USE OF FORCE AND SELF-DETERMINATION: LEGAL ASPECTS OF INDIA'S INTERVENTION IN EAST PAKISTAN IN 1971

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INTRODUCTION

Bangladesh as a sovereign independent republic was no less a reality in 1971 and than its early years as it is now after more than a quarter century of its independence. Establishing a case for Bangladesh is not intended here, inasmuch as the issue whether Indian intervention in 1971 was legal or illegal is a moot one in the sense that our determination of the issue will not affect the sovereignty or statehood of Bangladesh.[1] However, there are some points which might theoretically interest a person not to establish the claim of statehood of Bangladesh but to reconsider some other issues which will enable a decision maker to organise major world community interests at stake in any conflict situation in an order of relative priority.

Scholars have gone to the extent of suggesting that, "Illegality of intervention in aid of independence of a self-determination unit does not..., as a matter of law, impair the status of the local unit."[2] But is it illegal to assist a people who requested the assistance, who are entitled to self-determination but are denied their right to self-determination by a colonial, racist or alien regime or by a foreign state in contravention of the provisions of non-intervention? In simpler language the question is, "Which will prevail if there is a conflict between right to self-determination and respect for territorial integrity?" This question has several components: "Can force be used against a people to deprive

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1 Also even a very restricted view will not affect the statehood of Bangladesh. Harris commented, e.g., "Indian assistance to Bangladesh, although arguably illegal, did not impair the latter's statehood given that Bangladesh was a unit to which the principle of self-determination applied." Harris, D.J., Cases and Materials on International Law, London, 1991, at pp.112-113.

2 Crawford, J., The Creation of States in International Law, Oxford, 1979, at p.118.

them of their right to self-determination"? "Can a people use force to assert their right of self-determination"? "Can they seek assistance from third parties"? "Are third party states entitled to give them assistance"? "Is their (third party states') action lawful if they use force against the state depriving a people their right of self-determination"? And "Is there a duty incumbent on states to refrain from giving assistance to a state which is depriving a people their right to self-determination"? Perhaps some of these questions will be answered partially by determining in which sphere of law self-determination belongs, municipal or international.

Without any judgment on relevancy at this stage, two questions may be posed, "Were the U.S.[3] and the Chinese[4] policies during the

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[3] In U.S. evaluation nothing was more important than maintaining the territorial integrity and political independence of Pakistan. "We view what is going on in Pakistan as an internal matter" — The Crisis in East Pakistan, Statement by the Department of State Press Spokesmen, April 12, 1971, printed in Rahman, H.H. (ed.), *Bangladesher Shadhinata Juddha; Dalilpatra* (History of Bangladesh War of Independence; Documents) Vol.13; Ministry of Information, Government of the People's Republic of Bangladesh, Dhaka, 1982, at p.201.

"This country ... can only with enormous pain, accept the fact that military action was taken [by India] ... without adequate cause, and if we express this opinion in the United Nations, we do ... so ... because we believe that if, ... the right of military attack is determined by arithmetic, if political wisdom consists of saying the attacker has 500 million and the defender has 100 million, and, therefore, the United States must always be on the side of the numerically stronger, then we are creating a situation where, in the foreseeable future, we will have international anarchy, and where the period of peace, which is the greatest desire for the President to establish be jeopardised; not at first for the Americans, necessarily, but for peoples all over the world." See, Background briefing for a news conference given on 7 December by Henry Kissinger, President Nixon's adviser on national security, Congressional Record — Senate, December 9, 1971, excerpts reprinted ibid., pp.240-251 at pp.243-244.

"Indian officials have ... announced that regular Indian forces have been instructed to move into East Pakistan ... The very purpose which draws us together here ... 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 ... 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."

See, Statement by Mr. George Bush, Representative of the U.S.A. in the Security Council, December 4, 1971 UN Doc., reprinted ibid., p.923 at pp. 924-925.

Bangladesh independence war non-responsive to international law?" or "Were their position based upon some kind of misapprehension of law?" These questions are hypothetical inasmuch as the policies of major powers during the independence war was conditioned not so much by law or even by ideology[5] as by strategic speculations.[6] But how about the question, "Was U.S. and Chinese supply of military hardwares during the independence war to West Pakistan authorities which had been used against the people of East Pakistan, lawful?"[7] Accepting these limitations on the political and diplomatic plane does not preclude a theoretician from dwelling upon the legal modalities involved, if not for justifying past experiences, no doubt for future action. It needs to be

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4 Chinese position was more resolute than the U.S. and the same can be illustrated by the Draft Resolution by China in the Security Council which condemned the Indian Government for "acts of creating a *so-called 'Bangladesh'* and of subverting, dismembering and committing aggression against Pakistan." [*italics* added] S/10421, December 5, 1971 UN Doc., reprinted ibid., at p.837. See also Chou En-Lai's Message to Yahya Khan, 12 April, 1971 --- "[I]t is important to differentiate the broad masses of the people from a handful of persons who want to sabotage the unification of Pakistan ... The Chinese Government holds that what is happening in Pakistan at present is purely the internal affair of Pakistan, which can only be settled by the Pakistan people themselves and which brooks no foreign interference whatsoever," XXIV Pakistan Horizon, pp.153-154, reprinted ibid., at p.593; and Statement by Mr. Huang Hua, Representative of China in the Security Council:

"The question of East Pakistan is purely the internal affair of Pakistan. No one has the right to interfere in it. The Government of India, using the question of East Pakistan as a pretext, has committed armed aggression against Pakistan ... That is the law of the jungle ... According to the logic of the Indian Government any country can use self-determination as a pretext for invading other countries. What kind of guarantee is there of a State's sovereignty and territorial integrity, then?"

See, December 4, 1971 UN Doc., reprinted ibid., at p.928.

5 Samar Sen was critical of this, when he said, "We hear a great deal about the revolutionary doctrine; peoples rights, I do not know how these revolutionaries will behave when Bangladesh becomes independent." Statement by Mr. Samar Sen, Representative of India in the Security Council, December 4, 1971 UN Doc., reprinted ibid., at p.916, at p. 920.

6 See e.g., Hossain, I., "The Bangladesh Crisis and the Major Powers: Some Hypotheses," 6 (1980) Law and International Affairs, pp.68-79; Haque, A., "Liberation War in Bangladesh, Role of Delhi and Peking," 1 (1975) Law and International Affairs, pp.16-22.

7 See in this regard Hossain, I., supra note 6, at pp.76-77.

mentioned that in terms of normative models, the major concern of one dealing with international legal norms is to find out whether international community has clearly defined those aspects of any conflict situation and whether an empirical basis can be found for those definitions. From this perspective Bangladesh is a unique case, which projects itself into several modalities of permissibility or otherwise of use of force including the most controversial, humanitarian intervention.

This paper, therefore, focuses on the use of force and all other categories are considered in relation to it. In respect of the meaning of the phrases, use of force, self-determination, self-defence or humanitarian intervention and the extent to which force can be used lawfully, this paper concentrates on the regime established by the Charter of the United Nations.

SELF-DETERMINATION AND THE CHARTER OF THE UNITED NATIONS

Historically, the idea of the right of self-determination of peoples is a product of the Enlightenment.[8] Three major European thinkers of the Enlightenment — John Locke, Montesquieu and Jean Jacques Rousseau denied that governments possessed absolute power over their subjects. However, not until the 1760s did democracy find its champion in Jean Jacques Rousseau. Will of the people as the legitimate source of political power became the driving force of popular sovereignty and found its way from the Enlightenment and Rousseau to the French Revolution. While the French Revolution can serve as a modality of the internal aspect of self-determination, the American revolution can serve as the

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8 Two important exceptions being Machiavelli in the Renaissance and Thomas Hobbes during the English Revolution. Connor has commented that, "Machiavelli's final chapter of the Prince, written in 1513, might be viewed as a harbinger of the notion of national self-determination." See, Connor, W., "Nationalism and Political Illegitimacy," 8 (1981) Canadian Review of Studies in Nationalism, p.225. Hobbes although was of the view that once established the power of the government was absolute said that it rested not on divine right but on a contract made with the subjects. While the Enlightenment political thinkers were ambivalent towards Hobbes, the inextricable link of the idea of self-determination with the key political concept of the Enlightenment, that of the sovereignty of the people, should not be overlooked.

modality of the external aspect.[9] In any case the political nature of the principle was entrenched. From that standpoint we focus on the 'state making' aspect of the notion of self-determination.

Regarding 'recognition' from the international community, we have to look to the early twentieth century when President Woodrow Wilson of the United States of America played the leading role in developing and giving effect to the principle of self-determination. In his address of May 27, 1916 to the League to Enforce Peace, Wilson declared it to be fundamental that "every people has a right to choose the sovereignty under which they shall live."[10] His fourteen points entailed the optimisation of the concept as a prescription for political action.[11] The 1917 Declaration of Rights of Peoples of Russia recognised the right to "free self-determination" and the right including secession was incorporated in the Soviet Constitution.[12] British Prime Minister Lloyd George also recognised the right of self-determination, but he did not apply it to the overseas colonies of Great Britain. After the First World War although self-determination has been associated with the political reorganisation that took place on the international level nowhere in the Covenant of the League of Nations did the term appear.[13] Thus, despite

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9 External self-determination refers to a people opting for independence or union with other states. Internal self-determination, on the other hand, refers to the struggle of a people to rid themselves of an oppressive or unrepresentative indigenous regime. See Hamid, K.A., Human Rights, Self-Determination and the Right to Resistance: The Case Study of Hawaii, Washington, D.C. and Dhaka, 1994, pp.44-47. However, more analytically there can be four major aspects of self-determination, viz., (1) state making; (2) government making; (3) freedom from external control; and (4) freedom from internal subjugation, domination, imposition and exploitation. See Hussain, S.M., "Self-determination," 4 (1978) Law and International Affairs, p.18.

10 Quoted in Lansing, R., Self-Determination: A Discussion of the Phrase, 1921, p.5.

11 Umozurike, U.O., Self-Determination in International Law, Connecticut, 1972, pp.13-20.

12 See e.g., Lenin, V.I., The Right of Nations to Self-determination, Moscow, 1951, pp.86-125.

13 However, Article III of Wilson's First Draft of the Covenant provided for the application of the principle of self-determination, which reads:

The Contracting Powers unite in guaranteeing to each other political independence and territorial integrity; but it is understood between them that such territorial readjustments, if any, as may in the future become necessary by reason of changes in the present racial conditions and aspirations or present social and

all the recognition and emphasis at the political plane, the state of understanding of the concept until the signing of the U.N. Charter was chaotic in the absence of a legal mandate.[14]

With the signing of the Charter of the United Nations, the term self-determination received formal acceptance for the first time as an international legal principle and Articles 1(2) and 55 included references to self-determination.[15] One of the purposes of the U.N., according to Article 1(2) of the Charter, is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." While enumerating in Article 55 the various measures that the U.N. is to promote in the field of international economic and social co-operation, the Charter provides a rationale for these measures as creating "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 promotion of self-government in all "non-self-governing

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political relationships, pursuant to the principle of self-determination, and also such territorial readjustments as may in the judgment of three fourths of the Delegates be demanded by the welfare and manifest interest of the peoples concerned, may be effected, if agreeable to those peoples; and that territorial changes may in equity involve material compensation. The Contracting Powers accept without reservation the principle that the peace of the world is superior in importance to every question of political jurisdiction or boundary.

In the final draft Article III became Article X. For the text of Article X see infra note 48.

14 However, even before signing the Charter self-determination as a norm gained general recognition of the international community to such an extent that armed assistance by one state to peoples of another state who were struggling for self-determination was not regarded as impermissible. See e.g., Hussain, S.M., supra note 9, at pp. 23-27.

15 President Roosevelt and Prime Minister Churchill affirmed in Article 3 of the Atlantic Charter that:

They [the United States and Great Britain] respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self government restored to those who have been forcibly deprived of them.

Subsequently the Declaration by the United Nations expressly recognised the Atlantic Charter, as did the Declaration of the Four Nations on General Security. See Russell, R.B., A History of the United Nations Charter, Washington, D.C., 1958, [Appendices C & D] pp. 976-977. The principles of the Atlantic Charter were incorporated in the United Nations Charter.

territories" as envisaged in Chapter XI, and the idea of the trusteeship system, as elaborated in Chapter XII, stem from an evidently elevated status ascribed to self-determination as being an overriding principle which is to be understood as a precondition of international peace and security and not just as an expression of high ideals.

The development of the international community has helped to transform the concept of self-determination from a mere abstract political idea to a legal principle, a human right. In Resolution 637A (VII) of 16 December, 1952 the General Assembly recommended, *inter alia*, that "the States Members of the United Nations shall uphold the principle of self-determination of all peoples and nations." But still self-determination was left without any definition. The definition first appeared in the Declaration on the Granting of Independence to Colonial Countries and Peoples[16] wherein it was articulated to mean the right of peoples to "freely determine their political status and freely pursue their economic, social and cultural development."[17]

The Declaration, in conjunction with the United Nations Charter, supports the view that self-determination is now a legal principle. Resolution 1514 (XV) is in the form of an authoritative interpretation of the Charter rather than a recommendation.[18] The Declaration emphasises "the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples" and noted, "the peoples of the world ardently desire the end of colonialism in all its manifestations" and "all peoples have an inalienable right to complete freedom"[19] and declared:

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16 The Declaration was adopted by the United Nations General Assembly in Resolution 1514(XV) on 14 December 1960. Eighty-nine states voted for the resolution and none against: but there were nine abstentions, viz., Portugal, Spain, Union of South Africa, United Kingdom, United States, Australia, Belgium, Dominican Republic and France.

17 Declaration on the Granting of Independence to Colonial Countries and Peoples, U.N.G.A. Res. 1514 (XV) 15 U.N. GAOR Supp. (No.16) 66 UN Doc. A/4684 (1961) Article 2.

18 Brownlie, I., Principles of Public International Law, Oxford, 2nd ed., 1973, at p.187.

19 Declaration on the Granting of Independence to Colonial Countries and Peoples, supra note 17, Preamble.

> The subjugation of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of World peace and co-operation.
>
> All peoples have the right to self-determination; by virtue of that right they freely determine their political status, and freely pursue their economic social and cultural development.[20]

The current view of international legal scholars is that these norms expressed in the Declaration have achieved the status of customary international law.[21]

The right of self-determination received judicial recognition in both the *Namibia*[22] and the *Western Sahara Cases*.[23] In the *Namibia Case*, the Court stated that:

> ... the ... development of International Law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations made the principle of self-determination applicable to all of them.[24]

Moreover, in his separate opinion in the *Namibia Case*, Judge Ammoun, citing a statement by the representative of Pakistan, said that the "right of self-determination is a norm of the nature of *jus cogens*, derogation from which is not permissible under any circumstances".[25]

The two international covenants of 1966 on human rights ---- International Covenant on Economic, Social and Cultural Rights[26] and International Covenant on Civil and Political Rights[27] reaffirmed the freedom of a people to determine its own destiny. Article 1(1) of each Covenant reads:

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20 Ibid., Articles 1 and 2.

21 See e.g., supra note 18, at p.187.

22 *Legal Consequences for states of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, I.C.J. Reports 1971, at p.16.

23 *Western Sahara Case,* Advisory Opinion, I.C.J. Reports 1975, at p.12.

24 Supra note 22, at p. 31.

25 Ibid., at pp.77-78. Judge Ammoun also referred to the principle of self-determination in his separate opinion in the *Barcelona Traction Light and Power Co. Case, Belgium v. Spain,* I.C.J. Reports 1970, p.3 at p.304.

26 U.N.G.A. Res. 2200(XXI) 21 U.N. GAOR, Supp. (No.16) 49, U.N. Doc. A/6316(1967).

27 U.N.G.A. Res.2200(XXI) 21 U.N. GAOR, Supp. (No.16) 52, U.N. Doc. A/6316 (1967).

> All peoples have the right to self-determination. By virtue of that right they freely determine their economic, social and cultural development.[28]

All the states parties to the Covenants (not only those which have overseas colonies) are required to "promote the realisation of the right of self-determination" and "respect that right."[29] This is a necessary consequence of the recognition of the universality of the right of self-determination and of its status as a basic human right. Under the Charter all United Nations members have pledged to take "joint and separate action" to promote "universal respect for, and observance of, human rights and fundamental freedom for all without distinction as to race, sex, language or religion."[30]

The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations[31] contains seven principles of international law, one of which is the principle of self-determination.[32] Declaration on Friendly Relations states in the preamble:

> [T]he subjugation of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security,
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> ... 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

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28 Supra notes 26 and 27. It is to be noted that the Universal Declaration of Human Rights adopted by the General Assembly in 1948, curiously enough does not contain any explicit reference to self-determination. The gap, however, has been filled in the Declaration of 1960, *supra* note 17 and in the Covenants of 1966, supra notes 26 and 27.

29 Article 1(3) of each Covenant reads:
The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self Governing and Trust Territories, 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.
Supra notes 26 and 27.

30 Articles 55 and 56, U.N. Charter.

31 Adopted by the General Assembly on October 24, 1970 without vote. U.N.G.A. Res. 2625(XXV), 25 U.N. GAOR, Supp. (No.28) 121, U.N. Doc. A/8028 (1971) [hereinafter cited as Declaration on Friendly Relations].

32 The phrase "self-determination" occurs 12 times in the Declaration on Friendly Relations.

> promotion of friendly relations among States, based on respect for the principle of sovereign equality.[33] [*italics* added]

"By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations", The Declaration on Friendly Relations states,

> all peoples have the right freely to determine, without external interference, their political status and to 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.[34]

The Declaration on Friendly Relations also provides a description of the process of self-determination as follows:

> The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.[35]

Before concluding our discussion on self-determination two points must be elucidated viz., scope of self-determination in the state making sense in the non-colonial context and subject of the right of self-determination. Both of these points will have a bearing in our later discussion on Indian intervention in 1971 in the then East Pakistan. Regarding the first, it is to be noted that self-determination and Decolonisation is not synonymous. The wishes of the people of a decolonised territory have not always been ascertained through the well-recognised means of a plebiscite and where plebiscite has been held all the options have not been open to the people concerned.[36] Decolonisation is only one aspect of self-determination; the aspect of freedom from external control. But self-determination in the sense of

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33 Declaration on Friendly Relations, *supra* note 31, Preamble.

34 Ibid., operative paragraph 1 on the principle of self-determination. Further the Declaration on Friendly Relations casts a duty upon every State, "to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle ... bearing in mind that *subjugation of peoples to alien subjugation, domination and exploitation constitutes* a violation of the principle, as well as *a denial of fundamental human rights, and is contrary to the Charter."* [*Italics* added] Ibid., operative paragraph 2 on the principle of self-determination.

35 Ibid., operative paragraph 4 on the principle of self-determination.

36 See e.g., Hussain, S.M., supra note 9, at pp. 35-36 [fn 57].

state making, government making and freedom from internal domination, imposition and exploitation is as applicable to a decolonised state as to a state which has never been a colony.[37] Decolonisation ends the external control aspect of self-determination, all other aspects continue to be operative in a decolonised state.

Self-determination is not a right to be exercised once for all, rather it is a continuing right. Article 21(3) of the Universal Declaration of Human Rights states that the people shall always be in a position to be the "basis of the authority of government."[38] Levin offered an argument to show a link between the continuity of the right to self-determination and general contract law theory as follows:

> When a nation exercises its right to self-determination ... its right to free determination ... passes to the sphere of state law of the state to which the nation now belongs. But this holds good only as long as the conditions on which the nation became part of the given state are not violated by this state and as long as the nation's desire to stay within it remains in force, and it is not compelled to do so by coercive means. As soon as one of these phenomena occurs, the question again passes from the sphere of state law into the sphere of international law.[39]

Thus self-determination is a continuing right even in the state making sense and therefore is applicable in the non-colonial context even in the United Nations era and includes the right to secede. Principle VIII of the Helsinki Accord is an express recognition of this premise, which reads:

> ... all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.[40]

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37 Ibid.,at p.36.

38 Article 21(3) of the Universal Declaration of Human Rights reads:
The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be held by secret vote or by equivalent free voting procedures.
U.N.G.A. Res.217A(III), U.N. Doc. A/810 (1948) at p.71.

39 Levin, D.B., "The Principle of Self-Determination of Nations in International Law," in Soviet Yearbook of International Law, 1962, p.46.

40 Final Act of the Conference on Security and Co-operation in Europe, Helsinki, August 1, 1975. Printed in 14 (1975) International Legal Materials, p.1292.

The Declaration on Friendly Relations also recognises the continuing nature of the right in state making sense.[41]

The second point projects the most controversial issue regarding self-determination, viz., what constitutes the "self" or a "people" to whom this right is attributed. Many tests have been formulated, one, for example, is:

A. Identity of People
B. Identity of Territory
C. Majority Principle
D. Claim.[42]

According to this test an identical people (from the point of ethnicity — also termed as the "human criterion") making a claim regarding the affairs of an identifiable territory where they form the majority group are asserting a valid claim for self-determination. Makinson emphasized common elements of descent, language, religion, culture and history as follows:

> a people would ... essentially be defined as a collectivity whose degree of cohesion and sense of distinctness (based on the elements of descent, language, religion, culture, history, and others) are deemed "sufficiently strong to merit" attribution of a right of self-determination.[43]

But these common elements may not always be the most appropriate guiding principles. and a common belief or political objective may suffice to affirm the distinctiveness of a group of people. Hertz formulated the following test:

A. The criteria for determining nationality
B. The means of forming and expressing a national will
C. The purposes and limits of the national will.[44]

Aureliu Cristescu, Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, in a restrictive analysis stated:

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41 See in this regard operative paragraph 4 on the principle of self-determination, supra note 35.

42 See Hussain, S.M., supra note 9, pp.37-40.

43 Makinson, D., "Rights of Peoples: Point of View of a Logician," in Crawford, J. (ed.), The Rights of Peoples, Oxford, 1988, at p.75.

44 Hertz, F., Nationality in History and Politics: A Psychology and Sociology of National Sentiment and Nationalism, London, 1951, p.240.

> A people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognised in Article 27 of the International Covenant on Civil and Political Rights.[45]

This argument can be criticised as having a catastrophic effect on the concept of self-determination and undermining the whole notion of "a people." But it is to be noted that even this restrictive analysis will serve, if East Pakistan's position in 1971 is considered.[46]

However, formulating a satisfactory definition of "a people" is by no means a simple task. While in one case "descent, language, religion, culture, history, and other" links may not be necessary to establish such a claim in another case it will not be enough to have such a link. Generally, a group of people acquires the special status of "a people" at a particular time based on the necessity and importance of the claim at that time. The only criterion which must always be there is the presence of a state of mind or the ethos of people. It is the state of mind that explains the people's will to live together as a people and to continue the common way of life. Among others due regard must be paid to the legitimacy of the claim.

Prohibition of the Use of Force by the Charter of the United Nations

A detailed analysis of legitimate and illegitimate use of force is not intended here. The purpose of our analysis is very limited viz., whether use of force is prohibited under the Charter of the United Nations. If it is, "Are there any exceptions?" "What are those exceptions?" And finally, "Can use of force in aid of self-determination be constituted into

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45 Cristescu, A., The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments, New York, 1981, at para 279. Article 27 of the International Covenant on Civil and Political Rights reads:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. Supra note 27.

46 To wit, to establish the claim of Bengalis to the status of a people entitled to self-determination. The restrictive interpretations are generally due from an understanding of the contradiction of Articles 1(2) and 2(4) of the U.N. Charter; or more specifically of the preservation of territorial integrity and a secession movement sanctioned by the principle of self-determination. On this point see the discussion under Section IV. Correlation Between Use of Force and Self-Determination.

an exception of the prohibition?" Article 2(3) of the U.N. Charter requires all Member States to "settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered", while Article 2(4) demands:

> 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.[47]

The foundation for this law is the customary rule which is considered to have existed in 1939 and which rests on state practice and, in particular, the General Treaty for the Renunciation of War, 1928.[48]

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47 The purposes of the United Nations are:

1. To maintain international peace and security, and to that end to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends. Article 1, U. N. Charter.

48 Also known as the Pact of Paris or the Kellogg-Briand Pact (after the U.S. Secretary of State and French Foreign Minister respectively).

Article I

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and *renounce it as an instrument of national policy* in their relations with one another. [Emphasis supplied]

Article II

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

United Kingdom Treaty Series (1929) at p.29; 94 League of Nations Treaty Series, at p.57. After the First World War, the Covenant of the League of Nations imposed some limitations upon "resort to war", but did not abolish war. In the event of a dispute which was potentially disruptive, Member States agreed under the Covenant to submit the dispute to arbitration or judicial settlement or to

The customary norm is restated and reinforced by Article 2, paragraph 4, of the United Nations Charter[49] and the prohibition as a principle of customary international law has attained the character of *jus cogens.*[50]

Use of force is a vast subject and an inquiry into every possible aspect of this topic is out of the scope of this paper. The foremost problem relating to use of force is the meaning which should be ascribed to the terms "use of force" or "resort to force." No doubt "use of force" includes armed force. But does Article 2(4) confine itself to prohibiting only the use of armed force or are other categories of force e.g., economic and/or political force similarly prohibited? According to Lauterpacht, "force" in that Article is used in the ordinary connotation as referring to armed force as distinguished from economic or political pressure.[51] In Hans Kelsen's view, "force" in Article 2(4) on the other hand may be construed to refer to both armed and non-armed force.[52] According to McDougal and Feliciano, civil, political and economic pressure may, in some contexts endanger international peace and security and justice.[53] Professor Brownlie while refusing to accept Kelsen's position argued:

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inquiry by the Council of the League. War was not to be resorted to until three months after the award by the arbitrator, the judicial decision, or the Council's report had been made. In this way the Covenant provided a cooling-off period. Members also agreed not to go to war with fellow Members of the League who complied either with an arbitral award, judicial decision or with a unanimous report of the Council. Article X of the Covenant reads:

The members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.

United Kingdom Treaty Series (1919), at p.4.

49 Brownlie, I., International Law and the Use of Force by States, Oxford, 1963, p.112.

50 Endorsed by the International Court of Justice in *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits),* I.C.J. Reports 1986, p.14 at p.100.

51 Oppenheim, L., International Law, London, Vol.II 7th ed., 1952 by Lauterpacht, H., p.153.

52 Kelsen, H., The United Nations: Ten Years Legal Progress, The Hague, 1956, pp.4-5.

53 McDougal, M.S. and Feliciano, F.P., Law and Minimum World Public Order, New Haven and London, 1961, pp.124-126.

> whilst it is correct to assume that paragraph 4 applies to force other than armed force, it is very doubtful if it applies to economic measures of a coercive nature ... It is not to be assumed, however, that every unlawful use of force will involve an armed attack in the tactical or military sense of the phrase. Thus a naval blockade involves an unlawful use of force...[54]

The Preamble of the United Nations Charter and Article 51 specifically mention "armed force." The 1970 Declaration, on the other hand, is inconclusive. It recalls "the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any state."[55] But in the section on the use of force, force is not qualified.[56] Although economic coercion is prohibited in the 1970 Declaration's section on non-intervention,[57] it remains undefined and in the *Nicaragua Case* the International Court of Justice denied that American economic sanctions against Nicaragua constituted "a breach of the customary-law principle of non-intervention."[58] Uncertainty and the imprecision of definition still continues, but one can conclude without any difficulty that an interpretation of force encompassing economic and political force would go in favour of developing countries while the contrary i.e., it was only armed force which was outlawed, in favour of the developed countries.

Article 2(4) prohibits the use of force. It is not concerned only with the outlawing of war.[59] Article 2(4) does not distinguish between war and the use of force falling short of war,[60] for example, reprisals. Here,

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54 Supra note 49, at pp.362-365.

55 Declaration on Friendly Relations, supra note 31, Preamble.

56 Ibid., operative paragraphs on the principle of prohibition of use of force.

57 "... armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.
"No State may use or encourage the use of economic, political or any other type of measures to coerce another State ..." Ibid., operative paragraphs 1 and 2 on the principle of non-intervention. See also Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, 1965; U.N.G.A. Res.2131(XX) 20 U.N. GAOR, Supp. 14 at p.11; Operative paragraphs 1 and 2.

58 Supra note 50, at p.126 [paras 244 and 245].

59 cf. Article I of the Kellogg - Briand Pact, supra note 48.

60 Supra note 53, at p.125.

however, once again we come to a problem which bewilders scholars, namely, to determine what is an attack or resort to force as a matter of law — the quantum of force employed. In McDougal and Feliciano's view the Charter does not prohibit all coercion — it prohibits a certain level of coercion. A certain amount of coercion is "implicit and concomitant to the ordinary interaction of states ... which does not rise to the level and degree of prohibited coercion."[61] When the justification of self-defence is raised the question becomes one of fact, viz., "Was the reaction proportionate to the apparent threat?" We will revert to this point later in our discussion on self-defence[62] for now, it is to be noted that Article 2(4) has been supplemented by the 1970 Declaration on Friendly Relations. The Declaration is only a resolution and therefore is not legally binding. Nevertheless, it represents the consensus of the international community on the legal interpretation to be given to the Charter. The principles embodied in the Declaration have been described as the "basic principles of international law" and all States have been asked "to be guided by these principles in their international conduct."[63] This Declaration adds flesh to the prohibition on the use of force. It provides, *inter alia*, that:

> A war of aggression constitutes a crime against the peace ... Every state has the duty to refrain from the threat or use of force to violate the existing international boundaries ... international lines of demarcation ... from acts of reprisals ... from any forcible action which deprives peoples ... their right to self-determination ... from organising or encouraging the organisation of irregular forces or armed bands ... for incursion into the territory of another State ... [or] organising, instigating, assisting or participating in acts of civil strife or terrorist acts in another State ... The territory of a State shall not be the object of military occupation resulting from the use of force ... No territorial acquisition resulting from the threat or use of force shall be recognised as legal.[64]

To put it simply, any threat or use of force by a state, other than in accordance with the exceptions in which the use of force is justified, is contrary to, and prohibited by contemporary international law.

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61 Ibid., at pp.124-126.

62 See infra notes 70 to 80 and accompanying texts.

63 Declaration on Friendly Relations, *supra* note 31, General Part.

64 Ibid., operative paragraphs on the principle of prohibition of use of force.

Accordingly we come to our second question, namely, "What are these exceptions?"

The categories here also are not well defined. Brownlie listed six exceptions which have "received general acceptance in state practice" and four other exceptions which have "a somewhat uncertain status in existing law."[65] Brownlie did not enlist categories such as use of force in aid of self-determination, and humanitarian intervention. However, today there is a sharp difference of opinion among both scholars and governments on these points. An examination of all the categories will not be undertaken here, on the contrary we will try to give a brief account of the categories which are relevant *vis-a-vis* Indian intervention in 1971, namely, self-defence, humanitarian intervention and intervention in aid of self-determination.

Self - Defence

Of these self-defence is the most important, inasmuch as depending upon the definition a family of exceptions can be included within this head, while the other two are directly connected with the scenario circuitously in issue here. To elucidate how self-defence becomes relevant, without any endeavour to provide an answer at this stage, one hypothetical question may be asked: "Should deliberate and forcible expulsion of a population over a frontier be regarded as unlawful use of

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[65] Exceptions to the general prohibition, in which the use of force is justified and which have received general acceptance in state practice, are:

(a) Action in self-defence;
(b) Action in collective self-defence or in defence of other states;
(c) Action authorised by a competent international organ;
(d) Where a treaty confers a right to intervene or *ad hoc* invitation or consent is given by the territorial sovereign ...;
(e) Action to terminate acts of trespass in certain circumstances;
(f) Certain special cases of necessity arising from natural catastrophe.

Other exceptions which have a somewhat uncertain status in existing law are:

(a) Measures taken to protect the lives and, or, property of nationals on foreign territory;
(b) Action in anticipation of, or to remove the effects of, breaches of neutrality;
(c) A war of sanction;
(d) Action against ex-enemy states under the United Nations Charter, Articles 53 and 107.

See supra note 49, at pp. 432-433.

force, in order to entitle the 'victim' State to the right of self-defence?" In more general terms, "Was India's refugee problem relevant to determine the legality or otherwise of Indian intervention?"[66]

Reservation of the right of individual and collective self-defence has been made under the U.N. Charter in the following terms:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[67]

It is necessary to determine the meaning of Article 51 in the context of the Charter and its relation to the customary law regarding self-defence and use of force. In the context of the Charter the definitions of self-defence and use of force are mutually dependent in the sense that the more Article 2(4) is considered as comprehensive in its reference to "threat or use of force" the wider an interpretation should be given to "self-defence."[68] To be more specific, if Article 2(4) is considered as prohibiting force in the sense, for example of economic coercion, then a right of self-defence will accrue to protect the threatened economic interest, on the contrary if use of force is considered as including armed forces only, no such right of self-defence can be exercised to protect economic interests. However, in wording Article 51 confines itself to armed attack. Thus, despite any limit to which prohibition on use of force may be pushed,[69] "the inherent right of individual or collective self-defence" is available under that Article only "if an armed attack occurs." Therefore, if an extended definition of self-defence is intended the justification must be sought in general international law.

According to Bowett, the content of the right of self-defence is not to be determined by Article 51 of the Charter. That Article, as far as it

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66 See infra notes 88, 170 to 181 and accompanying texts.

67 Article 51, U.N. Charter.

68 In this regard reference is made *inter alia* to phrases "territorial integrity or political independence" and "or in any other manner inconsistent with the Purposes of the United Nations" in Article 2(4) of the U.N. Charter.

69 See in this regard supra notes 51 to 64 and accompanying texts

relates to individual State's right of self-defence, is purely declaratory of the fact that the right of self-defence under the general international law continues unimpaired under the Charter.[70] The right under general international law is available for protection of a State's "essential rights",[71] namely, its "political independence, territorial integrity, the lives and property of its nationals and even ... its economic independence."[72] Professor Julius Stone has also argued that Article 51 left the broader customary right of self-defence intact.[73] Central to Stone's idea is vindication of rights and justice and relying on this concept he even puts up a stout defence for the Anglo-French-Israeli attack on the Suez Canal.[74] Lauterpacht, on the other hand, suggested that armed self-defence is not available against an anticipated attack or a conduct falling short of armed attack.[75] In Kelsen's view, "a merely 'imminent' attack or any act of aggression which has not the character of an attack involving the use of armed force does not justify resort to force as an exercise of the right established by Article 51."[76] For United Nations Members the right of self-defence "has no other content than the one determined by Article 51."[77]

According to Brownlie, "to regard any form of action formerly held to be self-defence, at a time when self-defence was a phrase regarded as

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70 Bowett, D.W., Self-Defence in International Law, Manchester, 1958, at p.182.

71 "The function of the right of self-defence is to justify action, otherwise illegal, which is necessary to protect certain essential rights of the State against violation by other States." Ibid., at p.270.

72 Ibid., at p.185.

73 Stone, J., Aggression and World Order: A Critique of United Nations Theories of Aggression, London, 1958, pp.43-44; 97-98.

74 Ibid., at pp.100-103. Following the Anglo-French invasion of Suez, Lord Chancellor Viscount Kilmuir while justifying the British action in the House of Lords said, "...the right of individual self-defence was regarded as automatically excepted from both the Covenant of the League of Nations and the Pact of Paris without any mention of it, and clearly the same would have been true of the Charter of the United Nations had there been no Article 51 ... It would be an entire misreading of the whole intention of Article 51 to interpret it as forbidding forcible self-defence in resistance to an illegal use of force not constituting an armed attack." Hansard, H.L., Vol. 199, cols. 1348-1359. November 1, 1956.

75 Supra note 51, at p.156.

76 Kelsen, H., The Law of the United Nations, New York, 1950, at pp.797-798.

77 Kelsen, H., Recent Trends in the Law of the United Nations, A Supplement to 'The Law of the United Nations' supra note 76, New York, 1951, at p.914.

interchangeable with 'self-preservation' and 'necessity', as within a surviving 'customary right', is a very arbitrary process. To go further, and assert that the Charter obligations are qualified by this vague customary right, is indefensible."[78] In McDougal and Feliciano's view, self-defence under the Charter is not limited to response to armed attack or overt military violence; the Charter has not made the right of self-defence against current or imminent attack more restrictive than under the customary international law, but has left that right "unimpaired and unabridged."[79] Non-military coercion may give rise to the necessity of self-defence and justify response by military force; and the key effect is the creation in the target state of reasonable expectations, as third party may determine reasonableness that it must forthwith respond with exercise of military force if it is to maintain its primary values, customarily described as "territorial integrity and political independence."[80]

No doubt, self-defence, interpreted by customary international law, has a wider scope than when it is interpreted by reference to the "armed attack-self-defence" formula of Article 51 and without reference to customary international law. The uncertainty relates not to the wider scope of general international law, but to the effect of Article 51 on the customary right of self-defence.[81] The question is whether Article 51 not only reserves but also defines the customary right in a restrictive manner. Here again a tilt at either direction would go in favour either of developed or of developing countries or in between two states in favour either of the stronger or of the weaker state. To wit, if a restricted definition of self-defence is adopted relying upon the armed attack requirement of Article 51 small states will have more specific guaranties that their territorial integrity, political independence and juridical sovereignty will not be violated on the pretext of "self-defence" vis-à-vis

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78 Supra note 49, p.274; supra note 70, pp.184-185; at p.185: "It is ... fallacious to assume that members have only those rights which the Charter accords them; on the contrary they have those rights which general international law accords to them except in so far as they have surrendered them under the Charter..."

79 Supra note 53, at pp.234-238.

80 See ibid., at pp.196-202.

81 Brownlie, however, has argued that the customary law which is to be compared with the Charter is that of 1945 and not that of 1920 or an earlier period and generally speaking by 1945 self-defence was understood to be justified only in case of an attack by the forces of a state. Supra note 49, at pp. 274 and 279-280.

the powerful states, while on the other hand if "self-defence" is given a wider connotation relying on general international law, the protection afforded to small states by the Charter will be removed. Be that as it may, the legal position remains undefined. Brownlie concluded that there is considerable justification for submitting that "the right of self-defence, individual or collective, which has received general acceptance in the most recent period has a content identical with the right expressed in Article 51 of the Charter."[82] His position is based on consideration that the Charter represents the objective or general international law and the provision of the Charter and the terms of Article 51 have had strong influence on state practice since 1945.[83] He even have regarded "armed attack-self-defence" formula as pre-existent of the Charter.[84] This view puts a premium on Charter based security system while the whole object of the Charter is to render unilateral use of force, even in self-defence, subject to control by the Organisation.[85] This kind of presumption against self-help is useful in promoting international peace and security.

The desirable, if not utilitarian conclusion must be that in Article 2(4), "force" must be given a wide meaning while self-defence should be confined to "armed attack" formula of Article 51. Then two points remain to be clarified, namely, the mutual dependency as suggested earlier must be avoided on the ground that the overriding purpose of the United Nations is to "maintain international peace and security", and peace can best be maintained by keeping unilateral use of force within well defined limits, in other words, by considering Article 2(4) comprehensive in its reference to "threat or use of force", while giving Article 51 a narrow interpretation. This will reduce unilateral use of force by states to the lowest possible limits, a situation which is likely to promote peace. Secondly, a narrow interpretation seems to deprive states of their customary rights.[86] But who can effectively exercise those

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82 Ibid., at p.280.

83 See ibid., at p.280.

84 See supra note 49.

85 Under the United Nations system two international security organs --- the Security Council and the General Assembly --- have emerged. The discussion in this paper however have been confined for obvious reasons to unilateral use of force by States, and collective measures through the United Nations have not been considered.

86 Supra note 49.

rights? Not, of course, all the Members of the U.N., rather it is the powerful states who can enjoy such rights. So why not make use of force except within the parameter of Article 51 a concern for the United Nations, if not a complete monopoly? To this, borrowing from McDougal and Feliciano's terminology of reasonableness,[87] a qualification may be added, Here one question may be asked, "Was it reasonable for India to act in self-defence in aid of the liberation struggle in East Pakistan when its vital economic interests were threatened by the burden of maintaining a huge number of refugees?" An affirmative answer to this question is *prima facie* incompatible with our earlier conclusion based on "armed attack-self-defence" formula. But again it is not so, given the fact that in the last analysis we opt for accommodating some exceptional circumstances relying on the test of reasonableness, when it may be lawful to act in self-defence for protecting economic interests.[88]

Humanitarian Intervention

In passing on to the problem of defining humanitarian intervention as an exception to the general prohibition on the use of force we will be confronted with the difficulty of reconciling a state's supposedly absolute sovereignty with even more fundamental human rights which may be held to justify intervention on behalf of oppressed nationals of another state.[89] The point to be noted here at the outset is that the acceptance of humanitarian intervention as legal should not be understood as derogating from the comprehensive all encompassing prohibition on use of force in Article 2(4) of the Charter, rather it should

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87 Supra note 53.

88 These are, however, very exceptional cases and their legality may depend ultimately on the outcome of the act of self-defence. The presence of one or more other community interest/s e.g., self-determination, humanitarian intervention, which warrant action by the defending State may give them greater legal sanctions.

89 Stowell defined humanitarian intervention "as the justifiable use of force for the purpose of protecting the inhabitants of another state from treatment so arbitrary and persistently abusive as to exceed the limits within which the sovereign is presumed to act with reason and justice", and asked, "why ... should the independence of a state be more sacred than the law which gives it that independence?" Stowell, E.C., International Law, London, 1931, at p. 349 and p. 351.

be regarded as an exception with well defined limits sufficient to confine it to "humanitarian" purposes as distinguished from "selfish aims." The categories with which we were concerned earlier will come into play here also, to wit, general international law and the regime established by the Charter, of which we are concerned mainly, of course, with the Charter. And the dilemma here is that the Charter speaks in complementary policies on the one hand of restricting unilateral use of force as an instrument of national policy and, on the other, of urging action for protection of human rights. Consequently, both interpretations are plausible on a major purposes rationale.[90] This inconclusiveness of the Charter warrants the study of the problem with reference to the general international law and the teachings of the publicists,[91] while their relative priority should not be overlooked.

The classical writers on the law of nations claimed humanitarian intervention to be legally valid,[92] and by the end of nineteenth century the majority of publicists admitted that a right of humanitarian intervention existed.[93] While determining its legality by the touchstone of the U.N. Charter there are several gradations of the problem. The foremost is whether the customary international law recognised a right to use armed forces in the territory of another state for humanitarian intervention, and if so whether that right survives the Charter. According to Professor Richard Lillich, the doctrine is "so clearly established under customary international law that only its limits and not its existence are subject to debate."[94] Professor Brownlie argued it is extremely doubtful if this form of intervention has survived the general prohibition of resort

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90 Moore, J.N., Law and the Indo-China War, New Jersey, 1972, at p.183.

91 According to Article 38 of the Statute of the I.C.J. the sources of international law include, *inter alia,* "the teachings of the most highly qualified publicists."

92 See e.g., Grotius, H., *De Jure Belli ac Pacis*, Bk II, Ch.XXV 8; Ch. XX 38, The Classics of International Law, No.3, London, 1923; Vattel, E., *Le Droit des gens*, Bk II Ch.IV, para 56, The Classics of International Law, Washington, 1916.

93 See e.g., Woolsey, T.D., International Law, 1860, at pp.111-112; Creasy, E.S., First Platform of International Law, London, 1876, at p.297; Westlake, J., International Law, Cambridge, 2nd ed., Vol.-I, 1910, at pp.319-320.

94 Lillich, R., "Intervention to Protect Human Rights" 8 (unpublished paper presented at a Regional Meeting of the American Society of International Law at Queen's University on November 22-23, 1968) quoted in Moore, J.N., *supra* note 90, at p.183.

to force to be found in the United Nations Charter.[95] Bowett, on the other hand, recognised the legality of humanitarian intervention.[96] Among jurists who have asserted the legality of humanitarian intervention the most eminent has been Sir Hersch Lauterpacht who opined that

> when a State renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible."[97]

His rationale for humanitarian intervention is that "ultimately, peace is more endangered by tyrannical contempt for human rights than by attempts to assert, through intervention, the sanctity of human personality."[98]

The unique thing about the Charter of the United Nations is that it has not expressly condemned humanitarian intervention,[99] and accordingly those who strive to deny the continued existence of this right cannot show it to be unambiguously illegal and have to rely on logical derivations as those who opt for such a right. Thus, inasmuch as the Charter is not responsive to humanitarian intervention one way of looking into the problem is to find out the position which has been accorded to human rights in the Charter. It has been urged that when construed together Article 55, providing for respect for human rights and Article 56, pledging all members "to take joint and separate action ... for the achievement of the purposes set forth in Article 55" reinforce the customary law right of humanitarian intervention.[100] There is no doubt that the Charter imposes on the Members of the United Nations legal

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95 Supra note 49, at p.342.

96 Supra note 70, at p.95.

97 Oppenheim, L., International Law, London, Vol.I 8th ed., 1955, edited by Lauterpacht, H., at p.312.

98 Lauterpacht, H., International Law and Human Rights, London, 1950, p.32.

99 Such is also the case with the League Covenant and the Kellogg-Briand Pact, neither of which has condemned humanitarian intervention.

100 See McDougal, M.S. and Reisman, W.M., "Response by Professors McDougal and Reisman," 3 (1969) International Lawyer, pp.438, 444. See also Reisman, W.M., "Criteria for the Lawful Use of Force in International Law," 10 (1984-85) Yale Journal of International Law, p. 281.

obligations in the human rights field.[101] The International Court of Justice on several occasions held that the human rights clauses of the U.N. Charter contain binding legal obligations.[102] The Court has also unambiguously accepted that the obligation to respect fundamental human rights is an obligation found in general international law,[103] and denied impunity for human rights violations.[104] However, the judgment of the Court in the *Nicaragua Case*[105] has been claimed to endorse the view that unilateral armed humanitarian intervention has no justification at law.[106] But the Court's opinion in the *Nicaragua Case* does not lay down the general position of international law, rather it stated in context of the military activities by the United States against Nicaragua that Nicaragua's human rights record does not apply in the case as a legal defence. The judgment should not be taken out from the context of U.S. military activities and the nature of human rights violation involved, having due regard to which the Court declined to entertain a defence on the ground of humanitarian intervention. But that does not rule out the legality of humanitarian intervention, if certain practices or actions, revolting when judged by generally accepted standards of morality and decency, continue to take place in a given state despite protests and objections, such that humanitarian considerations outweigh the prohibition of intervention and justify a decision to interfere. The Court did not say absolutely that in no case humanitarian intervention could be made, rather it confined itself in denying United States in the circumstances of the case a right of humanitarian intervention and articulated in very clear language that no state can "with impunity

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101 Singh, N., Enforcement of Human Rights in Peace & War and the Future of Humanity, Dordrecht, 1986, p.28, interpreting the opinion of the International Court of Justice in the *Namibia Case*, supra note 22.

102 See e.g., *Namibia Case,* supra note 22, para 131; *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran),* I.C.J. Reports 1980, p.3 para 91.

103 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion,* I.C.J. Reports 1951, p.15.

104 *Nicaragua Case,* supra note 50, para 267.

105 Supra note 50.

106 Rodley, N.S., "Human Rights and Humanitarian Intervention: The Case Law of the World Court," 38 (April 1989) International and Comparative Law Quarterly, at pp. 327-328.

violate human rights."[107] Again, one of the modalities of a genuine case of humanitarian intervention, as we will see, is the absence of selfish motives which (motives) were evidently present in the *Nicaragua Case*. Accordingly the true interpretation of the Court's opinion should be that the Court without any attempt to define the modality of humanitarian intervention held that the United States cannot claim such a right in regard to its military activities against Nicaragua. But this finding does not affect the scope of defining a modality of humanitarian intervention which will exclude the *Nicaragua Case*.

The general criticism levelled against humanitarian intervention is that its doubtful benefits would be heavily outweighed by its costs in terms of respect for international law, since it will be open to abuse.[108] But the commission of official atrocities, including what must be termed genocide coupled with the manifest inability of the United Nations to intervene by force once it has been determined that there has been an action involving atrocious behaviour by a government, especially if that action is deemed to represent a threat to or a breach of the peace, justifies action by any state which is prepared to intervene. Thus justification, no doubt, can be admitted in favour of interference, provided an absence of selfish aims could be demonstrated. In respect of state practice the reluctance of states that might have been expected to invoke it (India, in respect of Bangladesh;[109] Vietnam, in respect of Kampuchea; Tanzania, in respect of Uganda;[110] and the United States in respect of Grenada) to use humanitarian ends to justify their invasion of another state's territory and that humanitarian benefits are only put forward as an *ex post facto* justification of intervention are other grounds which, it is argued, project an uncertain basis of such a right. The reluctance of states to claim the right of humanitarian intervention is due principally to the cloud that has been cast on that right by the inconclusiveness of the Charter. But that does not affect the right as it

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107 Supra note 104.

108 See supra note 49, at p.338.

109 Infra notes 183 to 190 and accompanying texts.

110 It has been argued that humanitarian intervention was the only possible legal basis of Tanzania's invasion of Uganda: see e.g., Teson, Humanitarian Intervention, 1988, at pp. 169-175.

existed before 1945,[111] and in many occasions such a right has been claimed along with other justifications for an intervention. Thus, states did not claim such a right as a sole justification lest their appeal to the international community may prove to be in vain and preferred to put forward other justifications when they were available along with it, but there was always present in the mind of intervening states a firm belief that they have such a right. Hence establishing that the Charter did not abrogate the right will put humanitarian intervention on a solid footing. The *ex post facto* classifications are also due to like reasons and can be addressed likewise.

As we have seen, the U.N. Charter imposes upon the United Nations and its Members legal obligations to "promote" respect for and observance of human rights. Moore has identified "minimum human rights" as one of the interests at stake in intervention in the sense that there are strong community policies for their protection regardless of the majority sentiment within an entity.[112] International community through the Universal Declaration on Human Rights[113] and International Covenant on Civil and Political Rights[114] reaffirmed their pledge to protect these minimum human rights and set forth a number of human

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111 Humanitarian intervention has been carried out by Russia in Turkey on behalf of Bulgarian nationals in 1877; the United States in Cuba in 1898; the Great Powers in Turkey on behalf of Greece in 1827; France in Syria in 1860; the European Great Powers plus Japan in China in 1900.
In respect of pre-Charter era Stowell listed some specific and typical instances in which humanitarian intervention is found to be in conformity with state practice, such as, persecution, oppression, uncivilized warfare, injustice, suppression of the slave trade, economic slavery, favoured treatment for aliens and humanitarian regulation of foreign commerce. See Stowell, E.C., supra note 89, at pp. 353-375. Stowell, however, did not recognize the right of armed intervention for all these categories and also, under modern international law some of his categories have been absorbed by other branches of the law. He recognized right of armed intervention *inter alia,* for the two most important categories, persecution and oppression. The modality of intervention which he described as legal under the category of oppression is now an established legal right and is an independent exception to the general prohibition on use of force, viz., intervention to promote self-determination. In the final analysis his categories, persecution, uncivilized warfare and injustice are relevant till this day.

112 Supra note 90, at p. 163.

113 Supra note 38.

114 Supra note 27.

rights on which there is at least nominal international agreement, e.g., right to be free from discrimination on the basis of race or sex, rights to life, liberty and the security of the person, and rights to be free from slavery, torture or inhuman treatment. The Convention on the Prevention and Punishment of the Crime of Genocide,[115] in force since 1951, is one of the most specific and important guaranties of minimum human rights. Article 2 of the Convention defines genocide as:

> ...[A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; .....

The International Court of Justice in the *Reservations Case* observed, "the principles underlying the Convention are principles which are recognised by civilised nations as binding on States, even without any conventional obligation."[116] These and other community pronouncements about minimum human rights suggest that there is room within appropriate safeguards for retention of the customary international law right of humanitarian intervention. Moore's criteria of minimum human rights can also serve as a modality for justifiable humanitarian intervention.

Two different modalities for humanitarian intervention can be laid down — one in the pre-insurgency situation and the other for determining legitimacy of interventions which go beyond pre-insurgency assistance. In the absence of insurgency, of course, if a widely recognised government requests foreign assistance for the protection of human rights, such assistance should be permissible just as is other pre-insurgency assistance.[117] Although an invitation to use forcible self-help may be important in reducing the coercion necessary to effectuate the protection of human rights, it does not seem necessary as a *sine qua non*

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115 UGA, Off. Rec. 3rd Sess., Resol. 174 (A/180) (1948) text reprinted in 45 (1951) American Journal of International Law , Supp., pp.7-10.

116 Supra note 103, at p. 23.

117 e.g., the 1964 intervention in the Congo by Belgium, with U.S. and U.K. logistical assistance, after 30 or more European and other aliens had been killed by revolutionaries and many others held hostage were at risk, by which 2000 people of many nationalities were evacuated by Belgian paratroopers with the consent of the Congolese Government.

for humanitarian intervention. The Dominican operation is an example of a situation in which such an invitation did not seem particularly meaningful. Biafra may have been another. The recognition of intervention which go beyond pre-insurgency assistance[118] would seem to encourage at least a minimum level of respect for fundamental human rights. When widespread loss of human life is at stake because of arbitrary action, it would seem mere sophistry to argue that community policies or legalities prevent effective action. Other factors suggesting preservation of some unilateral interventionary competence, even beyond pre-insurgency assistance, are the present lack of international machinery for the enforcement of human rights and the necessity to take quick decisive action in what is usually a crisis situation: international organisations are simply not able to respond with the same dispatch as individual states.[119] Professor Richard Lillich has suggested five useful criteria for judging the permissibility of interventions for the protection of human rights. They are: (1) the immediacy of violation of human rights, (2) the extent of violation of human rights, (3) an invitation from appropriate authorities to use forcible self-help, (4) the degree of coercive measures employed, and (5) the relative disinterestedness of the intervening state.[120] Moore puts forward five criteria for determining legality of interventions which go beyond pre-insurgency assistance, which are: (1) an immediate and extensive threat to fundamental human rights, particularly a threat of widespread loss of human life; (2) a proportional use of force which does not threaten greater destruction of values than the human rights at stake; (3) a minimal effect on authority structures; (4) a prompt disengagement, consistent with the purpose of the action; and (5) immediate full reporting to the Security Council and appropriate regional organisations.[121] Thus, during insurgency the

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118 e.g., Tanzania's invasion of Uganda. After Uganda had illegally occupied a part of Tanzania by armed force, Tanzania used armed force to eject the Ugandan troops and continued on into Uganda. Together with Ugandan rebels, Tanzanian forces defeated President Amin's forces, causing President Amin to flee and the replacement of his government, which had been responsible for atrocious human rights violations, with an estimated 300,000 deaths. See also Teson, supra note 110.

119 Supra note 90, at p. 185.

120 See Lillich, R., "Forcible Self-Help by States to Protect Human Rights," 53 (1967) Iowa Law Review, pp.347-351.

121 Supra note 90, at p.186.

requirement of "invitation" suggested by Lillich can be excluded. Moore's criteria can serve as a modality which will not conflict with the dicta of the International Court of Justice in the *Nicaragua Case*, and are responsive to the major community policies at stake in any intervention situation.

To conclude this section, accepting Moore's criteria a modality for justifiable humanitarian intervention can be suggested when a state abuses its sovereignty by large scale violation of fundamental human rights,[122] e.g., widespread loss of human life, to warrant action on behalf of oppressed nationals of another state.

THE CORRELATION BETWEEN USE OF FORCE AND SELF-DETERMINATION

This part of the paper will be directed towards an examination of our foremost question, "Which will prevail if there is a conflict between right to self-determination and respect for territorial integrity?" Use of force takes many forms here, e.g., by "the people" in assertion of their right or in "self-defence", by the alien regime denying self-determination and by third states in aid of "the people" or of the alien regime. Our purpose is to find out the legal sanctions attaching to each of them. The earlier discussion established it clearly that the right to self-determination is a positive rule of law and as such an exception to Article 2(4) is needed in the case of national liberation movements against colonial or racist regimes. Professor Reisman accepted such an exception.[123] The consensus of the international community that self-determination is a legal right comes from the fact that it has gained recognition in numerous international instruments.[124] In fact the current

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122 In Moore's terminology minimum human rights. See supra note 112.

123 Reisman, W.M., supra note 100, at p.280. However, Professor Reisman has gone too far and amongst the nine situations put forward by him, in which, according to him, a State is justified in using military force and covert activities unilaterally only self-defence, self-determination and decolonization, humanitarian intervention and enforcement of international judgments should be accepted.

124 In this regard in addition to what has already been said, Chapter I of the Charter of Economic Rights and Duties of States, U.N.G.A. Res.3281(XXIX) 29 U.N. GAOR Supp. (No.31) 50, U.N.Doc. A/9631 (1975); Article 7 of the Resolution on the Definition of Aggression, U.N.G.A. Res. 3314 (XXIX) 29 U.N. GAOR, Supp.(No.31)142, U.N. Doc. A/9631(1975) and Article 4(a) of the Declaration on the Establishment of a New International Economic Order, U.N.G.A. Res. 3201

international consensus is that the right of self-determination has become a peremptory norm of international law or *jus cogens*.[125]

The formulation of the Declaration on Friendly Relations is based on a recognition of the correlation between the permissibility of resort to force and self-determination. The seventh paragraph of the elaboration of the first principle that, states 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, states:

> Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.[126]

Thus prohibition on the use of force as provided in Article 2(4) of the Charter extends not only to use of force (1) against the territorial integrity and political independence of another state, but also (2) against a people entitled to self-determination. It should be emphasised that this prohibition against use of force against peoples is part of the principle that prohibits use of force in international relations. Two highly significant conclusions follow from this: (i) a movement for self-determination of peoples under colonial, racist or alien rule and the use of force against them belong to the sphere of international relations and not to the sphere of internal affairs and (ii) the prohibition of the threat or use of force against a state's territorial integrity or political independence is inapplicable to outside assistance sought by peoples struggling for self-determination against the colonial, racist or foreign

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(S-VI), 6(Special) U.N. GAOR, Supp. (No.1) 3 U.N. Doc. A/9559 (1974); can be cited.

Professor Rosalyn Higgins is of the view that to insist upon the argument that the U.N. resolutions are not binding and thus self-determination remains a mere principle is to "fail to give any weight either to the doctrine of *bona fides* or to the practice of states as revealed by unanimous and consistent behaviour." Higgins, R., The Development of International Law through the Political Organs of the United Nations, London, 1963, at pp.101-102.

125 See supra note 25. See also Espiell, H.G., "Self-Determination and Jus Cogens," in Cassese, A. (ed.), UN Law/Fundamental Rights: Two Topics in International Law, The Netherlands, 1979, at p.170.

126 Supra note 31.

authorities that have resorted to forcible action against them.[127] According to Professor Brownlie one of the corollaries of the principle of self-determination is that intervention against a liberation movement may be unlawful and assistance to the movement may be lawful.[128] The most significant aspect of the duty of a state, and of the rights of self-determination of peoples is stated in the Declaration on Friendly Relations as follows:

> Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination *such peoples are entitled to seek and to receive support* in accordance with the purposes and principles of the Charter.[129] [*italics* added]
>
> And
>
> Nothing in the foregoing paragraphs shall be construed as authorising 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.[130] [*italics* added]

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127 Hussain, S.M., "International Law of Use of Force and Self-Defense," 7 (Winter 1984) Law and International Affairs, p.40.

128 Brownlie, I., Principles of Public International Law, Oxford, 4th ed., 1990, at p.598.

129 Supra note 31. Operative paragraph 5 of the principle of self-determination. Article 7 of the Resolution on the Definition of Aggression provides:

Nothing in this Definition, and in particular Article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and recist regimes or other forms of alien domination; nor the *right of these peoples to struggle to that end and to seek and receive support,* in accordance with the principles of the Charter and in conformity with the above mentioned Declaration. [*ialics* added]

Supra note 124.

130 Supra note 31. Operative paragraph 7 of the principle of self-determination.

This is the clearest formulation of the correlation between self determination and use of force; between self-determination and territorial integrity and political independence of states; and between self-determination and self-defence. Only that state which conducts itself "in compliance with the principle of equal rights and self-determination of peoples" and, in consequence, has a government "representing the whole people belonging to the territory without distinction as to race, creed or colour" is entitled to the protection of the territorial integrity provision. The area of prohibition of the use of force has been expanded: use of force is impermissible not only against a state but also against a people entitled to self-determination. The area of self-defence is likewise expanded: the right of self-defence is available not only to a state so recognised but also to a people under colonial, racist or alien rule who are asserting their right of self-determination.

One practical problem about self-determination as a touchstone of permissibility of use of force is that it may cut for as well as against outside intervention in an internal arena and it may cut for or against assistance to either insurgents or *de facto* government.[131] In the colonial war in Algeria in 1960, and in the liberation war in Bangladesh (the then East Pakistan) in 1971, self-determination may have been served by assistance to insurgents and secessionists, whereas in Congo in 1961, in Greece in 1948, in Kenya, Uganda and Tanganyika in 1964 self-determination may have been better served by assistance to the government. According to one simplistic version of self-determination, states should be left alone in all circumstances to workout their own form of government.[132] If aid to the recognised government were legitimate then it would impair the right to revolution, and if aid to the insurgents were legitimate it would violate independence by interfering with the regular organ of the state. Such simplistic deductive notions ignore the reality that to-day ruthless governments can suppress their peoples; thus it seems to adopt a kind of Darwinian definition of self-determination as survival of the fittest within the national boundaries, even if fittest means most adept in the use of force.[133] The question, of

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131 Supra note 90, at p.441.

132 See e.g., Hall, W.E., International Law, Oxford, 7th ed., 1917, at p.302; Hall, W.E., International Law, Oxford, 8th ed., 1924, at p.347.

133 Supra note 90, at p.441.

course, is a different manner of asking whether the right of self-determination should be sacrificed to the *status quo*.

It is now accepted that self-determination should not be sacrificed to the *status quo*. The United Nations has indicated the same in the revolutionary situations in Algeria, Hungary, Rhodesia, South Africa, South-West Africa, and the Portuguese colonies. On the political plane history teaches that self-determination, whether denied by external or internal coercion, is sometimes attainable only through revolution, there is nothing therefore in the principle of self-determination which excludes revolutionary changes. On the legal plane, international law as it stands now provides clearly that when the two community polices of maintenance of territorial integrity and promotion of self-determination are in conflict in a particular situation, the latter is to prevail.[134] Thus it avoids both the postulates of Darwinian definition and the maintenance of *status quo*. If Darwinist categories of selection and survival of the fittest are not accepted the essential difficulty to which decision makers are leaded in any conflict situation is to identify the entity, people/insurgents or government assisting whom would serve the interest of self-determination. In some cases the situation may be clear enough or the community consensus strong enough for General Assembly resolution. And whether an accurate reflection of self-determination or not, at least such General Assembly resolutions are an authoritative community decision. The United Nations has authorised individual use of force in Southern Rhodesia, South Africa, South-West Africa and Portuguese colonies.[135] Whether or not the Rhodesian, South

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[134] See in this regard supra notes 124, 126, 129 and 130 and accompanying texts.

[135] The Southern Rhodesian resolution of November 7, 1968 authorized individual use of force on behalf of insurgents fighting against colonial or discriminatory regimes as follows, by urging:

all States, as a matter of urgency, to render all moral and material assistance to the national liberation movements of Zimbabwe [Southern Rhodesia], either directly or through the Organization of African unity ...G.A. Res. 2385, 23 U.N. GAOR Supp. 18 at 58 U.N. Doc. A/7218 (1968) (Article 14) A 1967. Southern Rhodesian resolution contained an identical provision. See G.A. Res. 2262 22 U.N. GAOR Supp. 16 at 45-47 U.N. Doc. A/6716 (1967) (Article 16). And the South African resolution of December 13, 1967 provides:

The General Assembly.....

African and similar resolutions could be successfully implemented, they do represent an important community determination that self-determination is denied sufficiently to justify resort to force. In the absence of such community determinations this question can be answered by reference to the test of "people" or "self" discussed above.[136] Accordingly a people entitled to self-determination have a right to use force in assertion of their right to self-determination and in self-defence, while use of force against a "people" to deprive them of their right of self-determination is absolutely prohibited. Finally a state can assist "a people" entitled to self-determination in their struggle against an alien regime without any violation of international law.

LEGAL ASPECTS OF INDIAN INTERVENTION

The aim of the present part of this paper is to identify the major community interests which were at stake during the crisis period (26th March, 1971 to 16 December, 1971) in the light of our earlier discussion. Several elementary concerns, however, do not require identification inasmuch as they were self-evident, e.g., it was pleaded *ad nauseam* that the "East Pakistan" case was essentially an internal matter; therefore, any outside initiative to resolve the issue would run counter to the spirit of the Charter, the world community judged the case in a different way. The crisis became serious enough to threaten international

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8. Appeals to all States and organizations to provide appropriate moral, political and material assistance to the people of South Africa in their legitimate struggle for the rights recognized in the Charter ...
G.A. Res. 2307, 22 U.N. GAOR, Supp. 16 at 19-20 U.N. Doc.A/6716 (1967). The 1968 Report of the Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa removes any doubt that this language is a call for military assistance to insurgents in South Africa (or for external initiation of insurgency). In referring to this provision the Committee reported:
The Special Committee takes note of the view of the liberation movement of South Africa that the policies and actions of the South African Government have obliged it to seek the achievement of the legitimate rights of the people by means including an armed struggle.
Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa, Report, 23 U.N. GAOR, Agenda Item No.31, at 31, U.N. Doc., A/7254 (1968).

136 See supra notes 42 to 46 and accompanying texts.

peace and security and *ipso facto* ceased to be essentially domestic.[137] Given the fact that the issue was one for international community, the practical problem was to organise the basic interests (these are, territorial integrity and political independence, non-intervention, right to self-determination, self-defence and humanitarian intervention) in an order of relative priority.[138] Inasmuch as right to self-determination justifies use

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137 The Secretary General, for example, referred to the "dual responsibility of the United Nations ... to observe provisions of article 2, paragraph 7 and to work within the framework of international economic and social co-operation to help promote and ensure human well-being and humanitarian principles" and expressed concern about the possible consequence of the situation "as a potential threat to peace and security." U Thant's Memorandum to the President of the Security Council, July 19, 1971 U.N. Doc., reprinted in Rahman, H.H. (ed.), supra note 3, at p. 811 and p. 812. See also U.N. Secretary General's Introduction to the Annual Report on the Work of the U.N. Organisation Relating to the Situation in East Bengal, September 17, 1971 U.N. Doc., extracts reprinted ibid., at p.814.

138 It is to be noted that threat to international peace and security first made the issue one of international concern and, there was consensus among international community in this regard. See e.g., Draft Resolution by U.S.A. in the Security Council, S/10416, December 4, 1971 U.N. Doc., reprinted ibid., at p. 834; Draft Resolution by Belgium Italy and Japan in the Security Council, S/10417, December 4, 1971 U.N. Doc., reprinted ibid., at p.834; Draft Resolution by Argentina, Nicaragua, Sierra Leone and Somalia in the Security Council, S/10419, December 4, 1971 U.N. Doc., reprinted *ibid.,* p.835; Draft Resolution by Argentina, Belgium, Burundi, Italy, Japan, Nicaragua, Sierra Leone and Somalia in the Security Council, S/10423, December 5, 1971 U.N. Doc., reprinted ibid., at p.836; Draft Resolution by Belgium, Italy, Japan, Nicaragua, Sierra Leone and Tunisia in the Security Council, S/10425, December 5, 1971 U.N. Doc., reprinted ibid.,at p.838; Draft Resolution by the U.S.A. in the Security Council, S/10446, December 12, 1971 U.N. Doc., reprinted ibid., at p.857; Revised Draft Resolution by the U.S.A. in the Security Council, S/10446/Rev.1, December 13,1971, reprinted *ibid.*, p.858; Draft Resolution by Italy and Japan in the Security Council, S/10451/Rev. 1, December 13, 1971 U.N. Doc., reprinted ibid., at p.859; Draft Resolution by Poland in the Security Council, S/10453, December 14, 1971 U.N. Doc., reprinted ibid., at p.861; Revised Draft Resolution by Poland in the Security Council, S 10453/Rev.1, December 15, 1971 U.N. Doc., reprinted *ibid., at* p.862; Draft Resolution by France and the U.K. in the Security Council, S/10455, December 15, 1971 U.N. Doc., reprinted ibid., at p.863; Draft Resolution by Syria in the Security Council, S/10456, December 15, 1971 U.N. Doc., reprinted ibid., at p.864; Draft Resolution by the U.S.S.R. in the Security Council, S/10457, December 15, 1971 U.N. Doc., reprinted ibid.,at p.864; Draft Resolution by Japan and the U.S.A. in the Security Council,

of force by and on behalf of "a people" to begin with, it can be examined whether East Bengalis were "a people" to claim self-determination.

Devoid of any universal criterion the prime concern no doubt is the will of the people;[139] and many statements about the same can be found, of which, one though made at a later time is almost a classic:

> The nation in Bangladesh is a nation because it intends to be a nation and nothing else. Enumeration of all that is peculiar to itself or all that it shares with a lot of other people, dead cargo or live heritage, would not explain or explain away the nation. The unbending pride the shared identity with 80 million people on weal and in woe, the insistence on being a Bengali and nothing else this is what makes the nation.[140]

Apart from what has already been said the list of criteria put forward by the International Commission of Jurists for identifying "a people" in relation to the events in East Pakistan as follows, can be accepted as the most comprehensive:

(1) a common history;
(2) racial or ethnic ties;

S/10450, December 16, 1971 U.N. Doc., reprinted ibid., at p.865; Revised Draft Resolution by Japan and the U.S.A. in the Security Council, S/10459/Rev.1, December 16, 1971 U.N. Doc., reprinted ibid., at p.866; Draft Resolution by Argentina, Burundi, Cameroon, Ghana, Honduras, Indonesia, Italy, Japan, Nicaragua, Sierra Leone, Somalia, Spain, Sudan and Tunisia in the General Assembly, A/L 647, December 7, 1971 U.N. Doc., reprinted ibid., at p.841; Revised Draft Resolution by Algeria, Argentina, Brazil, Burundi, Cameroon, Chand, Colombia, Costa Rica, Ecuador, Ghana, Guatemala, Haiti, Honduras, Indonesia, Italy, Ivory Coast, Japan, Jordan, Liberia, Libyan Arab Republic, Morocco, Netherlands, Nicaragua, Panama, Paraguay, Sierra Leone, Somalia, Spain, Sudan, Tunisia, Uruguay, Yemen, Zaire and Zambia in the General Assembly, A/L 647/Rev.1, December 7, 1971 U.N. Doc., reprinted ibid.,at p.842 and the Resolution Adopted by the General Assembly, A/Res./2793 (XXVI) December 7, 1971 U.N. Doc., reprinted ibid., at p.844.

Despite consensus regarding immediate threat to international peace and security what prevented the Security Council from taking any action even when full scale war has broken out between India and Pakistan after December 3, 1971 was lack of unanimity in organizing the major community policies in an order of relative priority.

139 See in this regard supra notes 42 to 46 and accompanying texts.

140 Razzaq, A., Bangladesh: State of the Nation, Dhaka, 1981, p.4. For a brief account of the differences between East and West Pakistan see Ahmed, M., Bangladesh: Constitutional Quest for Autonomy 1950-1971, Dhaka, 1979, at pp. 260-262.

(3) cultural or linguistic ties;
(4) religious or ideological ties;
(5) a common territory or geographical location;
(6) a common economic base; and
(7) a sufficient number of people.[141]

No matter what test, even the most restrictive,[142] we adopt the population of East Pakistan constituted "a people" for purposes of self-determination. In the absence of community determinations there has been strong support within the United Nations to adopt plebiscite "as a regular international instrument" for ascertaining self-determination,[143] and the elections of December 1970 in this regard can serve as the basis.[144] This fact was recognised in the Amendment by the U.S.S.R. to

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141 Secretariat of the International Commission of Jurists, The Events in East Pakistan, 1972, at p.70.

142 See in this regard *supra* note 46 and accompanying text. Cf. Statement of Mr. Mahmud Ali (Pakistan) in the U.N. General Assembly, "the people of East Pakistan ... are in a majority ... A majority has, or can acquire, the power to right wrongs and to correct imbalances. It is unthinkable for a majority to want to secede. By definition, a demand for secession is a minority's demand." October 5, 1971 U.N. Doc., extracts reprinted in Rahman, H.H. (ed.), supra note 3, at p.883 at p.887.

143 Johnson, H.S., Self-determination within the Community of Nations, Leyden, 1967, at p.64.

144 In the election Awami League, headed by Sheikh Mujibur Rahman obtained an absolute majority of the seats in the National Assembly --- 167 seats out of a total House of 313 and if only East Pakistan is considered it had won 167 seats out of 169. In the Provincial Assembly Awami League had won 298 seats out of 310. Thus the party could claim to represent the entire people of East Pakistan and also the majority population of the entire Pakistan. In other words, the Awami League having won the majority both in the National and Provincial Assemblies and having been deprived by the West Pakistan authorities from fulfilling their commitment, acquired a legal right to assemble and exercise the right of self-determination for and on behalf of their people which they eventually did by the Proclamation of Independence, the 10th and 13th paragraphs of which read as follows:

We the elected representatives of the people of Bangladesh, as honour bound by the mandate given to us by the people of Bangladesh whose will is supreme duly constitute ourselves into a Constituent Assembly, and

.....

declare and constitute Bangladesh to be a sovereign People's Republic ...

Draft Resolution S/10425 in the Security Council,[145] when it required the "immediate recognition" of "the Will of the East Pakistan population as expressed in the elections of December 1970." Without determining priority "conflict between principles of the territorial integrity of States and of self-determination" has been recognised by Secretary General U Thant.[146] For India, at first she seemed to be interested in some form of a federal political settlement between East and West Pakistan, but gradually her policy favoured a full fledged sovereign Bangladesh and in order to create pressure on Pakistan to attain this aim, India trained and gave arms to the Bengali guerrillas to fight the Pakistani forces.[147] In support of her action India always quoted self-determination along with other grounds.[148] Pakistan, as is obvious was critical of self-

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Mujibnagar, Bangladesh; Dated 10th day of April, 1971, reprinted in Ahmed, M., Bangladesh: Era of Sheikh Mujibur Rahman, Dhaka, 1991, at p.321 (Appendix A) at p.322.

For a brief account of the elections of 1970-71 see Ahmed, M., supra note 140, at pp.201-204.

145 S/10426, December 6, 1971 U.N. Doc., reprinted in Rahman, H.H. (ed.), supra note 3, p.838. See also, Revised Amendment by the U.S.S.R. to Draft Resolution S/10425 in the Security Council, S/10426, Rev.1, December 6, 1971 U.N. Doc., reprinted ibid., at p.839; Draft Resolution by the U.S.S.R. in the Security Council, S/10428, December 6, 1971 U.N. Doc., reprinted ibid., at p.839; Draft Resolution by the U.S.S.R. in the General Assembly, A/L 648, December 7, 1971 U.N. Doc., reprinted ibid., at p.843; Draft Resolution by Poland in the Security Council, S/10453, December 14, 1971 U.N. Doc., reprinted ibid., at p.861; Revised Draft Resolution by Poland in the Security Council, S/10453/Rev.1, December 15, 1971 U.N. Doc., reprinted ibid., at p.862; Draft Resolution by France and the U.K. in the Security Council, S/10455, December 15, 1971 U.N. Doc., reprinted ibid., at p.863; Draft Resolution by the U.S.S.R. in the Security Council, S/10457, December 15, 1971 U.N. Doc., reprinted ibid., at p.864.

146 U Thant's Memorandum to the President of the Security Council, *supra* note 137, at p.812 and U.N. Secretary General's Introduction to the Annual Report on the Work of the U.N. Organisation Relating to the Situation in East Bengal, supra note 137, at p.815.

147 Note in this regard the successful general offensive by guerrilla forces in November, 1971.

148 See e.g., India's reply to U.N. Secretary-General's Aide Memoire, Delivered on August 2, 1971 which says *inter alia*, "The conflict between the principles of territorial integrity of States and self-determination is particularly relevant in the situation prevailing in East Pakistan where the majority of the population is being suppressed by a minority military regime which ... had launched a campaign of massacre, genocide and cultural suppression of an ethnic group, comprising 75 million people." U.N. Doc., reprinted in Rahman, H.H. (ed.), supra note 3, at

determination,[149] and characterised the same as interference in internal affairs. But India refused to "make a mockery of self-determination."[150]

As we have seen self-determination is such an elementary regulatory principle in modern international law that it cannot be subordinated to the stability of state structure and where the demands for self-determination and human rights are suppressed by the use of force by dictatorial regimes, the claim for "internal self-determination", even in the strictest sense transforms into a right of secession, which ultimately will ensure both the external and internal self-determination. Self-determination in this sense is a continuing right even in the non-colonial context.[151] Thus the declaration of independence made by Bangabandhu Sheikh Mujibur Rahman at Dhaka on March 26, 1971 was a lawful exercise and "due fulfilment of the legitimate right of self-determination of the people of Bangladesh."[152] This declaration was subsequently confirmed by the Proclamation of Independence, [153] which

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p.761; Statement by Mr. Samar Sen, Representative of India in the Security Council --- "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 applied those criteria to East Bengal, and if we had a little morality we could declare East Pakistan a non-self-governing territory." December 4, 1971 U.N. Doc., reprinted *ibid.,* p.916 at p.922; Letter from the Permanent Representative of India to the U.N., to the Secretary General of the U.N. --- "International Law recognizes that where a mother-State has irrevocably lost allegiance of such a large section of its people as represented by Bangladesh and cannot bring them under its sway, conditions for the separate existence of such a State comes into being. It is India's assessment that this is precisely what has happened in Bangladesh. The overwhelming majority of the elected representatives of Bangladesh have irrevocably declared themselves in favour of separation from the mother-State of Pakistan and have set up a new State of Bangladesh. India has recognized this new State." A/8580, S/10445, December 12, 1971 U.N. Doc., reprinted ibid.,at p.852 at pp.854-855.

149 See e.g., Statement by Mr. Mahmud Ali (Pakistan) in the U.N. General Assembly — "Is it to be said that secession is rebellion at home but self-determination abroad?" September 27, 1971 U.N. Doc., reprinted ibid., at p.875 and p.882.

150 Statement by Mr. S. Sen Permanent Representative of India to the U.N. in the U.N. General Assembly (In exercise of his right to reply to Pakistani statement) October 5, 1971 U.N. Doc., reprinted ibid., at p.890 at p.891.

151 In this regard see *supra* notes 36 to 41 and accompanying texts.

152 Proclamation of Independence, *supra* note 144, paragraph 6 at p.321.

153 As to the legality of such a Proclamation drawn by one single political party see Ahmed, M., 1991, *supra* note 144, pp.5-7. See also, supra note 144.

took effect retrospectively from March 26, 1971[154] and whereby the people of Bangladesh through their elected representatives undertook "to observe and give effect to all duties and obligations ... as a member of the family of nations and to abide by the Charter of the United Nations"[155] and acquired the inherent right of self-defence "to defend the honour and integrity of Bangladesh."[156] But before the complete consolidation of her structure till December 16, 1971, assertion of the right of external self-determination was more imperative than defending integrity, which, however, became more relevant with the consolidation of the authority structure in the self-determination unit and the full fledged inherent right came into being with the establishment of a new *de facto* authority in Dhaka after December 16, 1971. In any case the use of force by the Mukti Bahini is justifiable as lawful expression of three modalities — self-defence, self-determination and protection of human rights.[157] Indian assessment of the situation in East Pakistan during the crisis period recognised this right of the people to use force and further recognised their right to receive assistance.[158] Jacob Malik, representative of the U.S.S.R. said in the Security Council:

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154 Proclamation of Independence, supra note 144, Paragraph 23 at p.323.

155 Proclamation of Independence, ibid., Paragraph 22 at p.323.

156 Supra note 152.

157 See e.g., Universal Declaration of Human Rights, which in the Preamble provides *inter alia:*

Whereas it is essential, if man is not to be compelled to have recourse, *as a last resort, to rebellion* against tyranny and oppression, that human rights should be protected by the rule of law. [*italics* added]

Supra note 38. See also Article 28 of the Algiers Declaration which states:

Any people whose fundamental rights are seriously disregarded has the right to enforce them, ... in the last resort, by the use of force.

Universal Declaration of the Rights of Peoples, adopted by the participants in an international conference of jurists, politicians, sociologists, and economists in Algiers, July 1-4, 1976. Reprinted in 3 (1977) Alternatives — A Journal of World Policy, p.280.

158 See e.g., Statement by Prime Minister Shrimati Indira Gandhi in the Lok Sabha regarding recognition of Bangladesh — The people of Bangladesh "were caught unawares and overtaken by a brutal military assault. They had no alternative but to declare for independence. The East Pakistan Rifles and East Bengal Regiment became the Mukti Fauj and later the Mukti Bahini, which was joined by thousands of young East Bengalies, determined to sacrifice their lives for freedom." December 6, 1971, reprinted in Rahman, H.H. (ed.), supra note 3, Vol.12, at p.960. See also Statement by Mr. Samar Sen Representative of India in

> The military conflict in that region is the direct consequence of a series of acts of oppression, mass repression and violence conducted over a number of months with the use of the most modern forms of weapons and arms with a view to suppressing the clearly expressed Will of 75 million East Pakistani. *The people of East Pakistan was obliged to respond to this and rebuff it by means of armed resistance.* [159] [*italics* added]

For international community the case was of determining priority,[160] and since internal self-determination was undermined to such an extent by the unjustified use of force, that internal self-determination gave way to external right of self-determination, the community of states had hardly any other choice but intervention.[161] Indian assessment of the crisis in East Pakistan was in line with this premise both before and after December 3, 1971, from which date the scenario was fundamentally changed. On December, 3 West Pakistan anticipating the inevitable break with the East Pakistan and in an attempt to internationalise the issue, made air attacks on seven important air bases in India.[162] This entitled India to act in self-defence even in the strictest "armed attack-self-defence" sense. Pakistan, however, characterised its actions of December 3 as "defensive measures."[163] The encapsulation of the inherent right of individual and collective self-defence was wonderfully expressed by Prime Minister Shrimati Indira Gandhi as follows:

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the Security Council — "So long as we have any light of civilized behaviour left in us, we shall protect them [the East Pakistani people]. We shall not fight their battle. Nobody can fight other people's battles. There are great powers seated around this table that have found out to their own cost that people cannot fight other peoples, battles, that they have to fight them themselves. But whatever help we can give ... we shall continue to give it." December 4, 1971 U.N. Doc., reprinted ibid., Vol.13, at p.916 and p.921.

159 Statement by Mr. Jacob Malik, Representative of the U.S.S.R. in the Security Council, December 6, 1971 U.N. Doc., reprinted ibid., at p.940.

160 In this regard as to what prevented the Security Council from taking any action see supra note 138.

161 Oeter, S., "The Right of Self-determination in Transition", in 49/50 (1994) Law and State, p.147 at p.171.

162 Islam, R., *Lakhya Praner Binimoye* [translated in Bangla from 'A Tale of Millions'], Dhaka, 1989, pp.267-268; Ahmed, F., Critical Times, Memoirs of a South Asian Diplomat, Dhaka, 1994, at pp.63, 65.

163 See Report of U.N. Secretary General to the Security Council, S/10410/Add.1, December 4, 1971 U.N. Doc., reprinted in Rahman, H.H. (ed.), supra note 3, at p.832.

> Now that Pakistan is waging war against India, the normal hesitation on our part not to do anything ... which might be construed as intervention, has lost significance. The people of Bangladesh battling for their very existence and the people of India fighting to defeat aggression now find themselves partisans in the same cause.[164]

In the Security Council U.S.A.[165] and China[166] charged India with aggression. However, the lack of unanimity regarding basic interests prevented the Security Council from acting. The U.S.S.R. emphasised "a political settlement in East Pakistan that would take into account the Will and inalienable rights and lawful interests of its population", who are "trying to defend their rights and human dignity, most elementary rights that are denied to them."[167] In its view the only correct course which the Security Council could follow was the adoption of a decision in which both questions — the question of the cease-fire and the question of the recognition by Pakistan of the expressed Will of the East Pakistan population — could be organically and inseparably bound together.[168] This was in line with Indian assessment of the community interests and the U.S.S.R. provided the psychological and political help to India at the Security Council by blocking every efforts for cease fire without effective self-determination of East Pakistan until India had won decisively in East Bangal which ultimately resulted in the achievement

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164 Statement by Prime Minister Shrimati Indira Gandhi in the Lok Sabha regarding recognition of Bangladesh, December 6, 1971, reprinted ibid., Vol.12 at p.960 at p.961. See also Statement by Samar Sen, Representative of India in the Security Council, --- "we shall continue to save our own national security and sovereignty ... nothing will stop us from protecting our own territory, integrity and sovereignty", December 4, 1971 U.N. Doc., reprinted ibid., Vol.13, at p.916 at p.921; Letter from the Permanent Representative of India to the U.N., to the Secretary General of the U.N.--- "India, which is exercising the inherent right of self-defence cannot be equated with Pakistan. India ... is engaged in defending its national sovereignty and territorial integrity in the exercise of its legitimate right of self-defence." A/8580, S/10445, December 12, 1971 U.N. Doc., reprinted ibid.,at p.852 at p.854; and Statement by Mr. Samar Sen, Representative of India in the Security Council, December 6, 1971 U.N. Doc., reprinted ibid., at p.944.

165 See Statement by George Bush, supra note 3.

166 See Statement by Huang Hua, *supra* note 4.

167 Statement by Mr. Jacob Malik, Representative of the U.S.S.R. in the Security Council, December 4, 1971 U.N.Doc., reprinted in Rahman, H.H. (ed.), *supra* note 3, p.930 at pp.936, 935.

168 Statement by Jacob Malik, *supra* note 159, at p.941.

International community, which has "seldom been confronted with a refugee problem of such enormous dimension as that of the refugees from East Pakistan in India," [175] expressed their concern, "at the heavy burden imposed on India and the disturbing influence of the general situation on the process of economic and social development in the area."[176] Secretary General U Thant in his Memorandum to the President of the Security Council indicated, "Indian Government still faces the appalling and disruptive problem of caring for an unforeseeable period of time for millions of refugees whose number is still increasing."[177] The U.S.S.R. characterised the refugee problem as a "calamity"[178] and expressed the view that India became the victim of the internal crisis of Pakistan.[179]

In the last analysis the refugee problem brings us to the question whether economic interest can be defended by use of force.[180] Bowett thought in "most exceptional circumstances" it can be.[181] But then the

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(ed.), *supra* note 3, p. 892 at pp.893-895. Regarding the magnitude of the problem see Statement of Foreign Minister Sardar Swaran Singh in the U.N. General Assembly --- "It has been impossible to make any firm estimate of what it would cost us in the coming months, but on the basis of the present figure the total cost may well be more than $800 million by the end of next month ... We are facing grave social, economic and political consequences." September 27, 1971 U.N. Doc., extracts reprinted ibid., at p.871 and at pp.871-872; cf. Statement by Mahmud Ali, supra note 149, at pp.877-878.

175 U.N. Resolution unanimously adopted by the Third Committee of the U.N. General Assembly, November 22, 1971 U.N. Doc., reprinted in Rahman, H.H. (ed.), *supra* note 3, p.805.

176 Resolution Adopted by the U.N. General Assembly on the Report of the Third Committee, December 6, 1971 U.N. Doc., reprinted *ibid*., p.806. Pakistan also acknowledged the "truly international nature" of the refugee problem — See Statement by Aga Shahi, supra note 171, at p.910.

177 *Supra* note 137, at p.811.

178 "Let each one of us visualise the position of India onto the territory of which has come this flood of foreigners — 10 million people. Ten million people are a whole State ... A whole State, in fact, was — transferred ... It is a calamity ... even Hitler's aggression did not bring about such a sudden translation of millions of people ... It has created a certain serious tension in the social, economic and political life of India." — Statement by Jacob Malik, *supra* note 167, at pp. 932-934.

179 Ibid., at p.932.

180 In this regard see supra note 88 and accompanying texts.

181 Supra note 70, at pp.106 et. seq. See also, supra notes 71 and 72.

questions, "What are these 'most exceptional circumstances'?" And "Was the refugee problem one 'of the most exceptional circumstances?" remain to be answered. Undoubtedly Pakistani atrocities resulting in the exodus of East Pakistan people to India was an interference in India's internal affairs, but as to the question whether it justified use of force we leave it at that.

The unique thing about the conflict situation in East Pakistan was that many interests mutually competing as well as complementary were present. Respect for territorial integrity and political independence and non-intervention no doubt took a second place giving way to intervention, but here we find several interests which were complementary and India was acting lawfully, if not in self-defence, then, of course for self-determination or for humanitarian ends. India, however, did not use this particular union of words, "humanitarian intervention",[182] but it always asserted very affirmatively that it would not tolerate the violation of "human rights and fundamental freedoms ... on such a vast scale and with so many brutalities and with such cynicism" as was taking place in East Pakistan.[183] What can, for example, be a clearer indication of the existence and exercise of a right of humanitarian intervention than the following emphatic formulation:

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[182] As to this see *supra* note 109, accompanying text and the following discussion.

[183] Statement by Samar Sen, supra note 170, at p.791. As to the obligation of international community in the field of human rights and nature of human rights violation in East Pakistan, see Statement by Ambassador S. Sen, Permanent Representative of India to the U.N. in the Social Committee of the Economic and Social Council on Agenda item 5(a) Report of the Commission on Human Rights on May 12, 1971 U.N. Doc., reprinted in Rahman, H.H. (ed.), supra note 3, at pp. 731-734. "What are the violations of human rights which are alleged to have occurred in East Pakistan...? Reports indicate that the following violations have occurred, 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, the press and assembly, suppression of political rights and suppression of the right of emigration." — Statement by Mr. John Salzberg, Representative for the International Commission of Jurists, to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, August 16, 1971 U.N. Doc., reprinted ibid.,at p.765 at p.767.

> ... we face the mortal danger through the annihilation of 75 million people at our doorstep. This cannot but fail to overwhelm us and we shall not tolerate it.[184]

Or, when in answer to a call for cease-fire India asserted that:

> When nations have talked to us of peace, they have overlooked the slaughter of men, women and children; they have forgotten the fate of 10 million refugees and thus totally ignored the moral and legal responsibility of the rulers of Pakistan. A call to cease-fire coupled with expressions of hope that the refugees would voluntarily return appears to India to have no purpose other than to cover up the annihilation of an entire nation ... India cannot be a party to the violent suppression of the rights of the aggrieved people of Bangladesh.[185]

India no doubt was insisting on a right of humanitarian intervention.

Indian assertion being sufficiently clear the point for determination is whether the circumstances were such as to suit that assertion. Our earlier discussion shows that during insurgency intervention can be made legitimately if there is an immediate and extensive threat to fundamental human rights, particularly a threat of widespread loss of human life.[186] And for East Pakistan people "minimum human rights" had been denied to them to warrant an exception to the territorial integrity provision. Mr. Samar Sen's Statement in the Security Council expresses the same view:

> ... several principles have been quoted by various Delegations: sovereignty, territorial integrity, non-interference in other peoples' affairs and so on. But I wonder why we should be shy about speaking of Human Rights? What happened to the Convention on Genocide? What happened to the Principle of Self-determination? What happened to all other social rights and conventions which you have so solemnly accepted?[187]

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184 Statement by Mr. Samar Sen, Representative of India in the Security Council, December 6, 1971 U.N. Doc., reprinted ibid.,at p. 963 and p.965.

185 Letter from the Permanent Representative of India to the U.N., *supra* note 148, at pp. 853-854. See also Statement by Mr. Samar Sen, supra note 5, at pp.920-921: "Much has been said about a cease-fire... Shall we release the Pakistani soldiers by a so-called cease-fire so that they can go on a rampage and kill the civilians...? Is this kind of cease-fire we desire?... I wish to give a very serious warning to the Council that we shall not be a party to any solution that will mean continuation of oppression of East Pakistani people, whatever the pretext, whatever the ground on which this is brought about. So long as we have any light of civilised behaviour left in us, we shall protect them."

186 In this regard see supra notes 117 to 122 and accompanying texts.

187 Supra note 184, at p. 963.

India identified the root of the problem as "the fate of seventy-five million people of East Bengal and their inalienable rights,"[188] and indicated the inactivity of the U.N. in this regard.[189] This inability of the Organisation to respond effectively to human rights violations, as we have seen, made Indian intervention even more lawful. Another aspect of this intervention is that while during insurgency intervention can be justified without any "invitation" from any appropriate authority, Bangladesh crisis provides an additional justification inasmuch as there clearly was such an "invitation" from the authority representing the "people" who were fighting for self-determination against the West Pakistani military regime.

To conclude — in East Pakistan the magnitude of Human Rights violation and the immediacy of threat to fundamental human rights demanded intervention in every way, the only question was whether India asserted the same. No doubt India did. She did it in so many words and in so many ways that the right of humanitarian intervention is now established as an exception to Article 2(4) of the Charter, beyond any doubt:

> Pakistani military action and the snuffing out of all human rights, and the reign of terror which still continues, have *shocked the conscience of mankind* ... Its actions have made so many serious inroads into much that our Charter stands for, that it would indeed be a travesty of international law and a mockery of international justice to suggest that what is involved is an internal issue ... We here in this Assembly may argue in a sophisticated manner as long as we like, but those who have been the victims of aggression, and who are fleeing from terror and massacre, will

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188 Prime Minister Indira Gandhi's Reply, Dated November 16, 1971, to U.N. Secretary-General's Letter of October 20, 1971; U.N. Doc., reprinted in Rahman, H.H. (ed.), supra note 3, p. 820 at p.821.

189 See e.g., Statement by Samar Sen, *supra* note 5, at pp.918-919: "[I]t ... is a matter of great surprise and infinite regret to us that when so many men, women and children were butchered, raped, massacred no action was taken ... military repressions were unleashed in a manner and in a way which would shock the conscience of mankind ... What happened to the campaign of genocide? Did the United Nations respond? What happened to the total elimination of all democratic rights? Did the United Nations respond? What happened to the millions of people who had been driven from their homes...? Was any solution found?"

not have such a tolerant outlook. *They will not forgive us or those who did not stand by them in their hour of trial.* [190] [*italics* added]

CONCLUSION

This paper professes to be a paper on international law of use of force, but in organising the sub-headings it was very selective, inasmuch as only those aspects of use of force have been considered which have a direct reference to the Indian intervention in the then East Pakistan in 1971. Our aim was to determine priority among conflicting interests. More specifically, among interests which were in conflict in the Indian intervention situation. However, this selectivity is very incidental because our purpose was not in the first place to determine the legality of Indian intervention (which conclusion in any case naturally follows from other conclusions derived). We deduce at least two priorities — self-determination over territorial integrity and humanitarian intervention over non-intervention. But this priority could have been, for example, of inherent right of self-defence over a Security Council resolution.[191] It is incidental that it is not so and when we say that the selectivity is incidental we mean the same.

We were selective because every one ought to be when the subject is so vast. In this regard Indian intervention is relevant in this paper because it provided the guide line for selectivity and determined the circumference. Secondly, when considering the legality of that intervention empirical application of the community determinations have been made to illustrate misapprehension and lack of unanimity, which it is necessary to avoid for the future. In addition, Indian intervention provides an empirical basis for humanitarian intervention and perhaps for self-defence by use of force to protect economic interests. Be that as it may, when the emergence of Bangladesh is in issue, at least circuitously, at the conclusion one thing about the same must be recognised, which is, to quote Secretary General U Thant, "the ... tragic situation [in East Pakistan], in which humanitarian, economic and political problems ... [were] mixed in such a way as almost to defy any

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190 Statement of Foreign Minister Sardar Swaran Singh, supra note 174, at pp.873-874.

191 Winston P. Nagan developed a similar thesis in his article, "Rethinking Bosnia and Herzegovina's Right of self-defence: A Comment," 52 (October, 1994) The Review, International Commission of Jurists, pp.34-46.

distinction between them, present[ed] a challenge to the United Nations,"[192] which he thought it was necessary to meet "as a whole."[193] We don't know whether he equated "self-determination" to a "political problem," but we do know that the United Nations has not met the challenge successfully, which was due to lack of unanimity in determining priority in a world that was highly decentralised in the *de facto* distribution of real and effective power in the world power process. However, it was possible to avoid greater loss due to Indian intervention. But does that absolve those who have failed to appreciate the basic interests? In today's more homogeneous world unanimity can be cheaper, but that has to follow the right track.

Use of force, no doubt is prohibited, but then there are certain exceptions of which we considered two — self-determination and humanitarian intervention. Our discussion regarding self-defence was not exhaustive, inasmuch as we confined ourselves in determining whether force can be used in self-defence to protect economic interests. Then again we left the question open. The ultimate conclusion achieved in this paper is that there are greater community interests in promoting self-determination and in protecting minimum human rights than respect for territorial integrity and political independence and non-use of force.

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192 U Thant's Memorandum to the President of the Security Council, supra note 137, at p.812.

193 Ibid., p.812.