

Article

The Indian Way of Humanitarian Intervention

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INTRODUCTION

In the intense debates about the legality of humanitarian intervention, commentators have argued at length over the Kosovo war in 1999, as well as other controversial instances of the use of force from Bosnia to Ukraine to Syria.¹ But perhaps the most consequential war is also the most forgotten. This was India's war against Pakistan in 1971, which followed a brutal onslaught by the Pakistani army on its own Bengali populace, and resulted in the independence of the fledgling state of Bangladesh.

With hundreds of thousands of people killed in Pakistan's crackdown, these atrocities were far bloodier than Bosnia and, by some accounts, on approximately the same scale as Rwanda.² Untold thousands died in squalid refugee camps as ten million Bengalis fled into neighboring India in one of the largest refugee flows in history. The crisis ignited a major regional war between India and Pakistan, intensified their strategic rivalry for decades to come, drove Pakistan to get nuclear weapons,³ and created Bangladesh, which has the eighth-largest population in the world today. And it brought the United States, the Soviet Union, and China into crisis brinkmanship that could have ignited a military clash among superpowers—possibly even a nuclear confrontation.⁴

The Bangladesh war was no less important for international law. While legal debates raged in 1971 about aggression, sovereignty, genocide, and self-determination, an eminent Indian law professor aptly wrote, “A number of international law concepts have been put to a severe test—a fiery ordeal, one is tempted to say—over the struggle for national liberation in Bangla Desh.”⁵ This case is crucial for what it shows about the weight given to international law and the United Nations by India, the world's largest democracy, emerging as a major actor in a new Asian century—when the future of international law and global order will be determined in large part by rising Asian great powers, above all China and India. In particular, Bangladesh offers important lessons about Asian interpretation and enforcement of international human rights law, about the real functioning of Security Council multilateralism, and about the state practice of intervention.

The legal and political debate about humanitarian intervention usually

1. See Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Remarks at the Annual Meeting of the American Society of International Law (Mar. 30, 2012), *reprinted in* 106 AM. SOC'Y INT'L L. PROC. 216 (2012).

2. Memorandum from U.S. Cent. Intelligence Agency (Sept. 22, 1971) (on file with Nixon Presidential Library and Museum, Yorba Linda, Cal., NSC Files [hereinafter NSC Files], Box 570, Indo-Pak Crisis, South Asia).

3. See Scott D. Sagan, *The Perils of Proliferation in South Asia*, ASIAN SURVEY, Nov.-Dec. 2001, at 1064; Scott D. Sagan, *Why Do States Build Nuclear Weapons? Three Models in Search of a Bomb*, 21 INT'L SECURITY 54 (1996).

4. GARY J. BASS, *THE BLOOD TELEGRAM: NIXON, KISSINGER, AND A FORGOTTEN GENOCIDE* (2013); SRINATH RAGHAVAN, *1971: A GLOBAL HISTORY OF THE CREATION OF BANGLADESH* (2013).

5. Rahmatullah Khan, *Legal Aspects*, in *BANGLA DESH: A STRUGGLE FOR NATIONHOOD* 85 (Mohammed Ayooob et al. eds., 1971).

focuses on cases of major Western powers going to war, which can be dismissed as neoimperialism. As Martti Koskenniemi wrote, “[W]hat counts as law, or humanitarianism, or morality, is decided with conclusive authority by the sensibilities of the Western Prince.”⁶ But India’s brief for saving Bangladeshis provides a crucial opportunity to hear the legal and moral voices of non-Westerners.

To this day, Indian commentators celebrate the Bangladesh war as a matter of high ethical and juridical principle. The prominent Indian scholar Pratap Bhanu Mehta recently wrote,

India’s 1971 armed intervention in East Pakistan—undertaken for a mixture of reasons—is widely and fairly regarded as one of the world’s most successful cases of humanitarian intervention against genocide. Indeed, India in effect applied what we would now call the “responsibility to protect” (R2P) principle, and applied it well.⁷

Some eminent political theorists agree: Michael Walzer has repeatedly pointed to Bangladesh as a paradigmatic case of a justified humanitarian intervention.⁸

But that was not at all the view of international legal authorities. India found almost no support for its position at the United Nations, and international law experts were cold to India’s claims as a whole.⁹ India was chastised for violating Pakistan’s sovereignty and threatening the stability of the international order. As Thomas Franck and Nigel Rodley wrote soon after the war, “[U]se of unilateral force remains and should remain illegal except in instances of self-defense against an actual attack,” and “the Bangladesh case, although containing important mitigating factors in India’s favor, does not constitute the basis for a definable, workable, or desirable new rule of law which, in the future, would make certain kinds of unilateral military interventions permissible.”¹⁰ While never minimizing the horror of the Pakistani army’s atrocities, Franck and Rodley emphasized the problems of updating public international law to allow for humanitarian intervention: the now-familiar quandaries over the definition of human rights, the threshold scale of the violation of such rights, the dilemma of which outside powers could intervene, and how such interventions would be controlled.¹¹ They compared India’s actions to those of Imperial Japan in Manchuria and Nazi Germany in

6. Martti Koskenniemi, *“The Lady Doth Protest Too Much”: Kosovo, and the Turn to Ethics in International Law*, 65 MODERN L. REV. 159, 171 (2002); see also W. Michael Reisman, *International Law After the Cold War*, 84 AM. J. INT’L L. 859, 861-62 (1990) (arguing that “humanitarian interventions, as exercises of power, are perforce reflections of the world power process” and thus “the arena of their operation will continue to be the internal affairs of smaller and weaker states”).

7. Pratap Bhanu Mehta, *Reluctant India*, 22 J. DEMOCRACY 97, 100 (2011).

8. E.g., MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 90, 101-08 (1977).

9. RENÉ PROVOST, *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* 299-300 (2002).

10. Thomas M. Franck & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT’L L. 275, 276 (1973). As will be discussed below, Franck’s views evolved considerably in later years. See *infra* notes 487-490 and accompanying text.

11. Franck & Rodley, *supra* note 10, at 275-76.

Czechoslovakia, noting Hitler's "agonizingly familiar" pretextual rhetoric about the purported suffering of the Sudetenland Germans.¹² At best, the severity of human suffering in Bangladesh might be seen as providing some mitigation for India's illegal actions. In Franck and Rodley's vivid analogy, "Cannibalism . . . is simply outlawed, while provision is made to mitigate the effect of this law on men adrift in a lifeboat."¹³

From today's vantage point, though, India's position might seem arguably more respectable. Since 1989, the Security Council has approved interventions in countries including Somalia, Haiti, Bosnia, East Timor, and Libya.¹⁴ After recent developments in state practice, there is significantly more juridical legitimacy to the notion of humanitarian intervention, although it certainly remains highly controversial.¹⁵ If India had faced this crisis in 2011 rather than 1971, it would presumably have gotten a warmer reception for its arguments about human rights and genocide, and perhaps some of its other claims.

This Article seeks to restore India's 1971 intervention to an appropriately prominent position in the debates in international law about the use of force. To do so, it uses unexplored and recently declassified documents from U.S. and Indian archives—in particular, the Nehru Memorial Museum and Library and the National Archives of India, both in Delhi—to reevaluate India's private and public justifications for intervention against Pakistan, taking advantage of recently unsealed records. To better understand the workings of multilateralism at the Security Council, this Article also relies on untapped declassified materials from the Nixon administration, including unheard White House tapes. While previous legal analyses have focused largely on India's public justifications before the United Nations during the brief December 1971 war,¹⁶ this Article introduces declassified Indian materials, domestic rhetoric, legal argumentation, and internal Indian government deliberations throughout the crisis to give a more accurate and complete picture of India's viewpoint.

This Article will argue that this case is important for international law today for at least three reasons. First, India's approach to human rights and humanitarian intervention, rather than exhibiting a distinctively Asian viewpoint, shows considerable convergence with the arguments of other liberal democracies in the West and elsewhere in the world. This is surprising. Many observers, particularly those who believe in a distinct "Asian values" view of

12. *Id.* at 284.

13. *Id.* at 290; *see also* Regina v. Dudley & Stephens, (1884) 14 Q.B.D. 273 (Eng.) (holding that necessity is not a defense to prosecution for cannibalism).

14. Catherine Powell, *Libya: A Multilateral Constitutional Moment?*, 106 AM. J. INT'L L. 298, 305 (2012).

15. W. Michael Reisman, *Why Regime Change Is (Almost Always) a Bad Idea*, 98 AM. J. INT'L L. 516, 517 (2004) (noting that humanitarian intervention "has lately acquired a degree of legal acceptance long denied it"). As early as 1968, Myres S. McDougal and Michael Reisman argued for U.N. involvement in Southern Rhodesia. *See* Myres S. McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1 (1968).

16. For two accomplished works, *see* THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 140-42 (2002); and NICHOLAS J. WHEELER, *SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY* 60-65 (2003).

human rights,¹⁷ might have expected that India, as a key postcolonial state, would take a distinct—and possibly radically different—political and jurisprudential approach to questions of intervention.¹⁸ After all, India's founding generation championed a sacrosanct ideal of sovereignty, with non-interference in the domestic affairs of other states enshrined as one of the central tenets of Indian foreign policy. And yet in the great cataclysm of the second partition on the subcontinent, Indians—themselves the victims of colonialism—found themselves explaining away the sovereignty of Pakistan.

One might have imagined that international legal authorities would have welcomed a gigantic Asian state's fresh commitments to some of the core legal instruments of human rights.¹⁹ This convergence would seem all the more noteworthy at a time of Cold War contestation over definitions of human rights, with India, despite its domestic leftism and pro-Soviet leanings, here preferring more liberal formulations to a Soviet collectivist vision.²⁰ Indeed, the global rebuff to India is striking since many of India's claims had considerable validity as part of the international law of human rights, although they would have required the support of the United Nations' political organs for any kind of enforcement. In the 1990s, such backing might have been forthcoming from an activist Security Council; in 1971, in the depths of the Cold War, it was impossible. In the 1990s and after, many similar arguments have received substantially more support from governments and legal authorities than they did in 1971.

India made its case in no fewer than four ways. Both publicly and privately, at home and abroad, the Indian government offered an interlocking series of at least four claims: (i) an argument from human rights, (ii) an argument from genocide, (iii) an argument from self-determination, and, finally, (iv) an argument from Indian sovereignty. The last argument—that Pakistan's internal problem had become an internal problem for India too—was the most doctrinally conventional, and not coincidentally the one that seemed to gain the most credence among other states and authorities. But all of them

17. DANIEL A. BELL, *BEYOND LIBERAL DEMOCRACY: POLITICAL THINKING FOR AN EAST ASIAN CONTEXT* (2006); Vladislav Surkov, *Russian Political Culture: The View from Utopia*, 49 *RUSSIAN SOC. SCI. REV.* 81 (Stephen D. Shenfield trans., 2008); Fareed Zakaria, *Culture Is Destiny: A Conversation with Lee Kuan Yew*, *FOREIGN AFF.*, Mar.-Apr. 1994, at 109.

18. See Prakash Shah, *International Human Rights: A Perspective from India*, 21 *FORDHAM INT'L L.J.* 24, 35-38 (1997).

19. SUNIL KHILNANI, *THE IDEA OF INDIA* 4 (1999); Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 *IND. L.J.* 1397, 1408-16 (1999) (discussing transnational enforcement of human rights law); Harold Hongju Koh, *The Future of Lou Henkin's Human Rights Movement*, 38 *COLUM. HUM. RTS. L. REV.* 487, 490 (2007) (noting an early "era of 'universalization' of human rights"); see also RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (2013) (arguing that the spread of human rights norms can be the result of acculturation); Ryan Goodman & Derek Jinks, *Incomplete Internalization and Compliance with Human Rights Law: A Rejoinder to Roda Mushkat*, 20 *EUR. J. INT'L L.* 443, 445 (2009) (arguing that "national-level case studies" are "indispensable" to understand the adoption of international law and calling for scholarly "case studies informed by a more fully developed account of global social influence").

20. Shah, *supra* note 18, at 28.

sound familiar today, as part of more recent debates about human rights and intervention.²¹

The second reason why India's 1971 war against Pakistan is important is because the crisis provides a window into the real functioning of multilateralism. While India's intervention was in the end unilateral, this was not India's choice. The Indian government would have been delighted to have a Chapter VII resolution endorsing its war. India worked hard to persuade the world with its four arguments for intervention and begged for humanitarian relief efforts for the millions of Bengali refugees in India. India's failure to get anything more than some inadequate humanitarian aid was in part due to the legal weaknesses of some of its arguments, but was primarily the result of Cold War politics. Unilateralism will often reflect a rogue state acting with contempt for world opinion,²² but that was hardly the case here. To the contrary, unilateralism was generated multilaterally, through the vigorous anti-Indian efforts of China and the United States, two permanent members of the Security Council, as well as other U.N. member states hostile to India: by preventing effective international action to help India, they drove India toward unilateral steps. While publicists today tend to remember 1971 (if at all) as a case of illegal unilateral humanitarian intervention, the war was also in part the responsibility of an international community that allowed India no effective recourse other than self-help.

Third and finally, there is the issue of state practice. Looking forward from 1971, some commentators would see the war for Bangladesh as a significant precedent in an evolving pattern of state practice (although they might or might not approve of this development). As Franck and Rodley wrote in 1973,

The Bangladesh case is an instance, by far the most important in our times, of the unilateral use of military force justified *inter alia*, on human rights grounds: and India succeeded. International law, as a branch of behavioral science, as well as of normative philosophy, may treat this event as the harbinger of a new law that will, henceforth, increasingly govern interstate relations.²³

Even though Franck and Rodley disapproved of the Indian government's policy, they quite rightly highlighted the importance of these actions. An

21. See, e.g., FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (1997); Terry Nardin, *From Right To Intervene to Duty To Protect: Michael Walzer on Humanitarian Intervention*, 23 EUR. J. INT'L L. 67 (2013); Michael Walzer, *The Moral Standing of States: A Response to Four Critics*, 9 PHIL. & PUB. AFF. 209, 218 (1980) [hereinafter Walzer, *Moral Standing of States*]; Michael Walzer, *On Humanitarianism*, FOREIGN AFF., July-Aug. 2011, at 77; see also Michael W. Doyle, *A Few Words on Mill, Walzer, and Nonintervention*, 23 ETHICS & INT'L AFF. 349, 363 (2010) ("Despite India's mixed motives, this was a case of legitimate humanitarian intervention.").

22. See José E. Alvarez, *Multilateralism and Its Discontents*, 11 EUR. J. INT'L L. 393 (2000); G. John Ikenberry, *Is American Multilateralism in Decline?*, 1 PERSP. ON POL. 533 (2003); Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2354 (2006) (noting George W. Bush's "strategic unilateralism" which shows "a broad antipathy toward international law"); Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23, 29 (2002) (arguing that more unilateral U.S. use of force after the September 11 attacks is more likely to violate international law).

23. Franck & Rodley, *supra* note 10, at 303.

authoritative overview of state practice must include the deeds of all states, not just the Western ones—all the more so now as major Asian countries are becoming more powerful and influential on the world stage. While the legal implications of state practice are rarely unambiguous, and in this instance would include the failure to halt genocide in Cambodia and Rwanda as well as cases of intervention such as Bosnia and Kosovo, Bangladesh certainly deserves to be part of that larger chronicle.²⁴

This Article will proceed in three parts. In Part I, it will discuss Pakistan's argument for its own sovereignty. In Part II, it will consider India's four interconnected claims for intervention—the argument from human rights, the argument from genocide, the argument from self-determination, and the argument from India's sovereignty—as well as briefly weighing their legal merit. Then, in Part III, it will turn to the functioning of multilateralism at the United Nations, to explain how India was stymied. Finally, Part IV will conclude and analyze Bangladesh as part of a controversial state practice of humanitarian intervention.²⁵

I. PAKISTAN'S CLAIMS OF SOVEREIGNTY

A. Background

Since the Partition of British India in 1947, India and Pakistan had been fierce enemies, strategic and ideological rivals with clashing claims on Kashmir. The newly independent states fought a war in 1947-48, and then again in 1965 over Kashmir.²⁶ From 1947 until 1971, Pakistan was a bifurcated country, with a thousand miles of Indian territory separating Pakistan's two far-flung wings: West Pakistan (present-day Pakistan, dominated by Urdu-speaking Punjabi elites) and downtrodden East Pakistan (present-day Bangladesh, populated by Bengalis).²⁷

South Asia was plunged into crisis in December 1970, when Pakistan held free and fair elections in both its wings. The Bengalis of East Pakistan

24. See Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT'L L. 107 (2006).

25. See ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM* (1993); SIMON CHESTERMAN, *JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW* (2001); MARTHA FINNEMORE, *THE PURPOSE OF INTERVENTION: CHANGING BELIEFS ABOUT THE USE OF FORCE* (2003); MICHAEL J. GLENNON, *LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTION AFTER KOSOVO* (2001); CHRISTOPHER GREENWOOD, *HUMANITARIAN INTERVENTIONISM: LAW AND POLICY* (2001); *HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS* (J.L. Holzgrefe & Robert O. Keohane eds., 2003); *HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS* (Jennifer Welsh ed., 2004); MAHMOOD MAMDANI, *SAVIORS AND SURVIVORS: DARFUR, POLITICS, AND THE WAR ON TERROR* (2009); JOHN STUART MILL, *A Few Words on Non-Intervention*, in 3 *DISSERTATIONS AND DISCUSSIONS: POLITICAL, PHILOSOPHICAL, AND HISTORICAL* 153 (London, Longmans, Green, Reader & Dyer 1867); SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE (2002).

26. SUMIT GANGULY, *CONFLICT UNENDING: INDIA-PAKISTAN TENSIONS SINCE 1947* (2001).

27. For a chronology of Pakistan, see ANATOL LIEVEN, *PAKISTAN: A HARD COUNTRY* app. 1 (2011).

voted overwhelmingly for a moderate Bengali nationalist party, the Awami League, which won so decisively that it stood to take control of both wings of the country. General Agha Muhammad Yahya Khan, the military dictator and President of Pakistan, entered into constitutional negotiations, which led only to deadlock.²⁸

President Yahya and his generals chose a harsh military solution, aiming to terrify their restive Bengali population into quietude. On March 25, 1971, the Pakistani army launched a devastating military crackdown on the Bengalis across East Pakistan.²⁹ This resulted in hundreds of thousands of deaths, and some ten million refugees fled into neighboring India.³⁰ Indian Prime Minister Indira Gandhi, while not yet ready to ignite a war by recognizing Bangladesh as independent, considered military plans for a possible invasion of East Pakistan.³¹

Before such a full-scale interstate war, India intervened by covertly sponsoring a Bengali guerrilla insurgency within East Pakistan. As D.P. Dhar, India's influential ambassador in Moscow, secretly wrote to the Prime Minister's top adviser, P.N. Haksar, "War—open declared war—fortunately in my opinion, in the present case is not the only alternative. We have to use the Bengali human material and the Bengali terrain to launch a comprehensive war of liberation."³² While ostensibly secret, this Indian backing for the Bengali rebellion was a colossal project, with the Indian army and Border Security Force operating training camps along the border,³³ while India's intelligence services worked closely with the insurgents.³⁴ For months, India intensified its

28. ARCHER K. BLOOD, *THE CRUEL BIRTH OF BANGLADESH* 33, 114-19, 128-34, 146-49 (2002); OWEN BENNETT JONES, *PAKISTAN: EYE OF THE STORM* 153-59 (3d ed. 2009).

29. BASS, *supra* note 4, at 50.

30. *Id.* at xxii; Sydney H. Schanberg, *Long Occupation of East Pakistan Foreseen in India*, N.Y. TIMES, Dec. 26, 1971, at A1; Tad Szulc, *U.S. Military Goods Sent to Pakistan Despite Ban*, N.Y. TIMES, June 22, 1971, at A1. Indian officials claimed a million dead, *see* Indira Gandhi, Prime Minister, India, Statement to Press (Dec. 31, 1971), *reprinted in* INDIRA GANDHI, *THE YEARS OF ENDEAVOUR: SELECTED SPEECHES OF INDIRA GANDHI, AUGUST 1969-AUGUST 1972*, at 156, 160 (1975), and Bangladeshis three million, which seem to be inflated numbers, *see* RAGHAVAN, *supra* note 4, at 12. One senior Indian official put the death toll at 300,000. RICHARD SISSON & LEO ROSE, *WAR AND SECESSION: PAKISTAN, INDIA, AND THE CREATION OF BANGLADESH* 306 (1990). A recent study relying on world health surveys found roughly 269,000 deaths. Ziad Obermeyer et al., *Fifty Years of Violent War Deaths from Vietnam to Bosnia*, 336 BRIT. MED. J. 1482, 1483 tbl.2 (2008). A Pakistani judicial inquiry estimated that the military had killed in action roughly 26,000 people. GOV'T OF PAKISTAN, *THE REPORT OF THE HAMOODUR REHMAN COMMISSION OF INQUIRY INTO THE 1971 WAR* 317, 340, 513 (2001).

31. BASS, *supra* note 4, at 90; RAGHAVAN, *supra* note 4, at 64-67.

32. Letter from D.P. Dhar, Ambassador to the Soviet Union, India, to P.N. Haksar, Principal Sec'y to the Prime Minister, India (1971) (on file with Nehru Memorial Museum and Library, Teen Murti Bhavan, Delhi, India, P.N. Haksar Papers, III Installment [hereinafter NMML, Haksar Papers], Subject File 89).

33. *See* P.N. DHAR, INDIRA GANDHI, *THE "EMERGENCY," AND INDIAN DEMOCRACY* 168 (2000); Gist of Discussions with Sector Commanders of Mukti Foj (July 9, 1971), in 9 JAYAPRAKASH NARAYAN, *SELECTED WORKS* 849 (Bimal Prasad ed., 2008); Report on the Visit of Border Areas of Assam, Meghalaya and Tripura 10-11 (July 7, 1971) (on file with NMML, Haksar Papers, Subject File 169).

34. *See* Report of R.N. Kao, Joint Dir., Research & Analysis Wing, India (July 3, 1971) (on file with NMML, Haksar Papers, Subject File 227).

sponsorship of these guerrillas, while training its military and waiting for the end of the monsoon and drier weather in which the Indian army would be able to fight effectively.³⁵

The Bengalis' guerrilla war led to border clashes between Indian and Pakistani troops, including a substantial battle at Boyra on November 21-22.³⁶ On November 29, according to a Pakistani postwar judicial inquiry, a desperate President Yahya decided to attack India.³⁷ Unbeknownst to him, India was reportedly planning to attack on December 4.³⁸ But Pakistan struck first on December 3 with an air and ground assault.³⁹

India had to wage war on two fronts, against West Pakistan and East Pakistan. In the west, India maintained a cautious posture against Pakistan's formidable military, which held strong and in some places drove back Indian troops.⁴⁰ But in the east, Indian troops charged forward, helped by the Bengali guerrillas, swiftly breaking Pakistan's already enfeebled control over East Pakistan. At the same time, the outbreak of full-scale war allowed India to recognize Bangladesh at last, on December 6.⁴¹

After fourteen days of bloody combat, Pakistani troops were routed in the east. With Indian forces deep inside Bangladesh, Pakistan offered its surrender in Dhaka on December 16.⁴² Prime Minister Gandhi, resisting the temptation to keep fighting in the west, ordered a ceasefire on the western front as well.⁴³ India announced that 2,307 of its warfighters had been killed, while Pakistan presumably suffered greater casualties⁴⁴—as well as a devastating sense of defeat and a heightened fear of India that would sustain the India-Pakistan enmity for decades.⁴⁵ The war ended with the creation of the new state of Bangladesh.

35. J.F.R. JACOB, *SURRENDER AT DACCA: BIRTH OF A NATION* 71-77 (1997); Letter from S.R. Sen, Exec. Dir., Int'l Dev. Ass'n, Int'l Bank for Reconstruction & Dev., to I.G. Patel, Sec'y, Dep't of Econ. Affairs, Ministry of Fin., India (June 9, 1971) (on file with NMML, Haksar Papers, Subject File 225).

36. See BASS, *supra* note 4, at 261-62.

37. GOV'T OF PAKISTAN, *supra* note 30, at 204; see also SISSON & ROSE, *supra* note 30, at 230.

38. KATHERINE FRANK, *INDIRA: THE LIFE OF INDIRA NEHRU GANDHI* 338 (2001). *But see* JONES, *supra* note 28, at 173 (stating that India's attack was originally planned for December 6).

39. Letter from Indira Gandhi to President Richard M. Nixon (Dec. 15, 1971) (on file with NMML, Haksar Papers, Subject File 173). Although Pakistan struck first on December 3, Franck wrote, "In December, 1971, India's armed forces invaded East Pakistan . . ." FRANCK, *supra* note 16, at 139.

40. Memorandum from Lt. Col. A.J.M. Homji, Staff Officer, Indian Army (1971) (on file with NMML, Haksar Papers, Subject File 235) (describing the Manekshaw-Kulikov Talks of February 24-25, 1972); Report of U.S. Dep't of State (Dec. 6, 1971) (on file with NSC Files, Box 571, Indo-Pak War).

41. See Indira Gandhi, Speech in Lok Sabha and Rajya Sabha (Dec. 6, 1971), *reprinted in* 11 I.L.M. 121 (1972) (recognizing Bangladesh).

42. Report of U.S. Dep't of State (Dec. 16, 1971) (on file with NSC Files, Box 573, Indo-Pak War).

43. *Id.*

44. *Id.*

45. STEPHEN P. COHEN, *THE PAKISTAN ARMY* 158-61 (1998).

B. Pakistan's Argument for Sovereignty

For most of the crisis, Pakistan could claim to have the fundamentals of the international law of force on its side. Pakistan's government lawyers and diplomats tended to simply rely on basic authorities such as the U.N. Charter's Article 2(4), which famously states, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."⁴⁶ Under Article 51, member states hold an "inherent right of individual or collective self-defence" against "an armed attack."⁴⁷

While the Charter mandates respect for "human rights and fundamental freedoms,"⁴⁸ this is clearly hortatory and nonbinding and does not overcome the general ban on intervention. The obvious exception comes under Chapter VII, whereby the Security Council might determine that atrocities somewhere constituted a "threat to the peace, breach of the peace, or act of aggression," and thus authorize military action in order to "restore international peace and security."⁴⁹ With Pakistan sheltered by Chinese and U.S. vetoes, there was no prospect of any such Chapter VII authorization for India in 1971.

Throughout the crisis, Pakistan's government asserted its sovereign prerogative to act as it pleased within its own territory.⁵⁰ Pakistan carried the day by pointing to the Charter's well-known Article 2(7): "Nothing contained

46. U.N. Charter art. 2, para. 4; FRANCK, *supra* note 16, at 136-37 (2002) (calling Articles 2(4) and 51 "a prohibition of any humanitarian intervention that involves the use of military force"); W. Michael Reisman, *Article 2(4): The Use of Force in Contemporary International Law*, 78 AM. SOC'Y INT'L L. PROC. 74, 74-76 (1984); *see also* Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 3-4 (1999) (arguing that the prohibition constitutes a *jus cogens* peremptory norm). Humanitarian intervention was widely seen as legal in the nineteenth century. *See* JOHANN CASPAR BLUNTSCHLI, *LE DROIT INTERNATIONAL CODIFIÉ* [INTERNATIONAL LAW CODIFIED] 269-70 (5th ed. 1895); IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 338 (1963); I L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 312-13 (H. Lauterpacht ed., 8th ed. 1955); HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 100-02 (6th ed. 1855); Antoine Rougier, *La Théorie de l'intervention d'humanité*, 17 REVUE GÉNÉRALE DU DROIT INTERNATIONAL PUBLIC 468, 515-25 (1910). As Richard Lillich notes, "[T]he doctrine of humanitarian intervention was . . . clearly established under customary international law . . ." Richard B. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325, 334 (1967). But some authorities claim that the U.N. Charter swept that away. *See, e.g.*, Ian Brownlie, "International Law and the Use of Force by States" *Revisited*, 1 CHINESE J. INT'L L. 1, 1-19 (2002); *see also* Lillich, *supra*, at 334-38 (surveying arguments that the U.N. Charter prohibits humanitarian intervention and concluding that under Article 2(7) the United Nations definitely has the legal right to use forceful measures for humanitarian purposes if the state violating norms of human rights causes "an actual threat to the peace"). Despite that, Reisman writes, "[T]he advent of the United Nations neither terminated nor weakened the customary institution of humanitarian intervention." Reisman, *supra*, at 80.

47. U.N. Charter art. 51.

48. *Id.* art. 55(c).

49. *Id.* arts. 39, 42; *see also* IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 533-34 (6th ed. 2003) (describing the Security Council's resort to Chapter VII "in respect of peacekeeping . . . to ensure the provision of humanitarian assistance" in Somalia and Bosnia); Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention"*, 93 AM. J. INT'L L. 824, 828 (1999) (noting Article 42's inability to "serve without some modification in the law and the practice of the veto" to authorize humanitarian intervention in the context of Kosovo).

50. On sovereignty, *see* BROWNLIE, *supra* note 49, at 105-08, 123-37, 160-61.

in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state”⁵¹ By June, the Pakistani government had formulated a more detailed legal defense. Pakistan complained that India’s covert sponsorship of Bengali rebels was “[i]n violation of international law which lays a clear obligation on all States to respect the territorial integrity and jurisdiction of other States,” as well as of India’s “legal duty” under “many international treaties and conventions obligating States to use all means at their disposal to prevent inhabitants of their territory, national or alien, from aiding, abetting or promoting civil strife in other countries.”⁵² Pakistan pointed to “unmistakable norms of international law” such as the Charter and a prominent 1965 General Assembly declaration to establish that “no State shall organise, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.”⁵³ Zulfikar Ali Bhutto, then serving as Pakistan’s Deputy Prime Minister, told a senior U.S. official, “India’s interference was a negation of all UN precepts and principles.”⁵⁴

These Pakistani arguments about sovereignty won considerable support around the world. The United States, Britain, France, West Germany, and Japan all saw the atrocities as “a matter of internal affairs of Pakistan.”⁵⁵ Henry Kissinger, the White House National Security Adviser, told President Richard Nixon, “[T]here is absolutely no justification for [India’s interference]—they don’t have a right to invade Pakistan no matter what Pakistan does in its territory.”⁵⁶ One senior Chinese official declared China’s support for Pakistan “in the just struggle to safeguard State sovereignty” and to “oppose foreign aggression and interference”;⁵⁷ another Chinese diplomat insisted that “no other country has a right to interfere under any pretext” in East Pakistan.⁵⁸ Saudi Arabia vehemently supported Pakistan’s right to take any steps to maintain its

51. U.N. Charter art. 2, para. 7; Report from Z.C. Bakshi, Assistant High Comm’r for India, Karachi, Pak., to B.K. Acharya, High Comm’r for India, Islamabad, Pak. (Apr. 6, 1971) (on file with Nat’l Archives of India, Delhi, India, Ministry of External Affairs Papers [hereinafter MEA], HI/1012/31/71).

52. G.A. Res. 2131(XX), ¶ 2, U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/RES/20/2131, at 2 (Dec. 21, 1965).

53. *Id.*; Memorandum from Agha Hilaly, Ambassador to the U.S., Pak., to Henry A. Kissinger, Assistant to the President for Nat’l Sec. Affairs (June 14, 1971) (on file with NSC Files, Box 625, Country Files—Middle East, Pakistan, vol. V).

54. Telegram from George H.W. Bush, Ambassador to the U.N., to William P. Rogers, Sec’y of State (Dec. 11, 1971) (on file with NSC Files, Box 572).

55. Letter from P.N. Haksar to Indira Gandhi (May 12, 1971) (on file with NMML, Haksar Papers, Subject File 166).

56. Transcript of Telephone Conversation Between Richard M. Nixon and Henry A. Kissinger (May 23, 1971), *reprinted in* 11 FOREIGN RELATIONS OF THE UNITED STATES, 1969-1976, at 140 (Louis J. Smith ed., 2005) [hereinafter FRUS].

57. Report of Brajesh C. Mishra, Chargé d’Affaires to China, India (June 4, 1971) (on file with MEA, HI/1012/14/71).

58. Fu Hao, Delegate to the U.N., China, Speech to the Third Comm. of the United Nations Debate on Pakistani Refugees in India (Nov. 19, 1971) (transcript available in MEA, HI/121/13/71, vol. II).

domestic stability and integrity.⁵⁹ As Nicholas Wheeler rightly comments, “[T]he overwhelming reaction of the society of states was to affirm Pakistan’s right to sovereignty and the rule of non-intervention.”⁶⁰

C. Nehruvian Ideology and the Problem of Sovereignty

Pakistan’s claims about its sovereignty were not just persuasive to foreigners, but to Indians as well. Ever since Jawaharlal Nehru’s generation wrested India’s national sovereignty from the British Empire at a terrible cost, a core doctrine of India’s Nehruvian foreign policy was respect for sovereignty and territorial integrity and a strict non-interference in the internal affairs of other states.⁶¹ India insisted on its own sovereignty and territorial integrity.⁶² Even for its hated rival Pakistan, India usually would publicly demand “mutual respect for sovereignty, territorial integrity and non-interference in each other’s internal affairs.”⁶³

India’s senior leaders, including Haksar and many in his inner circle, were steeped in these Nehruvian ideals, which Indira Gandhi inherited from her father, Nehru. Haksar wrote:

While our sympathy for the people of Bangla Desh is natural, India, as a State, has to walk warily. Pakistan is a State. It is a Member of the U.N. and, therefore, outside interference in events internal to Pakistan will not earn us either understanding or goodwill from the majority of nation-States.⁶⁴

But India’s deference toward sovereignty was undone by its own public opinion, expressed through its democratic system.⁶⁵ Almost the entire political spectrum clamored to stop the killing, with scant concern about criticizing what Pakistan did inside its own borders. The activist Jayaprakash Narayan declared that “what is happening in Pakistan is surely not that country’s internal matter alone.”⁶⁶ He dismissed the concept of non-interference as a “fiction,” arguing that since the superpowers arrogantly intervened in weaker countries, India

59. Telegram from Nicholas G. Thatcher, Ambassador to Saudi Arabia, to Joseph J. Sisco, Assistant Sec’y of State for Near E. & S. Asian Affairs (Apr. 27, 1971) (on file with U.S. Nat’l Archives II, College Park, Md., R.G. 59 [hereinafter POL], POL 23-9 PAK, Box 2531).

60. WHEELER, *supra* note 16, at 58.

61. Pratap Bhanu Mehta, *Still Under Nehru’s Shadow?*, 8 INDIA REV. 209 (2009).

62. Record of Conversation Between Alexei N. Kosygin, Chairman, Council of Ministers, Soviet Union, and Swaran Singh, Minister of External Affairs, India (June 8, 1971) (on file with NMML, Haksar Papers, Subject File 203); *see also* Benedict Kingsbury, *Sovereignty and Inequality*, 9 EUR. J. INT’L L. 599 (1998) (arguing that state sovereignty as a normative concept is facing challenges but remains preferable to alternative models).

63. Letter from P.N. Haksar to Indira Gandhi (Jan. 10, 1971) (on file with NMML, Haksar Papers, Subject File 163).

64. Memorandum from P.N. Haksar to Indira Gandhi (Mar. 1971) (on file with NMML, Haksar Papers, Subject File 164).

65. *See* Sumit Ganguly, *India’s Improbable Success*, 19 J. DEMOCRACY 171 (2008). For an argument that nascent democracy can lead to war, *see* EDWARD D. MANSFIELD & JACK SNYDER, *ELECTING TO FIGHT: WHY EMERGING DEMOCRACIES GO TO WAR* (2005); and Edward D. Mansfield & Jack Snyder, *Democratization and the Danger of War*, 20 INT’L SECURITY 5 (1995).

66. Jayaprakash Narayan, Statement to Press in Sitabdiara, India (Mar. 27, 1971), *reprinted in* NARAYAN, *supra* note 33, at 610, 611.

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could “interfer[e] . . . in the interest of humanity, freedom, democracy and justice.”⁶⁷

Haksar, a dedicated Nehruvian, was troubled. He wrote,

For countries situated far away, it is natural to argue that events in East Bengal are, legally and juridically, matters pertaining to the internal affairs of Pakistan. For us in India this mood of calm detachment cannot be sustained. There is a vast revulsion of feeling in India against the atrocities which are being daily perpetrated.⁶⁸

In a secret report, K. Subrahmanyam, India’s leading strategic thinker, warned,

[A]fter passing the unanimous resolution in the Parliament expressing solidarity with the people of Bangla Desh and declaring our full confidence in the victory of the liberation struggle, it is too late to feel compunctions about intervention. . . . It is going to be difficult to convince the world that India has observed the so[-]called norms of international behaviour in this respect.⁶⁹

II. INDIA’S ARGUMENTS FOR HUMANITARIAN INTERVENTION

India, desperate to return the refugees and keen to retaliate against Pakistan, had no viable policy options that would uphold Nehruvian principles. Any policy to get the refugees home would require some interference in Pakistan’s internal politics⁷⁰: at minimum, pressure for the military authorities to cut a constitutional deal with Bengali nationalists; at maximum, military intervention.⁷¹

Of course, many observers understandably suspected that India was seizing an opportunity to dismember Pakistan. No doubt, India had mixed motives: strategic goals stemming from its bitter rivalry with Pakistan, as well

67. Jayaprakash Narayan, Statement to Press in Patna, India (Apr. 2, 1971), *reprinted in* NARAYAN, *supra* note 33, at 612, 613.

68. Draft Letter from P.N. Haksar to Indira Gandhi (May 12, 1971) (on file with NMML, Haksar Papers, Subject File 166).

69. Annex to Letter from K. Subrahmanyam, Dir., Inst. for Def. Studies & Analyses, India, to P.N. Haksar (Apr. 4, 1971) (on file with NMML, Haksar Papers, Subject File 276) [hereinafter Subrahmanyam Report].

70. See Jack Snyder, *Realism, Refugees, and Strategies of Humanitarianism*, in REFUGEES IN INTERNATIONAL RELATIONS 31 (Alexander Betts & Gil Loescher eds., 2010) (discussing the wide range of policy options for humanitarians: providing short-term emergency relief, finding a stable political bargain to stop atrocities, or eliminating the root causes of conflict).

71. As Stephen Krasner argues, a logic of consequences won out over a logic of appropriateness: “Rulers might consistently pledge their commitment to nonintervention but at the same time attempt to alter the domestic institutional structures of other states, and justify this practice by alternative norms such as human rights” STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 8 (1999); see also LOUIS HENKIN, INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS 23-44 (1990); Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 STAN. L. REV. 959 (2000); Louis Henkin, *That “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1 (1999); Louis Henkin, *The Mythology of Sovereignty*, AM. SOC’Y INT’L L. NEWSL., Mar.-May 1993; Paul W. Kahn, *The Question of Sovereignty*, 40 STAN. J. INT’L L. 259 (2004); Paul W. Kahn, *Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 CHI. J. INT’L L. 1, 5-6 (2000) (asking “is law about sovereignty or about rights?”); W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’L L. 866 (1990).

as genuine humanitarian sentiments among Indian officials and the public.⁷² As Martha Minow has noted, “People invented human rights institutions in the cauldron of hopes for individuals caught in terrifying circumstances and concern for those far away from them. These innovations had to take their place amid clashes between idealism and national self-interest, amid international tensions.”⁷³ Indeed, all governments have political preferences;⁷⁴ what is pertinent for international law is how norms or law shape policies, or how policies are at least partially modified by the need to express justifications through a moral or legal framework.⁷⁵ As Robert O. Keohane wrote, “From a Realist perspective, it is remarkable how moralistic governments often are in discussing their obligations and those of others.”⁷⁶ While it is impossible to overlook the strategic antagonisms between India and Pakistan, it is also impossible to construct a coherent delineation of India’s motives that does not take international law into account.

One possible move for India would have been to deny the applicability of international law, or even question its basic legitimacy. At one point, an Indian official, drafting a speech, simply crossed out a Nehruvian phrase: “No country however big or powerful, must be allowed to dominate ~~or interfere in the internal affairs of~~ any other country.”⁷⁷ Soon before the outbreak of war, a frustrated Prime Minister Gandhi decried “the thinly disguised legalistic formulation that it was merely an internal affair of Pakistan.”⁷⁸

After all, from the viewpoint of many Indians, was public international law not essentially the creation of the imperial powers, imposed on the

72. Jack Goldsmith notes, “Nations do not lightly expend national blood and treasure to stop human rights abuses in other nations.” Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 93 (2003).

73. Martha Minow, *Instituting Universal Human Rights Law: The Invention of Tradition in the Twentieth Century*, in LOOKING BACK AT LAW’S CENTURY 58, 59 (Austin Sarat et al. eds., 2002).

74. E.H. CARR, THE TWENTY YEARS’ CRISIS, 1919-1939, at 64 (1939); HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE (4th ed. 1964); KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS 111 (1979) (“Self-help is necessarily the principle of action in an anarchic order.”); Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT’L ORG. 513 (1997).

75. Goodman, *supra* note 24, at 110 (2006) (arguing that “encouraging aggressive states to justify using force as an exercise of humanitarian intervention can facilitate conditions for peace . . . [T]he very conditions that commentators suggest would unleash pretext wars by aggressive states may, in general and on average, temper the bellicose behavior of those states”); *see also* Lillich, *supra* note 46, at 350-51 (noting that “other motives usually are present to combine with humanitarian ones,” but claiming that “the presence of such motives does not invalidate the resort to forcible self-help if the overriding motive is the protection of human rights”). For more wary views, see LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 144-45 (2d ed. 1979) (noting that “‘humanitarian intervention’ can too readily be used as the occasion or pretext for aggression”); and Thomas H. Lee, *The Augustinian Just War Tradition and the Problem of Pretext in Humanitarian Intervention*, 28 FORDHAM INT’L L.J. 756 (2005).

76. ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 126 (1984).

77. Draft for Deputy Minister’s Speech on South East Asia, with Particular Reference to the Sino-American Detente (July 18, 1971) (on file with NMML, Haksar Papers, Subject File 229) (strikethrough in original).

78. Indira Gandhi, Speech in Lok Sabha and Rajya Sabha (Nov. 15, 1971) (on file with MEA, HI/121/13/71, vol. II).

postcolonial world?⁷⁹ Had not the U.N. Charter been drawn up by colonial powers seeking to extend their grip on their far-flung possessions in Africa and Asia? This kind of abnegation of international law was prominently suggested by the strategist Subrahmanyam in an influential secret report sent to the senior ranks of the government, including Haksar, Foreign Minister Swaran Singh, Defense Minister Jagjivan Ram, the army chief of staff, and others. Subrahmanyam noted that India had gotten away with its 1961 seizure of Goa from Portuguese colonial rule, despite international condemnation.⁸⁰ “Over a period of time in international community all actions tend to be overlooked,” he argued candidly. “U.S. intervention in Guatemala, Cuba, Dominican Republic, Soviet intervention in Czechoslovakia and Hungary and French intervention in Chad are all now vague memories. None of these nations had as much justification to intervene as India now has in Bangla Desh.”⁸¹

But despite such temptations of overt unlawfulness, India, then a middle-weight power, clearly chose to couch its diplomacy inside the extant architecture of international law.⁸² India publicly prided itself on its respect for international law and engagement with the United Nations.⁸³ The country had a history of working through the United Nations, although not without trepidation, since Nehru in 1947 “pledged” to “cooperate” in building the “beginnings of this world structure . . . laid down in the United Nations Organization.”⁸⁴ Or, as Nixon said in an Oval Office meeting, “[T]he Indians are susceptible to this world public opinion crap.”⁸⁵

Thus speaking before the Security Council in December 1971, Foreign Minister Singh said, “This is a struggle not merely for survival in dignity and freedom of nearly one-sixth of mankind, but for survival of the international community within the framework of international covenants and agreements which the peoples of the world have so arduously built up after two holocausts during this century.”⁸⁶ He reminded the Council of India’s “record of co-operation with the United Nations over the past 25 years and its unqualified

79. José E. Alvarez, *Contemporary International Law: An “Empire of Law” or the “Law of Empire”?*, 24 AM. U. INT’L L. REV. 811, 811-15 (2009).

80. See Reisman, *supra* note 46, at 78 (“India seized Portuguese enclaves in the subcontinent. To all intents and purposes the international community acquiesced.”).

81. Subrahmanyam Report, *supra* note 69.

82. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* (1995); THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1992); Martha Finnemore & Katherine Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887 (1998); Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 YALE L.J. 2599 (1997).

83. Manu Bhagavan, *A New Hope: India, the United Nations and the Making of the Universal Declaration of Human Rights*, 44 MOD. ASIAN STUD. 311 (2010).

84. *Id.* at 327.

85. Audio tape: Recording of Conversation Between Richard M. Nixon, Henry A. Kissinger, and Alexander M. Haig Jr., Deputy Assistant to the President for Nat’l Sec. Affairs, in Wash., D.C. (Dec. 12, 1971) (on file with Nat’l Archives, Nixon Presidential Materials, White House Tapes, Conversation No. 637-3) (transcript available in [E-7] FOREIGN RELATIONS OF THE UNITED STATES, 1969-1976, Doc. 177 (Louis J. Smith ed., 2005) [hereinafter FRUS E-7]).

86. Swaran Singh, Statement to the U.N. Sec. Council (Dec. 12, 1971) (transcript available in MEA, WH/109/31/71, vol. I).

commitment to the purposes and principles of the Charter.”⁸⁷ Prime Minister Gandhi explained to Parliament why her government could not match furious public rhetoric: “The House is aware that we have to act within international norms.”⁸⁸ She later wrote to U.N. Secretary-General U Thant:

India’s dedication to the purposes and principles of the Charter is well-known. It is borne out by our record over the last 26 years. India has not been content merely by giving verbal or moral support to the United Nations but has been in the forefront of a selfless struggle in the defence of peace, against colonialism, imperialism and racialism. Indian soldiers have sacrificed⁸⁹ their lives in carrying out missions of peace in Korea, in Congo and West Asia.

One should not exaggerate India’s commitment to international law.⁹⁰ Foreign Minister Singh privately told his diplomats, “[W]hen war comes even if it is our action, we should be able to make a case that it has been forced on us.”⁹¹ While no rogue state, India distrusted some U.N. agencies and resented their meddling in the Kashmir dispute.⁹² Most importantly, India dared not come clean publicly about its massive sponsorship of Bengali insurgents inside East Pakistan. When asked point-blank about India’s ongoing support for the guerrillas, Gandhi evasively said, “The freedom-fighters have many resources.”⁹³ Indian authorities did not argue, for instance, that Bangladesh was in a legal state of insurgency or belligerency.⁹⁴ Instead, Indian officials denied or dodged Pakistan’s credible allegations of arming the insurgents.⁹⁵ As an Indian diplomat privately conceded, “Pakistan is fully aware of our activities vis-a-vis East Bengal. . . . As soon as I mention anything to Pakistan Foreign Secretary, I shall be faced with these charges. I shall of course deny them but . . . this will not carry conviction.”⁹⁶

India showed its least law-respecting side when Secretary-General Thant proposed putting observers from the U.N. High Commission for Refugees on

87. *Id.*

88. Indira Gandhi, Statement in Lok Sabha (Mar. 27, 1971), in GANDHI, *supra* note 30, at 522-23.

89. Singh, *supra* note 86.

90. José E. Alvarez, *Do Liberal States Behave Better?*, 12 EUR. J. INT’L L. 183 (2001); see also JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 13 (2005) (“[I]nternational law does not pull states toward compliance contrary to their interests, and the possibilities for what international law can achieve are limited by the configurations of state interests and the distribution of state power.”).

91. Swaran Singh, Statement in London, U.K. (June 1971) (transcript available in NMML, T.N. Kaul Papers [hereinafter NMML, Kaul Papers], I-III Installment, Subject File 19, Part II).

92. Letter from P.N. Haksar to Indira Gandhi (July 26, 1971) (on file with NMML, Haksar Papers, Subject File 169).

93. Excerpts from Press Conference by Indira Gandhi in New Delhi, India (Oct. 19, 1971) (on file with MEA, HI/121/13/71, vol. I).

94. See HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 275 (1947); Khan, *supra* note 5, at 91-96; M.K. Nawaz, *Bangla Desh and International Law*, 11 INDIAN J. INT’L L. 251, 259-60 (1971).

95. Letter from J.N. Dixit, Dir., Ministry of External Affairs, India, to Heads of Mission (Dec. 4, 1971) (on file with MEA, HI/121/13/71, vol. II).

96. Memorandum (May 1, 1971) (on file with NMML, Haksar Papers, Subject File 227).

both sides of the East Pakistan border. The Indian government was horrified,⁹⁷ but could not publicly explain its real objection: that this plan, supported by Pakistan⁹⁸ and the United States,⁹⁹ would expose or obstruct India's sponsorship of the guerrillas. Haksar warned Gandhi, "[S]ome of the big Powers, specially the United States, are very keen that U.N. should be so involved largely to prevent activities of Bangla Desh freedom fighters. We are resisting these attempts" ¹⁰⁰ India got the Soviet Union to quietly shoot down the proposal.¹⁰¹ Haksar privately told the Prime Minister:

All our diplomatic efforts are directed towards ensuring that neither the Security Council nor the U.N. High Commission for Refugees become a brake on the struggle of the people of East Bengal for their democratic rights and liberties. I am saying all this to show that the so-called "inactivity" of the U.N. as an organisation is, in many ways, not so harmful.¹⁰²

Still, for months, Indian officials sought to find workable justifications for interfering in East Pakistan. Looking to international law, Indian officials and legal authorities advanced four interlocked claims for intervention in East Pakistan: arguments from human rights, genocide, self-determination, and India's own sovereignty. These were all put forward more or less simultaneously throughout 1971 after the start of Pakistan's crackdown on March 25, with the exception of the argument from Indian sovereignty, which was not concocted until late May. All of these arguments were flawed in some ways, and few international lawyers would accept them without complaint. Still, these Indian arguments are striking in their resemblance—although not identity—with some of the arguments voiced by Western democracies in the Security Council in the 1990s.

Nonetheless, when India made arguments that the Security Council of the 1990s would find worthy of Chapter VII resolutions, it heard nothing but silence. Indeed, in 1971, the Security Council did not convene or pass any resolutions on South Asia from the start of the slaughter in March until the outbreak of the India-Pakistan war in December.

97. Letter from Indira Gandhi to Prime Ministers and Heads of Government (Oct. 1, 1971) (on file with NMML, Haksar Papers, Subject File 173).

98. Letter from A.A. Khan, Dir. Gen., Ministry of External Affairs, India, to Heads of Mission in London, Wash., Paris, Bad Godesberg, Brussels, and Vienna (Oct. 8, 1971) (on file with NMML, Haksar Papers, Subject File 220).

99. Audio tape: Recording of Conversation Between Richard M. Nixon, Josip Broz Tito, President, Yugoslavia, and Alexander Akalovsky, Translator, in Wash., D.C. (Oct. 28, 1971) (on file with Nat'l Archives, Nixon Presidential Materials, White House Tapes, Conversation No. 605-9).

100. Letter from P.N. Haksar to Indira Gandhi, *supra* note 92; *see also* Letter from P.N. Haksar to Indira Gandhi (Aug. 14, 1971) (on file with NMML, Haksar Papers, Subject File 170) [hereinafter Haksar Aug. 14 Letter].

101. Haksar Aug. 14 Letter, *supra* note 100.

102. Letter from P.N. Haksar to Indira Gandhi, *supra* note 92.

A. *The Argument from Human Rights*

1. *India's Claims*

Since India's founding, human rights were organic to its legal system.¹⁰³ India's progressive constitution, drafted from 1948 to 1950 under the influence of the U.S. Bill of Rights and the Universal Declaration of Human Rights, guarantees a panoply of justiciable "Fundamental Rights" protecting equality before law, life, liberty, speech, assembly, association, religion, conscience and more.¹⁰⁴ While often not achieved, these rights provisions are well known among Indians, and regularly used by ordinary citizens in the courts.¹⁰⁵

Indians were swift to speak out for human rights in East Pakistan as well.¹⁰⁶ The activist Jayaprakash Narayan demanded the "defence of the political and human rights" of the Bengalis.¹⁰⁷ Indian lawyers were no less vocal. If the U.N. Charter forbade wars except in self-defense, they noted, it also contained numerous provisions enshrining the protection of human rights.¹⁰⁸

Rahmatullah Khan, an international law professor at Jawaharlal Nehru University who would go on to be Secretary General of the Indian Society of International Law, pointed to the Charter's Article 1, which promotes "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."¹⁰⁹ S. Sharma, India's delegate to the International Law Association, noted soon after the war, "It is hard to find a case of violation of human rights of this nature and style." He therefore argued that humanitarian interventions could be restrained by requirements of necessity and proportionality, as well as guided by "the immediacy of the violation of human rights, the extent of violations, a prompt disengagement after the action and prompt reporting to the Security Council."¹¹⁰

103. On the endurance of India's Constitution, see Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 782 (1997) (arguing that Indira Gandhi and Jawaharlal Nehru "supported a serious effort to write a constitution to memorialize the fundamental commitments of the Indian people's breakthrough into independence"). On possible moral and legal obligations to citizens of other countries, see KWAME ANTHONY APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* (2006); Martha C. Nussbaum, *Patriotism and Cosmopolitanism, in FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM* (Joshua Cohen ed., 1996); Noah Feldman, *Cosmopolitan Law?*, 116 YALE L.J. 1022 (2007); and Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 STAN. L. REV. 1667 (2003).

104. INDIA CONST. arts. 12-35; Matthew George, *Human Rights in India*, 11 HOWARD L.J. 291 (1965); Shah, *supra* note 18, at 33-34.

105. See Harvey M. Grossman, *Freedom of Expression in India*, 4 UCLA L. REV. 64 (1956); Shah, *supra* note 18; Abhishek Singhvi, *India's Constitution and Individual Rights*, 41 GEO. WASH. INT'L L. REV. 327 (2009).

106. Telegram from Kenneth B. Keating, Ambassador to India, to William P. Rogers (Apr. 6, 1971) (on file with POL 23-9 PAK, Box 2530).

107. Letter from Jayaprakash Narayan to Participants of Proposed Int'l Conference on Bangl. in New Delhi, India (Sept. 3, 1971), *reprinted in* NARAYAN, *supra* note 33, at 640, 641.

108. U.N. Charter arts. 1(1)-(3), 13(1)(b), 55, 56, 62, 68, 73, 76.

109. *Id.* art. 1(3); Khan, *supra* note 5, at 109.

110. *Human Rights*, 55 INT'L L. ASS'N REP. CONF. 539, 617 (1972); see also Ved P. Nanda, *Self-Determination in International Law: The Tragic Tale of Two Cities—Islamabad (West Pakistan)*

Sharma noted that, before the creation of the United Nations, traditional “[p]rinciples of humanitarian intervention . . . permitted the use of forcible self-help in cases in which a State maltreated its subjects in a manner which shocked the conscience of mankind.”¹¹¹ Khan argued that human rights could constitute juridical grounds for intervention. He invoked the authority of Grotius and Fauchille to establish the legality of humanitarian intervention when another state acted “contrary to the laws of humanity.” He argued that individuals were proper subjects of international law, pointing to major instruments of human rights law: the Nuremberg and Tokyo international military tribunals, the Universal Declaration of Human Rights, and the Convention on the Prevention and Punishment of Genocide (Genocide Convention). In an argument that would have garnered wider support today, he concluded that recent developments “disprove[] the positivist claim that states alone are the subjects of international law, and that human rights fall exclusively within the domain of state sovereignty.”¹¹²

Sharma claimed there was a state practice of humanitarian interventions, providing examples from the nineteenth century:

[T]here have been interventions on humanitarian grounds at the cost of international peace, in exceptional cases where crimes and atrocities against humanity have outweighed considerations of sanctity of state independence. At the Nuremberg trials [British prosecutor Sir Hartley] Shawcross stated: “The rights of humanitarian intervention on behalf of the rights of man trampled upon by a state in a manner shocking the sense of mankind has long been considered to form part of the recognised law of nations.”¹¹³

He concluded: “the issue of human rights of 75 million people in a state whose total population is 130 million can hardly be considered as an internal affair of that country. Again, rules of international law have never prohibited absolutely intervention of a humanitarian character.”¹¹⁴

Human rights became a mainstay of Indian government rhetoric. A resolution unanimously adopted by both houses of India’s Parliament on March 31 pledged to “defend human rights” in East Pakistan.¹¹⁵ In a major May 24 speech to the Lok Sabha (the lower house of India’s Parliament), Prime Minister Gandhi warned, “[T]his suppression of human rights, the uprooting of people, and the continued homelessness of vast numbers of human beings will threaten peace.”¹¹⁶ She later acclaimed the Bengali rebels’ “heroic struggle . . . in defence of the most elementary democratic rights and liberties.”¹¹⁷ Foreign

and Dacca (East Pakistan), 66 AM. J. INT’L L. 321, 336 (1972).

111. *Human Rights*, *supra* note 110, at 617.

112. Khan, *supra* note 5, at 103-06.

113. *Id.* at 107.

114. *Id.* at 108.

115. See Indira Gandhi, Speech in Lok Sabha (Dec. 17, 1971), *reprinted in* INDIRA GANDHI: SPEECHES IN PARLIAMENT 814, 814 (Surendra Mishra ed., 1996).

116. Indira Gandhi, Statement in Lok Sabha (May 24, 1971) (transcript available in NMML, Haksar Papers, Subject File 166).

117. Gandhi, *supra* note 78.

Minister Singh told the General Assembly that “the snuffing-out of all human rights, and the reign of terror, which still continues, have shocked the conscience of mankind.”¹¹⁸

After Pakistan attacked India on December 3, Gandhi justified the war not merely as self-defense, which obviously would have more easily passed muster under the U.N. Charter, but also as a fight for “freedom and basic human rights in Bangla Desh.”¹¹⁹ India’s foreign ministry argued that the “basic” cause of strife was “the continued denial of fun[d]amental human rights.”¹²⁰ When India finally recognized Bangladesh’s independence on December 6, India’s foreign ministry claimed that the “fundamental human and political rights of the people would be restored and respected” there.¹²¹

During the war, Singh told the Security Council:

In face of a direct and consistent violation of the Universal Declaration of Human Rights and the provisions of Articles 55 and 56 of the Charter by Pakistan, the Security Council and the United Nations should have found themselves in a position to intervene in the matter and persuade Pakistan to return to the path of reason.¹²²

He later complained that an anti-Indian ceasefire resolution “totally ignores those Charter principles as well as other instruments which prohibit the massive violations of human rights. The world has not seen such a massive violation of human rights since the Charter was promulgated as in Bangla Desh during the past nine months.”¹²³

In a wartime letter to Nixon, Gandhi cited the U.S. Declaration of Independence as saying “whenever any form of Government becomes destructive of man’s inalienable rights to life, liberty and pursuit of happiness, it was the right of the people to alter or abolish it.” She blamed Nixon for giving Pakistan’s rulers

the impression that they could do what they liked because no one, not even the United States, would choose to take a public position that while Pakistan’s integrity was certainly sacrosanct, human rights, liberty were no less so and that there was a necessary inter-connection between the inviolability of States and the contentment of their people.¹²⁴

2. The Rhodesian Precedent

In human rights, Indian officials found a possible precedent for impinging upon Pakistani sovereignty. In 1947, India had tried to empower the Security Council to enforce human rights: “The Security Council of the United Nations

118. Swaran Singh, Statement to the U.N. Gen. Assembly (Sept. 27, 1971) (transcript available in MEA, HI/121/13/71, vol. I).

119. Indira Gandhi, Statement in Lok Sabha (Dec. 4, 1971) (transcript available in MEA, HI/121/25/71).

120. Letter from J.N. Dixit to Heads of Mission, *supra* note 95.

121. *Id.*

122. Singh, *supra* note 86.

123. Swaran Singh, Statement to U.N. Sec. Council (Dec. 13, 1971) (transcript available in MEA, WII/109/31/71, vol. I).

124. Letter from Indira Gandhi to Richard M. Nixon, *supra* note 39.

shall be seized of all alleged violations of human rights, investigate them and enforce redress within the framework of the United Nations.”¹²⁵

India was particularly proud of its longstanding commitment to fighting racism.¹²⁶ The young Mohandas Gandhi’s campaign against white supremacy in South Africa was famed among Indians as a precursor of their own freedom struggle.¹²⁷ Under Indira Gandhi, India denounced South African apartheid, with few compunctions about interfering in South Africa’s domestic affairs.¹²⁸

India went still further against another white supremacist regime in Southern Rhodesia (present-day Zimbabwe). In 1966, for the first time, the Security Council invoked Chapter VII to impose mandatory economic sanctions there.¹²⁹ India repeatedly urged Britain, the colonial power, to wage war against the “illegal racist minority régime.”¹³⁰ India wanted every state to break off all political and economic ties to Southern Rhodesia, and urged international backing for the rebels fighting against white supremacy. In 1968, the Indian government promoted a draft Security Council resolution condemning the execution of prisoners as a “threat to international peace and security”—the well-known Chapter VII standard for involving the Security Council—and urged a reluctant Britain “to take urgently all necessary measures including the use of force.”¹³¹ In March 1968, when Southern Rhodesia executed three people, Prime Minister Indira Gandhi had India’s Parliament stand for a minute of silence for them as martyrs, declaring, “The illegal regime in Southern Rhodesia has committed a grave and heinous crime against humanity.”¹³² She bluntly added that India supported “helping the freedom fighters militarily.”¹³³

In March 1970, the Security Council, acting under Chapter VII, condemned the “illegal régime in Southern Rhodesia,” denounced repression

125. Bhagavan, *supra* note 83, at 329.

126. Letter from P.N. Haksar to Indira Gandhi (Jan. 10, 1971) (on file with NMML, Haksar Papers, Subject File 163).

127. JOSEPH LELYVELD, *GREAT SOUL: MAHATMA GANDHI AND HIS STRUGGLE WITH INDIA* 33-131 (2011).

128. Record of Conversation Between Edward Heath, Prime Minister, U.K., and Indira Gandhi (Oct. 24, 1971) (on file with NMML, Haksar Papers, Subject File 220); Letter from P.N. Haksar to Indira Gandhi (Jan. 11, 1971) (on file with NMML, Haksar Papers, Subject File 163).

129. S.C. Res. 232, para. 2, U.N. SCOR, 21st Year, U.N. Doc. S/RES/232, at 7 (Dec. 16, 1966).

130. U.N. Sec. Council Draft Resolution of Alg., Eth., India, Pak., and Sen., pmbl., para. 4, U.N. Doc. S/8545 (Apr. 16, 1968).

131. *Id.* at paras. 2, 7. Pakistan joined India in invoking Chapter VII. The end result was S.C. Res. 253, U.N. SCOR, 23d Year, U.N. Doc. S/INF/23/Rev.1, at 5 (1968). For an overview of the Rhodesian crisis, see J. Leo Cefkin, *The Rhodesian Question at the United Nations*, 22 INT’L ORG. 649 (1968); Richard M. Cummings, *Rhodesian Unilateral Declaration of Independence and the Position of the International Community*, 6 N.Y.U. J. INT’L L. & POL. 57 (1973); Rupert Emerson, *Self-Determination*, 65 AM. J. INT’L L. 459, 467 (1971); Walter Darnell Jacobs, *Rhodesia*, 130 WORLD AFF. 34 (Apr.-June 1967); Philip Murphy, *An Intricate and Distasteful Subject*, 121 ENG. HIST. REV. 746 (2006); and Carl Watts, *Moments of Tension and Drama*, 8 J. COLONIALISM & COLONIAL HIST. 98 (2007).

132. Indira Gandhi, Statement in Lok Sabha (Mar. 7, 1968), *reprinted in* INDIRA GANDHI: SPEECHES IN PARLIAMENT, *supra* note 115, at 851, 851; *U.S. Deplors Rhodesia Action*, CHI. TRIB., Mar. 7, 1968, at 4.

133. Gandhi, *supra* note 132, at 852.

that violated the “fundamental freedoms and rights” of the suffering people, and called upon U.N. member states “to increase moral and material assistance to the people of Southern Rhodesia in their legitimate struggle to achieve freedom and independence.”¹³⁴

That was only a year before the crackdown started in East Pakistan. Thus Indian commentators invoked Southern Rhodesia as a justifiable precedent for Bangladesh. Rahmatullah Khan noted that the United Nations “did brand the Rhodesian situation as a threat to international peace and security.”¹³⁵ He wrote,

If the treatment of Indians in South-Africa, the apartheid policy, Ian Smith’s UDI [unilateral declaration of independence] in Rhodesia, and even the domestic law of the Soviet Union prohibiting marriages by Russian girls to foreigners, could be considered matters not essentially within the domestic jurisdiction of these states, there seems to be no insuperable legal obstacle to treat the situation in Bangla Desh so. If the UN wishes to declare this struggle as a matter of “international concern” it will have a better case than in any of these precedents.¹³⁶

Rhodesia was an important case for non-Indian commentators too. A few years before the Bangladesh crisis, Myres McDougal and Michael Reisman argued in the *American Journal of International Law* for the lawfulness of Security Council economic sanctions against Southern Rhodesia, noting that the Council had broad competence to determine what constituted a threat to peace.¹³⁷ The Rhodesian authorities, they wrote, had

repudiated the human rights provisions of the Charter, as authoritatively interpreted by the competent U.N. organs, and the prescriptions of the increasingly authoritative Universal Declaration [of Human Rights]. As far as customary international law is concerned, they have violated the more traditional human rights policies in a degree which . . . would have in the past served to justify “humanitarian intervention” by individual nation states.¹³⁸

And pointing to the interconnectedness of the modern world, they questioned whether Rhodesian oppression could properly be seen as purely under domestic jurisdiction.¹³⁹ As they wrote, “even in the absence of a finding of a threat to the peace, the United Nations could have acquired a considerable competence with respect to Rhodesia because of the systematic suppression of human rights practiced there. The concept of domestic jurisdiction in international law has

134. S.C. Res. 277, ¶¶ 1, 5, 14, U.N. SCOR, 25th Year, U.N. Doc. S/INF/25, at 5-6 (Mar. 18, 1970); see also McDougal & Reisman, *supra* note 15.

135. Khan, *supra* note 5, at 98.

136. *Id.* at 110-11; see also David Luban, *Just War and Human Rights*, 9 PHIL. & PUB. AFF. 161, 175 (1980) (noting that “socially basic human rights include security rights”).

137. McDougal & Reisman, *supra* note 15, at 6-7.

138. *Id.* at 11-12. For a rational-choice reconsideration of the workings of customary international law, see Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999); and Jack L. Goldsmith & Eric A. Posner, *Further Thoughts on Customary International Law*, 23 MICH. J. INT’L L. 191 (2001). For a critique, see Detlev F. Vagts, *International Relations Looks at Customary International Law: A Traditionalist’s Defence*, 15 EUR. J. INT’L L. 1031 (2004).

139. McDougal & Reisman, *supra* note 14, at 12-13.

never been impermeable.”¹⁴⁰

More bluntly, the strategist Subrahmanyam secretly told India’s leadership:

India and other nations have repeatedly urged Britain to use force against [the] Rhodesian regime in defence of the rights of [the] majority of Rhodesians. The U.N. has been calling for sanctions against South Africa to compel the white minority regime to give up the oppression against the majority. The Indian intervention will be in the spirit of the action India has been demanding in these two cases. There is no need for India to feel guilty of having interfered in the affairs of another nation.¹⁴¹

He hoped that “if India were to successfully intervene to restore majority rule in Bangla Desh, one likely consequence will be pressure on U.N. in regard to cases of Rhodesia and South Africa.”¹⁴² Following such guidance, India’s foreign ministry urged the United Nations to show “the same kind of concern about the actions of Yahya Khan in East Bengal as they have done about racialism and colonialism in South Africa, Portuguese colonies and Rhodesia.”¹⁴³

3. Results

Since massive violations of human rights are patently prohibited under international law, the argument from human rights attracted some sympathy.¹⁴⁴ But this was not enough to trigger significant condemnations of Pakistan in U.N. organs, nor any Security Council action, let alone the kind of economic sanctions imposed on Southern Rhodesia—and certainly not for using human rights as a *casus belli* against Pakistan.

India won only limited success in U.N. bodies. Its most noteworthy achievement came in April 1971, when India—stymied in efforts to convene a Security Council meeting about East Pakistan—tried to raise Pakistan’s violation of human rights at a session of the Economic and Social Council (ECOSOC), which had a human rights report on its agenda.¹⁴⁵ Invoking Article 2(7) of the Charter, Pakistan tried to have the Indians ruled out of order in ECOSOC for attempting “to intervene in matters which are essentially within the domestic jurisdiction of any state.” ECOSOC, Pakistan argued, had no legal

140. *Id.* at 15; see also Myres S. McDougal & W. Michael Reisman, *The Continuing Validity of Humanitarian Intervention*, 3 INT’L LAW. 435 (1969) (responding to criticisms); Reisman, *supra* note 71, at 872 (“In modern international law, the ‘unilateral declaration of independence’ by the Smith Government in Rhodesia was not an exercise of national sovereignty but a violation of the sovereignty of the people of Zimbabwe.”).

141. Subrahmanyam Report, *supra* note 69.

142. *Id.*

143. Memorandum (1971) (on file with MEA, WII/121/54/71, vol. II).

144. Reisman, *supra* note 71, at 872 (1990) (“[T]he word ‘sovereignty’ can no longer be used to shield the actual suppression of popular sovereignty from external rebuke and remedy.”). For thoughtful skepticism about the promotion of human rights, see DAVID KENNEDY, *THE DARK SIDE OF VIRTUE* (2004); and ERIC A. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* (2014).

145. Telegram from George H.W. Bush to William P. Rogers (Apr. 20, 1971) (on file with POL 23-9 PAK, Box 2531).

competence to consider human rights questions arising from a civil conflict. Moreover, Pakistan's diplomats claimed, Article 4 of the International Covenant on Civil and Political Rights (ICCPR)¹⁴⁶ allowed Pakistan to "derogate from their [ICCPR] obligations in [a] time of public emergency which threatens the life of the nation."¹⁴⁷

Surprisingly, the U.S. Mission to the United Nations, helmed by George H.W. Bush (the future President of the United States), rebuffed Pakistan, despite the fact that Nixon was strongly supportive of Pakistan as a Cold War ally. Bush's Mission argued to the State Department that silencing India "would be contrary to [the] tradition which we have supported that [the] human rights question transcend[s] domestic jurisdiction and should be freely debated."¹⁴⁸ That was already the United States' position regarding the persecution of Jews in the Soviet Union and in Arab countries. "We have never objected to the right of others to criticize domestic conditions in the US maintaining that, as a free society, our policies are fully open to scrutiny."¹⁴⁹ In response, the State Department cautiously allowed Bush to vote for India's right to speak on human rights, "based on established principle under which [the] right of any UN member to raise specific human rights situation in proper forum has long been recognized."¹⁵⁰ The State Department wrote that ECOSOC had a "Charter responsibility to promote respect for human rights," and noted, "Established practice in Human Rights Commission and ECOSOC has confirmed [the] competence [of] these bodies to discuss allegations [of] specific instances [of] violations [of] human rights occurring anywhere in the world."¹⁵¹

In the end, these Indian efforts amounted to little. Pakistan's delegation merely had to listen to charges of human rights violations at an ECOSOC meeting. Twenty-two non-governmental organizations with consultative status at ECOSOC tried to get the U.N. Commission on Human Rights to express its concern and to take steps to protect the Bengalis, but nothing was done.¹⁵²

India's argument from human rights did score another unlikely success: with the oppressive Soviet Union. After vigorous lobbying by India's ambassador in Moscow, D.P. Dhar,¹⁵³ the Soviet Union (despite its own dreadful human rights record) demanded that Pakistan end its repression, respect election results, and uphold the Universal Declaration of Human

146. International Covenant on Civil and Political Rights, art. 4, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

147. Telegram from George H.W. Bush to William P. Rogers, *supra* note 145. But ICCPR Article 4 stipulates that "no derogation . . . may be made under this provision" for abuses including arbitrary killing, genocide, and torture. ICCPR, *supra* note 146, art. 4(2).

148. Telegram from George H.W. Bush to William P. Rogers, *supra* note 145.

149. *Id.*

150. Telegram from Christopher Van Hollen, Deputy Assistant Sec'y of State for Near E. & S. Asian Affairs, to George H.W. Bush (April 27, 1971) (on file with POL 23-9 PAK, Box 2531).

151. *Id.*

152. Nanda, *supra* note 110, at 335.

153. Report from D.P. Dhar to T.N. Kaul, Foreign Sec'y, India (Apr. 8, 1971) (on file with MEA, HI/1012/57/71).

Rights.¹⁵⁴ Even Dhar seemed surprised.¹⁵⁵ It had not been easy, he wrote, for the Soviets “to overcome their inhibitions about so-called principles of national integrity etc., which controlled their policy regarding similar situation in Biafra.” But he believed, plausibly enough, that the Soviet Union was swayed by Cold War alliance politics, combining “an absolute faith” in Indira Gandhi’s leftist policies with “a nice appreciation of the sheer weight of India in Asia today.”¹⁵⁶

Still, the argument from human rights only raised awareness of Pakistani atrocities, but without gaining international legal approval for sanctions or military measures. India’s invocations of the human rights provisions in the U.N. Charter fell flat for obvious doctrinal reasons. The Charter does say, in Article 55, that “the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”¹⁵⁷ In Article 56, the member states “pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.”¹⁵⁸ But while this would make Security Council action in promotion of human rights acceptable, it clearly does not make it obligatory.¹⁵⁹ Nor does the Charter endorse the use of military force for human rights. If the Charter meant that “take joint and separate action” could be interpreted as military attack, it surely would have stipulated that explicitly.

The same holds true for the other core instruments of human rights, including the Universal Declaration of Human Rights,¹⁶⁰ the International Covenant on Civil and Political Rights,¹⁶¹ the Genocide Convention,¹⁶² and the International Convention on the Elimination of All Forms of Racial Discrimination.¹⁶³ None of them call for military action against abusive states.

154. *Id.*; Telegram from William F. Spengler, Country Dir. for Pak. and Afg., Bureau of Near E. & S. Asian Affairs, U.S. Dep’t of State, to Joseph S. Farland, Ambassador to Pak. (Apr. 3, 1971) (on file with POL 23-9 PAK, Box 2530).

155. Letter from D.P. Dhar to T.N. Kaul (Apr. 4, 1971) (NMML, Haksar Papers, Subject File 227); *see also* Letter from D.P. Dhar to P.N. Haksar (Apr. 4, 1971) (on file with NMML, Haksar Papers, Subject File 227).

156. Letter from D.P. Dhar to T.N. Kaul, *supra* note 155.

157. U.N. Charter art. 55.

158. *Id.* art. 56.

159. *See* Tom J. Farer & Felice Gaer, *The UN and Human Rights*, in UNITED NATIONS, DIVIDED WORLD 240 (Adams Roberts & Benedict Kingsbury eds., 2d ed. 1994).

160. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); Hurst Hannum, *Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287 (1996) (weighing the Declaration’s importance as a source of global standards for human rights, as customary international law, and as a model for national laws protecting human rights).

161. ICCPR, *supra* note 146, art. 2; *see also* BROWNLIE, *supra* note 49, at 536-37, 539-40 (explaining that the ICCPR imposes monitoring mechanisms and creates an optional competence to consider complaints of noncompliance by states).

162. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

163. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.

The ICCPR, for instance, allows its Human Rights Committee to write a report,¹⁶⁴ “make available its good offices to the States Parties concerned with a view to a friendly solution,”¹⁶⁵ or establish an ad hoc conciliation committee,¹⁶⁶ but nothing more.

In short, the international human rights regime, as constituted in 1971, might allow discussion of violations of rights, perhaps the investigation or denunciation of them, but no enforcement measures that went further than the possible imposition of economic sanctions¹⁶⁷—and that was not on the table either. A secret Pakistani postwar judicial inquiry aptly noted that the General Assembly condemned “India on a question of principle, namely, that a State was not entitled to physically intervene in the internal affairs of a neighbouring state on any pretext whatsoever.”¹⁶⁸

It would not be until decades later that the United Nations would shoulder Chapter VII responsibilities for massive violations of human rights and international humanitarian law.¹⁶⁹ In 1994 in Rwanda, the U.N. High Commissioner for Human Rights, acting with the approval of the Security Council, deployed human rights officers.¹⁷⁰ In Bosnia, the Security Council repeatedly condemned violations of international humanitarian law and “ethnic cleansing” by Bosnian Serb forces.¹⁷¹ In 1993, alarmed at “widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia, including reports of mass killing and continuance of the practice of ‘ethnic cleansing,’” the Security Council determined that “this situation constitutes a threat to international peace and security,” and created the U.N. ad hoc International Criminal Tribunal for the Former Yugoslavia.¹⁷² And in 1999, the Security Council, concerned at “systematic, widespread and flagrant violations of international humanitarian and human rights law” in East Timor, determined that that situation was “a threat to peace and security,” and acted under Chapter VII to authorize a multinational force to “take all necessary measures” to restore peace there.¹⁷³ But no such innovative U.N.

164. ICCPR, *supra* note 146, art. 41(1)(h).

165. *Id.* art. 41(1)(e).

166. *Id.* art. 42(1).

167. See Franck & Rodley, *supra* note 10, at 302.

168. GOV'T OF PAK., *supra* note 30, at 346.

169. See, e.g., S.C. Res. 942, paras. 7-8, U.N. Doc. S/RES/942 (Sept. 23, 1994) (“[d]etermining that the situation in the former Yugoslavia continues to constitute a threat to international peace and security” and “[a]cting under Chapter VII of the Charter of the United Nations”).

170. See S.C. Res. 965, U.N. Doc. S/RES/965 (Nov. 30, 1994).

171. In 1994, the Security Council determined the situation in Bosnia to “constitute a threat to international peace and security,” and strongly condemned “all violations of international humanitarian law, including in particular the unacceptable practice of ‘ethnic cleansing’” by Bosnian Serb forces. S.C. Res. 941, *pmbl.*, para. 2, U.N. Doc. S/RES/941 (Sept. 23, 1994).

172. S.C. Res. 808, *pmbl.*, U.N. Doc. S/RES/808 (Feb. 22, 1993); see also S.C. Res. 827, *pmbl.*, U.N. Doc. S/RES/827 (May 25, 1993) (expressing the Security Council’s “grave alarm” at “widespread and flagrant violations of international humanitarian law” in Bosnia, “including reports of mass killing, massive, organized and systematic detention and rape of women, and the continuance of the practice of ‘ethnic cleansing’”); GARY J. BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 210-15 (2000).

173. S.C. Res. 1264, *pmbl.*, para. 3, U.N. Doc. S/RES/1264 (Sept. 15, 1999).

actions were concocted on behalf of the Bengalis back in 1971.

B. *The Argument from Genocide*

1. *India's Claims*

Indians did not merely describe abuses of human rights, but a systematic ethnic slaughter which qualified as genocide.¹⁷⁴ This invoked a *jus cogens* standard, branding Pakistan's crackdown as fundamentally prohibited under international norms and law.¹⁷⁵ In such a circumstance, an interventionist state could even potentially claim to be exercising self-help as a victim itself of the violation of international law.¹⁷⁶

From the start, India's public opinion and press widely condemned Pakistan for genocide.¹⁷⁷ Indians equated Pakistan with Nazi Germany,¹⁷⁸ with the activist Jayaprakash Narayan denouncing a "holocaust"¹⁷⁹ by a "Hitlerian junta."¹⁸⁰ Indira Gandhi's own Congress Party decried "the crime of genocide."¹⁸¹

On March 31, personally led by Gandhi herself, both houses of India's usually fractious Parliament unanimously urged all governments to press Pakistan to stop "the systematic decimation of people which amounts to genocide."¹⁸² This harsh language was not just for public consumption: the Indian mission in Islamabad secretly wrote of "the holocaust in East Bengal,"¹⁸³ while Ambassador Dhar in Moscow privately denounced Pakistan's "carnage and genocide."¹⁸⁴ In his secret report to top Indian leaders, Subrahmanyam wrote, "The Indian intervention will be to save the majority of the population in a country from genocide by a military oligarchy." If India could "make the Bangla Desh genocide" its *casus belli*, then "the Super Powers and even China will find it difficult to side with Pakistan."¹⁸⁵

174. See Sumit Ganguly, *Pakistan's Forgotten Genocide—A Review Essay*, 39 INT'L SECURITY 169 (2014); Martha Minow, *Naming Horror: Legal and Political Words for Mass Atrocities*, 2 GENOCIDE STUD. & PREVENTION 37 (2007).

175. See Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUST. Y.B. INT'L L. 82 (1992).

176. FRANCK, *supra* note 16, at 135-36.

177. Telegram from Kenneth B. Keating to William P. Rogers (Apr. 1, 1971) (on file with POL 23-9 PAK, Box 2530); Telegram from Kenneth B. Keating to William P. Rogers (Apr. 5, 1971) (on file with POL 23-9 PAK, Box 2530).

178. Sham Lal, *The Realpolitik of Charity*, TIMES OF INDIA, June 11, 1971, at 10.

179. Letter from Jayaprakash Narayan to Participants of the Proposed Int'l Conference on Bangl., *supra* note 107, at 641.

180. Jayaprakash Narayan, Address at the Int'l Conference on Bangl. in New Delhi, India (Sept. 18, 1971), reprinted in NARAYAN, *supra* note 33, at 648, 655.

181. Draft Resolution for the Working Comm. of the All India Congress Comm. (Mar. 29, 1971) (on file with NMMML, Haksar Papers, Subject File 164).

182. INDIRA GANDHI, INDIA AND BANGLA DESH: SELECTED SPEECHES AND STATEMENTS, MARCH TO DECEMBER 1971, at 14 (1972).

183. Report from Ashok S. Chib, Acting High Comm'r to Pak., India, to T.N. Kaul (June 9, 1971) (on file with MEA, HI/1012/30/71).

184. Report from D.P. Dhar to T.N. Kaul (May 13, 1971) (on file with MEA, HI/1012/57/71).

185. Subrahmanyam Report, *supra* note 69.

Prime Minister Indira Gandhi repeatedly accused Pakistan of genocide and drew comparisons to the Holocaust. After a tour of refugee camps in India's border states, she told her aides that "we cannot let Pakistan continue this holocaust."¹⁸⁶ On May 26, in the Lok Sabha, she blamed Pakistan for "calculated genocide."¹⁸⁷ Writing to Nixon, explaining her rejection of a proposal to post U.N. observers on the India-Pakistan border, Gandhi asked: "Would the League of Nations Observers have succeeded in persuading the refugees who fled from Hitler's tyranny to return even whilst the pogroms against the Jews and political opponents of Nazism continued unabated?"¹⁸⁸ To a Washington audience, she decried the "genocidal punishment of civilians for having voted democratically."¹⁸⁹ Did quieting the situation "mean . . . [w]e support the genocide?" she angrily asked a British reporter while visiting London.¹⁹⁰ "When Hitler was on the rampage, why didn't you say[,] 'Let's keep quiet and let's have peace in Germany and let the Jews die, or let Belgium die, let France die?'"¹⁹¹

Once war began on December 3, Gandhi condemned Pakistan not just for aggression but for "genocide."¹⁹² Indian diplomats argued that "genocide in Bangla Desh . . . is not an internal matter of Pakistan and is the concern of the international community, under the Genocide Convention and other international instruments."¹⁹³ At the Security Council, Foreign Minister Singh highlighted "the genocide of a people and the suppression of human rights that inevitably led to the present conflagration."¹⁹⁴ Soon after the end of the war, Gandhi told reporters in Delhi that

the Pakistani army sought to annihilate an entire population, an entire people, 75 million of them. This was regarded by the world community as an internal affair, although even according to the United Nations it is not really so. You cannot annihilate the whole people and be allowed to do it even if it is your own country.¹⁹⁵

Of course, Indian politicians were not overly concerned with legal precision. But both India and Pakistan were indeed parties to the Genocide Convention, and Indian legal authorities highlighted its well-known definition of genocide as killing, harming, or perpetrating certain kinds of persecution that

186. DHAR, *supra* note 33, at 156.

187. Indira Gandhi, Statement in Lok Sabha (May 26, 1971), *reprinted in* INDIRA GANDHI: SPEECHES IN PARLIAMENT, *supra* note 115, at 887, 888.

188. Letter from Indira Gandhi to Richard M. Nixon (Aug. 7, 1971) (on file with NMML, Haksar Papers, Subject File 170).

189. Indira Gandhi, Statement at Nat'l Press Club in Wash., D.C. (Nov. 5, 1971), *reprinted in* GANDHI, *supra* note 30, at 549, 550.

190. Television Interview by Michael Charlton, British Broad. Corp., with Indira Gandhi (Nov. 1, 1971), *reprinted in* GANDHI, *supra* note 30, at 541, 545.

191. *Id.*

192. Letter from Indira Gandhi to Richard M. Nixon, *supra* note 39.

193. Letter from J.N. Dixit to Heads of Mission, *supra* note 95.

194. Singh, *supra* note 86.

195. Indira Gandhi, Statement to Press in New Delhi, India (Dec. 31, 1971), *reprinted in* GANDHI, *supra* note 30, at 156, 158.

are “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”¹⁹⁶ M.K. Nawaz, who served as director of the Indian Society of International Law and executive editor of the *Indian Journal of International Law*, noted:

The Bengali people who have a language and culture different from the people of West Pakistan can accordingly be considered as constituting an ethnical group within the meaning of Article II of the Genocide Convention. Therefore, any deliberate act resulting in the killing of a substantial number of the Bengali people by the West Pakistan militia would amount to the crime of genocide within the meaning of Article II of the Convention.¹⁹⁷

2. Genocide Against Hindus

The best case for branding these atrocities as genocide was one that India did not dare make. Pakistanis might have argued that their crackdown on the Bengalis was counterinsurgency but not genocide. Despite that, there was clear ethnic or religious targeting of the Hindu minority among the Bengalis.

In April, one of Gandhi’s top aides noted, her government decided that Pakistan was systematically expelling millions of “the ‘wily Hindu’ who was supposed to have misled simple Bengali Muslims into demanding autonomy.”¹⁹⁸ Behind closed doors, the foreign secretary accused Pakistan of “deliberately killing Hindus in East Pakistan.”¹⁹⁹ And Ambassador Dhar denounced the Pakistani army’s “discriminatory and preplanned policy of selecting Hindus for butchery.”²⁰⁰

The targeting was manifest in the demographics of the refugees flooding into India. Although Hindus comprised only 17% of the population of East Pakistan,²⁰¹ by the middle of June, there were some 5,330,000 Hindu refugees, as against 443,000 Muslims and 150,000 from other groups.²⁰² Another Indian report calculated that the refugees were about 80% Hindu.²⁰³

But while India might have exploited these powerful facts under international law, the Indian government assiduously hid this stark reality from its own public. The government feared that publicizing anti-Hindu genocide could have splintered Indians on communal lines between Hindus and

196. Genocide Convention, *supra* note 162, art. 2.

197. Nawaz, *supra* note 94, at 261-62; *see also* S.C. Chaturvedi, *The Proposed Trial of Pakistani War Criminals*, 11 IND. J. INT’L L. 645, 649-51 (1971) (arguing that the Pakistani military’s mass killing of Bengalis shows a criminal intent to destroy the Bengalis as a group, and considering the prospects for trials for genocide).

198. DHAR, *supra* note 33, at 152-54.

199. Telegram from Kenneth B. Keating to William P. Rogers (May 4, 1971), in FRUS, *supra* note 56, at 101, 102; *see also* Memorandum, *supra* note 143.

200. Telegram from D.P. Dhar to T.N. Kaul (Apr. 28, 1971) (on file with NMML, Haksar Papers, Subject File 227).

201. A.C. Sen, Note on Meeting Between Jayaprakash Narayan and the Bangl. Cabinet in Exile on July 8-9, 1971, *reprinted in* NARAYAN, *supra* note 33, app. 102, at 840, 847.

202. Pak. Div., Ministry of External Affairs, India, Refugee Statistics (July 3, 1971) (on file with MEA, WII/121/54/71, vol. II).

203. *See* Report on the Visit of Border Areas of Assam, Meghalaya and Tripura, *supra* note 33.

Muslims, possibly setting off riots.²⁰⁴ Thus Gandhi, in her Lok Sabha speech on May 24, deceptively described the refugees as belonging “to every religious persuasion—Hindu, Muslim, Buddhist and Christian.”²⁰⁵ “In India we have tried to cover that up,” Swaran Singh privately told Indian diplomats in London, “but we have no hesitation in stating the figure to foreigners.”²⁰⁶ Rather than basing their accusations of genocide on the government’s best evidence about the victimization of Hindus, India focused on the decimation of Bengalis as a group—or simply used the word for its shocking impact.

3. Results

In the face of such dire accusations, some international lawyers suggested that international law needed to be reconsidered for this possible case of genocide. Ved Nanda, an American law professor sympathetic to India, argued that Pakistan’s “reprehensible . . . use of ‘genocide’ or ‘selective genocide’” should be enough to overcome legal objections about Pakistan’s territorial integrity.²⁰⁷ As Richard Lillich put it soon after the war, the United Nations’ “months of inactivity” followed by war

manifestly calls for a fundamental re-evaluation of the protection of human rights by general international law. The doctrine of humanitarian intervention, whether unilateral or collective, surely deserves the most searching reassessment given the failure of the United Nations to take effective steps to curb the genocidal conduct and alleviate the mass suffering.²⁰⁸

Still, the invocation of genocide hardly meant that India was legally entitled to use military force against Pakistan. Of course, the Genocide Convention allows state parties to “call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide,”²⁰⁹ and today, after Bosnia and Rwanda,²¹⁰ it is possible to imagine an expansive reading of this language that might lead to a Security Council debate about a Chapter VII resolution authorizing force. But this provision of the Genocide Convention has usually been read more narrowly, as the Convention obviously includes no explicit mention of military force. Anyway, the Charter provides that its own obligations trump those of any other international instrument.²¹¹ The Genocide Convention would not be invoked to request a U.N. investigation (or stronger actions) until 2004, when U.S. Secretary of State Colin Powell accused Sudan’s government of genocide in

204. Telegram from D.P. Dhar to T.N. Kaul, *supra* note 200.

205. Gandhi, *supra* note 116.

206. Singh, *supra* note 91.

207. Nanda, *supra* note 110, at 336.

208. Richard Lillich, *The International Protection of Human Rights by General International Law, Second Interim Report of the Sub-Committee*, in REPORT OF THE INTERNATIONAL COMMITTEE ON HUMAN RIGHTS OF THE INTERNATIONAL LAW ASSOCIATION 608, 624 (1972).

209. Genocide Convention, *supra* note 162, art. 8.

210. See S.C. Res. 925, U.N. Doc. S/RES/925 (June 8, 1994).

211. U.N. Charter art. 103.

Darfur.²¹²

Indian legal experts had limited hopes for what U.N. action to prevent and suppress genocide might mean. While Nawaz, of the Indian Society of International Law, argued that the Genocide Convention empowered U.N. organs to take action “outside the scope of domestic jurisdiction prohibition,”²¹³ he only envisioned international prosecutions against perpetrators of genocide. As he noted, the Convention provided for trying alleged acts of genocide before a competent national court where the crimes occurred or before “such international penal tribunal as may have jurisdiction”²¹⁴—something manifestly unlikely to happen, since Pakistan would not conduct such a trial, and there was no such international court in existence at the time. Perhaps states might file a case against Pakistan in the International Court of Justice, as provided for in the Genocide Convention (although India itself could not, having bound itself upon joining the Convention that all parties to the dispute had to consent to such a step—something that Pakistan would presumably not do).²¹⁵ But few Indian authorities imagined that the United Nations would do much. To the contrary, the Genocide Convention’s reference to the U.N. Charter would immediately call to mind the Charter’s prohibitions on the use of force except for self-defense. As Franck and Rodley noted, “the violation of a right, except in a community of savages, does not automatically give rise to a right to obtain redress by countering the illegal act with another illegal act.”²¹⁶

Genocide has in recent years been a significant goad to international legal action. It played a major role in the creation of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court.²¹⁷ In 1994, regarding Rwanda, the Security Council noted that “genocide constitutes a crime punishable under international law.”²¹⁸ Pointing to the 1996 judgment of the International Court of Justice case on genocide in Bosnia, Bruno Simma writes, “In the face of genocide, the right of states, or collectivities of states, to counter breaches of human rights most likely becomes an obligation.”²¹⁹ But in 1971, as India screamed genocide, the world—not for the first or last time—sat silent.²²⁰

212. *The Current Situation in Sudan and the Prospects for Peace: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. 3-10 (2004) (statement of Colin L. Powell, Sec’y of State).

213. Nawaz, *supra* note 94, at 262.

214. Genocide Convention, *supra* note 162, art. 6.

215. Nawaz, *supra* note 94, at 262.

216. Franck & Rodley, *supra* note 10, at 302.

217. *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Int’l Crim. Trib. for Rwanda Sept. 2, 1998); BASS, *supra* note 172; José E. Alvarez, *Crimes of State/Crimes of Hate: Lessons from Rwanda*, 24 *YALE J. INT’L L.* 365 (1999); William A. Schabas, *Genocide Law in a Time of Transition*, 61 *RUTGERS L. REV.* 161 (2008); Beth A. Simmons & Allison Danner, *Credible Commitments and the International Criminal Court*, 64 *INT’L ORG.* 225 (2010).

218. S.C. Res. 925, *supra* note 210, at para. 6.

219. Simma, *supra* note 46, at 2.

220. POWER, *supra* note 25, at 82.

C. *The Argument from Self-Determination*

1. *India's Claims*

Anticolonial revolts are a hallmark of the postwar age, and there is a long normative tradition that upholds national self-determination against imperial domination—sometimes even trumping the territorial integrity of an abusive state.²²¹ In India's own liberation struggle against British imperialism, achieving self-determination was crucial to the realization of the "Fundamental Rights" enshrined in its Constitution.²²² Following on India's widespread acclaim for Bangladeshi democracy, the Indian case for self-determination rested on principles of popular consent.²²³

The democratic will of the people of East Pakistan, Indians argued, demonstrated their nationhood. Therefore the Indian government asserted that Pakistani sovereignty was a dead letter because the Bengali people in East Pakistan no longer consented to be governed from Islamabad—either because the Bengalis comprised a nation which had a right to secession (following nationalist theories of secession); or because they had democratically voted for the Awami League in what amounted to a referendum on self-determination (following choice theories of secession); or, after the crackdown began, because they would never be willing to live under such cruel Pakistani rulers (following remedial theories of secession).²²⁴ The Indian foreign ministry pointed out that, before the crackdown began, the Awami League had not asked for statehood, only autonomy: "It is only after the outbreak of the military repression, massacre and reign of terror by the Pakistan Army that the people of East Bengal came to the conclusion that it was no longer possible for them to live in peace with West Pakistan."²²⁵

Prime Minister Gandhi wrote to world leaders, "the loyalty of a people to a State cannot be enforced at gun-point."²²⁶ Rather than merely endorsing autonomy for East Pakistan, Haksar wrote to India's ambassador in Poland,

221. EREZ MANELA, *THE WILSONIAN MOMENT: SELF-DETERMINATION AND THE INTERNATIONAL ORIGINS OF ANTICOLONIAL NATIONALISM* (2007); MILL, *supra* note 25, at 261; WALZER, *supra* note 8, at 90-108; DOYLE, *supra* note 21, at 362.

222. Shah, *supra* note 18, at 27 ("For colonized nations, the appreciation of human rights . . . was linked to their struggle for emancipation.").

223. Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 *YALE J. INT'L L.* 177, 184-87 (1991) (questioning whether "principles of democratic government translate into a right of secession").

224. Susanna Mancini, *Secession and Self-Determination*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 481, 483-87 (Michel Rosenfeld & András Sajó eds., 2012); *see also* Alexander H. Berlin, *Recognition as Sanction: Using International Recognition of New States to Deter, Punish, and Contain Bad Actors*, 31 *U. PA. J. INT'L L.* 531 (2009) (advocating a sanction theory of recognition that uses international recognition of a secessionist entity as a tool to punish human rights abuses by a parent state); Joshua Castellino, *The Secession of Bangladesh in International Law*, 7 *ASIAN Y.B. INT'L L.* 83, 84 (1997) (arguing that the creation of Bangladesh was a significant "stage in the development of the international law of self-determination").

225. Letter from J.N. Dixit to Heads of Mission, *supra* note 95.

226. Letter from Indira Gandhi to Heads of State and Heads of Gov't (May 14, 1971) (on file with NMML, Haksar Papers, Subject File 166).

“[T]he Poles should be made to understand that there is an irrevocable break between the people of East Bengal and the people of what is now called West Pakistan. . . . Pakistan, as it existed prior to 25th of March, 1971, has ceased to exist.”²²⁷ Swaran Singh told the Parliament, “We maintain the right of each and every country and people to decide their own destiny without any interference from outside. This applies as much to Bangla Desh as to Vietnam or the [P]alestine problem.”²²⁸

For those political theorists—most importantly Allen Buchanan—who justify self-determination as a remedial measure for terrible human rights abuses, Bangladesh is an important case in point.²²⁹ While remedial-right theories of secession are often challenged on the grounds that it is hard to define how much exploitation or oppression would justify secession,²³⁰ the brutality of the Pakistani army’s assault seems to render this a relatively easy case in normative terms—but not in legal terms.²³¹

Indian international lawyers claimed that “Bangla Desh”—which is Bengali for “Bengal Nation”²³²—was entitled to national self-determination.²³³ With unpropitious timing, they were confronted by the recent passage in October 1970 of U.N. General Assembly Resolution 2625, widely seen to this day as a chief authority for upholding state sovereignty over self-determination.²³⁴ It inveighed against

Any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . . possessed of a government representing the whole people belonging

227. Letter from P.N. Haksar to Swaran Singh (June 3, 1977) (on file with NMML, Haksar Papers, Subject File 108).

228. Swaran Singh, Reply to Debate in Lok Sabha (July 20, 1991) (transcript available in MEA, WII/125/59/71).

229. ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 353 (2004) (arguing that “the secession of East Pakistan” could be seen as a “justifiable remedy” for “massive human rights violations”). For similar discussions, see ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL APPRAISAL 109 (1995); BENYAMIN NEUBERGER, NATIONAL SELF-DETERMINATION IN POSTCOLONIAL AFRICA 71 (1986). For a legal precedent treating secession as a remedial option, see *The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs*, League of Nations Doc. B7.21/68/106 (Apr. 16, 1921).

230. Mancini, *supra* note 224, at 486.

231. See Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT’L L. 1, 46-47 (2011) (“International law should recognize a right to secession only in the rare circumstance when the physical existence of a territorially concentrated group is threatened by gross violations of fundamental human rights.”). Hannum, who is cautious about secession, writes, “The secession of Bangladesh, opposed initially by the vast majority of states, owes more to the Indian army and Soviet political support than to the principle of self-determination.” *Id.* at 49.

232. Phillips Talbot, *The Subcontinent: Ménage à Trois*, 50 FOREIGN AFF. 698, 700 (1972).

233. Khan, *supra* note 5; Nawaz, *supra* note 94.

234. G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 18, U.N. Doc. A/8018 (Oct. 24, 1970); see also Yoram Dinstein, *Is There a Right To Secede?*, 90 AM. SOC’Y INT’L L. PROC. 299, 300 (1996); Hannum, *supra* note 231, at 14 (noting that because the resolution “[m]ay be considered to state existing international law,” “[i]ts provisions therefore possess unusual significance”); Robert Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT’L L. 713 (1971).

to the territory without distinction as to race, creed or colour.²³⁵

Still, seizing on the latter phrases, Nawaz, of the Indian Society of International Law, claimed that “on careful study . . . the principle of self-determination is limited by territoriality only when States ensure conditions leading to the economic, social and cultural development of *all* peoples living in a State.” Since Pakistan’s government discriminated against the Bengali people (although not formally in the way of, say, apartheid South Africa), he denied the territorial integrity of a united Pakistan: “[T]he Bengali people have been subject to domination and exploitation by the West Pakistanis who, for all intents and purposes, are aliens. Consequently, the principle of self-determination applies to the people of Bangla Desh.”²³⁶

Indian lawyers appealed in rather straightforward terms to the most widely cited standard for statehood, the Montevideo Convention on the Rights and Duties of States (1933), which, according to many publicists, has reached the status of customary international law.²³⁷ Following Hersch Lauterpacht, if an entity met the requirements of statehood, then there would be a duty for other states to recognize it.²³⁸ While in recent years there have been more expansive criteria for recognizing new states, including respect for the rule of law and human rights,²³⁹ the Montevideo Convention was the standard Indian reference in 1971. The Convention famously stipulates, “The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.”²⁴⁰ As the Indians knew, the last two criteria are usually interpreted to demonstrate independence.²⁴¹ Once Bangladesh defined itself as a state, it would gain sovereignty: “No state has the right to intervene in the internal or external affairs of another.”²⁴²

Of course, these Montevideo criteria are not simple to apply,²⁴³ and there is no central authority which rules upon them.²⁴⁴ Still, Nawaz offered a similar set of criteria for recognizing a new state: “(a) a people, (b) a territory, (c) a

235. G.A. Res. 2625, *supra* note 234, at 124.

236. Nawaz, *supra* note 94, at 255-56.

237. Jure Vidmar, *International Legal Responses to Kosovo’s Declaration of Independence*, 42 VAND. J. TRANSNAT’L L. 779, 818-19 (2009).

238. LAUTERPACHT, *supra* note 94.

239. See, e.g., *Declaration on Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*, 62 BRIT. Y.B. INT’L L. 559 (1991).

240. Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 U.N.T.S. 21 [hereinafter Montevideo Convention]; see also JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* (2d ed. 2006); MIKULAS FABRY, *RECOGNIZING STATES: INTERNATIONAL SOCIETY AND THE ESTABLISHMENT OF NEW STATES SINCE 1776* (2010); Thomas D. Grant, *Defining Statehood: The Montevideo Convention and Its Discontents*, 37 COLUM. J. TRANSNAT’L L. 403 (1999).

241. Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT’L L. 605 (1941). On independence, see *Customs Regime Between Germany and Austria*, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 41 (Sept. 5).

242. Montevideo Convention, *supra* note 240, art. 8.

243. See CRAWFORD, *supra* note 240, at 434; see also LAUTERPACHT, *supra* note 94, at 1.

244. Brilmayer, *supra* note 223, at 183, 191-92.

government, and (d) sovereignty.” He contended that Bangladesh qualified: it had a people, which was united in “solidarity and nationalism” by Awami League leadership, and was bigger than many U.N. member states; it had a defined territory, that of East Bengal;²⁴⁵ it had a provisional government, carrying the mandate of the 1970 elections. He argued, “It derives authority from the popular will as manifested in the general elections. In short, it is a government which is ‘formed by the will of the nation, substantially declared’—to quote the telling phrase of Thomas Jefferson.”²⁴⁶

Rahmatullah Khan, the Jawaharlal Nehru University law professor, exhorted his government to recognize Bangladesh as an independent state:

Bangla Desh qua state fulfils the elementary criteria required under international law for recognition. It has an independent government exercising authority over *most* (some is sufficient criterion) inhabitants and in *all* the territory except towns (though the legal requirement is to establish control over *some* territory). Recognition of Bangla Desh will be quite proper on these grounds.²⁴⁷

He concluded, “[T]he rules of public international law provide no obstacles in the way of a possible recognition by India of Bangla Desh”²⁴⁸

Trying a different and perhaps more artful formulation, other Indian commentators tried to justify Bangladesh’s self-determination as an anticolonial enterprise, rendering the ban on violating sovereignty less potent.²⁴⁹ After all, the Indian military had seized Goa from Portugal in 1961, arguing that Portuguese colonialism there was tantamount to ongoing aggression against India.²⁵⁰ On this account, West Pakistan had replaced Britain as the colonial power ruling illegitimately over East Pakistan. (This echoes how East Timor went from Portuguese rule to Indonesian rule.²⁵¹) Thus Indira Gandhi condemned West Pakistan’s governance of East Pakistan as a “repressive, brutal and colonial policy.”²⁵² Standing up for national liberation

245. This element might be salient for Brilmayer. *See id.* at 192 (arguing that “every separatist movement is built upon a claim to territory, usually based on an historical grievance” and that “without a normatively sound claim to territory, self-determination arguments do not form a plausible basis for secession”).

246. Nawaz, *supra* note 94, at 257-58.

247. Khan, *supra* note 5, at 90.

248. *Id.* at 112; *see also* Nanda, *supra* note 110, at 336 (suggesting criteria for placing demands of self-determination above those of a “non-interventionist” stand on the part of the United Nations).

249. For other anticolonial perspectives on self-determination, see Organization of African Unity, African Charter on Human and Peoples’ Rights, art. 20(1)(2)(3), *adopted* June 27, 1981, 1520 U.N.T.S. 217; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 74 (June 21) (separate opinion of Vice President Ammoun) (describing self-determination as an “imperative right of peoples”); Hannum, *supra* note 231, at 12-13, 32 (“[S]elf-determination has never been considered an absolute right to be exercised irrespective of competing claims or rights, except in the limited context of ‘classic’ colonialism.”); Rosalyn Higgins, *The United Nations and Lawmaking: The Political Organs*, 64 AM. J. INT’L L. 37, 43 (1970); and Mancini, *supra* note 224, at 490.

250. Emerson, *supra* note 131, at 465.

251. Roger S. Clark, *The “Decolonization” of East Timor and the United Nations Norms on Self-Determination and Aggression*, 7 YALE J. WORLD PUB. ORD. 2 (1980).

252. Letter from Indira Gandhi to Richard M. Nixon, *supra* note 39.

movements, Nawaz argued that a recent General Assembly resolution on principles of international law “lays down a negative obligation on States, i.e., not to use force against peoples fighting for freedom and independence, and permits a positive right for States to give support to the peoples resisting forcible action.”²⁵³ Khan saw the Bengali struggle as a “war[] of national liberation”²⁵⁴ against West Pakistani colonialism. Based on what he termed customary international law expressed by the General Assembly, that body’s resolutions “have in effect taken colonial rule out of the ‘domestic jurisdiction’ disability of the UN Charter. No colonial power today can invoke Article 2(7) of the Charter as a jurisdictional bar to UN competence.”²⁵⁵ Indeed, he noted, under a 1965 General Assembly resolution, colonial rule itself was a threat to international peace and security. Therefore India would “not only be entitled to recognize the Bangla Desh government but will also have the right to lend moral and material assistance to it if the situation in Bangla Desh could be categorized as a national liberation war against a colonial and racially discriminatory regime.”²⁵⁶

Following a choice theory of secession, India emphasized the democratic mandate of the Awami League as evidence of Bangladeshi nationhood—and of the illegitimacy of West Pakistani rule.²⁵⁷ Samar Sen, India’s permanent representative to the United Nations, urged the United States to support a “democratic solution.”²⁵⁸ When Gandhi finally recognized Bangladesh, she told her democratic Parliament that the new state’s “legitimacy” drew from “the will of the overwhelming majority of the people, which not many governments can claim to represent.”²⁵⁹ (In contrast, she sneered that Yahya’s regime in Islamabad was “hardly representative of its people even in West Pakistan.”²⁶⁰) Even so, these claims could only have a limited impact: while there is lively scholarly discussion of what Thomas Franck in more recent years termed a nascent “right to democratic governance,”²⁶¹ this was hardly commonplace in 1971.²⁶²

India at one point also tried to appeal to the ICCPR’s call to promote the realization of the right of self-determination “of the peoples of Non-Self-

253. G.A. Res. 2625, *supra* note 234; Nawaz, *supra* note 94, at 256-57.

254. Khan, *supra* note 5, at 96; *see also* Nanda, *supra* note 110, at 336 (“East Pakistan approaches the parameters of a colonial situation . . .”).

255. Khan, *supra* note 5, at 98.

256. *Id.* at 98-99.

257. Report from Ashok S. Chib to T.N. Kaul (Apr. 8, 1971) (on file with MEA, HI/1012/30/71).

258. Telegram from George H.W. Bush to William P. Rogers (Apr. 16, 1971) (on file with POL 23-9 PAK, Box 2531).

259. Indira Gandhi, Speech in Lok Sabha and Rajya Sabha (Dec. 6, 1971) (on file with MEA, HI/121/25/71).

260. *Id.*

261. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46 (1992); *see also* Vidmar, *supra* note 237.

262. Thomas M. Franck, *Legitimacy and the Democratic Entitlement*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 25, 32-35 (Gregory H. Fox & Brad R. Roth eds., 2000).

Governing” territories²⁶³ (although without noting that the General Assembly had rejected stronger language insisting that ruling powers “grant this right [to self-determination] on a demand for self-government on the part of these people” as determined through a U.N.-run plebiscite²⁶⁴). As Sen told the Security Council during the December war,

Under the resolutions of the United Nations General Assembly there are certain criteria laid down concerning how and when an area can be regarded as non-self-governing. If we had applied those criteria to East Bengal, and if we had a little more morality, we could declare East Pakistan a non-self-governing territory.²⁶⁵

For all that, India was in fact slow to recognize Bangladesh as an independent state, not doing so until the outbreak of war with Pakistan in December 1971. As Haksar noted, because of the “civil chaos” in rebellion-torn East Pakistan, “it was a matter of extreme practical necessity for India to recognise the Government of Bangla Desh—a Government which obviously has the widest possible support in the country expressed through the general elections held in December 1970.”²⁶⁶ To justify recognition, Haksar formulated a rather questionable legal case that owed much to a choice theory of secession but failed to invoke any specific treaties or custom.²⁶⁷ Using his language anyway, Gandhi wrote to Secretary-General Thant:

International Law recognizes that where a mother-State has irrevocably lost allegiance of such a large section of its people as represented by Bangla Desh and cannot bring them under its sway, conditions for the separate existence of such a state come into being. It is India’s assessment that this is precisely what has happened in Bangla Desh. The overwhelming majority of the elected representatives of Bangla Desh have irrevocably declared themselves in favour of separation from the mother-State of Pakistan and have set up a new State of Bangla Desh. India has recognised this new State.²⁶⁸

When Swaran Singh read this statement before the Security Council, Zulfikar Ali Bhutto, representing Pakistan, retorted that this principle could splinter states across Asia and the globe. But Singh stood firm:

If the majority population of any country is oppressed by a militant minority, as is the case in Bangla Desh and in Southern Africa, or in Palestine, it is the inalienable right of the majority population to overthrow the tyranny of the minority rulers and decide its destiny according to the wishes of its own people. The birth right of the majority of the population of a country to revolt against the tyranny of a militant minority cannot be denied under the principles and purposes of the Charter or according to international law.²⁶⁹

263. ICCPR, *supra* note 146, art. 1(3).

264. Rep. of the Comm’n on Human Rights, 8th Sess., Apr. 14-June 14, 1952, U.N. Doc. E/2256; ESCOR, 14th Sess., Supp. No. 4 (1952).

265. Samar Sen, Permanent Representative to the U.N., India, Address at the Sec. Council (Dec. 4, 1971) (on file with MEA, HI/121/13/71, vol. II).

266. Memorandum on India’s Objectives in the Current Conflict with Pakistan (Dec. 9, 1971) (on file with NMML, Haksar Papers, Subject File 173).

267. Letter from P.N. Haksar to Swaran Singh (Dec. 11, 1971) (on file with NMML, Haksar Papers, Subject File 173).

268. Singh, *supra* note 86.

269. Swaran Singh, Statement to the U.N. Sec. Council (Dec. 13, 1971) (on file with MEA,

Summarizing some of India's major legal claims about self-determination, the Indian foreign ministry claimed:

[The] Pakistan Army's brutal attack on East Bengal and the genocide launched in the area convinced the people of East Bengal that they would continue to be treated as a colony if they remained as part of Pakistan. . . . Seen in this context, the Bangla Desh issue is not an issue of secession but that of self-determination.²⁷⁰

2. *The Problem of Self-Determination Inside India*

India's case for self-determination was undermined in one particularly conspicuous way: India's own fears about domestic secessionists in its own far-flung territories. Indeed, India promoted a restrictive view of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and ICCPR's right of self-determination, expressed in a formal reservation when it acceded to these two covenants in 1979.²⁷¹ Fortifying itself against separatist claims, India declared that "the words 'the right of self-determination' . . . apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of the people or nation—which is the essence of national integrity."²⁷² This prompted formal objections from France, Holland, and West Germany that the right of self-determination applied to all peoples, not just those under foreign domination. Still, long after the Bangladesh war, India would continue to assert a legal view of self-determination that did not apply to its own populace.²⁷³

Like many postcolonial states, India feared ethnic or religious separatist movements.²⁷⁴ But India, with its vast territory and multitude of potential rebels, was especially concerned.²⁷⁵ In this period, the Indian government was anxious about its remote eastern territories of Nagaland and Mizoram. In 1966, Mizo rebels declared their independence from India, prompting a harsh military response by Indira Gandhi. India marched troops against rebels in Nagaland too, where a peace effort fell apart, followed by brutal Naga terrorist attacks on civilians.²⁷⁶ During the Bangladesh crisis, Gandhi loudly objected to Indian Tamil activists "comparing the Tamil Nadu situation with Bangla Desh

WII/109/31/71, vol. I).

270. Letter from J.N. Dixit to Heads of Mission, *supra* note 95.

271. Dinstein, *supra* note 234, at 301.

272. Patrick Thornberry, *Self-Determination, Minorities, Human Rights: A Review of International Instruments*, 38 INT'L & COMP. L.Q. 867, 879 (1989).

273. Hannum, *supra* note 231, at 26.

274. See ISSA G. SHIVJI, *THE CONCEPT OF HUMAN RIGHTS IN AFRICA* 77 (1989); Benedict Kingsbury & Kirsty Gover, *Indigenous Groups and the Politics of Recognition in Asia*, 11 INT'L J. MINORITY & GROUP RTS. 1 (2004).

275. LIEVEN, *supra* note 27, at 21; Jawaharlal Nehru, *The Unity of India*, 16 FOREIGN AFF. 231 (1938).

276. J.F.R. JACOB, *SURRENDER AT DACCA: BIRTH OF A NATION* 30 (1997); see also Indira Gandhi, Statement in Lok Sabha (Mar. 20, 1968), reprinted in GANDHI, *supra* note 115, at 667, 667; David P. Fidler & Sumit Ganguly, *Counterinsurgency in India*, in *THE ROUTLEDGE HANDBOOK OF INSURGENCY AND COUNTERINSURGENCY* (Paul B. Rich & Isabelle Duyesteyn eds., 2012); Letter from P.N. Haksar to Indira Gandhi (Mar. 15, 1972) (on file with NMML, Haksar Papers, III Installment, Subject File 179).

situation.”²⁷⁷

Above all, India worried about the disputed territory of Kashmir. India dreaded United Nations involvement there.²⁷⁸ From India’s perspective, the state of Jammu and Kashmir was an integral part of India, with Pakistan illegitimately trying to stir up separatism among Muslims there.²⁷⁹ Early in 1971, India’s foreign intelligence agency, the Research and Analysis Wing, secretly warned that “Pakistan might be tempted to start fomenting violent agitation sabotage etc. in the J[ammu] & K[ashmir] State followed by extensive infiltration.”²⁸⁰

This made for some uncomfortable hypocrisies during the East Pakistan crisis. Haksar confidentially reminded Gandhi that, in Indian-controlled Kashmir, India’s Parliament had made it “unlawful to preach secession.”²⁸¹ Days before the slaughter started in East Pakistan, the Indian ambassador in Washington refused to allow Kashmiris to vote on their own future: “Any talk of a plebiscite raises the question whether a part of a country can choose to come out of it?”²⁸² As Haksar privately noted, while advocating for Bangladesh:

We have also to be careful that we do not publicly say or do anything which will cast any shadow on the stand we have consistently taken in respect of Kashmir that we cannot allow its secession and that whatever happens there is a matter of domestic concern to India and that we shall not tolerate any outside interference.²⁸³

3. Results

This self-determination justification was perhaps the least convincing of India’s arguments. Few U.N. member states wanted to legitimize the dismemberment of sovereign countries. As one Indian ambassador privately noted, “America, under her greatest President, fought a bloody civil war to prevent secession of the southern States.”²⁸⁴ Egypt seemed fixated on

277. Report on Tamil Nadu Congress Political Conference at Madurai (May 20-21, 1971) (on file with NMML, Haksar Papers, Subject File 236).

278. See David M. Malone & Rohan Mukherjee, *From High Ground to High Table: The Evolution of Indian Multilateralism*, 17 *GLOBAL GOVERNANCE* 311, 313 (2011).

279. See Sumit Ganguly, *Explaining the Kashmir Insurgency: Political Mobilization and Institutional Decay*, 21 *INT’L SECURITY* 76, 78 (1996); see generally Ashutosh Varshney, *India, Pakistan, and Kashmir: Antimonies of Nationalism*, 31 *ASIAN SURV.* 997 (1991) (tracing the history of conflict over Kashmir).

280. Letter from P.N. Haksar to Indira Gandhi (Jan. 14, 1971) (on file with NMML, Haksar Papers, Subject File 220); see also Franck & Rodley, *supra* note 10, at 296 (“These repressions of political freedom in Kashmir and elsewhere in India scarcely make more convincing New Delhi’s role as a disinterested champion of principles of freedom and self-determination beyond its boundaries.”).

281. Letter from P.N. Haksar to Indira Gandhi (Mar. 31, 1971) (on file with NMML, Haksar Papers, Subject File 164).

282. Letter from L.K. Jha, Ambassador to the U.S., India, to T.N. Kaul (Mar. 12, 1971) (on file with NMML, Haksar Papers, Subject File 227).

283. Memorandum from P.N. Haksar to Indira Gandhi, *supra* note 64; see also Memorandum from P.N. Haksar to Indira Gandhi (Mar. 16, 1972) (on file with NMML, Haksar Papers, Subject File 179).

284. Letter from D.N. Chatterjee, Ambassador to Fr., India, to Narendra Singh, Joint Sec’y of External Affairs, India (July 6, 1971) (on file with NMML, Haksar Papers, Subject File 171).

maintaining a unified Pakistan,²⁸⁵ while the United Nations bureaucracy and the General Assembly insisted on maintaining Pakistan's unity.²⁸⁶

The case for self-determination was particularly obnoxious to China, which excoriated secessionists in Taiwan and Tibet, as it still does to this day. Under Mao Zedong, China was already a fierce Cold War enemy of India. Chinese Premier Zhou Enlai praised Yahya for avoiding a "split" in Pakistan, and applauded "the unification of Pakistan and unity of people of East and West Pakistan." In contrast, he blasted India's "gross interference in internal affairs of Pakistan."²⁸⁷ During the war, China denounced attempts to split up states, whether by lopping off Taiwan from China or Bangladesh from Pakistan.²⁸⁸

As a legal matter, India's case here was obviously weak both in doctrinal and practical terms.²⁸⁹ While self-determination has considerable weight in international law,²⁹⁰ in the postwar era, secession remains forbidden under international law in almost all circumstances, and is also ruled out by most national constitutions.²⁹¹ As a matter of practice, almost all states are vehemently opposed to a rule that might allow their own fracturing.²⁹² Hurst Hannum argues that the widespread rejection among U.N. members of East Pakistan's secession was a repudiation of Indian claims that Pakistan was a discriminatory and non-representative state under General Assembly resolution 2625.²⁹³ As Lea Brilmayer writes, "Even if one accepts a right of self-determination in some contexts, this does not entail acknowledging a right of secession."²⁹⁴

285. Letter from J.J. Bahadur Singh, Ambassador to Egypt, India, to R.C. Arora, Dir., Ministry of External Affairs, India (Jan. 19, 1972) (on file with NMML, Haksar Papers, Subject File 220).

286. Letter from J.N. Dixit to Heads of Mission (Dec. 3, 1971) (on file with MEA, HI/121/13/71, vol. II).

287. Zhou Enlai, Premier, China, to Agha Muhammad Yahya Khan, President, Pak. (Apr. 12, 1971) (on file with POL 23-9 PAK, Box 2531).

288. Note from R.K. Kapur, Senior Research Officer, Special Unit, Ministry of External Affairs, India (Dec. 13, 1971) (on file with MEA, HI/121/13/71, vol. II); Text of Draft Resolution Tabled by China in the Sec. Council (Dec. 4-6, 1971) (on file with MEA, HI/121/13/71, vol. II).

289. For a discussion of self-determination principles, see generally BROWNLIE, *supra* note 49, at 160-61, 553-55; CASSESE, *supra* note 229; HURST HANNUM, *AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION* (1990); THOMAS D. MUSGRAVE, *SELF-DETERMINATION AND NATIONAL MINORITIES* (1997); MICHLA POMERANCE, *SELF-DETERMINATION IN LAW AND PRACTICE: THE NEW DOCTRINE IN THE UNITED NATIONS* (1982); and *SECESSION AND SELF-DETERMINATION* (Steven Macedo & Allen Buchanan eds., 2003).

290. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (Jan. 26); BROWNLIE, *supra* note 49, at 553-54; ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 16 (1986). *But see* Hannum, *supra* note 231, at 12 ("[T]he principle of self-determination had not attained the status of a rule of international law by the time of the drafting of the United Nations Charter or in the early United Nations era.").

291. Mancini, *supra* note 224, at 481, 490.

292. See THEODORE CHRISTAKIS, *LE DROIT À AUTODÉTERMINATION EN DEHORS DES SITUATIONS DE DÉCOLONISATION [THE RIGHT TO SELF-DETERMINATION OUTSIDE OF THE DE-COLONIZATION CONTEXT]* (1999); James Crawford, *State Practice and International Law in Relation to Secession*, 69 BRIT. Y.B. INT'L L. 85 (1998).

293. Hannum, *supra* note 231, at 17.

294. Brilmayer, *supra* note 223, at 178. Brilmayer largely approves of Bengali claims to secede,

Similarly, many of the core U.N. declarations on self-determination insist upon maintaining the territorial integrity of states.²⁹⁵ Although both the 1966 ICCPR and ICESCR stipulate in a much-cited common article that “[a]ll peoples have the right of self-determination,”²⁹⁶ territorial integrity ranks as a more important principle.²⁹⁷ It is easier for international law to accept self-determination within a state than by creating a new one—particularly when the original state is contesting the secessionists.²⁹⁸ In 1971, the common view was that self-determination did not imply a right of secession.²⁹⁹ As one distinguished commentator pointed out in a major review of self-determination in the *American Journal of International Law* in 1971, anyone who believed that those Covenants granted all people the right to self-determination “is invited to consult the Germans, Koreans, and Vietnamese; the Biafrans or Ibos, the south Sudanese, the Baltic peoples, the Formosans, the Somalis, and the Kurds and Armenians.”³⁰⁰

Self-determination would thus be interpreted merely as protecting the cultural and linguistic traditions of peoples within the borders of their current state, rather than permitting secession.³⁰¹ There was still substantial resistance among some powerful Western countries even to anticolonial cases of self-determination.³⁰² When Biafra sought to break away from federal Nigeria—which in 1971 would have been the most important recent instance of attempted secession—the Organization of African Unity favored maintaining current states even when their borders had been drawn by heedless colonialists.³⁰³ In January 1970, Secretary-General Thant, asked about Katanga and Biafra, declared, “[T]he United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member State.”³⁰⁴ When the Helsinki Final Act was made a few

but rests that approval on “serious human rights abuses,” rather than on the illegitimacy of a united Pakistan, which—as she rightly notes—had been formed with Bengali participation in the anticolonial struggle. *Id.* at 196-97; see also HANNUM, *supra* note 289, at 42 (“Several authors have argued for recognition of a ‘right to secession’ as part of the right of self-determination, but such a right does not yet exist.”).

295. G.A. Res. 1514, 15 U.N. GAOR Supp. No. 16, U.N. Doc., A/4684, at 66, 67 (1960); G.A. Res. 2625, *supra* note 234.

296. ICCPR, *supra* note 146, art. 1; International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3.

297. Hannum, *supra* note 231, at 16-17. He notes, “Secession is not presently recognized as a right under international law, nor does international law prohibit secession.” *Id.* at 42.

298. See Emerson, *supra* note 131; Thornberry *supra* note 272 (discussing the limitations on secession). For major statements after 1971, see Vienna Declaration and Programme of Action, U.N. GAOR, World Conf. on Hum. Rts., 48th Sess., U.N. Doc. A/CONF.157.24 (1993); Reference re Secession of Quebec, 2 S.C.R. 217 (1998) (Can.). For an argument that the ICCPR and ICESCR do allow a right of secession, see Dinstein, *supra* note 234, at 301-02.

299. Emerson, *supra* note 131, at 464 (“[T]he customary verdict has been that self-determination does not embrace secession, at least as any continuing right.”).

300. *Id.* at 463.

301. Mancini, *supra* note 224, at 490; see also Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, 567 (Dec. 22).

302. Emerson, *supra* note 131, at 461-62.

303. Brillmayer, *supra* note 223, at 182.

304. Emerson, *supra* note 131, at 464 (quoting *Secretary-General’s Press Conference in Dakar*,

years later, in 1975, it bore the same ambiguities: granting a right of self-determination to peoples, but without defining who those peoples were, nor accepting a right of secession.³⁰⁵

Faced with such familiar prohibitions on secession, the Indian government itself seemed wary. After all, India might simply have unilaterally recognized Bangladesh as an independent state. Then India could have appealed to the United Nations to protect the new state from foreign invaders or occupiers from West Pakistan—much as the United Nations's 1992 admission of Bosnia as a member state³⁰⁶ would make possible its long series of Security Council resolutions defending Bosnia against outside forces.³⁰⁷ But even the Indian government staunchly refused to recognize Bangladesh throughout the protracted crisis of 1971 until the outbreak of full-scale war in December, fearing that premature recognition would have instantly ignited a war with Pakistan, as well as alienating foreign governments.

Moreover, even were the fundamental objections of territorial integrity somehow to be put aside, as many commentators have noted, the Montevideo criteria rely in large part on effectiveness,³⁰⁸ and the Bengali rebels were not capable of running a *de facto* state in East Pakistan. Using that logic, P.N. Haksar gloomily wrote that few Western governments were sympathetic to India's assertions: "Obviously, no Government recognises a revolt unless it acquires legitimacy. That legitimacy is acquired by control of territory and by its writ running. From this point of view, the Government of Bangla Desh has not succeeded in satisfying the criteria."³⁰⁹

Since the end of the Cold War, self-determination has gained some limited ground, in a manner reminiscent of the aftermath of World War I.³¹⁰ Faced with irredentist movements and the collapse of established countries, the United Nations has in recent years accepted for membership successor states which split off from member states such as the Soviet Union, Czechoslovakia, Yugoslavia, Indonesia, and Sudan. While most states—led by China and Russia—still rebuff secessionists, a number of powerful Western governments did back Kosovo's independence from Serbia. In 2008, when Serbia tried to slow or prevent the recognition of Kosovo's independence by asking the

U.N. MONTHLY CHRON., Feb. 1970, at 36).

305. Hannum, *supra* note 231, at 28-29 ("There was no suggestion at Helsinki or in subsequent CSCE meetings that the right of self-determination could justify secession by an oppressed minority."); Mancini, *supra* note 224, at 489.

306. S.C. Res. 755, U.N. Doc. S/RES/755 (May 20, 1992). On Bosnian independence, see Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yug.), 1996 I.C.J. 595, 612-613 (July 11).

307. S.C. Res. 770, U.N. Doc. S/RES/770 (Aug. 13, 1992).

308. Vidmar, *supra* note 237, at 821.

309. Memorandum on Points Which P.M. Might Consider Making at the Meeting of the Opposition Leaders, to Be Held on Friday, May 7, to Consider the Situation in Bangla Desh (May 1971) (on file with NMML, Haksar Papers, Subject File 166).

310. Hannum, *supra* note 231, at 2-11; Martti Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice*, 43 INT'L & COMP. L.Q. 241 (1994); Mancini, *supra* note 224, at 491; see also Robert McCorquodale, *Self-Determination: A Human Rights Approach*, 43 INT'L & COMP. L.Q. 857, 857-59 (1994).

General Assembly to request an advisory opinion from the International Court of Justice on whether Kosovo's unilateral declaration of independence from Serbia was in accordance with international law.³¹¹ Britain responded that Kosovo's independence had already been recognized by almost all European Union countries, while the United States said, "We are confident that the recognition of Kosovo's independence by an ever-increasing number of States is consistent with international law."³¹² Although Serbia did win the General Assembly vote, it was disappointed when in 2010, the International Court of Justice ruled in a narrowly-framed advisory opinion that Kosovo's unilateral declaration of independence had not violated international law.³¹³ Still, these are small steps toward a wider international rule of self-determination—a principle which India itself was reluctant to endorse.

D. The Argument from Sovereignty

1. India's Claims

India's most effective argument aimed not at undermining Pakistan's national sovereignty, but upholding India's. After all, Pakistan's domestic crackdown had created a domestic catastrophe for India. By September, India reckoned it was sheltering some eight million Bengali refugees, with more coming every day—all of them Pakistani nationals.³¹⁴

"West Bengal today is deluged by millions of victims of Pakistan's oppression," wrote the panic-stricken chief minister of West Bengal, a major Indian state.³¹⁵ These exiles desperately needed humanitarian and medical supplies.³¹⁶ Inevitably, refugees died in huge numbers, particularly children, with mortality rates at least five times as high as those in other migrant populations in India.³¹⁷ Worse, India's intelligence services cautioned Gandhi that Maoist revolutionaries were fomenting upheaval in the refugee camps,³¹⁸ further destabilizing border states like West Bengal, which were already hotbeds of leftist radicalism.³¹⁹ Nawaz argued that Pakistan had an international

311. G.A. Res. 63/3, U.N. Doc. A/RES/63/3 (Oct. 8, 2008).

312. U.N. GAOR, 63rd Sess., 22nd plen. mtg., U.N. Doc. A/63/PV.22, at 5 (Oct. 8, 2008).

313. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22). The I.C.J. did not consider whether Kosovo was entitled to statehood. See *Recent International Advisory Opinion: Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo*, 124 HARV. L. REV. 1098, 1098 (2011).

314. Memorandum from Pramad Kumar, Undersec'y, Ministry of External Affairs, India (Sept. 22, 1971) (on file with MEA, HI/1012/30/71).

315. Letter from A.K. Mukherjee, Chief Minister of W. Bengal, India, to S.S. Dhavan, Governor of W. Bengal (June 1971) (on file with NMML, Haksar Papers, Subject File 168).

316. Letter from Bhashani to P.N. Haksar (July 29, 1971) (on file with NMML, Haksar Papers, Subject File 171).

317. Senate Report by Kennedy on Indo-Pak. War (Nov. 1, 1971) (on file with NSC Files, Box 574).

318. PUPUL JAYAKAR, *INDIRA GANDHI: AN INTIMATE BIOGRAPHY* 171-72 (1992).

319. Memorandum by P.N. Haksar (July 15, 1971) (on file with NMML, Haksar Papers, Subject File 169).

legal obligation to make amends to India for the massive costs of looking after the refugees.³²⁰

In May 1971, Haksar first suggested to the Prime Minister an innovative formulation to use in an appeal to world leaders: “Is it right on the part of Pakistan to seek to solve its internal problems by throwing the burden of millions of their citizens on to a neighbouring State?”³²¹ But Gandhi chose a somewhat more cautious version which only obliquely questioned national sovereignty: “Apparently, Pakistan is trying to solve its internal problems by cutting down the size of its population in East Bengal, and changing its communal composition through an organised and selective programme of eviction; but it is India that has to take the brunt of this.”³²²

Soon after, Gandhi visited refugee camps in the border states of West Bengal, Assam, and Tripura.³²³ Shocked, she returned to Delhi determined that the refugees would have to go home, which would require a domestic political deal between Pakistan’s military and Bengali leaders.³²⁴ For the Prime Minister’s major address scheduled for May 24, Haksar threw away a staid draft from the foreign ministry.³²⁵ In her speech, Gandhi inverted Pakistan’s insistence on its inviolable sovereignty:

[W]e have never tried to interfere with the internal affairs of Pakistan, even though they have not exercised similar restraint. And even now we do not seek to interfere in any way. But what has actually happened? *What was claimed to be an internal problem of Pakistan, has also become an internal problem for India.* We are, therefore, entitled to ask Pakistan to desist immediately from all actions which it is taking in the name of domestic jurisdiction, and which vitally affect the peace and well-being of millions of our own citizens. Pakistan cannot be allowed to seek a solution of its political or other problems at the expense of India and on Indian soil.³²⁶

Using language evoking Chapter VII, she warned, “They are threatening the peace and stability of the vast segment of humanity represented by India.”³²⁷

This argument from sovereignty became a standard Indian government nostrum.³²⁸ Haksar even tried to use it with Zhou Enlai, as a way of steering around China’s doctrinal insistence on not interfering in the domestic affairs of other countries:

We recognise fully that the internal affairs of another country are no part of our

320. Nawaz, *supra* note 94, at 265.

321. Letter from P.N. Haksar to Indira Gandhi (May 12, 1971) (on file with NMML, Haksar Papers, Subject File 166).

322. Letter from Indira Gandhi to World Leaders (May 14, 1971) (on file with NMML, Haksar Papers, Subject File 166).

323. Statement of Gandhi, *supra* note 116.

324. DHAR, *supra* note 33, at 158.

325. Letter from P.N. Haksar to Indira Gandhi (May 23, 1971) (on file with NMML, Haksar Papers, Subject File 166).

326. Gandhi, *supra* note 116 (emphasis added).

327. *Id.*

328. Letter from R. Ranganathan, Deputy Sec’y, Ministry of External Affairs, India, to Heads of Mission (June 17, 1971) (on file with MEA, HI/121/13/71).

responsibility; but when there is, in effect, a transfer of a substantial proportion of the population of that country to our own, our involvement becomes inescapable What would otherwise have remained an exclusively domestic situation, or problem, has thus assumed international proportions.³²⁹

Foreign Minister Singh coached his diplomats on what to say at their posts: “[R]epression internally has resulted in the uprooting of six million refugees. With what stretch of the imagination is this an internal matter?”³³⁰

Singh also implicitly accused the United States of interfering in Pakistan’s internal affairs by helping the junta against the Bengalis: “[G]iving of aid really is interference in the internal affairs because you give aid to a military regime which is a minority regime.” American support for Yahya was “truly interference in the internal affairs.” Then he instructed the diplomats, “You can use your genius for the purpose of thinking of other such arguments.”³³¹

Some Indians pressed the argument still further, viewing India as the victim of Pakistani aggression, almost tantamount to an armed attack. Gandhi called the refugee burden “a new kind of aggression” against India.³³² S. Sharma, India’s delegate to the International Law Association, defended India’s sovereignty under the self-defense provisions of the U.N. Charter’s Article 2(4): “In the absence of effective supranational procedures, one can assume that this right of self-defence permits necessary and proportionate humanitarian intervention on behalf of individual States or groups of States.”³³³ And in a wartime Security Council debate, the Indian permanent representative to the United Nations argued that the refugees constituted a “kind of aggression” by Pakistan.³³⁴ In another Security Council session, Singh described the ten million refugees as a “massive civilian invasion.”³³⁵

But it was the more basic claim about the refugee burden that became a mainstay of Indian rhetoric. In her wartime appeal to world governments, Gandhi wrote,

India has always stood for total non-interference by one State into the domestic affairs of another State. However, if one State deliberately drives millions of its citizens across the territory of another State and casts upon the receiving State unconscionable burdens, what remedies are open to the receiving State who has become a victim of domestic policies of a Member-State of the United Nations?³³⁶

329. Letter from P.N. Haksar to Indira Gandhi (July 16, 1971) (on file with NMML, Haksar Papers, Subject File 169).

330. Singh, *supra* note 91.

331. *Id.* at 20.

332. Gandhi, *supra* note 189, at 549.

333. *Human Rights*, *supra* note 110, at 617.

334. Samar Sen, Statement to the U.N. Sec. Council (Dec. 5, 1971) (on file with MEA, HI/121/13/71, vol. II).

335. Singh, *supra* note 86.

336. Letter from P.N. Haksar to Indira Gandhi, (Dec. 1971) (on file with NMML, Haksar Papers, Subject File 173).

2. Results

The argument from sovereignty, more respectful of the basic Charter norms than India's other arguments, put even Pakistan's most dedicated friends on the back foot. After all, Pakistan's convulsions had sent people fleeing not just into India, but also into other neighboring countries. The U.S. State Department estimated that thirty thousand Bengalis escaped into Burma, while about twenty thousand refugees in India crossed into Nepal in search of less crowded conditions.³³⁷ While India got no support for treating the refugees as equivalent to an armed attack,³³⁸ it did get considerable sympathy for having to cope with refugees who were unquestionably displaced foreign nationals.

For the United States, the civil war in East Pakistan remained "an internal matter which the Pakistanis must solve for themselves," but even the Nixon administration conceded that it had "international dimensions."³³⁹ At a minimum, as Kissinger said privately, "if the Pakistanis had what looked like a plausible refugee program, then the Indians would have less of an excuse to go to war."³⁴⁰

The Soviet Union, supporting India, was more forthright. Premier Aleksei Kosygin told Singh, "While maintaining a position of non-interference, we, at the same time, should take a resolute position against Yahya Khan regarding the question of the refugees." Soviet officials told their Indian counterparts that they shared Gandhi's assessment that this was "no longer an internal affair of Pakistan, but it concerns many States, in fact it concerns the whole world. . . . The problem has outgrown the borders of Pakistan. It has spilled out of its territorial bounds and its baneful consequences are spreading wider and wider every day"³⁴¹

Other governments were circumspect. Japan's government privately agreed that this was "no longer an internal matter of Pakistan but an international problem," but did not dare to say so publicly. Malaysia and Thailand also agreed in private that this was not a domestic Pakistani issue, but out of fear of Indonesia and China respectively, neither government would speak up in public.³⁴²

This argument from sovereignty, at a minimum, points to a conceptual problem for international law. How can one state use its sovereignty to expel

337. Memorandum from Theodore L. Eliot Jr., Exec. Sec'y, U.S. Dep't of State, to Henry A. Kissinger (July 21, 1971) (on file with NSC Files, Box H-058).

338. See Simma, *supra* note 46, at 5 (explaining why an exodus of refugees cannot be considered an armed attack under the U.N. Charter).

339. Memorandum from Theodore L. Eliot Jr. to Henry A. Kissinger (Aug. 27, 1971) (on file with NSC Files, Box H-082).

340. Memorandum of Conversation Between Joseph S. Farland, Ambassador to Pak., Henry A. Kissinger, and Harold Saunders, Nat'l Sec. Council (July 30, 1971), *reprinted in* FRUS, *supra* note 56, at 302, 304.

341. Teleconference Between Swaran Singh and Aleksei Kosygin (June 8, 1971) (transcript available in NMML, Haksar Papers, Subject File 203).

342. Report from Siddhartha Ray, Minister of Educ., India, to Indira Gandhi (June 25, 1971) (on file with NMML, Haksar Papers, Subject File 168).

refugees when the burden will fall upon other states? Indeed, one prominent political theorist points to the refugees as a justification for humanitarian intervention. For Michael Walzer, military measures could be justified by “the expulsion of very large numbers of people,” which shows “extreme” oppression: “The Indian intervention might as easily have been justified by reference to the millions of refugees as by the reference to the tens of thousands of murdered men and women.”³⁴³

Whatever the state of international law, mass atrocity is almost never strictly an internal problem. People will always run away from genocide or crimes against humanity,³⁴⁴ and cannot be expected to respect lines on the map. Jews tried to escape the Nazi dragnet, but found American, British, and Canadian doors slammed shut against them.³⁴⁵ About half of Bosnia’s people were displaced during the 1992-95 war, some remaining inside Bosnia, but many escaping into Croatia and the rest of Europe. When Tutsi rebels defeated Rwanda’s genocidal government in 1994, some two million people, mostly Hutu, fled into Zaire (now the Democratic Republic of Congo), destabilizing the region for decades.³⁴⁶ Even North Korea, perhaps the most repressive state on earth, cannot prevent some of its citizens from fleeing into South Korea and China today.³⁴⁷

Today there is a growing if cautious recognition that refugee flows can pose a threat to nearby states. While authorities certainly still would not accept that a refugee flow is equivalent to an armed attack and thus triggers Article 51,³⁴⁸ the Security Council has in recent years edged toward treating mass expulsions as a threat to the peace. In 1994, thousands of Haitian refugees fled to Florida from a military regime that was spurning democratic election results,³⁴⁹ in a kind of small-scale version of what India faced. But the United States, rather than coping with impoverished exiles in Florida or languishing in limbo in an emergency camp at Guantánamo Bay, got the Security Council to act under Chapter VII authorizing a multinational force to oust the Haitian

343. Walzer, *Moral Standing of States*, *supra* note 21, at 218.

344. See FRANCK, *supra* note 16, at 137.

345. IRVING M. ABELLA & HAROLD M. TROPER, *NONE IS TOO MANY: CANADA AND THE JEWS OF EUROPE, 1933-1948* (1986); RICHARD BREITMAN, *OFFICIAL SECRETS: WHAT THE NAZIS PLANNED, WHAT THE BRITISH AND AMERICANS KNEW* (1998); MARTIN GILBERT, *CHURCHILL AND THE JEWS* (2007); DAVID S. WYMAN, *THE ABANDONMENT OF THE JEWS: AMERICA AND THE HOLOCAUST, 1941-1945* (1984).

346. GÉRARD PRUNIER, *AFRICA’S WORLD WAR: CONGO, THE RWANDAN GENOCIDE, AND THE MAKING OF A CONTINENTAL CATASTROPHE* (2009); JASON STEARNS, *DANCING IN THE GLORY OF MONSTERS: THE COLLAPSE OF THE CONGO AND THE GREAT WAR OF AFRICA* (2011).

347. U.N. Human Rights Council, *Rep. of the Detailed Findings of the Comm’n of Inquiry on Human Rights in the Democratic People’s Republic of Korea*, U.N. Doc. A/HRC/25/63 (Feb. 7, 2014); BARBARA DEMICK, *NOTHING TO ENVY: ORDINARY LIVES IN NORTH KOREA* (2010).

348. Simma, *supra* note 46, at 5.

349. Harold Hongju Koh, *Reflections on Refoulement and Haitian Centers Council*, 35 HARV. INT’L L.J. 1 (1994); Harold Hongju Koh, *The “Haiti Paradigm” in United States Human Rights Policy*, 103 YALE L.J. 2391 (1994); Harold Hongju Koh, *The Human Face of the Haitian Interdiction Program*, 33 VA. J. INT’L L. 483, 487 (1993) (“There is a fire in the barn in Haiti, but when people start to flee, we decide that the problem is the people fleeing, not the fire.”); *America’s Least-Wanted*, ECONOMIST, July 16, 1994, at 23-24.

junta.³⁵⁰ As Anthea Roberts recently wrote, “Refugee flows across national borders as a result of humanitarian crises may constitute a threat to international peace and security”³⁵¹ Thomas Franck noted in 2002 that the Security Council approved coercive measures in Haiti—as well as Somalia and ex-Yugoslavia—not for humanitarian reasons alone, but also because of the “the threat to peace caused by massive out-flows of refugees and the danger of wider involvement by other states.”³⁵²

The most momentous recent example is Rwanda. In June 1994, the Security Council noted that “the massive exodus of [Rwandan] refugees to neighbouring countries constitute[s] a humanitarian crisis of enormous proportions”³⁵³ Soon after, the Security Council, calling Rwanda “a unique case which demands an urgent response by the international community,” determined that “the magnitude of the humanitarian crisis in Rwanda constitutes a threat to peace and security in the region”³⁵⁴—thereby achieving the Charter’s Article 39 and 42 threshold for U.N. intervention.³⁵⁵ Thus the Security Council invoked Chapter VII to demand an end to the killing and asked for more state support for the faltering United Nations Assistance Mission for Rwanda.³⁵⁶ For all the inadequacy of the military deployment, this was at least a striking statement that refugee flows can constitute a threat to international peace and security. Belying the Security Council’s claim of the uniqueness of Rwanda’s crisis, though, India had experienced a similar kind of refugee crisis in 1971, which demonstrably posed such a threat to the peace as to ignite a major war within a few months.

Still, in the end, to understand why India’s combined arguments won so little support, one must turn from legal doctrine to international relations.³⁵⁷ For all the limits and weaknesses of India’s legal arguments, its primary problem was its international isolation during the Cold War, with little hope of winning over Security Council members. This outcome can only be fully explained by turning to a consideration of the multilateral politics of the Cold War.

350. S.C. Res. 940, U.N. Doc. S/RES/940 (July 31, 1994).

351. Anthea Roberts, *Legality vs. Legitimacy: Can Uses of Force Be Illegal but Justified?*, in HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE 180, 180 n.5 (Philip Alston & Euan MacDonald eds., 2008).

352. FRANCK, *supra* note 16, at 136-37.

353. S.C. Res. 925, U.N. Doc. S/RES/925 (June 8, 1994).

354. S.C. Res. 929, U.N. Doc. S/RES/929 (June 22, 1994).

355. U.N. Charter arts. 39, 42.

356. S.C. Res. 929, *supra* note 354.

357. See Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations, and Compliance*, in THE HANDBOOK OF INTERNATIONAL RELATIONS 538 (Walter Carlsnaes et al. eds., 2002).

III. MULTILATERALISM

A. *India's Isolation*

It is widely accepted today that humanitarian intervention, if ever allowable under international law, can only be accepted as legitimate when it has multilateral approval under Chapter VII.³⁵⁸ Appropriately, the advocates of multilateralism point to a global consensus as a way of correcting against self-interested motives in an intervening state.³⁵⁹

International law, as presently constituted both by treaty and custom,³⁶⁰ prohibits unilateral humanitarian intervention.³⁶¹ Franck and Rodley note with approval that, in the nineteenth century, European states intervening to protect persecuted Ottoman minorities did so only with the multilateral authorization of the Concert of Europe.³⁶² Rodley has argued that the International Court of Justice's jurisprudence demonstrates that "the doctrine of unilateral armed humanitarian intervention has no justification at law."³⁶³ At the regional level, the African Union does allow itself "to intervene in a Member State pursuant to a decision of the [African Union] Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity," but only as a collective enterprise.³⁶⁴ Even the "Responsibility to Protect," as adopted by a U.N. World Summit in 2005, requires Chapter VII approval by the Security

358. Franck & Rodley, *supra* note 10, at 304. On multilateralism generally, see HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* (1977); HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* (1933); and José E. Alvarez, *Multilateralism and Its Discontents*, 11 EUR. J. INT'L L. 393, 394 (2000) ("Multilateralism is our shared secular religion. Despite all of our disappointments with its functioning, we still worship at the shrine of global institutions like the UN.").

359. Lillich, *supra* note 46, at 344-51; see Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. J. INT'L L. 323 (2008) (discussing the "instinctive baseline inclination" for bilateralism or multilateralism); Kal Raustiala, *Sovereignty and Multilateralism*, 2 CHI. J. INT'L L. 401 (2000).

360. See, e.g., *Libyan Arab Jamahiriya/Malta Judgment*, 1985 I.C.J. 13, ¶ 27 (June 3) (stating that customary international law must be "looked for primarily in the actual practice and *opinio juris* of States"); *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 183. For applications, see Simma & Alston, *supra* note 175.

361. BROWNLIE, *supra* note 49, at 710-11. For arguments against unilateral intervention, see Goodman, *supra* note 24, at 111; W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3 (2000); Reisman, *supra* note 15, at 520 (arguing that humanitarian intervention should be "inclusively authorized and accomplished rather than exclusively and unilaterally effected"). For important statements, see Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, G.A. Res. 36/103, U.N. GAOR, 36th Sess., Supp. No. 51 (Dec. 9, 1981); Definition of Aggression, G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31 (Dec. 14, 1974); G.A. Res. 2625, *supra* note 234. See also THEODORE MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY INTERNATIONAL LAW* 216-17 (1989).

362. Franck & Rodley, *supra* note 10, at 280-82; see GARY J. BASS, *FREEDOM'S BATTLE: THE ORIGINS OF HUMANITARIAN INTERVENTION* 362-65 (2008); DAVIDE RODOGNO, *AGAINST MASSACRE: HUMANITARIAN INTERVENTIONS IN THE OTTOMAN EMPIRE, 1815-1914* (2011); *HUMANITARIAN INTERVENTION: A HISTORY* (Brendan Simms & D.J.B. Trim eds., 2011).

363. Nigel S. Rodley, *Human Rights and Humanitarian Intervention: The Case Law of the World Court*, 38 INT'L & COMP. L.Q. 321, 327-28 (1989).

364. Constitutive Act of the African Union art. 4(h), adopted July 11, 2000, OAU Doc. CAB/LEG/23.15, http://www.au.int/en/sites/default/files/ConstitutiveAct_EN.pdf.

Council.³⁶⁵

To this day, when international lawyers remember Bangladesh, they mostly treat it as a failed attempt to promote a doctrine of unilateral humanitarian intervention.³⁶⁶ India's unilateralism remains one of the most problematic aspects of its 1971 policy.³⁶⁷ But although India did end up acting unilaterally, it was not for lack of effort. As its diplomatic record demonstrates, India—not known as an especially renegade state before or after 1971—would have preferred to act with world support. Far from being a hegemon rewriting the rules of global order,³⁶⁸ or a rogue state unconcerned with world opinion, India was desperate for foreign approval.

Indian legal commentators such as Rahmatullah Khan always envisioned acting through the United Nations, and argued at length that the Bangladesh crisis should be considered a threat to international peace and security and thus a matter suitable for the world organization: “[T]he possibilities of United Nations intervention—through collective recognition or ‘internationalization’—are rather remote, though the UN has a strong case to do so.”³⁶⁹ S. Sharma made a similar claim: “the situation in East Bengal has reached a stage where it can be considered as a threat to international peace. Therefore, Article 2(7) of the Charter is no longer a hindrance in legitimate outside intervention.”³⁷⁰ (While Pakistan invoked this article for not “authoriz[ing] the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state,” this Indian lawyer remembered that it also said “this principle shall not prejudice the application of enforcement measures under Chapter VII.”)³⁷¹ Far from seeking to gut the United Nations, Indian international law experts saw a historic opportunity for it to showcase its utility:

Article 2(7) does not bar UN intervention in a situation like East Bengal. Rather a positive action will strengthen the authority of the UN, its principles and objectives. The happenings in East Bengal attract UN intervention both on the basis of the protection of human rights and the threat to international peace and security. . . .

365. 2005 World Summit Outcome, G.A. Res. 60/I, para. 139, U.N. GAOR, 60th Sess., Supp. No. 49, U.N. Doc. A/RES/60/1, at 30 (Sept. 16, 2005) (“[W]e are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII . . .”).

366. Roberts, *supra* note 351, at 181.

367. See CHESTERMAN, *supra* note 25, at 235-36; HENKIN, *supra* note 75, at 144-45; Richard B. Bilder, *Kosovo and the “New Interventionism”*: *Promise or Peril?*, 9 J. TRANSNAT’L L. & POL’Y 153, 160 (1999); Ian Brownlie, *Thoughts on Kind-Hearted Gunmen*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 147-48 (Richard B. Lillich ed., 1973). For proponents of unilateral humanitarian intervention, see Martha Brenfors & Malene Maxe Petersen, *The Legality of Unilateral Humanitarian Intervention: A Defence*, 69 NORDIC J. INT’L L. 449 (2000); Andrew Field, *The Legality of Humanitarian Intervention and the Use of Force in the Absence of United Nations Authority*, 26 MONASH U. L. REV. 339, 346-47, 350-51 (2000); Samuel Vincent Jones, *Darfur, the Authority of Law, and Unilateral Humanitarian Intervention*, 39 U. TOL. L. REV. 101 (2007).

368. Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT’L L. 369, 393-95, 407 (2005).

369. Khan, *supra* note 5, at 110-12; see Nanda, *supra* note 110, at 322.

370. *Human Rights*, *supra* note 110, at 618.

371. U.N. Charter art. 2, para. 7.

The necessity and legal justification for intervention by the UN in East Bengal is more compelling than in any other situation in the past.³⁷²

But to achieve such a Chapter VII resolution, India needed to win over the Security Council. At this moment in the Cold War, that was simply impossible. The United States and China were resolutely opposed to even a *multilateral* humanitarian intervention for the Bengalis. India was officially nonaligned in the Cold War, but, under the influence of pro-Soviet senior officials like Haksar and Ambassador Dhar, tilted toward the Soviet Union. Against it, India faced two hostile Security Council permanent members: the United States and the People's Republic of China, which was about to displace Taiwan there.³⁷³ The United States was a treaty ally of Pakistan, and Nixon had a racist disdain for India and Indians. Maoist China had fought a bloody war against India in 1962, and Zhou Enlai was venomously antagonistic to India. In the Oval Office, Secretary of State William Rogers explained to Nixon and Kissinger, "in the Security Council we would be China, Pakistan, and the United States all on one side, so we've got some pretty good leverage."³⁷⁴

On top of that, with unfortunate timing for India, the slaughter in East Pakistan came just as the United States was launching its secret opening to China. Kissinger's first covert trip to Beijing was in July 1971, in the midst of the Bangladesh crisis. Pakistan won gratitude from the Nixon administration by serving as a back channel between the United States and China as they secretly established ties. The success of Nixon's historic initiative meant that the United States and China, unsympathetic to India in this phase of the Cold War, were newly coordinated in their diplomatic efforts on behalf of Pakistan.³⁷⁵

If any state had put forward a Chapter VII resolution supporting India, either the United States or China—in the radical throes of the Cultural Revolution—would have promptly vetoed it. In the Oval Office, Kissinger once told the President that, in Security Council debates, the United States did not have to go as far as China (whose diplomats delivered fiery Cultural Revolution polemics) in denouncing India. Nixon exploded: "I want to go damn near as far! You understand? I don't like the Indians."³⁷⁶ Another time, Nixon told Kissinger, "I want to piss on them [the Indians] for their responsibility. . . . We

372. *Human Rights*, *supra* note 110, at 623.

373. INTERNATIONAL CRISIS GROUP, ASIA REPORT NO. 166, CHINA'S GROWING ROLE IN UN PEACEKEEPING (2009), http://www.crisisgroup.org/~media/Files/asia/north-east-asia/166_chinas_growing_role_in_un_peacekeeping.pdf.

374. Audio tape: Recording of Conversation Between Richard M. Nixon, Henry A. Kissinger, and William P. Rogers in Wash., D.C. (Nov. 24, 1971) (on file with Nat'l Archives, Nixon Presidential Materials, White House Tapes, Conversation 624-21) (transcript available in FRUS E-7, *supra* note 85, Doc. 156).

375. BASS, *supra* note 4, at 145-77; WALTER ISAACSON, KISSINGER: A BIOGRAPHY 343-49 (1992); HENRY KISSINGER, ON CHINA 215 (2011); HENRY KISSINGER, WHITE HOUSE YEARS 729-39 (1979).

376. Audio tape: Recording of Conversation Between Richard M. Nixon and Henry A. Kissinger in Wash., D.C. (Nov. 22, 1971) (on file with Nat'l Archives, Nixon Presidential Materials, White House Tapes, Conversation No. 622-1).

can't let these goddamn, sanctimonious Indians get away with this."³⁷⁷

Even so, India repeatedly appealed globally to governments and public opinion, asking for political support as well as relief and funding for the refugees. Gandhi made an encompassing plea to the "conscience of the world."³⁷⁸ India dispatched a legion of ministers and diplomats to plead its case around the world, everywhere from Nepal to Brazil, Somalia to Sierra Leone, Burundi to Nigeria, France to Denmark, Sudan to Kenya.³⁷⁹ Swaran Singh made an extensive foreign tour in June,³⁸⁰ a minister was sent around Asia;³⁸¹ a senior official toured Latin America.³⁸²

But the results were disappointingly meager.³⁸³ Britain was lukewarm,³⁸⁴ with West Germany the most forthcoming of the European powers.³⁸⁵ India was particularly hurt by its near-total abandonment by the Non-Aligned Movement,³⁸⁶ particularly Indonesia and Egypt.³⁸⁷ Saudi Arabia, Libya, and Kuwait pressured Egypt to be even more pro-Pakistan.³⁸⁸ While India did get some donations for the refugees, the total sum was, senior Indian officials noted, miserably inadequate.³⁸⁹ In Parliament, the Prime Minister was accused of "taking a begging bowl to other countries."³⁹⁰ As India's ambassador in Paris reported, "The problem really is of India, and the world in general is not directly affected."³⁹¹

India's own peculiarities—as a liberal, democratic, anticolonialist, and pro-Soviet country—consigned it to political isolation. "The 'United Nations Organisation' reflects the 'Establishment' of this World," one Indian

377. Audio tape: Recording of Conversation Between Richard M. Nixon and Henry A. Kissinger in Wash., D.C. (Dec. 10, 1971) (on file with Nat'l Archives, Nixon Presidential Materials, White House Tapes, Conversation No. 635-8) (transcript available in FRUS E-7, *supra* note 85, Doc. 172).

378. Gandhi, *supra* note 116.

379. BASS, *supra* note 4, at 137-41; Letter from J.N. Dixit to Heads of Mission (Oct. 29, 1971) (on file with MEA, HI/121/13/71, vol. I).

380. Transcript of Conversation Between Swaran Singh and Andrei A. Gromyko, Minister of Foreign Affairs, Soviet Union (June 7, 1971) (on file with NMML, Haksar Papers, Subject File 203).

381. Letter from P.N. Haksar to T.N. Kaul (June 25, 1971) (on file with NMML, Haksar Papers, Subject File 168).

382. Letter from J.N. Dixit to Heads of Mission (Oct. 26, 1971) (on file with MEA, HI/121/13/71, vol. I).

383. Letter from P.N. Haksar to T.N. Kaul (July 9, 1971) (on file with NMML, Haksar Papers, Subject File 169).

384. Letter from Edward Heath to Indira Gandhi (May 27, 1971) (on file with NMML, Haksar Papers, Subject File 168).

385. Briefing by Swaran Singh (June 1971) (on file with NMML, Kaul Papers, Subject File 19, Part II).

386. Report from Ashok S. Chib to T.N. Kaul (Nov. 10, 1971) (on file with MEA, HI/1012/30/71).

387. Letter from J.J. Bahadur Singh to R.C. Arora, *supra* note 285.

388. *Id.*

389. Letter from P.N. Haksar to Indira Gandhi (Aug. 8, 1971) (on file with NMML, Haksar Papers, Subject File 170); *see* Nawaz, *supra* note 94, at 265-66.

390. Indira Gandhi, Statement in Lok Sabha (June 15, 1971), in *INDIRA GANDHI: SPEECHES IN PARLIAMENT*, *supra* note 115, at 891.

391. Letter from D.N. Chatterjee to Narendra Singh, *supra* note 284.

ambassador wrote:

India is regarded warily in the West because she is against the concept of Imperialism and because she “invented” the “Third World.” India is looked on with suspicion in the “Third World” because of her (subversive) sentiments for democracy, human rights etc; the Muslim world is wrathful because of our secularism. The Communist countries regard India as insolent and potentially dangerous because we have rejected Communism as the Prime Condition for Progress. We are, of course, on the side of God. But, is God on our side?³⁹²

Abandoned, Indian officials privately vented their frustrations. “I am fully convinced about the total ineffectiveness of the [U.N.] Organisation,” Singh told a London meeting of Indian diplomats. “They talk and talk and do nothing.”³⁹³ “Once an issue is taken to the United Nations,” wrote the Indian ambassador in Paris, “debates and propaganda become interminable—the object being to prevent the settlement of the issue. If action is our aim, then the United Nations is to be avoided.” He waxed cynical about the moral stature of the Security Council’s permanent members, who had perpetrated “massacres of adequate dimensions. The records of Russia and America are sufficiently impressive. . . . [T]here is nothing great about the Great Powers except for their capacity for destruction.”³⁹⁴

This kind of deadlock made Indians despair of multilateralism. Gandhi bitterly declared, “the Security Council, sitting far away, is not doing justice to us. Every country looks only to its self-interest and speaks accordingly. They are not worried about the loss of millions of lives or that people are still being killed and oppressed.”³⁹⁵ She complained to Nixon,

[A]ny [U.N.] public debate at this stage will lead to a hardening of attitudes, which would make the task of reconciliation an extremely difficult one. . . . In India it will create the impression that the participants are interested not so much in a lasting solution as in side-tracking the main issue, namely, the revolt of the people of East Bengal against the tyranny of the military regime of West Pakistan.³⁹⁶

As Sharma, the Indian delegate at the International Law Association, claimed (with more normative vehemence than legal accuracy), “If the World Organization does not act, individual initiative is the alternative, and it is not unlawful if it is necessary and proportionate.”³⁹⁷ The Indian ambassador in Paris argued that India should act on its own: “Some notable French men have privately hinted to me that India should take ‘suitable action’ in her own self-interest”³⁹⁸ Having been abandoned, nobody should have been surprised

392. Letter from D.N. Chatterjee to P.N. Haksar (July 6, 1971) (on file with NMML, Haksar Papers, Subject File 171); see David P. Fidler & Sumit Ganguly, *India and Eastphalia*, 17 *IND. J. GLOBAL LEGAL STUD.* 147, 148-50 (2010).

393. Singh, *supra* note 91.

394. Letter from D.N. Chatterjee to Narendra Singh, *supra* note 284.

395. Indira Gandhi, Speech at Public Meeting in Jaipur, India (Nov. 28, 1971), in *GANDHI*, *supra* note 30, at 576, 580.

396. Letter from Indira Gandhi to Richard M. Nixon (Nov. 16, 1971), in *FRUS*, *supra* note 56, at 522, 523.

397. *Human Rights*, *supra* note 110, at 617.

398. Letter from Chatterjee to Singh, *supra* note 284.

that India fell back on self-help.³⁹⁹

B. *The Security Council*

Both Mao Zedong and Richard Nixon disdained the United Nations. Nixon once said, “what the UN does is really irrelevant.”⁴⁰⁰ At another point, Nixon asked Kissinger about the Chinese, “Do they think the [U.N.] is worth shit?” “No, no,” Kissinger replied.⁴⁰¹

The Nixon administration was less motivated by the legal rights and wrongs than by the Cold War imperative of defending Pakistan. After Pakistan’s air attacks on December 3, the United States and China exercised their combined influence in the previously silent Security Council to punish India.⁴⁰² Kissinger condemned India for aggression; but, in the alternative, he forgivingly said that if Pakistan was the aggressor, the U.S. position should be that “it’s like Finland attacking Russia; that they were provoked into it and didn’t have any choice.”⁴⁰³ Kissinger, while privately calling the Indians “those sons of bitches,” proposed a legal-minded approach for a press briefing: “It is against the Charter of the United Nations, it’s against the principles of this country, and make them attack us on that ground.”⁴⁰⁴

Nixon and Kissinger carefully coordinated their U.N. efforts with China.⁴⁰⁵ As Kissinger told a Situation Room meeting, “We don’t want the Chinese to be the only country supporting Pakistan.”⁴⁰⁶ In a secret late-night meeting at a CIA safe house in New York, Kissinger told Huang Hua, China’s permanent representative to the United Nations, “We do not accept the proposition that another country has the right to use military force to alleviate whatever strains are caused by the refugees, and we will not accept military

399. See Blum, *supra* note 359, at 334-35 (“[T]he normative aspiration for a unified, equal, and binding universal law keeps stumbling against the reality of a system of equally sovereign states, materially different from one another, and upon whose joint consent the law depends for its enactment and observation.”).

400. Audio tape: Recording of Conversation Between Richard M. Nixon, H.R. Haldeman, White House Chief of Staff, and Henry A. Kissinger in Wash., D.C. (Dec. 15, 1971) (on file with Nat’l Archives, Nixon Presidential Materials, White House Tapes, Conversation No. 638-4) (transcript available in FRUS E-7, *supra* note 85, Doc. 189).

401. Audio tape: Conversation Between Richard M. Nixon, Henry A. Kissinger, and Attorney General John Mitchell in Wash., D.C. (Dec. 8, 1971) (on file with Nat’l Archives, Nixon Presidential Materials, White House Tapes, Conversation No. 307-27) (transcript available in FRUS E-7, *supra* note 85, Doc. 165).

402. Transcript of Telephone Conversation Between Richard M. Nixon and Henry A. Kissinger (Dec. 4, 1971) (on file with NSC Files, Box 643, Country Files—Middle East, India/Pak.).

403. Transcript of Telephone Conversation Between Richard M. Nixon and William P. Rogers (Dec. 3, 1971) (on file with George Washington University, National Security Archive [hereinafter NSA]).

404. Audio tape: Recording of Conversation Between Richard M. Nixon and Henry A. Kissinger in Wash., D.C. (Nov. 30, 1971) (on file with Nat’l Archives, Nixon Presidential Materials, White House Tapes, Conversation No. 626-10).

405. Conversation Between Richard M. Nixon, H.R. Haldeman, and Henry A. Kissinger, *supra* note 400.

406. Minutes of Washington Special Actions Group Meeting (Nov. 22, 1971), *reprinted* in FRUS, *supra* note 56, at 529, 533.

aggression by India against Pakistan.”⁴⁰⁷

If the Security Council imposed a ceasefire, India dared not fail to comply. So India relied on stalling or vetoes from an increasingly embarrassed Soviet Union to stave off a ceasefire resolution for as long as possible.⁴⁰⁸ India’s senior leadership understood that its troops were racing to victory against a clock set by the United Nations. The vice admiral of India’s eastern fleet later wrote, “[T]hey would throw the [U.N.] Book at us with every article they could find in it, to stop the war.”⁴⁰⁹ As Ambassador Dhar secretly argued, “The fact had to be accomplished in its entirety within a week or eight days for the simple reason that foreign intervention both of friend, foe and the neutral alike would have prevented us from doing anything substantial.”⁴¹⁰

While Indian troops charged deep into East Pakistan, the Security Council held a debate fiercely politicized along Cold War lines. On December 4, the United States, supported by Britain and seven non-permanent Council members, as well as Secretary-General Thant, introduced a resolution for an immediate ceasefire and withdrawal of troops—which would in effect put an end to a war that India was winning, leaving the Bengalis under continued Pakistani rule.⁴¹¹

Advocating for the resolution, Ambassador George H.W. Bush, while not mentioning Pakistan’s atrocities against Bengalis, sweepingly condemned India: “The very purpose which draws us together here—building a peaceful world—will be thwarted if a situation is accepted in which a government intervenes across its borders in the affairs of another with military force in violation of the United Nations Charter.”⁴¹² He declared, “The time is past when any of us could justifiably resort to war to bring about change in a neighbouring country that might better suit our national interests as we see them.” Brushing aside any discussion of the origins of the conflict, and ignoring Pakistan’s initiation of full-scale war, Bush stated that the credibility of the United Nations was at stake: “If it is to fulfill the responsibilities imposed on it by the Charter, it must act to stop the fighting and preserve the territorial integrity of member states.”⁴¹³ Against that, India’s permanent representative scorned the United Nations for wasting time with “unnecessary

407. Memorandum of Conversation Between U.S. and Chinese Officials in N.Y., N.Y. (Nov. 23, 1971) (on file with NSA).

408. Telegram from T.N. Kaul to Samar Sen (Dec. 4, 1971) (on file with MEA, WII/109/31/71, vol. I).

409. N. KRISHNAN, *NO WAY BUT SURRENDER: AN ACCOUNT OF THE INDO-PAKISTAN WAR IN THE BAY OF BENGAL*, 1971, at 22 (1980).

410. Letter from Dhar to Haksar, *supra* note 32.

411. Audio tape: Recording of Telephone Conversation Between Richard M. Nixon and George H.W. Bush (Dec. 8, 1971) (on file with Nat’l Archives, Nixon Presidential Materials, White House Tapes, Conversation No. 16-48).

412. George H.W. Bush, Statement to the U.N. Sec. Council on the India-Pakistan Conflict (Dec. 4, 1971) (on file with MEA, WII/109/31/71, vol. I).

413. George H.W. Bush, Statement to the U.N. Sec. Council on the India-Pakistan Conflict (Dec. 5, 1971) (on file with MEA, WII/109/31/71, vol. I).

polemics, propaganda, controversies—and Bengal is burning.”⁴¹⁴ Meanwhile, Gandhi claimed that a ceasefire would “cover up the annihilation of an entire nation.”⁴¹⁵

Still, the United States’ ceasefire resolution overwhelmingly carried the day, winning eleven votes, while only the Soviet Union and Poland voted against.⁴¹⁶ Kissinger told Nixon that their resolution “was vetoed, so it had no formal standing, but still it was eleven to two.”⁴¹⁷ As Kissinger explained to Nixon, “At the Security Council, the Indians and Soviets are going to delay long enough so a resolution cannot be passed. If it was, the Soviets would veto. UN will be impotent. So the Security Council is just a paper exercise.”⁴¹⁸

China was even rougher on India. “The question of East Pakistan is purely the internal affairs of Pakistan,” Ambassador Huang told the Security Council. “The Government of India is using the question of East Pakistan as a pretext [to commit] armed aggression against Pakistan.”⁴¹⁹ China offered its own harsh call for a ceasefire, which added strident condemnations of India for “creating a so-called ‘Bangla Desh’” and “subverting, dismembering and committing aggression against Pakistan.” This did not garner enough support to get a vote.⁴²⁰

India leaned heavily on the Soviet Union.⁴²¹ “The USSR delegation was a permanent support to India,” noted an Indian diplomat. The Soviets offered their own draft resolution, calling for Pakistan to find a political settlement to end violence against the Bengalis, which would “inevitably” restore peace to the region.⁴²² This was an obvious delaying tactic, allowing India time to mop up the Pakistani army, and only the Soviet Union and Poland backed it, with China voting against and all other states abstaining. Next, a group of smaller powers offered another resolution calling for an immediate ceasefire and

414. Samar Sen, Statement to the U.N. Sec. Council (Dec. 4, 1971) (on file with MEA, HI/121/13/71, vol. II).

415. Letter from Indira Gandhi to Alexei N. Kosygin (Dec. 11, 1971) (on file with NMML, Haksar Papers, Subject File 173).

416. Letter from N. Krishnan, Joint Sec’y & Head of U.N. Div., Ministry of External Affairs, India, to Heads of Mission (Dec. 13, 1971) (on file with MEA, HI/121/13/71, vol. II); Note from R.K. Kapur, *supra* note 288; Audio tape: Recording of Conversation Between Richard M. Nixon and Henry A. Kissinger (Dec. 7, 1971) (on file with Nat’l Archives, Nixon Presidential Materials, White House Tapes, Conversation No. 16-37); Memorandum from Henry A. Kissinger to Richard M. Nixon (Dec. 7, 1971) (on file with NSC Files, Box 571, Indo-Pak War).

417. Audio tape: Recording of Conversation Between Richard M. Nixon and Henry A. Kissinger, *supra* note 416.

418. Transcript of Telephone Conversation Between Richard M. Nixon and Henry A. Kissinger (Dec. 4, 1971) (on file with NSC Files, Box 643, Country Files—Middle East, India/Pakistan).

419. Huang Hua, Permanent Representative to the U.N., China, Statement to the U.N. Sec. Council (Dec. 4, 1971) (on file with MEA, HI/121/13/71, vol. II); *see* Telegram from George H.W. Bush to William P. Rogers (Dec. 8, 1971) (on file with NSC Files, Box 572, Indo-Pak War).

420. Note from R.K. Kapur, *supra* note 288; Text of Draft Resolution Tabled by China in the Sec. Council, *supra* note 288.

421. Letter from T.N. Kaul to Samar Sen (Dec. 4, 1971) (on file with MEA, WII/109/31/71, vol. I).

422. Text of Draft Resolution Tabled by Soviet Union in the Sec. Council (Dec. 4-6, 1971) (on file with MEA, HI/121/13/71, vol. II).

withdrawal of forces.⁴²³ The Indians decided that this was “simply a variation of the U.S. resolution although sugar-coated with a call for speedy return of refugees.”⁴²⁴

If there was anything other than an anti-Pakistan resolution, Kissinger explained to Nixon, “the Russians will veto it,” and if “it’s anti-Pakistan, the Chinese will veto it.” Nixon burst out laughing. Standing firm, Nixon and Kissinger instructed Bush to introduce another similar resolution, daring the Soviet Union to cast a second veto.⁴²⁵ The Soviets did so, with another embarrassing vote of eleven to two.⁴²⁶ Nixon sternly warned Leonid Brezhnev that “you are supporting the Indian Government’s open use of force against the independence and integrity of Pakistan.”⁴²⁷

C. The General Assembly

In the evening on December 6, the Security Council gave up and, under the authority of the “Uniting For Peace” resolution, referred the Indo-Pakistani war to the General Assembly.⁴²⁸ This was canny forum-shopping by the Nixon administration.⁴²⁹

Even before the U.S. and Chinese delegations began lobbying, India had few supporters in the General Assembly.⁴³⁰ The Indian ambassador in Paris complained that the “august body” was dominated by countries “suspicious of democracy, human rights, etc. They have had long practice at suppressing them at home.”⁴³¹ As Rahmatullah Khan, the Jawaharlal Nehru University law professor, gloomily predicted about the General Assembly and the Human Rights Commission,

none of these organs whose composition is determined by government representation is likely to take a stand on purely humanitarian motives. They are set into motion by hard political bargaining on pragmatic considerations of usually narrow national interests. The ruthless and large-scale killings in Biafra and Indonesia virtually went unnoticed in these bodies.⁴³²

423. Text of Resolution Tabled by Arg., Belg., Burundi, Italy, Japan, Nicar., Sierra Leone, and Som. (Dec. 5, 1971) (on file with MEA, HI/121/13/71, vol. II).

424. Note from R.K. Kapur, *supra* note 288; Report from K.S. Shelvankar, Ambassador to the Soviet Union, India, to T.N. Kaul (Jan. 30, 1972) (on file with MEA, HI/1012/57/71).

425. Transcript of Telephone Conversation Between Richard M. Nixon and Henry A. Kissinger (Dec. 5, 1971) (on file with NSA).

426. Note from R.K. Kapur, *supra* note 288.

427. Letter from Richard M. Nixon to Leonid Brezhnev, Gen. Sec’y of the Cent. Comm. of the Communist Party, Soviet Union (Dec. 6, 1971), in FRUS, *supra* note 56, at 667, 668.

428. S.C. Res. 303, U.N. Doc. S/RES/303 (Dec. 6, 1971); Note from R.K. Kapur, *supra* note 288. The vote was eleven in favor, with the Soviet Union, Poland, Britain, and France abstaining. The General Assembly originally adopted the “Uniting for Peace” resolution during the Korean War. G.A. Res. 377(V), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775, at 10 (Nov. 3, 1950).

429. Audio tape: Recording of Telephone Conversation Between Richard M. Nixon and George H.W. Bush (Dec. 8, 1971) (on file with Nat’l Archives, Nixon Presidential Materials, White House Tapes, Conversation No. 16-48).

430. Letter from Swaran Singh to T.N.Kaul (July 3, 1971) (on file with MEA, WII/121/54/71).

431. Letter from D.N. Chatterjee to Narendra Singh, *supra* note 284.

432. Khan, *supra* note 5, at 111.

Pakistan's claims that the Charter guaranteed non-interference in member states won many votes in the General Assembly.⁴³³

On December 7, India received a stinging global rebuff. In a lopsided General Assembly defeat, 104 countries voted for a ceasefire and withdrawal,⁴³⁴ while just eleven backed India: the Soviet Union, the two Soviet constituent republics with U.N. membership (Belarus and Ukraine), obedient Soviet satellites (Cuba, Bulgaria, Hungary, Mongolia, and Poland), and India's tiny neighbor Bhutan.⁴³⁵ India was again snubbed by the Non-Aligned Movement, including Yugoslavia, Egypt, Ghana, and Indonesia.⁴³⁶ As Bush proudly explained to Nixon, "We got strong support through Africa and through the Arab countries."⁴³⁷ While this vote had no binding legal authority, it was a devastating embarrassment for India.⁴³⁸ "The Indian lovers are a breed apart," Nixon told Kissinger. "But by God they don't rule in the [U.N.], do they?"⁴³⁹

If anyone stood up for the U.N. Charter's prohibitions on aggression, it was Nixon. Despite his own dubious record in Cambodia and Laos, Nixon declared that he was defending world order: "I said international morality will be finished—the United Nations will be finished—if you adopt the principle that because a country is democratic and big it can do what the hell it pleases."⁴⁴⁰ He privately instructed Bush, "It is aggression that is wrong. That's what the [U.N.] is built upon, after all." Bush said, "There was *total* agreement on the principle of ceasefire and withdrawal . . . and the fact also that India, in spite of its sanctimony, was really the *aggressor*. . . . I said, look, we're talking about war and peace. We're talking about *invasion*." Nixon concluded, "If we ever allow the internal problems of one country to be justification for the right of another country, bigger, more powerful, to invade it, then international order is finished in the world. That's really the principle, isn't it?" Bush agreed: "That's why they lost the vote."⁴⁴¹

But in the privacy of the Oval Office, Nixon's less principled side surfaced. He said, of the Indians, "Look, these people are savages." Extending that thought, he argued that

433. See Ali statement to the Gen. Assembly (Sept. 27, 1971) (on file with MEA, HI/121/13/71, vol. I).

434. See, e.g., G.A. Res. 2793 (XXVI), U.N. GAOR, 26th Sess., Supp. No. 29, U.N. Doc. A/L647, at 3 (Dec. 7, 1971); Implications of the General Assembly Resolution (Dec. 1971) (on file with MEA, HI/121/13/71, vol. II).

435. BASS, *supra* note 4, at 284-85, 456.

436. *Id.*

437. Audio tape: Recording of Telephone Conversation Between Richard M. Nixon and George H.W. Bush, *supra* note 429.

438. Implications of the General Assembly Resolution, *supra* note 434.

439. Audio tape: Recording of Telephone Conversation Between Richard M. Nixon and Henry A. Kissinger (Dec. 7, 1971) (on file with Nat'l Archives, Nixon Presidential Materials, White House Tapes, Conversation No. 16-37).

440. Audio tape: Recording of Conversation Between Richard M. Nixon, Henry A. Kissinger, and John Mitchell, in Wash., D.C., *supra* note 400.

441. Audio tape: Recording of Telephone Conversation Between Richard M. Nixon and George H.W. Bush, *supra* note 429.

we cannot have a stable world if we allow one member of the United Nations to cannibalize another. Cannibalize, that's the word. I should have thought of it earlier. You see, that really puts it to the Indians. It has, the connotation is savages. To cannibalize . . . that's what the sons-of-bitches are up to.⁴⁴²

D. Victory in Dhaka

To no avail, Indian officials tried to blame the war on Pakistani aggression. In a new Security Council debate, Swaran Singh pledged India's "unqualified" fealty to the Charter, and denounced Pakistan for striking first and declaring war.⁴⁴³ Gandhi, declaring India's devotion to "the purposes and principles of the Charter," issued another global appeal: "India feels legitimately aggrieved that in calling for a cease fire, the U.N. makes no distinction between the aggressor and its victim."⁴⁴⁴ She repeated her argument from sovereignty, pointing to the strains caused by the refugees: "Has the United Nations considered the unprecedented situation created by one Member of the United Nations for another Member?"⁴⁴⁵

The Prime Minister was angrier when addressing a domestic audience. Speaking to a crowd in Delhi, Gandhi complained that India's critics

did not utter a single word when the Pakistani forces were murdering lakhs [hundreds of thousands] of people in Bangla Desh. . . . Till then they described all these happenings as a the internal affair of Pakistan. If and when a country is out to fully destroy another country or another race, it cannot be accepted as an internal affair of a country.⁴⁴⁶

Kissinger, privately accusing India of "naked aggression supported by Soviet power," wanted to intensify the rhetoric at the Security Council.⁴⁴⁷ The U.S. effort was working: the Soviet Union was weary of sheltering India.⁴⁴⁸ Soviet diplomats were, as Haksar informed Gandhi, "anxious that India should enable the Soviet Union to say something in the Security Council which is not altogether negative in character."⁴⁴⁹ Haksar hoped to "give an appearance of positive approach" while "not compromising Indian objectives in Bangla Desh."⁴⁵⁰ He and the Soviets worked out a script: the Soviets would initiate a proposal for the Security Council, and India would consider it and consult with the Bangladeshi authorities. Haksar suggested that the resolution be introduced

442. Audio tape: Recording of Conversation Between Richard M. Nixon, H.R. Haldeman, and Henry A. Kissinger in Wash., D.C. (Dec. 15, 1971) (on file with Nat'l Archives, Nixon Presidential Materials, White House Tapes, Conversation No. 638-4).

443. Singh, *supra* note 86.

444. Swaran Singh, Draft of Letter to U Thant, U.N. Sec'y-Gen. (Dec. 11, 1971) (on file with NMML, Haksar Papers, Subject File 173).

445. *Id.*

446. Indira Gandhi, Speech (Dec. 12, 1971) (on file with MEA, WII/109/31/71, vol. I).

447. Transcript of Telephone Conversation Between Richard M. Nixon and Henry A. Kissinger (Dec. 11, 1971) (on file with NSA).

448. Transcript of Telephone Conversation Between Henry A. Kissinger and Yuli Vorontsov, Chargé d'Affaires, Embassy of the Soviet Union to the United States (Dec. 12, 1971) (on file with NSA).

449. Haksar to Gandhi (Dec. 13, 1971) (on file with NMML, Haksar Papers, Subject File 174).

450. *Id.*

by some country other than the Soviet Union or Poland, which would allow the Soviets to deflect or veto any unpalatable amendments.⁴⁵¹

Stalling at the Security Council,⁴⁵² Haksar warned India's cabinet, "every day's delay in completing the military operations in Bangla Desh is playing into the hands of our opponents."⁴⁵³ He candidly explained the "political and tactical advantage" of a plodding round of U.N. diplomacy: "We shall gain time. We would not appear negative and intransigent."⁴⁵⁴

On December 12, the Soviet Union, for the third and last time, vetoed another Security Council resolution calling for an immediate ceasefire and withdrawal.⁴⁵⁵ With Indian troops nearing victory, Nixon knew that a ceasefire was imminent, but noted, "I'd like to do it in a certain way that pisses on the Indians."⁴⁵⁶ For his part, Haksar feared "complete civil chaos in East Bengal where Pakistan will continue to have a juridical legitimacy from the point of view of the United Nations while we and [the] Bangla Desh Government would be deemed to be trespassers."⁴⁵⁷ Finally, on December 16, the Pakistani army surrendered unconditionally in Dhaka.⁴⁵⁸

After the war was over, India did at least adhere to the Security Council's vetoed resolutions calling for withdrawal. India pulled its troops out of Bangladesh. This action matched up to India's claims that its early recognition of Bangladeshi statehood proved that it was fighting a war of liberation, not conquest. "The act of recognition shows a voluntary restraint which we have imposed upon ourselves," Haksar privately briefed Indian officials. "It signifies our desire not to annex or occupy any territory."⁴⁵⁹ As S. Sharma told the International Law Association, the potential abuse of humanitarian intervention could be prevented by the application of requirements of necessity and proportionality, including a prompt withdrawal.⁴⁶⁰

Moreover, India's recognition of Bangladesh afforded India a new way to

451. *Id.*

452. *Id.*

453. Haksar to Cabinet's Political Affairs Comm. (Dec. 13, 1971) (on file with NMML, Haksar Papers, Subject File 174).

454. *Id.*

455. FRUS, *supra* note 56, at 790 n.3.

456. Audio tape: Recording of Conversation Between Richard M. Nixon, H.R. Haldeman, and Henry A. Kissinger in Wash., D.C. (Dec. 15, 1971) (on file with Nat'l Archives, Nixon Presidential Materials, White House Tapes, Conversation No. 638-4) (transcript available in FRUS E-7, *supra* note 85, Doc. 189).

457. Telegram from P.N. Haksar to T.N. Kaul (Dec. 15, 1971) (on file with NMML, Haksar Papers, Subject File 173).

458. A.A.K. NIAZI, THE BETRAYAL OF EAST PAKISTAN 235 (1998); *Instrument of Surrender by the Pakistani Eastern Command to the Indian and Bangladesh Force (16 December 1971)*, 60 INT'L L. STUD. SER. U.S. NAVAL WAR COL. 815 (1979); Sydney H. Schanberg, *2 Men at a Table*, N.Y. TIMES, Dec. 17, 1971, at A1, A16; Memorandum by Richard D. Christiansen, Deputy Dir. of Operations for Dep't of State (Dec. 16, 1971) (on file with NSC Files, Box 573, Indo-Pak War).

459. A note on India's objectives in the current conflict with Pak. (Dec. 9, 1971) (on file with NMML, Haksar Papers, Subject File 173).

460. *Human Rights*, *supra* note 110, at 617. In contrast, after Hitler seized the Sudetenland, he proceeded to annex Moravia and Bohemia and set up a puppet regime in Slovakia, effectively destroying Czechoslovakia.

counter Pakistan's argument about national sovereignty: if Bangladesh was now an independent country, then Pakistan had no right to station uninvited troops on Bangladeshi territory. "We do not want anybody's territory," Gandhi had said in a wartime speech. "India does not desire to interfere in their country and will not do so." As she framed it, "The Pakistani forces, which are in Bangla Desh, have not been sent there with their consent." It was their "duty" to "withdraw from there."⁴⁶¹ As Singh told the Security Council: "Golden Bengal belongs to the people of Bangla Desh and to nobody else."⁴⁶²

IV. CONCLUSION: BANGLADESH AND STATE PRACTICE

The creation of Bangladesh stands as an enduring reminder of the tension between the stringency of the U.N. Charter's ban on force and the more freewheeling reality of state practice.⁴⁶³ Whatever enforcement of human rights norms there was in Bangladesh in 1971, it came in a way that did not fit well with the Charter regime.⁴⁶⁴ Still, as Michael Reisman observed about adaptations in human rights law,

When constitutive changes such as these are introduced into a legal system while many other struts of the system are left in place, appliers and interpreters of current cases cannot proceed in a piecemeal and mechanical fashion. Precisely because the human rights norms are constitutive, other norms must be reinterpreted in their light, lest anachronisms be produced.⁴⁶⁵

Since 1971, other cases of possible humanitarian intervention have mounted, with varying degrees of legal license: Tanzania's overthrow of Idi Amin in Uganda;⁴⁶⁶ U.N.-authorized interventions in Somalia,⁴⁶⁷ Haiti, Bosnia, and East Timor;⁴⁶⁸ the Economic Community of West African States' intervention in Liberia's civil war, retroactively authorized by the Security Council;⁴⁶⁹ NATO's interventions in Kosovo (unauthorized) and Libya (authorized);⁴⁷⁰ Australia's mission in East Timor; Britain's deployment in

461. Indira Gandhi, Speech (Dec. 12, 1971) (on file with MEA, WII/109/31/71, vol. I).

462. Swaran Singh, Statement to the U.N. Sec. Council (Dec. 13, 1971) (on file with MEA, WII/109/31/71, vol. I).

463. INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, *THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED* 172 (2000) [hereinafter *KOSOVO REPORT*]; Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 *AM. J. INT'L L.* 809, 837 (1970) ("What killed Article 2(4) was the wide disparity between the norms it sought to establish and the practical goals the nations are pursuing in defense of their national interest.").

464. Minow, *supra* note 73, at 59 ("It is understandable to be skeptical about whether human rights can bear weight beyond the calculus of powerful nations. In addition, human rights in international contexts can seem amorphous, naïve, and quixotic given the lack of sovereign power, a police force, or an established enforcement mechanism.").

465. Reisman, *supra* note 71, at 873.

466. Hassan Farooq, *Realpolitik in International Law: After Tanzanian-Ugandan Conflict Humanitarian Intervention Reexamined*, 17 *WILLAMETTE L. REV.* 859 (1981).

467. S.C. Res. 751, U.N. SCOR, 47th Sess., 3069th mtg., U.N. Doc. S/RES/751 (1992).

468. S.C. Res. 1264, U.N. Doc. S/RES/1264 (Sept. 15, 1999).

469. S.C. Res. 1116, U.N. SCOR, 52nd Sess., 3793rd mtg., U.N. Doc. S/RES/1116, at 1 (1997); see CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 99 (2d ed. 2004).

470. S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

Sierra Leone.⁴⁷¹ For all the flaws of the United Nations' efforts in Bosnia in the 1990s, the Security Council assertively declared the situation there to be "a threat to international peace and security,"⁴⁷² and stacked up resolutions condemning Bosnian Serb atrocities, creating "safe areas," demanding a ceasefire, imposing a no-fly zone,⁴⁷³ deploying a U.N. peacekeeping mission,⁴⁷⁴ and authorizing member states to use air power.⁴⁷⁵

In Rwanda, for all the disasters in the response to the crisis, the Security Council did condemn the domestic slaughter of civilians without balking at questions of Rwandan sovereignty, as well as extending and bolstering the mandate of a Chapter VI U.N. peacekeeping mission already there.⁴⁷⁶ Despite the U.N. Charter's Article 2(7), the Security Council was so unconcerned with Rwandan sovereignty as to demand the cessation of violent incitement on hate radio.⁴⁷⁷ The Security Council lent some retroactive legitimacy to NATO's intervention in Kosovo by rejecting Russia's resolution for censure.⁴⁷⁸ At the regional level, the Constitutive Act of the African Union, which entered into force in 2001, provides for "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."⁴⁷⁹ And in recent years, the "Responsibility to Protect" doctrine has questioned the inviolability of state sovereignty,⁴⁸⁰ while the Security Council has authorized the protection of civilians in Mali, Côte d'Ivoire, the Democratic Republic of Congo, and the Central Africa Republic.⁴⁸¹

471. Kristi Samuels, *Jus Ad Bellum and Civil Conflicts: A Case Study of the International Community's Approach to Violence in the Conflict of Sierra Leone*, 8 J. CONFLICT & SEC. L. 315 (2003). On the aftermath of large-scale atrocity, see MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998); and TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS (Robert I. Rotberg & Dennis Thompson eds., 2000).

472. S.C. Res. 770, U.N. Doc. S/RES/770 (Aug. 13, 1992); S.C. Res. 836, U.N. Doc. S/RES/836 (June 4, 1993).

473. S.C. Res. 781, U.N. Doc. S/RES/781 (Oct. 9, 1992); S.C. Res. 786, U.N. Doc. S/RES/786 (Nov. 10, 1992).

474. See S.C. Res. 819, U.N. Doc. S/RES/819 (Apr. 16, 1993); S.C. Res. 824, U.N. Doc. S/RES/824 (May 6, 1993); S.C. Res. 836, U.N. Doc. S/RES/836 (June 4, 1993).

475. S.C. Res. 836, *supra* note 474.

476. S.C. Res. 918, U.N. Doc. S/RES/918 (May 17, 1994).

477. *Id.*

478. U.N. SCOR, 54th Sess., 3989th mtg., U.N. Doc. S/PV.3989, at 6 (1999).

479. Constitutive Act of the African Union, 8 AFR. Y.B. INT'L L. 479, 485 (2000), *adopted* July 11, 2000, OAU Doc. CAB/LEG/23.14 (entered into force May 26, 2001), art. 4(h).

480. U.N. Sec. Council, Summit Statement Concerning the Council's Responsibility in the Maintenance of International Peace and Security, U.N. Doc. S/23500, Jan. 31, 1992, at 1-5; INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf>; S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011); S.C. Res. 1706, U.N. Doc. S/RES/1706 (Aug. 31, 2006) ("reaffirms *inter alia* the provisions of paragraphs 138 and 139 of the 2005 United Nations World Summit outcome document" for Darfur, Sudan); Ramesh Thakur & Thomas G. Weiss, *R2P: From Idea to Norm—and Action*, 1 GLOBAL RESP. PROTECT 22 (2009); see also Koh, *supra* note 1, at 219 (discussing the Responsibility to Protect (R2P) in the context of Syria's civil war); Anne Orford, *Moral Internationalism and the Responsibility To Protect*, 24 EUR. J. INT'L L. 83 (2013).

481. S.C. Res. 2127, U.N. Doc. S/RES/2127 (Dec. 5, 2013).

India's intervention in 1971, while certainly unauthorized by the Security Council, is surely part of this chronicle. But there are complex implications to acknowledging the historical facts. By expressing some sympathy for India's actions, international lawyers may lend legitimacy to acts of war in violation of the U.N. Charter—or even, at the limit, treat it as a precedent in state practice that undermines the current international legal order. As Jack Goldsmith recently noted, “[T]he precedential value of an action under international law cannot be established at the time of the action, but rather is determined by how the action is interpreted and used in the future.”⁴⁸²

This kind of debate is more familiar from NATO's intervention in Kosovo in 1999, which similarly posed the problem of a use of military force which had some potent moral claims but was unauthorized by the Security Council. That has led to a variety of reactions from international lawyers. Some have suggested that the Charter framework has been rendered obsolete, or have sought to introduce a fluidity to the Charter's standards. The Independent International Commission on Kosovo decreed the intervention “illegal but legitimate,”⁴⁸³ while Judge Antonio Cassese uncomfortably concluded that it was against international law but morally correct.⁴⁸⁴ Franck suggested that NATO's war was illegal but mitigated by the circumstances, asking that NATO face only mild criticism for its “technically illegal but morally justified actions.”⁴⁸⁵ He further argued that “the UN system . . . has responded benevolently to the use of unauthorized force solely for the purpose of preventing a major humanitarian catastrophe,” pointing to the Security Council's refusal to censure NATO after the Kosovo war.⁴⁸⁶

What could happen to international law if Bangladesh is allowed to stand as another such instance? Soon after India's war, Franck and Rodley suggested that severe human suffering in Bangladesh—and, presumably, in future human rights emergencies—provided mitigation for intervenors, while still holding the intervention to be illegal. They wrote, “The hortatory, norm-building effect of a total ban is greater than that of a qualified prohibition, especially at that stage of its legal life where the norm is still struggling for general recognition.”⁴⁸⁷ In later years, after Kosovo, Franck softened his opposition to India's actions. He suggested that the recent state practice of intervention revealed either a new interpretation of Article 2(4) or

482. Jack Goldsmith, *The Kosovo Precedent for Syria Isn't Much of a Precedent*, LAWFARE (Aug. 24, 2013, 8:02 AM), <http://www.lawfareblog.com/2013/08/the-kosovo-precedent-for-syria-isnt-much-of-a-precedent>.

483. KOSOVO REPORT, *supra* note 463, at 4.

484. Antonio Cassese, Ex Iniuria Ius Oritur: *Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 23, 25 (1999). See Oona Hathaway, *Between Power and Principle*, in THE ROLE OF ETHICS IN INTERNATIONAL LAW 52 (Donald Earl Childress III ed., 2012).

485. FRANCK, *supra* note 16, at 184; see CHESTERMAN, *supra* note 25, at 75.

486. Thomas M. Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 WASH. U. J.L. & POL'Y 51, 64-65 (2011).

487. Franck & Rodley, *supra* note 10, at 290. For a critique, see Roberts, *supra* note 351, at 191-95.

the evolution of a subsidiary adjectival international law of mitigation, one that may formally continue to assert the illegality of state recourse to force but which, in ascertainable circumstances, mitigates the consequences of such wrongful acts by imposing no, or only nominal, consequences on states which, by their admittedly wrongful intervention, have demonstrably prevented the occurrence of some greater wrong.⁴⁸⁸

While still warning against India's use of military force in Bangladesh without Security Council approval, he also asked, "[H]ow high a price in justice could be exacted for the sake of preserving the primacy of peace? And how well was peace being preserved by permitting such injustice?"⁴⁸⁹ As he wrote in 2001, "Was the admission of Bangladesh to the UN after Indian troops had won its independence not a form of absolution?"⁴⁹⁰

At most, the acceptance of a humanitarian intervention in Bangladesh or Kosovo could be a step toward a wholly new and more permissive legal standard for intervention: not a breach of law, but a step toward a new kind of law altogether.⁴⁹¹ For instance, Bruno Simma is unequivocal that humanitarian interventions without Security Council authorization are unlawful, but also believes in weighing the particular case and "the efforts, if any, undertaken by the parties involved to get 'as close to the law' as possible."⁴⁹² He thus praises NATO's efforts to base its Kosovo actions on the Charter and relevant Security Council resolutions, with NATO trying to act in the name of the international community despite a looming Russian veto.⁴⁹³ In hard cases, he concludes there may be times when states are pushed to act against the law, but hopes to keep instances like Kosovo to a minimum: "The more isolated these instances remain, the smaller will be their potential to erode the precepts of international law."⁴⁹⁴

In recent years, scholars have proposed a variety of possible legal reforms to accommodate lifesaving military missions: modifying the Charter, limiting the use of the veto, upgrading "Responsibility to Protect" principles from a normative standard to a rule of international law, and more.⁴⁹⁵ Meanwhile,

488. FRANCK, *supra* note 16, at 139.

489. *Id.* at 143.

490. Franck, *supra* note 486, at 65; see Reisman, *supra* note 71, at 875 ("It is no longer politically feasible or morally acceptable to suspend the operation of human rights norms until every constitutive problem is solved. In the interim, new criteria for unilateral human rights actions must be established.").

491. GOLDSMITH & POSNER, *supra* note 90, at 198-99 (arguing that "an act that is inconsistent with international law can be interpreted either as a violation of it or as a first step in its revision"); see also Oona Hathaway & Ariel Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404 (2006); Doyle, *supra* note 21, at 361 (noting that while "some external considerations . . . call for *overriding* nonintervention, there are other injustices that justify *disregarding* the prohibition against intervention").

492. Simma, *supra* note 46, at 6.

493. *Id.* at 11-12.

494. *Id.* at 22.

495. G.A. Res. 60/1, U.N. GAOR, 60th Sess., U.N. Doc. A/60/L.1 (Oct. 24, 2005); FRANCIS M. DENG et al., SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA (1996); KOSOVO REPORT, *supra* note 463, at 192-98; William W. Burke-White, *Adoption of the Responsibility To Protect*, in THE RESPONSIBILITY TO PROTECT: THE PROMISE OF STOPPING MASS ATROCITIES IN OUR

other experts, including Franck, suggested that the U.N. system has become more sensitive to context, rather than reflexively slamming down Article 51.⁴⁹⁶ Referring to Haiti and ex-Yugoslavia, he argued that the Security Council could reasonably have judged mass refugee flows and the prospect of outside intervention as threatening to international peace and security⁴⁹⁷—an argument that would seem to apply to India in 1971 as well. Reviewing recent state practice, including the controversial Bangladesh case, Franck still understandably worried about abusive uses of force by big powers,⁴⁹⁸ but also noted the emergence of a “more nuanced reconciling” of the Charter’s prohibition on force with the practical necessities of safeguarding human rights, which depends “more on the circumstances than on strictly construed text.”⁴⁹⁹

As interventionist exceptions mount up, they can threaten the anti-interventionist rule, which is of grave concern to proponents *faute de mieux* of the current system. When does mitigation become absolutism, or shade into precedent? At what point do we conclude that the Charter has been violated by so many unlawful wars that it becomes a dead letter?⁵⁰⁰ Some commentators fear that more instances of unilateral humanitarian intervention, if not condemned by states, could establish new customary standards or create a new authoritative interpretation of the Charter.⁵⁰¹ Some custodians of international law do not want any more such exceptions. Anthea Roberts, wary about allowing claims of extreme necessity to justify violating the Charter, argues that it is appropriate for permanent members to use their veto to block an unwelcome use of force—reflecting not deadlock but the proper functioning of the Charter system.⁵⁰² She dislikes “euphemisms for *breaking* the law.”⁵⁰³

Among the skeptics, ironically enough, one should count India itself. India did not treat its 1971 mission as a legal precedent. Rather than overthrowing the international order, India was determinedly minimalist in its precedential claims, treating its war as an emergency one-off.⁵⁰⁴ Instead of

TIME (Jared Genser & Irwin Cotler eds., 2011) (arguing that R2P is a normative and political statement but not binding international law); Ian Hurd, *Is Humanitarian Intervention Legal?: The Rule of Law in an Incoherent World*, 25 ETHICS & INT’L AFF. 293 (2011); Anne-Marie Slaughter, *Security, Solidarity, and Sovereignty: The Grand Themes of the UN Reform*, 99 AM. J. INT’L L. 619, 620 (2005). For more expansive views of R2P, see generally ANNE ORFORD, INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT 22-27 (2011); and Jennifer M. Welsh & Maria Banda, *International Law and the Responsibility To Protect: Clarifying or Expanding States’ Responsibilities?* 2 GLOBAL RESP. PROTECT 3 (2010).

496. Franck, *supra* note 486, at 63.

497. FRANCK, *supra* note 16, at 136-37.

498. *Id.* at 154.

499. *Id.* at 138-39.

500. See, e.g., Franck, *supra* note 463; Michael Glennon, *How International Rules Die*, 93 GEO. L. J. 939 (2005); John Yoo, *Using Force*, 71 U. CHI. L. REV. 729 (2004).

501. Roberts, *supra* note 351, at 196-97.

502. *Id.* at 186 (“‘Paralyzed’ is a strong and pejorative word that implies that the Security Council has been unable to act when it should have acted. . . . If a permanent member uses the veto because it believes force would be inappropriate, that is precisely the role for which the veto was intended.”).

503. *Id.* at 188.

504. See Simon Chesterman, *Hard Cases Make Bad Law: Law, Ethics and Politics in*

emerging from 1971 as a crusader for human rights everywhere, India, still influenced by its Nehruvian doctrine of non-interference, has been wavering and skeptical about humanitarian uses of force, only somewhat more willing to accept it over the decades. When India disastrously sent peacekeepers to Sri Lanka in 1987, it did so with the consent—although consent extracted under pressure—of Sri Lanka’s government.⁵⁰⁵ It stood alongside the Non-Aligned Movement in rejecting a right to humanitarian intervention, although it did join the World Summit in 2005 in accepting a “Responsibility to Protect.” On the one hand, India has contributed troops to U.N. missions in Sierra Leone and the Democratic Republic of Congo, and accepted U.N.-approved missions in Somalia and East Timor. On the other, India loudly denounced NATO’s Kosovo war as both illegitimate and illegal, with India’s ambassador at the United Nations declaring, as if in repudiation of India’s own position in 1971,

The attacks against the Federal Republic of Yugoslavia . . . are in clear violation of Article 53 of the Charter [W]e have been told that the attacks are meant to prevent violations of human rights. Even if that were to be so, it does not justify unprovoked military aggression. Two wrongs do not make a right.⁵⁰⁶

Many Indian elites have criticized the “Responsibility to Protect” as veiled neoimperialism.⁵⁰⁷ Confronted with a hard choice about voting for U.N. Security Council Resolution 1973 authorizing NATO force in Libya, India abstained.⁵⁰⁸

Bangladesh is in some ways more problematic than Kosovo, and in other ways less. On the one hand, troublingly, India acted entirely alone, without a multilateral coalition or regional organization to give some semblance of a wider legitimacy.⁵⁰⁹ Worse, India had a history of bitter antagonism with Pakistan and had already fought two wars against it, in 1947-48 and 1965 (and would fight more in the future), which obviously undermined any pretensions to impartial execution of international law. Nor could India base its actions on any extant Security Council resolutions, since there were no such resolutions until the end of the war. On the other hand, India, with only a limited ability to fight and a modest range for projecting military force, was less likely to get into the habit of launching illegal wars than a superpower, and even so would be constrained to acting on a regional scale against its weaker neighbors. Even India’s most alarmingly belligerent moments since independence—its 1961 seizure of the Portuguese colonial stronghold of Goa (shielded by a Soviet veto), its ill-starred peacekeeping deployment in Sri Lanka in 1987, and its

Humanitarian Intervention, in JUST INTERVENTION 46 (Anthony F. Lang Jr. ed., 2003).

505. Kudrat Virk, *India and the Responsibility To Protect: A Tale of Ambiguity*, 5 GLOBAL RESP. PROTECT 56, 60 (2013).

506. FRANCK, *supra* note 16, at 168.

507. Rudra Chaudhuri, *Beyond Making Trouble: Responsibility, Sovereignty and India’s Position on Syria*, TELEGRAPH (Kolkata), Apr. 17, 2013.

508. Virk, *supra* note 505, at 5-7.

509. See FRANCK, *supra* note 16, at 159 (noting that in ECOMOG’s interventions in both Liberia and Sierra Leone, “the UN system might tolerate a subregional humanitarian military intervention it had not authorized and might even join in carrying it out”).

1988 intervention to prevent a mercenary coup in the Maldives—were localized, aimed at security problems on its front door.⁵¹⁰ Even for a harsh critic of these actions, they look relatively tame compared to the records of the United States, Russia, Britain, and France over the same span of time. A middleweight power like India would find it comparatively harder to make a routine of flouting international legal standards.

In the end, the Indian experience in Bangladesh suggests that the current state of law is inadequate and will likely face fresh challenges that could be damaging to its credibility and legitimacy. Franck would later ask what should have been done if there had been states willing to stop the genocide in Rwanda but they had not received Security Council authorization—which is not so different from what actually happened in South Asia in 1971.⁵¹¹ As Martha Minow has noted, “The actual meaning of human rights . . . cannot be assessed apart from the institutions and practices necessary for enforcement, and these are both less clear and less well established than the substantive vision.”⁵¹² While the Charter system allows the Security Council’s permanent members considerable power to pass judgment on the use of force of smaller states, Africans and Asians point out that there is no equivalent legal yardstick for assessing the ways in which those permanent members of the Security Council might fall short of being disinterested stewards of international order.⁵¹³ The current system, privileging the political preferences of the Security Council’s permanent members (which in 1971 meant Mao and Nixon) above those of regional actors, has caused considerable cynicism among postcolonial states in Asia and Africa.

As Franck wisely put it, observing “the measured expansion of the ambit for discretionary state action” while not giving up on Article 2(4)’s attempt to prevent unilateral intervention, the United Nations in recent years “has sought balance, rather than either absolute prohibition or license.”⁵¹⁴ It may prove harder to strike such a judicious balance in the future in a Security Council that seems increasingly deadlocked between the United States, Russia, and China.⁵¹⁵ But no matter the configuration of great power relationships, large-scale violations of human rights are going to continue to happen, and neighboring states will probably bear the brunt of them. These neighbor states may be dragged into local conflicts by a variety of political mechanisms:

510. STEPHEN P. COHEN, *INDIA: EMERGING POWER* 127-155 (2001); C. RAJA MOHAN, *CROSSING THE RUBICON: THE SHAPING OF INDIA’S NEW FOREIGN POLICY* 237-241 (2005); Devin T. Hagerty, *India’s Regional Security Doctrine*, 31 *ASIAN SURV.* 351, 353-60 (1991).

511. See Franck, *supra* note 486, at 64.

512. Minow, *supra* note 73, at 58.

513. See José E. Alvarez, *Judging the Security Council*, 90 *AM. J. INT’L L.* 1 (1996); W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 *AM. J. INT’L L.* 83 (1993). For one creative solution, see Oona A. Hathaway et al., *Consent-Based Humanitarian Intervention: Giving Sovereign Responsibility Back to the Sovereign*, 46 *CORNELL INT’L L.J.* 499 (2013).

514. FRANCK, *supra* note 16, at 171.

515. Rick Gladstone, *Friction at the U.N. as Russia and China Veto Another Resolution on Syria Sanctions*, *N.Y. TIMES*, July 20, 2012, <http://www.nytimes.com/2012/07/20/world/middleeast/russia-and-china-veto-un-sanctions-against-syria.html>.

preexisting interstate antagonisms, cross-border solidarities, or refugee flows. As India's experience demonstrates, it will not just be hegemonic or Western states which are driven toward unilateral self-help in such circumstances. These neighbor states might be tempted to undertake their own unilateral actions—with concomitant threats to regional order and damage to the Charter regime⁵¹⁶—unless the international community can manage to offer more effective multilateral relief and rescue.

516. Discussing international humanitarian law, John Witt warns against “a false idol of worship for the ideals of the law of nations, one that is so remote from our experience as to make it less likely (not more likely) that the laws of war will find traction in times of crisis.” JOHN FABIAN WITT, *LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* 6 (2012).