

# SELF-DETERMINATION OUTSIDE THE COLONIAL CONTEXT: THE BIRTH OF BANGLADESH IN RETROSPECT†

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## I. INTRODUCTION

In the aftermath of the Indo-Pakistan War in December 1971, the independent nation-state of Bangladesh was born.<sup>1</sup> Within the next four months, more than fifty countries had formally recognized the new nation.<sup>2</sup> As India's military intervention was primarily responsible for the success of the secessionist movement in what was then known as East Pakistan, and for the creation of a new political entity on the international scene,<sup>3</sup> many serious questions stemming from this historic event remain unresolved for the international lawyer. For example: (1) What is the continuing validity of Article 2 (4) of the United Nations Charter?<sup>4</sup> (2) What is the current status of the doctrine of humanitarian intervention in international law?<sup>5</sup> (3) What action could the United Nations have taken to avert the Bangladesh crisis?<sup>6</sup> (4) What measures are necessary to prevent such tragic occurrences in the future?<sup>7</sup> and (5) What relationship exists between the principle of self-

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† This paper is an adapted version of a chapter that will appear in Y. ALEXANDER & R. FRIEDLANDER, *SELF-DETERMINATION* (1979).

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1. See generally *BANGLADESH: CRISIS AND CONSEQUENCES* (New Delhi: Deen Dayal Research Institute 1972); D. MANKEKAR, *PAKISTAN CUT TO SIZE* (1972); *PAKISTAN POLITICAL SYSTEM IN CRISIS: EMERGENCE OF BANGLADESH* (S. Varma & V. Narain eds. 1972).

2. *Ebb Tide*, *THE ECONOMIST*, April 8, 1972, at 47.

3. For an account of the war between India and Pakistan which began on December 3, 1971, and ended 13 days later on December 16 with the surrender of the Pakistani Army, see D. MANKEKAR, *supra* note 1; S. CHOWDHURY, *THE GENESIS OF BANGLADESH* 168-69 (1972) [hereinafter cited as *THE GENESIS OF BANGLADESH*].

4. Art. 2, para. 4 of the U.N. CHARTER reads: "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." For two divergent viewpoints on the continuing validity of Article 2(4), see Franck, *Who Killed Article 2(4)?*, 64 *AM. J. INT'L L.* 809 (1970); Henkin, *The Reports of the Death of the Article 2(4) are Greatly Exaggerated*, 65 *id.* at 544.

5. See, e.g., *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* (R. Lillich ed. 1973).

6. See, e.g., Nanda, *A Critique of the United Nations Inaction in the Bangladesh Crisis*, 49 *DEN. L.J.* 56 (1972).

7. *Id.* at 64-67.

determination in international law and the birth of Bangladesh?

Although the debate on all these important issues continues, only the last question, which perhaps has received the least attention by scholars,<sup>8</sup> will be the subject of the present inquiry. The discussion will open with a brief account of the events preceding the Indo-Pakistan War and the socio-economic and political climate in which these events occurred. This description should provide an appropriate framework for investigation of the validity of the claim that the secession of East Pakistan was justified under the principle of self-determination.

## II. EVENTS PRECEDING THE BANGLADESH CRISIS IN A HISTORICAL CONTEXT<sup>9</sup>

The seeds of the Bangladesh crisis were sown in 1947 when India was partitioned, creating the states of India and Pakistan. The latter consisted of two disparate parts, East and West Pakistan, divided not only by ethnic, linguistic, and cultural differences, but also separated physically by over a thousand miles of Indian territory. The only major bond which initially brought together these seemingly diverse parts was the common religion of Islam. Within the next two decades, East Pakistan experienced a growing domination of its economic and political life by West Pakistan.<sup>10</sup> Consequently, the religious bond could no longer ensure a lasting unity, and while East-West Pakistan relations were straining to a breaking point, the initial hostility between East Pakistan and India had considerably eased by the late 1960's.<sup>11</sup>

8. For prior discussions of the subject, see THE GENESIS OF BANGLADESH, *supra* note 3, at 192-210; *East Pakistan Staff Study*, 8 INT'L COMM'N JUR. REV. 42, 42-52 (June 1972); Nanda, *Self-Determination in International Law: The Tragic Tale of Two Cities—Islamabad (West Pakistan) and Dacca (East Pakistan)*, 66 AM. J. INT'L L. 321 (1972) [hereinafter cited as *Self-Determination in International Law*]; Nayar, *Self-Determination: The Bangladesh Experience*, 7 REVUE DES DROITS DE L'HOMME 231 (1974).

9. In addition to the sources cited in note 1 *supra*, see, e.g., M. AYOUB *et al*, BANGLA DESH—A STRUGGLE FOR NATIONHOOD (1971); MINISTRY OF EXTERNAL AFFAIRS, GOVERNMENT OF INDIA, BANGLA DESH DOCUMENTS (Sept. 1971) [hereinafter cited as BANGLA DESH DOCUMENTS]; S. CHOWDHURY, THE LAST DAYS OF UNITED PAKISTAN (1974); D. LOSHAK, PAKISTAN CRISIS (1971); K. SIDDIQUI, CONFLICT, CRISIS AND WAR IN PAKISTAN (1972); A. MASCARENHAS, THE RAPE OF BANGLADESH (1972); E. MASON, R. DORFMAN & S. MARGLIN, CONFLICT IN EAST PAKISTAN: BACKGROUND AND PROSPECTS (1971); R. PAYNE, MASSACRE (1973).

10. BANGLA DESH DOCUMENTS, *supra* note 9, at 5; THE GENESIS OF BANGLADESH, *supra* note 3, at 9-19; *Self-Determination in International Law*, *supra* note 8, at 328-30; Naquvi, *West Pakistan's Struggle for Power*, 4 S. ASIAN REV. 213 (1971).

11. The following account demonstrates the prevailing East Pakistan mood in the late 1960's. The Awami League launched a mass movement for autonomy of East Pakistan in 1966. In January 1968, the Pakistani Government announced that it would prosecute twenty-eight persons for conspiring to bring about the secession of East Pakistan with India's help. Between December 1968 and February 1969, in East Pakistan "at least 117 persons were killed, 464 injured and 1,500 persons were arrested for participating in the movement [for autonomy]." THE GENESIS OF BANGLADESH, *supra* note 3, at 44.

The general elections in Pakistan in December 1970, the first to be based on the adult franchise, precipitated the crisis. The Awami League Party, led by Sheikh Mujibur Rahman, contested the elections on the following six-point platform, which called for a fully autonomous East Pakistan:<sup>12</sup>

1. The Pakistan Constitution shall be federal; a parliamentary form of government shall be elected on the basis of adult franchise and population;
2. The federal government shall be responsible only for defense and foreign affairs, and, subject to the conditions provided in number 3 below, currency;
3. Two separate and freely convertible currencies shall be introduced into East and West Pakistan, or in the alternative, a separate reserve bank will be established in East Pakistan, to prevent the transfer of reserves and flight of capital from East to West Pakistan;
4. Fiscal policy for East Pakistan shall be vested in East Pakistan;
5. There shall be separate foreign exchange earnings for East and West Pakistan; the Constitution shall empower East Pakistan to establish trade and aid links with foreign countries; and
6. East Pakistan shall have a separate militia or para-military force.

On this platform, the Awami League Party won 167 seats, a majority in the 313-member National Assembly.<sup>13</sup> A Bengali leader, M.A. Bhashani, called the election results a plebiscite for a sovereign and independent East Pakistan.<sup>14</sup>

The ruling elite in West Pakistan—a military-industrial-landlord-business coalition—was apparently alarmed at the prospect of being ruled by the Awami League Party. In addition, the ruling coalition considered the East Pakistani demand for political and economic autonomy unacceptable because of the fear that it would deprive West Pakistani manufactured goods of a captive market and would result in Pakistan's loss of the bulk of its foreign exchange and valuable raw materials, such as jute and tea.<sup>15</sup>

The West Pakistani military and political leaders exacerbated the

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12. The Awami League Manifesto, containing the six-point program, is published in *BANGLA DESH DOCUMENTS*, *supra* note 9, at 66, *reprinted in* 4 *N.Y.U.J. INT'L L. & POL.* 524 (1971).

13. *BANGLA DESH DOCUMENTS*, *supra* note 9, at 130.

14. Cited in George, *Jai Banglar, Jai*, *FAR EASTERN ECON. REV.*, Jan. 16, 1971, at 20-21.

15. *See THE GENESIS OF BANGLADESH*, *supra* note 3, at 11-19.

volatile situation in East Pakistan when President Yahya Khan postponed the convening of the National Assembly which was due to meet on March 3, 1971 to draft a constitution.<sup>16</sup> Mass demonstrations in East Pakistan followed; the Bengalis greeted Yahya with slogans of "Joi Bangla" ("long live independent Bengal") and brought business to a standstill at Sheikh Rahman's call for non-cooperation with the government.<sup>17</sup> On the eve of the civil war, Rahman said that the East Pakistanis wished only to be "left in peace [and to] live as free people."<sup>18</sup> There ensued serious acts of civil disobedience, including refusal to pay taxes and a total strike in government offices and businesses. This was accompanied by a change in the East Bengali mood which began to reflect a desire for complete independence as opposed to mere autonomy.

Following three weeks of inconclusive negotiations in Dacca between Yahya and Rahman, the Pakistani military attacked Dacca without warning on the night of March 25, 1971 and initiated a reign of terror throughout East Pakistan which continued with increasing intensity until December 1971.<sup>19</sup> The general pattern of repression consisted of the destruction and burning of villages on a colossal scale, indiscriminate killing and raping of civilians, and sorting out and murdering Hindus, university teachers and students, lawyers, doctors, Awami League leaders and supporters, Bengali military and police officers.<sup>20</sup> As a result of these repressive measures, many observers accused the Pakistani armed forces and Razakars (local volunteer militiamen collaborating with the Pakistani armed forces in East Bengal) of committing selective genocide, depriving East Pakistan of Bengali leadership.<sup>21</sup>

By December 1971, the continuing wave of terror had forced approximately ten million people to flee East Pakistan and take refuge in

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16. *Does Pakistan Exist?*, THE ECONOMIST, March 6, 1971, at 19-20; *Pakistan: Yahya's Choice*, FAR EASTERN ECON. REV., March 6, 1971, at 12.

17. Munthe-Kaas, *The Rising Right*, FAR EASTERN ECON. REV., March 6, 1971, at 6; *India Holds Its Breath*, *id.* at 5; *Pakistan: Yahya's Choice*, *id.* at 12; N.Y. Times, March 17, 1971, at 17, col. 1; *id.*, March 19, 1971, at 10, col. 1; *id.*, March 24, 1971, at 11, col. 1; *id.*, May 2, 1971, § (Magazine), at 91-94.

18. Adams, *The Final Round*, FAR EASTERN ECON. REV., March 20, 1971, at 6.

19. See generally *Hearings Before the Subcomm. to Investigate Problems Connected with the Refugees and Escapees of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. pt. I at 95-226, pt. II at 311-53, pt. III at 431-811 (1971) [hereinafter cited as *Senate Hearings*]; *Hearings Before the Subcomm. on Asian and Pacific Affairs of the House Comm. on Foreign Affairs*, 92d Cong., 1st Sess. 35-50 (1971); *Self-Determination in International Law*, *supra* note 8, at 331-33.

20. N.Y. Times, Jan. 9, 1972, § 6 (Magazine), at 46-48; Manchester Guardian Weekly, Dec. 20, 1971, at 4, cols. 1, 3.

21. Cousin, *Genocide in East Pakistan*, SATURDAY REV., May 22, 1971, at 20; Shaplen, *The Birth of Bangladesh (Part I)*, NEW YORKER, Feb. 12, 1972, at 40, 65; *Senate Hearings*, *supra* note 19, at 118, 120; *Self-Determination in International Law*, *supra* note 8, at 332, nn.81-86.

India.<sup>22</sup> This in turn put a severe strain on Indian-Pakistani relations and a full-scale war erupted between the two nations, which ended after twelve days with the surrender of the Pakistani army.<sup>23</sup> The following account illustrates the nature of the havoc caused by the war: "Thirty million people dislocated by the war. More than 1.5 million homes destroyed. Nine million refugees returning from India to rebuild their lives and homes. War damage drastically reducing rail traffic. Key rail and road bridges destroyed."<sup>24</sup> According to Toni Hagen, the Swiss U.N. chief in Dacca, the destruction suffered by Bangladesh was greater than that suffered by Europe in World War II.<sup>25</sup>

To place these events in a proper socio-economic and political context, it should be noted that the Awami League's call for economic and political autonomy for East Pakistan stemmed from the perceived domination of East Pakistan by the "domineering and alien power" of West Pakistan.<sup>26</sup> The East Pakistani members of the Pakistan National Assembly had constantly charged the central government with discrimination for not providing them with adequate representation in the army and national civil services, and for treating them unfavorably in the allocation of finances and other investments.<sup>27</sup> By the late 1960's, East Pakistan had become the major supplier of West Pakistan's needed raw materials and financial resources and was a major but captive market for West Pakistan's manufactured goods.<sup>28</sup>

### A. Disparities in Political Processes

The East Pakistanis complained of their treatment in Pakistan as "second-class citizens."<sup>29</sup> They were severely under-represented in the civil service and military forces, and their representation in central government services was "barely fifteen percent," after twenty-one years of independence, according to Rahman in his election broadcast of October 28, 1970.<sup>30</sup> East Pakistanis comprised less than ten percent of the

22. N.Y. Times, Jan. 24, 1972, at 1, cols. 5, 7; *id.*, Dec. 13, 1971, at 16, cols. 3, 6 (statement of India's Defense Minister S. Singh); Mehta, *Letter From West Bengal*, NEW YORKER, Dec. 11, 1971, at 166.

23. For an account of the Indo-Pakistan War, see D. MANKEKAR, *supra* note 1.

24. The Christian Science Monitor, April 4, 1972, at 1, col. 2. See also Nanda, *Bangladesh Economy in Ruin*, Rocky Mountain News, Oct. 1, 1971 (Global Section), at 1, col. 1.

25. TIME, Feb. 28, 1972, at 30. See also N.Y. Times, Dec. 22, 1971, at 14, col. 1; *id.*, Dec. 30, 1971, at 8, col. 3; *id.*, Jan. 24, 1972, at 1, cols. 5, 7; *id.*, at 8, col. 3.

26. *East Pakistan Staff Study*, *supra* note 8, at 49.

27. The point is made in Jha, *Roots of Indo-Pakistani Discord*, INDIAN J. POL. SCI., Jan.-March 1971, at 14, 29 nn.95-96 with n.95 citing the National Assembly of Pakistan debates for the years 1962-65.

28. THE GENESIS OF BANGLADESH, *supra* note 3, at 11, 15-19.

29. Gourgey, *Bangla Desh's Leader: Sheikh Mujib*, VENTURE (London), 13 July/Aug. 1971, at 13.

30. The text is contained in SEMINAR (New Delhi), June 1972, at 39-40.

officer corps,<sup>31</sup> and only one East Pakistani was appointed to cabinet minister in the Pakistani government, holding the finance portfolio for four days.<sup>32</sup> In the Pakistani army, East Pakistani representation was less than ten percent, and of fifty senior army officers who were promoted to the rank of major-general and above since 1947, only one was from East Pakistan.<sup>33</sup>

### B. Regional Economic Disparities

During the first two decades of Pakistan's independence, the net transfer of resources from East to West Pakistan was officially estimated at one billion dollars.<sup>34</sup> The extent of economic disparity between the two regions,<sup>35</sup> an "appalling record [and] an intolerable structure of injustice,"<sup>36</sup> is indicated by the following figures. While East Pakistan earned sixty-five to seventy percent of Pakistan's foreign exchange in the 1950's and 1960's, it received "just a thirty percent return from it,"<sup>37</sup> hardly a fair share by any standard. West Pakistan's regional income in 1970 was twenty-five percent higher than that of East Pakistan, while in 1947 it was lower.<sup>38</sup> West Pakistan's national income rose by 34.8% between 1965 and 1970, while in East Pakistan, it rose by 22.1%; during that period the annual growth rate of West Pakistan was six percent as compared with four percent by East Pakistan.<sup>39</sup> In April 1970, Professor Anisur Rahman, Professor of Economics at the University of Islamabad, asserted that the per capita income of West Pakistan was 100 percent greater than that of East Pakistan.<sup>40</sup> A similar disparity existed in social, educational, and health fields.

In industrial development, the disparity was even more pro-

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31. Barnds, *Pakistan's Disintegration*, 22 WORLD TODAY 319, 320 (1971).

32. Plastri, *Behind the Revolt in East Pakistan*, 18 DISSENT 321 (1971).

33. *Id.*

34. Gourgey, *supra* note 29, at 13. See also Rahman's address before the December 1970 elections, cited in THE GENESIS OF BANGLADESH, *supra* note 3, at 18-19.

35. See generally Chowdhury, *Economic Policy and Industrial Growth in Pakistan-A Review*, 10 PAKISTAN DEV. REV. 264, 267-68 (1970), and authorities cited therein; George, *The Cross of Bengal*, FAR EASTERN ECON. REV., April 24, 1971, at 57-63; *Bangla Desh*, supplement to MONTHLY COMMENTARY ON INDIAN ECONOMIC CONDITIONS (New Delhi), April 1971, at 9; *Does Pakistan Exist?*, THE ECONOMIST, March 6, 1971, at 19-20; THE GENESIS OF BANGLADESH, *supra* note 3, at 12-19.

36. SEMINAR, *supra* note 30, at 40.

37. Gourgey, *supra* note 29, at 13.

38. These figures are based on a survey by a Pakistani economist, quoted in Ray, *Web of Bourgeois Politics*, 6 ECON. & POL. WEEKLY 1221, 1222 (1971).

39. *Id.*

40. Rahman, *East Pakistan: The Roots of Estrangement*, 3 S. ASIAN REV. (London) 235, 235-36 (1970).

nounced. West Pakistan, at the time of independence in 1947, had very little manufacturing. By the end of the decade, almost seventy percent of Pakistan's manufacturing industry was located in the West. The annual increase of agricultural production in the West was 5.5% compared with a three percent increase in the East. Almost eighty percent of Pakistan's budget and seventy percent of its development funds were spent in West Pakistan.<sup>41</sup>

East Pakistan's economic interests were often at variance with those of West Pakistan. To illustrate, the Indo-Pakistan war in 1965, which resulted in the breaking of trade links between the two countries, had seriously limited East Pakistan's export of commodities such as fish and jute, which were primarily dependent on Indian markets. Additionally, East Pakistan was forced to import its coal and cement from China and Sweden instead of from India, at three times Indian prices.<sup>42</sup>

### III. THE PRINCIPLE/RIGHT OF SELF-DETERMINATION— PRESCRIPTIONS AND PRACTICE

The debate continues on the nature, content, and scope of the right of a people to self-determination. While different views may exist as to what type of group can claim this right and how the right is to be reconciled with the principle of the "territorial integrity" of member-states of the United Nations, there seems to be a broad consensus on two points. First, the right of a people to self-determination encompasses in legal terms the right of a people to constitute, either alone or jointly with other peoples, a sovereign nation. Second, in the colonial context, the principle of equal rights and self-determination of peoples has become an established rule of customary international law.<sup>43</sup>

Among others, Professors McDougal, Lasswell, and Chen,<sup>44</sup>

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41. Ray, *supra* note 38.

42. See generally George, *The Cross of Bengal*, FAR EASTERN ECON. REV., April 24, 1971, at 57-63; *Does Pakistan Exist?*, THE ECONOMIST, March 6, 1971, at 19-20.

43. Progress report by Special Rapporteur, *The Historical and Current Development of the Right to Self-Determination on the Basis of the Charter of the United Nations and Other Instruments Adopted by United Nations Organs, with Particular Reference to the Promotion and Protection of Human Rights and Fundamental Freedoms*, U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 29th Session, U.N. Doc. E/CN.4/Sub. 2/L. 641, at 12 (1976). For the various U.N. resolutions on the subject see *id.* at 7-8. For a selective bibliography on self-determination see U.N. Doc. E/CN.4/Sub. 2/377/Add. 7 (1977).

44. See, e.g., McDougal, Lasswell, & Chen, *The Protection of Respect and Human Rights: Freedom of Choice and World Public Order*, 24 AM. U.L. REV. 919 (1975); Chen, *Self-Determination as a Human Right*, in TOWARD WORLD ORDER and HUMAN DIGNITY 198 (1976) [hereinafter cited as *Self-Determination as a Human Right*].

Bassiouni,<sup>45</sup> Dinstein,<sup>46</sup> Emerson,<sup>47</sup> Friedlander,<sup>48</sup> Green,<sup>49</sup> Moore,<sup>50</sup> Paust,<sup>51</sup> and Reisman and Suzuki<sup>52</sup> have provided useful guidance in clarifying many perplexing aspects of self-determination. Therefore, this discussion will be limited to a brief recounting of the authoritative prescriptions and practices of the United Nations on self-determination so as to provide the necessary background for relating self-determination to the secession of Bangladesh.

### A. Prescriptions

Self-determination as a principle is acknowledged in Articles 1 and 55 of the United Nations Charter. According to Article 1 (2) of the Charter, one of the purposes of the United Nations is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. . . ."

Article 55 explicitly states the relationship between equal rights and self-determination of peoples on the one hand, and respect for human rights and fundamental freedoms on the other:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, 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.

In addition, Article 73 implicitly proclaims this principle<sup>53</sup> and Ar-

45. Bassiouni, *Self-Determination and the Palestinians*, PROC. AM. SOC. INT'L L., April 1971, at 31-40.

46. Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT'L & COMP. L.Q. 102 (1976).

47. Emerson, *Self-Determination*, PROC. AM. SOC. INT'L L., April 1966, at 135-41; Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459 (1971).

48. Friedlander, *Self-Determination: A Legal-Political Inquiry*, 1 DET. C.L. REV. 71 (1975).

49. Green, *Self-Determination and Settlement of the Arab-Israeli Conflict*, PROC. AM. SOC. INT'L L., April 1971, at 40.

50. Moore, *Toward an Applied Theory for the Regulation of Intervention*, in LAW AND CIVIL WAR IN THE MODERN WORLD 3 (J. Moore ed. 1974).

51. Paust, *Self-Determination: A Definitional Focus*, in SELF DETERMINATION (1979).

52. See generally Reisman & Suzuki, *Recognition and Social Change in International Law: A Prologue for Decisionmaking*, in TOWARD WORLD ORDER AND HUMAN DIGNITY 403 (1976); Suzuki, *Self-Determination and World Public Order: Community Response to Territorial Separation*, 16 VA. J. INT'L L. 779 (1976) [hereinafter cited as *Self-Determination and World Public Order*].

53. Article 73 of the Charter deals with non self-governing territories. The Declaration attempts "to ensure, within due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses [and] to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement."

ticles 2<sup>54</sup> and 56<sup>55</sup> create direct obligations for member-states regarding implementation of the provisions of Article 1 and Article 55.

The right of self-determination finds clear expression in the International Covenant on Economic, Social and Cultural Rights as well as in the International Covenant on Civil and Political Rights, which were adopted by the General Assembly in December 1966,<sup>56</sup> and entered into force in 1976.<sup>57</sup> Article 1, which is common to both Covenants, reads:

-1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development;

. . . .

3. The States Parties to the present Covenant . . . shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Earlier, in 1960, the Declaration on the Granting of Independence to Colonial Countries and Peoples<sup>58</sup> acknowledged the "right" of "all peoples" to self-determination, by virtue of which they freely determine their political status and freely pursue their economic, social, and cultural development.<sup>59</sup> Subsequently, the General Assembly in its 25th session unanimously adopted the Declaration on Principles of International Law Concerning Friendly Relations (hereinafter cited as the Declaration),<sup>60</sup> which also acknowledged the right of all peoples to de-

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54. Article 2 (2) reads: "All Members, in order to insure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter."

55. Article 56 reads: "All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

56. The International Covenant on Civil and Political Rights was adopted in G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 52, U.N.Doc. A/6546 (1966). The International Covenant on Economic, Social and Cultural Rights was adopted in G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N.Doc. A/6316 (1966).

57. See Schwelb, *Entry into Force of the International Covenant on Human Rights and the Optional Protocol to the International Covenant on Civil and Political Rights*, 70 AM. J. INT'L L. 511 (1976).

58. G.A. Res. 1514, 15 U.N. GAOR, Supp. (No. 16) 66, U.N.Doc. A/4684 (1960).

59. *Id.*

60. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28) 121, U.N.Doc. A/8028 (1970) [hereinafter cited as Declaration on Friendly Relations]. See also Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT'L L. 713 (1971); Note, *Toward Self-Determination—A Reappraisal as Reflected in The Declaration on Friendly Relations*, 3 GA. J. INT'L & COMP. L. 145 (1973).

termine their political, economic, social, and cultural destiny without any external interference. The Declaration states in the Preamble that:

. . . the subjection of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security, [and] the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and . . . its effective application is of paramount importance for the promotion of friendly relations among states, based on respect for the principle of sovereign equality . . . .

One of the seven principles proclaimed by the Declaration is the principle of equal rights and self-determination of peoples, by virtue of which "all peoples have the right freely to determine, without external interference, their political status and pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter."

While the modes of implementing the right of self-determination may take any of the following forms—"[t]he establishment of a sovereign and independent state, the free association or integration with an independent state, or the emergence into any other [freely determined] political status . . ." <sup>61</sup>—a state's duty towards a people claiming the right to self-determination is

. . . to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuance of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter. <sup>62</sup>

Addressing the issue of the territorial integrity of states, the Declaration reads:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging 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 as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

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61. *Id.*

62. *Id.*

While there are ambiguities in the above language as to the scope of a people's right to self-determination—autonomy within a federal structure or full independence—the important message seems to be that only a state which is possessed of a “government representing the whole people belonging to the territory without distinction as to race, creed or colour” is the one which satisfies the requirement of conducting itself “in compliance with the principle of equal rights and self-determination of peoples. . . .”<sup>63</sup>

This statement is significant, for in order to be entitled to protection from “any action which would dismember or impair . . . [its] territorial integrity or political unity . . . ,” a state has to meet the requirement of possessing a “government representing the whole people.”<sup>64</sup> Read in this light, the principle of self-determination could, under special circumstances, be accorded priority over the opposing principle of territorial integrity. This interpretation is further supported by the statement in the Preamble of the Declaration that “the subjection of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security. . . .” Thus, the important tasks facing the international community are identifying the criteria for determining these special circumstances, and establishing appropriate institutional and procedural arrangements which would facilitate this determination.

### B. *State Practices In and Outside the United Nations*

Traditionally there has been little room for the application of self-determination outside the colonial context.<sup>65</sup> However, it is hardly surprising that nations are unwilling to accept a principle which allows subgroups within their own population to secede. Consequently, states have usually ignored or rejected claims for territorial separation in a non-colonial setting. Many examples could be cited, including those of Katanga,<sup>66</sup> Biafra,<sup>67</sup> Kurdistan,<sup>68</sup> Tibet,<sup>69</sup> Eritrea,<sup>70</sup> the Southern Su-

63. *Id.*

64. *Id.*

65. *See, e.g.,* note 47 *supra*.

66. *See generally* L. MILLER, *WORLD ORDER AND LOCAL DISORDER* 66-116 (1967); Lemarchand, *The Limits of Self-Determination: The Case of the Katanga Secession*, 56 *AM. POL. SCI. REV.* 404 (1962).

67. *See generally* Baker, *The Emergence of Biafra: Balkanization or Nation-Building?*, *ORBIS* 518 (1968); Panter-Brick, *The Right of Self-Determination: Its Application to Nigeria*, 44 *INT'L AFFAIRS* 26 (1968); Nixon, *Self-Determination: The Nigeria/Biafra Case*, 24 *WORLD POL.* 473 (1972).

68. *See, e.g.,* Edmonds, *The Kurdish National Struggle in Iraq*, 58 *ASIAN AFF.* 147 (1971); Edmonds, *Kurdish Nationalism*, 6 *J. CONTEMP. HIST.* (London) 87 (1971); Woodson, *We Who Face Death*, 147 *NAT'L GEOGRAPHIC* 364 (1975).

69. *See generally* Sinha, *How Chinese was China's Tibet Region?*, *TIBETAN REV.* (Calcutta), April 1968, at 9; Takla, *Taiwan and Tibet*, *id.* at 7; *N.Y. Times*, Sept. 5, 1971, § 1, at 5, col. 1.

70. *See generally* Koehn, *Ethiopian Politics: Military Intervention and Prospects for Fur-*

dan,<sup>71</sup> Northern Ireland,<sup>72</sup> Quebec,<sup>73</sup> and Formosa.<sup>74</sup>

Commenting on the United Nations practice, Professor Rupert Emerson has recently written that "the room left for self-determination in the sense of the attainment of independent statehood is very slight, with the great current exception of decolonization."<sup>75</sup> The rationale is not hard to understand either, for ". . . the United Nations would be in an extremely difficult position if it were to interpret the right of self-determination in such a way as to invite or justify attacks on the territorial integrity of its own members."<sup>76</sup>

The Nigerian conflict, which lasted over two and a half years,<sup>77</sup> illustrates the United Nations practice. While only five states recognized an independent Biafra,<sup>78</sup> the Biafran claim for self-determination was acknowledged neither at the United Nations nor the Organization of African Unity (OAU).<sup>79</sup> The response of these two organizations is worth recalling—the United Nations never even considered the question, while the OAU strongly favored a unified Nigeria. Emperor Haile Selassie of Ethiopia, one of six heads of state who were members of an OAU consultative committee on Nigeria, asserted that the national unity of individual African states is preferable because it is believed to be an "essential ingredient for the realization of the larger and greater objective of African unity."<sup>80</sup> Also, the OAU Charter specifically mentions the parties' adherence to the principle of "respect for the

*ther Change*, AFRICA TODAY, April-June 1975, at 7; Gebre-Medhin, *Eritrea: Background to Revolution*, MONTHLY REV., Sept. 1976, at 52-61; Martin, *War In Eritrea*, 89 NEW STATESMAN 166, 166-67 (1975); Morgan, *Geographic Evaluation of the Ethiopia—Eritrea Conflict*, 15 J. MOD. AFR. ST. 667, 667-74 (1977); Tseggai, *Case for Eritrean National Independence*, BLACK SCHOLAR, June 1976, at 20-27.

71. See generally Gray, *The Southern Sudan*, 6 J. CONTEMP. HIST. (London) 108 (1971); Al-Rahim, *Arabism, Africanism, and Self-Identification in the Sudan*, 8 J. MOD. AFR. STUD. 233 (1970).

72. See generally C. O'BRIEN, STATES OF IRELAND (1972); Reik, *Ireland: Religious War or Class Struggle?*, SATURDAY REV., March 18, 1972, at 25.

73. See, e.g., Levesque, *For an Independent Quebec*, 54 FOR. AFF. 734, 734-44 (1976); Morton, *Quebec in Revolt*, CANADIAN FORUM, Feb. 1977, at 13; Smith, *Preparing for Independence*, *id.* at 4-5; *Canada's Last Chance*, THE ECONOMIST, Nov. 20, 1976, at 15-16.

74. See generally L. CHEN & H. LASSWELL, FORMOSA, CHINA AND THE UNITED NATIONS: FORMOSA IN THE WORLD COMMUNITY (1967); Chen & Reisman, *Who Owns Taiwan?: A Search for International Title*, 81 YALE L.J. 599, 599 n.2 (1972).

75. Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459, 465 (1971).

76. V. VAN DYKE, HUMAN RIGHTS, THE UNITED STATES AND THE WORLD COMMUNITY 102 (1970).

77. For a text of the Declaration of Secession of May 30, 1967, see 6 INT'L LEGAL MATERIALS 679 (1967). On January 12, 1970, the Biafran surrender was announced.

78. Ijalaye, *Was Biafra at any Time a State in International Law?*, 65 AM. J. INT'L L. 551, 553-54 (1971).

79. See generally Panter-Brick, *supra* note 67; *Self-Determination in International Law*, *supra* note 8, at 326-27.

80. Report of the O.A.U. Consultative Mission to Nigeria, *cited in* Ijalaye, *supra* note 78, at 556.

sovereignty and territorial integrity of each state."<sup>81</sup>

Earlier, during the Congo crisis, the United Nations had offered an organized opposition to Katanga's claim to secede.<sup>82</sup> Subsequently, U.N. Secretary-General U Thant stated that the United Nations "has never accepted and does not accept and I do not believe will ever accept the principle of secession of a part of its Member State."<sup>83</sup> Similarly, leaders of newly independent states have consistently taken the position that the right of self-determination does not include the right of secession.<sup>84</sup>

### C. *Appraisal of the Right of Self-Determination*

The right of self-determination is not an individual right, but a collective right. The claim is for participation not only in power processes but in all value processes—power, wealth and resources, respect and rectitude, enlightenment and skill, and affection and well-being.<sup>85</sup> The focus of attention is on deprivation of human rights as it relates to a group communally.<sup>86</sup>

Thus, one of the major tasks is the identification of "peoples" who are claiming the right of self-determination. The process of identifying such peoples usually involves consideration of objective and subjective factors. On the one hand, an ethnic identity linked by a common history, often accompanied by a shared language or religion, may be present, while on the other hand, the group's sense of identity may stem from an ethos or state of mind. However, both subjective and objective elements are often present when a claim for self-determination is made. Because a claim to the formal power to decide one's future course is based upon one's own values and perceptions, it can be persuasively argued that the subjective factors of one's own identity and a common destiny should control.<sup>87</sup> Thus, the differentiation of a subgroup from the dominant group should turn more upon a psychological perception rather than tangible attributes, such as racial characteristics.

An additional problem is the determination of the scope of the separation between the subgroup and the dominant group in a body

81. V. VAN DYKE, *supra* note 76, at 86-87.

82. L. MILLER, *supra* note 66.

83. 7 U.N. MONTHLY CHRONICLE, Feb. 1970, at 36.

84. V. VAN DYKE, *supra* note 76, at 87, which cites Indian, Indonesian, and Senegalese leaders taking this position.

85. Professor Myres McDougal articulates these value processes in M. McDOUGAL, *STUDIES IN WORLD PUBLIC ORDER* 336-37 (1960). See also McDougal, Lasswell, & Chen, *The Protection of Respect and Human Rights: Freedom of Choice and World Public Order*, 24 AM. U.L. REV. 919 (1975).

86. *Self-Determination as a Human Right*, *supra* note 44.

87. See generally Dinstein, *supra* note 46, at 104-105.

politic. The major question here relates to the extent to which perceptions and commitments are shared by members of the subgroup. The inquiry has to be focused on how widely the demands articulated by the elites of the subgroup are shared by the other members of the subgroup.<sup>88</sup> This will give rise to two further questions: the first relates to the proper percentage of support required to constitute a following sufficient to warrant serious consideration of the claim to self-determination, while the second relates to the identification and accommodation of those who prefer to remain within the body politic.<sup>89</sup>

Along with identifying the group seeking self-determination, another major task is to inquire into the reasons underlying the wish to secede. For in order to determine the validity of the claim, the reasons ought to be compelling, leaving little hope that any action short of separation would satisfy the subgroup's claim for effective participation in the value processes. Given the nature of the state system which characterizes the international community, self-determination cannot be completely divorced from its effects upon the parent state, the surrounding region, or the international community. The claim must be studied in a total context; territorial separation should meet the test of maximizing values which the community as a whole strives to achieve.<sup>90</sup>

Claims by a subgroup for territorial separation may be based upon a combination of the following: differences of political belief, the desire to more effectively control and manage one's own resources, or a strong ethnic or cultural identification with a neighboring group. In light of the already mentioned "maximization of community values" test, and in view of the nature of the international system which tends to revolve around nation-states, it becomes apparent that the different political beliefs, claims to resources, and ethnic or cultural identification cannot form the main thrust of a claim of self-determination.

First, as the current state system reflects and accommodates divergent views as to political and economic organizational structures, it would be dangerous and unworkable to accord legitimacy to claims rising out of ideological beliefs. Second, claims to resources and group identification should not by themselves give the claim to territorial separation priority over the principle of territorial integrity. Claims arising out of the desire to control and manage one's own natural resources are implicit in any claim of self-determination, whether or not such desire makes up a major part of the claim. Finally, the desire of a people seeking to become attached to a neighboring state made up of

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88. *Self-Determination and World Public Order*, *supra* note 52, at 816.

89. *Id.*

90. *See generally id.* at 813-20.

inhabitants with whom the subgroup seeking territorial separation identifies is emotionally compelling (especially since the colonial powers drew up boundaries without considering the people who would be affected by them). However, in the absence of other factors related primarily to the lack of the subgroup's participation in the value processes of the body politic, an international blessing to such desire would undermine the stability of the international order by placing it in a perpetual state of flux.

Ultimately, the only reliable test for evaluating the reasonableness of a claim to self-determination has to be the nature and extent of the deprivation of human rights of the subgroup making the claim. Dramatic developments in international legal norms and state practices over the past three decades have transformed the individual into a subject of international law, capable of exercising rights as an independent entity in the international arena.<sup>91</sup> In addition, human rights issues are no longer considered to lie within the "domestic jurisdiction" of a nation-state.<sup>92</sup> Indeed, the need is to "focus on the essential relationship between the principle of self-determination and human rights, and assert the essential nature of the right of self-determination as a right that justifies the remedying of a deprivation by restoring self-government."<sup>93</sup> Thus, it is submitted that the principles of self-determination and territorial integrity as well as other related principles of international law such as "humanitarian intervention,"<sup>94</sup> non-intervention,<sup>95</sup> and prohibition of the use of force<sup>96</sup> must be interpreted in the light of the individual rights which form the basis of group rights to a dignified human existence.

#### IV. SELF-DETERMINATION AND BANGLADESH

The pertinent questions are: (1) Did the people in Bangladesh constitute an identifiable people in terms of the U.N. Charter, the Inter-

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91. The most dramatic illustration of this right is the right of the individual to have access to a supra-national arena within the purview of the European Convention on Human Rights. See generally R. BEDDARD, *HUMAN RIGHTS AND EUROPE—A STUDY OF THE MACHINERY OF HUMAN RIGHTS PROTECTION OF THE COUNCIL OF EUROPE* (1973); Higgins, *Conceptual Thinking about the Individual in International Law*, 24 N.Y.L.S. L. REV. 11 (1978).

92. The large number of U.N. resolutions dealing with issues of human rights attest to the validity of the statement made. See note 43 *supra*.

93. W. OFUATEY-KODJOE, *THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW* (1977).

94. *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* (R. Lillich ed. 1973).

95. See generally Martin, *Interdependence and the Principle of Self-Determination and Non-Intervention*, 48 DEP'T ST. BULL. 710 (1963); Moore, *The Control of Foreign Intervention in Internal Affairs*, 9 VA. J. INT'L L. 247 (1969).

96. Note 4 *supra*.

national Covenants, the Declarations, and other relevant instruments of international law? If this answer is in the affirmative, (2) Did these people have a valid claim for territorial separation under the principle of self-determination? A brief discussion of these questions follows.

*A. The People of East Pakistan Constituted a Separate, Identifiable People*

Since there are no guidelines in the various U.N. human rights instruments on what constitutes a people, it will be helpful to apply the various traits commonly used to identify a people to the population of East Pakistan. Such traits include: a common race or ethnicity, language, culture, religion, history, geography, economy, and a subjective element of an ethos or state of mind.<sup>97</sup>

Differences between the populations of East Pakistan and West Pakistan are striking; their only common bond is the emotive symbol of Islam. The physical separation of over a thousand miles adds to the racial, cultural, linguistic, and economic differences.

If the term race were used in a non-scientific way, connoting differences of physical appearance, dominant characteristics and behavior, then the East Pakistanis, about 73 million in number and constituting fifty-five percent of the total population of Pakistan, are racially different from the West Pakistanis. Even President Ayub Khan admitted the racial differences between East and West Pakistan, although his remarks are derogatory and show an attitude of racial superiority. He suggested that because of a "forced mixture of races" in West Pakistan, the population had benefited from a "fusion of ideas, outlook and culture," while the East Pakistanis "have all the inhibitions of downtrodden races and have not yet found it possible to adjust psychologically to the requirements of the newborn-freedom."<sup>98</sup>

The East Pakistanis speak the Sanskrit-based Bengali language and were consistently opposed to West Pakistan's imposition of the Persian/Arabic-based Urdu.<sup>99</sup> Further, they identify more closely with Bengali culture and intellectual thought than with the predominant Persian and Arabic influence from West Pakistan.<sup>100</sup> An observer has suggested that there is "no controversy that in art, literature and philosophy, in music, poetry and prose, the Bengali culture has obtained a

97. See generally Dinstein, *supra* note 46, at 103-105.

98. THE GENESIS OF BANGLADESH, *supra* note 3, at 40.

99. See generally *id.* at 23-24; Evan, *The Language Problem in Multi-National States: The Case of India and Pakistan*, 58 ASIAN AFF. 180, 184-85 (June 1971).

100. See generally ILLUSTRATED WEEKLY OF INDIA, May 9, 1971, at 23; Sayeed, *Islam and National Integration in Pakistan*, in SOUTHEASTERN POLITICS AND RELIGION 407 (D. Smith ed. 1966).

status which has hardly been paralleled in West Pakistan."<sup>101</sup> Geographically, West Pakistan is mountainous and arid, while the East is deltaic, traversed by many rivers and streams, and covered by luxuriant vegetation. These geographical features are manifested in social and temperamental differences, including their staple diet, which for East Pakistan is rice and for West Pakistan is wheat and corn.

A staff study of the International Commission of Jurists concluded its statement on the differences between the then two parts of Pakistan with these words:

West Pakistan turned naturally for its cultural and commercial exchanges towards the Arab Middle East and Iran, East Pakistan towards India and the Asian Far East. Economically, the two wings hardly comprised a natural unity, and the economic conflict with India resulted in East Pakistan being cut off from their natural economic outlet and trading partners in the neighboring parts of India. Quantitatively, each of the wings was large enough in population and territory to constitute a separate nation-state.<sup>102</sup>

The assertion that the East Pakistanis constituted a separate Bengali people is further supported by their state of mind, which was reflected in their demands initially for full autonomy and subsequently, in March 1971, for independence. The sequence of events since Pakistan's independence in August 1947 highlights the development of these divergent attitudes. As early as February 1948, a Bengali member of the Pakistan Constituent Assembly observed: "[a] feeling is growing among the Eastern Pakistanis that Eastern Pakistan is being neglected and treated merely as a 'colony' of West Pakistan."<sup>103</sup> Four years later in February 1952, Bengali students held mass demonstrations in Dacca after the decision was made to adopt Urdu as the only state language. The police dispersed them by opening fire, killing twenty-six persons and wounding 400 more.<sup>104</sup> In March 1954, the United Front, which was a coalition of the opposition parties in East Pakistan, fought elections on a platform advocating autonomy. In elections considered to be a referendum on the issue of autonomy, the United Front captured 223 out of 237 seats whereas the ruling Muslim League Party won only ten seats.<sup>105</sup> However, in May 1954, the Legislative Assembly was dissolved, the United Front government was dis-

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101. THE GENESIS OF BANGLADESH, *supra* note 3, at 7.

102. *East Pakistan Staff Study*, *supra* note 8, at 48.

103. THE GENESIS OF BANGLADESH, *supra* note 3, at 24.

104. *Id.*

105. *Id.* at 26.

missed, and Governor's rule was proclaimed in East Pakistan.<sup>106</sup>

Pakistan gradually moved from a parliamentary democracy to a bureaucratic-military coalition and in October 1958, a military dictatorship under General Ayub Khan took over. General Ayub stayed in power until March 1969. During this period people in East Pakistan were restive. Ayub reacted to this restive mood by warning his followers in Dacca that "they should be prepared to face even a civil war, if forced upon them, to protect the sovereignty and integrity of the country. . . . Civil war was a dangerous thing. But if a nation faces destruction, it has to be accepted."<sup>107</sup> However, the movement for the autonomy of East Bengal on the basis of Rahman's six-point program gathered so much momentum that Ayub Khan could no longer resist it. In March 1969, General Mohammed Yahya Khan, the army Commander-in-Chief, took control of the government.<sup>108</sup> The overwhelming victory of the Awami League in the December 1970 elections has already been mentioned.<sup>109</sup> By March 1971, there was a growing movement in East Pakistan for independence, with demonstrations and slogans of "Joi Bangla" or "long live independent Bengal."<sup>110</sup> In August 1971, the Yahya government issued a White Paper containing an allegation that Rahman and the Awami League attempted to secure effective independence for East Bengal by constitutional negotiations and that they had planned to launch an armed rebellion to take independence by force if constitutional negotiations failed.<sup>111</sup>

It should be noted that while initially East Pakistanis had opted for autonomy for their province within a federation or confederation, and the six-point program reflected this desire, the March 1971 breakdown of negotiations on the convening of the National Assembly marked a new era in the East Bengali mood. There had been demands for an independent Bangladesh even before the postponement of the Assembly. However, with that postponement, the Bengali peoples' demand was for full independence because they realized that without it they would have no opportunity to participate in the various value processes including the power process.<sup>112</sup>

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106. *Id.* at 27.

107. *Id.* at 43.

108. *Id.* at 45.

109. BANGLA DESH DOCUMENTS, *supra* note 9, at 130.

110. George, *Jai Banglar, Jai*, FAR EASTERN ECON. REV., Jan. 16, 1971, at 74-75.

111. THE GENESIS OF BANGLADESH, *supra* note 3, at 74-75.

112. The Bangladesh Proclamation of Independence is *reprinted in* 11 INT'L LEGAL MATERIALS 119 (1972).

*B. The People of East Pakistan Had a Justifiable Claim for Territorial Separation*

The East Pakistani claim for territorial separation was justified by a combination of factors: (1) the racial, cultural, geographic, and linguistic differences between East and West Pakistan;<sup>113</sup> (2) the striking economic and political disparities from which the East Pakistanis suffered for over two decades;<sup>114</sup> and (3) the brutally repressive measures used by the West Pakistani military forces to crush the East Pakistanis.<sup>115</sup>

To apply the U.N. prescription on self-determination as contained in the Declaration,<sup>116</sup> the State of Pakistan never possessed a "government representing the whole people . . . without distinction as to race, creed or colour," and therefore, never satisfied the Declaration's requirement of conducting itself "in compliance with the principle of equal rights and self-determination of peoples. . . ." Consequently, Pakistan was not entitled to protection from "any action which would dismember or impair . . . [its] territorial integrity or political unity. . . ."<sup>117</sup> Events following the December 1970 elections and the postponement of the National Assembly in March 1971—including Rahman's call for non-cooperation, mass demonstrations and demand for complete independence for Bangladesh—reflected the East Bengali perception that their basic rights could be secured only after territorial separation.

What followed the March 25, 1971 crackdown by the Pakistan military has been described by Justice A.S. Chowdbury, Vice Chancellor of the University of Dacca and the Pakistani member of the U.N. Human Rights Commission, as "atrocities unparalleled in history."<sup>118</sup> A description of the gross violations of human rights was given by John Salzberg, representative of the International Commission of Jurists, in his statement to the U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities: "killing and torture; mistreatment of women and children; mistreatment of civilians in armed conflict; religious discrimination; arbitrary arrest and detention; arbitrary deprivation of property; suppression of the freedom of speech, assembly and the press; suppression of political rights; and suppression of the right of migration."<sup>119</sup> "Other reports have indicated that a

113. Notes 97-111 *supra* and the accompanying text.

114. Notes 29-42 *supra* and the accompanying text.

115. Notes 19-25 *supra* and the accompanying text.

116. Note 60 *supra*.

117. Declaration on Friendly Relations, *supra* note 60.

118. N.Y. Times, May 30, 1971, at 5, col. 1.

119. Press Release of the International Commission of Jurists, Aug. 16, 1971, at 3-4.

'coldblooded, planned' attempt at systematic and selective killing of the leaders of the Awami League, Bengali military and police officials, and intellectuals (especially university teachers, writers and students), was undertaken purportedly to deprive East Pakistan of any future leadership."<sup>120</sup> These atrocities have been described by some observers as genocide or selective genocide.<sup>121</sup>

Since the state of Bangladesh was accorded early recognition by other states<sup>122</sup> and admittance into the United Nations,<sup>123</sup> it appears that the international community acknowledged the legitimacy of its claim for self-determination.

## V. APPRAISAL AND RECOMMENDATIONS

It is easy to argue that, even in a non-colonial context, East Pakistan's claim for territorial separation was justified. Special circumstances in East Pakistan warranted placing

the demands of self-determination above those of 'territorial integrity' and of a 'non-interventionist' stand on the part of the United Nations. For where violence is perpetrated by a minority to deprive a majority of political, economic, social and cultural rights, the principles of 'territorial integrity' and 'non-intervention' should not be permitted to be used as a ploy to perpetuate the political subjugation of the majority.<sup>124</sup>

Difficult cases, however, lie ahead. As the final chapter of colonialism draws to a close, a number of states, new and old, find themselves challenged by restive elements within their borders. Thus, the international community is likely to be faced with many more claims for territorial separation in non-colonial settings in the future. The absence of

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120. See sources cited in *Self-Determination in International Law*, *supra* note 8, at 332, nn.81 & 82.

121. See, e.g., STATESMEN WEEKLY (New Delhi), Aug. 21, 1971, at 11, col. 1; N.Y. Times, Aug. 17, 1971, at 3, col. 4.

122. *Ebb Tide*, THE ECONOMIST, April 8, 1972, at 47.

123. On November 29, 1972, the General Assembly adopted Resolution 2937 (XVII) expressing the desire that Bangladesh be admitted to the United Nations at an early date. 1972 U.N. YEARBOOK 219, 219-20. On the recommendation of the Security Council, made on June 10, 1974, the General Assembly admitted Bangladesh on Sept. 17, 1974. 1974 U.N. YEARBOOK 296, 296-97.

124. *Self-Determination in International Law*, *supra* note 8, at 336. On the Katanga situation, Professor Suzuki convincingly argues: "The denial of the Katangese attempt to secede does not necessarily preclude nor contradict the right of self-determination of a subgroup within a body politic. To determine the lawfulness of separation in the future by relying solely upon the 'Katanga precedent' would be to consider only one side of past events . . . . The territorial integrity of the State is *not* a goal to be pursued. It is merely one of the conditions under which the enjoyment of human rights can be secured. The goal is instead the protection and fulfillment of the fundamental basis for a dignified human existence . . . ." *Self-Determination and World Public Order*, *supra* note 52, at 807 n.123.

guidelines for hearing and evaluating such claims will leave few alternatives to violence, but perhaps more importantly, it will reflect a retreat from the emerging expectations that the individual has a right to a dignified human existence; for such an individual right finds fruition only when the group to which the individual belongs is accorded the right of territorial separation by the international community. Furthermore, the recognition of such a right is likely to have the effect of deterring abusive state practices. If so, the international community as a whole benefits. The lessening of tensions within states is likely to mean less tension between and among states because intrastate conflicts invariably affect the world community, as the recent conflicts in Angola and Zaire have so forcefully demonstrated.<sup>125</sup>

It is submitted that if a group demanding self-determination is identified, if severe deprivations of human rights exist to the extent that the group is subjected to "alien subjugation, domination and exploitation," and if the claim for territorial separation meets the test of legitimacy by its evaluation in a contextual setting,<sup>126</sup> the claim should be accorded recognition. It should not matter whether the group in question is separate from the state and is territorially based or is dispersed within the state; the conditions that validly qualify the group's claim to territorial separation must be the distinctiveness of the group and its subjugation based upon that distinctiveness. Thus, the focus should be on the deprivation of the right to participate in the value processes of the body politic. While the effect of the territorial separation on world public order should be taken into account, the effect of such separation on the parent state alone should not be the sole determining factor for measuring the legitimacy of such a claim.

If institutions and procedures exist which will acknowledge and legitimize the demands for territorial separation irrespective of their effect upon the parent state alone, it is likely to encourage states to take measures to provide all their citizens with basic human rights. Cer-

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125. See, e.g., Garrett, *Lessons of Angola: An Eyewitness Report*, BLACK SCHOLAR, 1976, at 2-15; Saul, *Angola and After*, MONTHLY REV., May 1976, at 4-15; *South Africa*, THE ECONOMIST, May 21, 1977, at 72; *They Crossed a Frontier*, *id.*, April 16, 1977, at 10-11; *Three Factions, Three Countries?*, *id.*, July 26, 1975, at 40; *Keeping Out of It*, NATION, June 3, 1978, at 650-52; *Talking Tough Versus Acting Tough*, NEW REPUBLIC, May 27, 1978, at 5-6; *Massacre in Zaire*, NEWSWEEK, May 29, 1978, at 34-36; *Inside Kolwezi: Toll of Terror*, TIME, June 5, 1978, at 32-36; *Massacre in Zaire*, U.S. NEWS & WORLD REPORT, June 5, 1978, at 41-42.

126. Professor Suzuki articulates the following criteria to determine the legitimacy of a claim: "The critical questions are whether the subgroup's disidentification is *real* and whether its demands are compatible with basic community policies. In short, to approximate a public order of human dignity, the test of reasonableness is the determining factor in deciding how to respond to the claim of self-determination. The total context of such a claim must be considered: the potential effects of the grant or denial of self-determination upon the subgroup, the incumbent group, neighboring regions, and the world community." *Self-Determination and World Public Order*, *supra* note 52, at 784.

tainly, the international community, through its established norms, institutions, and procedures, should first address strategies short of territorial separation to promote the subgroup's participation in the value processes of the body politic; but where there is no alternative to territorial separation, then it must respond efficiently and effectively to whatever repercussions may follow such separation.

The Secretary-General of the United Nations should invoke his or her authority under Article 99<sup>127</sup> to bring the matter before the Security Council, which under the Charter has the primary responsibility of dealing with grave situations which potentially threaten international peace. In the face of inaction by the Security Council, the General Assembly has ample authority to make appropriate recommendations. Of utmost importance, however, is the involvement of the U.N. human rights machinery in situations where claims for territorial separation are made. Specifically, the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities should take the initiative, for it has been authorized to do so in those situations which, based upon the information available to the Sub-Commission, reveal a consistent pattern of violations of human rights.<sup>128</sup> Also, the U.N. Commission on Human Rights might be authorized to meet in emergency sessions to discuss situations which demand urgent and immediate attention because of "the imminent threat or willful destruction of human life on a massive scale," a suggestion made by the International Commission of Jurists during the Bangladesh crisis.<sup>129</sup> Perhaps a high-ranking official of the U.N. Commission on Human Rights should be authorized to undertake some initial investigation and recommend measures for the Commission.<sup>130</sup> Additionally, where applicable, the machinery available under the International Convention on the Elimination of All Forms of Racial Discrimination<sup>131</sup> and other U.N. instruments should be applied.

In sum, a close link exists between human rights and self-determi-

127. U.N. CHARTER Art. 99 reads: "The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security."

128. Pursuant to the authority granted under Resolution 8 (XXIII) of the U.N. Commission on Human Rights. See 42 U.N. ESCOR, Supp. (No. 6) 131 (1967).

129. Press Release of the International Commission of Jurists, April 5, 1972, at 3.

130. See generally Nanda, *A Critique of the United Nations Inaction in the Bangladesh Crisis*, 49 DEN. L.J. 56 (1972).

131. International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature March 21, 1966, 660 U.N.T.S. 195, adopted by the United Nations General Assembly in G.A. Res. 2106 (xx), 20 U.N. GAOR, Supp. (No. 14), U.N. Doc. A/6014 (1966). See generally, Reisman, *Response to Crimes of Discrimination and Genocide: An Appraisal of the Convention on the Elimination of Racial Discrimination*, 1 DEN. J. INT'L L. & POL'Y 29 (1971).

nation, and between massive violations of human rights and international peace and security. It now seems imperative that the traditional principle of self-determination, primarily instrumental in the dramatic transformation of former colonies into independent nation-states, be extended to include the right of territorial separation of any people "subjugated, dominated and exploited,"<sup>132</sup> who because of their group identification are deprived of the opportunity to participate in the value processes of a body politic. It is the responsibility of the international community to devise appropriate institutions, procedures, and strategies to implement this right.

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132. *Self-Determination and World Public Order*, *supra* note 52, at 784.