

Bargaining Away Justice

Gary J. Bass

India, Pakistan, and the International Politics of Impunity for the Bangladesh Genocide

In recent decades, the world has seen a profusion of new institutions of international criminal justice, with the creation of United Nations criminal tribunals for the former Yugoslavia and Rwanda, hybrid courts for Sierra Leone and Cambodia, national courts exercising universal jurisdiction, and the permanent International Criminal Court (ICC). Several heads of government—Laurent Gbagbo, Hissène Habré, Slobodan Milošević, Charles Taylor—have faced trial. These events have revived a vigorous debate on the roots of international justice, as well as on its impact on postwar societies.

One of the most important cases, however, has been almost entirely overlooked: Bangladesh, now with the eighth-largest population on Earth and by far the largest country today confronting the aftermath of a genocide. With more inhabitants than Russia or Japan and a fast-growing economy,¹ Bangladesh is in political chaos, driven in part by the legacy of its bloody 1971 war for independence from Pakistan—what Bangladeshis widely call genocide. Some forty-five years ago, in March 1971, the Pakistan army launched a massive killing campaign against its Bengali population, in what was then East Pakistan and is now Bangladesh. Hundreds of thousands of people perished in the Pakistani crackdown, and some 10 million Bengalis fled into neighboring India—one of the biggest refugee flows of all time. The bloodshed did not stop until India defeated Pakistan in a short war in December 1971, which ended with the creation of the new country of Bangladesh. Although largely forgotten in the United States and Europe, these atrocities reshaped the politics and the map of Asia.

The legacy of this bloodshed smolders in Bangladesh's politics today. Since 2009, Prime Minister Sheikh Hasina has made war crimes trials for the geno-

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1. Amartya Sen, "Quality of Life: India vs. China," *New York Review of Books*, May 12, 2011, <http://www.nybooks.com/articles/2011/05/12/quality-life-india-vs-china/>.

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cide one of her top priorities. In 2010, the government created a national war crimes court, trying and executing Islamist leaders for aiding the Pakistani military during the crackdown in 1971—an initiative that has proved popular with Bangladeshis despite stern criticism from international human rights groups that many of the trials are unfair.² In February 2013, when this tribunal sentenced a prominent Islamist politician to a life sentence for atrocities committed in 1971, tens of thousands of angry Bangladeshis took to the streets to demand that he be executed, in the worst turmoil in decades. Thus far seventeen war criminals have been convicted, with subsequent executions provoking violent demonstrations by their supporters, which have been met with harsh police tactics. Scores of people have been killed in polarized protests and counter-protests.³ For the last three years, in what some authorities believe is retaliation for the war crimes tribunal's prosecution of Islamist politicians, shadowy Islamist vigilantes have been brutally murdering secular writers, Hindus, foreigners, and gay rights activists.⁴ Most recently, in July 2016, this spree of killings was capped with a horrific massacre of twenty-two people, mostly foreigners, in an upscale Dhaka neighborhood by Islamist terrorists.

This article seeks to further the general understanding of both the causes and results of impunity for mass atrocities, while extending the study of international justice into South Asia. With India emerging as a major power, this article reveals for the first time how the world's largest democracy confronted the problem of international justice in its own region. Although most studies of war crimes trials have concentrated on Europe, sub-Saharan Africa, and Latin America, the crucial case of Bangladesh illustrates some of the political processes at work in Asia, a vital region that has in recent decades lagged in efforts to pursue international criminal justice.⁵

2. International Crisis Group, "Mapping Bangladesh's Political Crisis" (Brussels: International Crisis Group, 2015); Geoffrey Robertson, "Report on the International Crimes Tribunal of Bangladesh" (Sarajevo: International Forum for Democracy and Human Rights, 2015); Human Rights Watch, "Bangladesh: Halt Execution of War Crimes Accused" (New York: Human Rights Watch, December 8, 2013), <https://www.hrw.org/news/2013/12/08/bangladesh-halt-execution-war-crimes-accused>; and Surabhi Chopra, "The International Crimes Tribunal in Bangladesh: Silencing Fair Comment," *Journal of Genocide Research*, Vol. 17, No. 2 (2015), pp. 211–220.

3. "Fear in the Shadows," *Economist*, November 7, 2015, p. 36.

4. Geeta Anand and Julfikar Ali Manik, "Bloggers, Bangladesh, and Insight on 39 Killings," *New York Times*, June 9, 2016.

5. Cambodia marks another important Asian case where accountability has been late and highly controversial. For decades after the Khmer Rouge's genocide in 1975–79, there were no prosecutions. No country filed a suit against the Khmer Rouge regime at the International Court of Justice, in part because China, the United States, and Thailand had found the Khmer Rouge useful to balance against Vietnam. See Ben Kiernan, "Introduction: Conflict in Cambodia, 1945–2002," *Critical Asian Studies*, Vol. 34, No. 4 (2002), pp. 487–491. Finally, in 2004, the United Nations and Cambo-

Bangladesh stands as one of the most important cases where the pursuit of war criminals was foiled, resulting in a disturbing impunity for one of the ugliest episodes of the Cold War. Using unexplored declassified Indian government papers from archives in Delhi, this article documents for the first time the real reasons why India and Bangladesh abandoned the pursuit of accused Pakistani war criminals after 1971—decisions that form a significant part of wider patterns of state behavior in seeking to punish the perpetrators of mass atrocities. In particular, this untapped Indian archival record shows how Pakistan was able to successfully resist Indian and Bangladeshi pressure to put its soldiers on trial as war criminals. These Indian archives reveal how the Indian and Bangladeshi governments put their own international security above justice, with peacemaking with Pakistan proving more important than trials.⁶

Indians painfully realized that international criminal law could not be enforced without substantial military and political power. At most, India and

dia's government created a hybrid tribunal, which has been hamstrung by Cambodian obstruction. See Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975–1979* (New Haven, Conn.: Yale University Press, 2002); Beth Van Schaack, "The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot," *Yale Law Journal*, Vol. 106, No. 7 (May 1997), pp. 2259–2291; Hurst Hannum, "International Law and Cambodian Genocide: The Sounds of Silence," *Human Rights Quarterly*, Vol. 11, No. 1 (February 1989), pp. 82–138; and John D. Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (Ann Arbor: University of Michigan Press, 2014).

6. Gary King, Robert O. Keohane, and Sidney Verba write, "Both quantitative and qualitative research can be systematic and scientific. Historical research can be analytical, seeking to evaluate alternative explanations through a process of valid causal inference." See King, Keohane, and Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton, N.J.: Princeton University Press, 1994), pp. 4–5. The numerous footnotes in this article are meant to provide replicability of data. On case studies, see *ibid.*, pp. 43–46, 75–114, 129–149; Theda Skocpol, *States and Social Revolutions: A Comparative Analysis of France, Russia, and China* (Cambridge: Cambridge University Press, 1979), p. 36; Stephen Van Evera, *Guide to Methods for Students of Political Science* (Ithaca, N.Y.: Cornell University Press, 1997), pp. 49–88; Alexander L. George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge, Mass.: MIT Press, 2005); David Collier, "The Comparative Method: Two Decades of Change," in Dankwart A. Rustow and Kenneth Paul, eds., *Comparative Political Dynamics: Global Research Perspectives* (New York: HarperCollins, 1991), pp. 7–31; James D. Fearon, "Counterfactuals and Hypothesis Testing in Political Science," *World Politics*, Vol. 43, No. 2 (January 1991), pp. 169–195; Robert H. Bates et al., *Analytic Narratives* (Princeton, N.J.: Princeton University Press, 1998); Barbara Geddes, "How the Cases You Choose Affect the Answers You Get: Selection Bias in Comparative Politics," *Political Analysis*, Vol. 2, No. 1 (1990), pp. 131–150; and Arend Lijphart, "Comparative Politics and Comparative Method," *American Political Science Review*, Vol. 65, No. 3 (September 1971), pp. 682–698. On integrating case studies with large-*n* work, see Evan S. Lieberman, "Nested Analysis as a Mixed-Method Strategy for Comparative Research," *American Political Science Review*, Vol. 99, No. 3 (August 2014), pp. 435–452; Christopher H. Achen and Duncan Snidal, "Rational Deterrence Theory and Comparative Case Studies," *World Politics*, Vol. 41, No. 2 (January 1989), pp. 144–169; and Sidney Tarrow, "Bridging the Quantitative-Qualitative Divide in Political Science," *American Political Science Review*, Vol. 89, No. 2 (June 1995), pp. 4461–4474.

Bangladesh sought to prosecute Pakistani troops who were captured during the December 1971 war, but not the senior leadership in Islamabad. The basic reason was not legal, but military: although Indian troops and Bengali guerrillas had won a decisive victory in East Pakistan, the war had been inconclusive on the other front in West Pakistan. Although the humiliation of battlefield defeat was enough to topple Pakistan's military regime, there was no chance of senior leaders in Islamabad winding up in front of an Indian, Bangladeshi, or international court.

There was little prospect of justice in the long years after 1971. After India allowed its captured Pakistani prisoners of war to return home, the only suspects available for Bangladeshi authorities to prosecute were Bangladeshis accused of collaborating with Pakistan. In practice, Bangladesh's current trials tend to target Islamists who are political opponents of the prime minister.⁷ But no matter what, the pursuit of justice today is inevitably distorted by the ongoing impunity of those Pakistani killers who were shielded from prosecution by the power of the Pakistani state. Thus the Bangladesh case joins the realist emphasis on amnesty with a liberal focus on the consequences of impunity. It suggests that a deal for amnesty—though perhaps politically necessary when initially struck—can have troubling consequences in the longer term.

Bangladesh's significance goes well beyond the politics of South Asia, and this consequential case is meant to contribute to a burgeoning literature on international criminal justice. This case study joins a wider set of cases where governments sought international criminal justice, elucidating politics at work in such efforts.⁸ Despite many excellent journal articles on Nuremberg, the ICC, and other courts,⁹ it is easier for social scientists to study existing trials

7. Salil Tripathi, "What Pakistan Left Behind," *Newsweek Pakistan*, March 22, 2013, <http://newsweekpakistan.com/features/2713>; Anand Kumar, "The War Crimes Trial and Forthcoming Elections in Bangladesh," *IDSA Comment*, March 18, 2013, http://www.idsa.in/idsacomments/WarCrimesTrialandForthcomingElectionsinBangladesh_akumar_180313; and "Bangladesh War Crimes Trial: Delwar Hossain Sayeedi to Die," *BBC News*, February 28, 2013.

8. Although Harry Eckstein has argued for the value of analyzing "a single crucial case," this study is not meant as a single crucial case, but intended to join a wider series of rigorously conducted case studies. See Eckstein, "Case Study and Theory in Political Science," in Fred I. Greenstein and Nelson W. Polsby, eds., *Handbook of Political Science*, Vol. 1: *Political Science: Scope and Theory* (Reading, Mass.: Addison-Wesley, 1975), p. 127; and King, Keohane, and Verba, *Designing Social Inquiry*, pp. 209–212.

9. Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon, 1998); Guillermo O'Donnell and Philippe C. Schmitter, *Transitions from Authoritarian Rule*, Vol. 4: *Tentative Conclusions about Uncertain Democracies* (Baltimore, Md.: Johns Hopkins University Press, 1989); Carlos Santiago Nino, *Radical Evil on Trial* (New Haven, Conn.: Yale University Press, 1996); and José E. Alvarez, "Crimes of States/Crimes of Hate: Lessons from Rwanda," *Yale Journal of International Law*, Vol. 24, No. 2 (Summer 1999), pp. 365–483.

than abandoned ones.¹⁰ Still, there is as much to be learned from instances in which governments put international security above the pursuit of justice.

Above all, Bangladesh's experience shows the primacy of international security over justice. Even in a case when there was a significant military victory over the perpetrators and the moral drive for war crimes trials was strong, international criminal justice remained frustratingly elusive. Beyond its particular implications for South Asia, Bangladesh stands more generally as a illustrative case of the political processes by which the demands of international security can trump the prosecution of war criminals. In this important case, peacemaking ultimately proved more important than accountability. At the same time, the long, uneasy aftermath of that eclipse of justice suggests that even when amnesty is necessary for the pursuit of peace, it can leave a toxic legacy for future politics.

This article begins by considering the state of the social science literature on the politics of international criminal justice, with realists arguing for offering amnesties to powerful spoilers, while liberals and others suggest that there are potent norms that allow political opportunities for the prosecution of war criminals—as well as pointing to the risk that impunity will have alarming long-term consequences for post-conflict societies.

The article seeks to connect these theoretical arguments in the case of Bangladesh. It shows how international security came to outweigh the post-war pursuit of justice for both India and Bangladesh, using detailed process-tracing to reveal how these states reluctantly bargained away justice in the face of stubborn Pakistani resistance to prosecutions of war criminals. The article demonstrates the self-serving motivations of states with those that suffered the most taking the lead in seeking vengeance. In addition, it examines how India was constrained by international law and considers more tentatively how the

10. Excellent works considering impunity include Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991), pp. 211–231; Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," *International Security*, Vol. 28, No. 3 (Winter 2003/04), pp. 5–44; Beth A. Simmons and Alison Danner, "Credible Commitments and the International Criminal Court," *International Organization*, Vol. 62, No. 2 (Spring 2010), pp. 225–256; Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W.W. Norton, 2011); Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2001); Naomi Roht-Arriaza, ed., *Impunity and Human Rights in International Law and Practice* (New York: Oxford University Press, 1995); James L. Gibson, "Truth, Justice, and Reconciliation: Judging the Fairness of Amnesty in South Africa," *American Journal of Political Science*, Vol. 46, No. 3 (July 2002), pp. 540–556; David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (New York: Oxford University Press, 2014); and Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge: Cambridge University Press, 2009).

impunity of Pakistani war criminals has left a bitter strain of resentment in Bangladeshi politics to this day.

The Politics of Impunity

In the growing social science literature on the politics of international justice, realist political scientists have maintained that amnesties are an ugly but necessary part of peacemaking or democratization. Samuel Huntington argued that authoritarian regimes commonly secured amnesties for themselves during negotiated transitions to democracy. He regretfully concluded, “[T]he least unsatisfactory course may well be: do not prosecute, do not punish, do not forgive, and, above all, do not forget.”¹¹ Furthering Huntington’s argument, Jack Snyder and Leslie Vinjamuri contend that amnesties are tragic but essential: “When enforcement power is weak, pragmatic bargaining may be an indispensable tool in getting perpetrators to relinquish power and desist from their abuses.”¹² Studying numerous civil wars, they find that amnesties “can help to pave the way for peace,” whereas trials worked best in relatively stable situations where abusive groups were already weak.¹³

The more widespread and brutal the violations of human rights, the more likely it is that the perpetrators will try to block peacemaking or democratization that could threaten them with prosecution. As Guillermo O’Donnell and Philippe Schmitter argue, after terrible military repression in Argentina and Uruguay, it proved “even more difficult for the bulk of the armed forces to disengage itself from the worst acts of the regime.” If the generals cannot block a transition, they will “strive to obtain iron-clad guarantees that under no circumstances will ‘the past be unearthed.’” As O’Donnell and Schmitter note, “[W]here and when it is easier to bury the past, is where and when it is less important to do so.”¹⁴

Jon Elster argues that transitional justice—meaning the judicial and non-judicial steps taken by a society to redress mass abuses of human rights—may need to be sacrificed to achieve a peaceful transition.¹⁵ In postwar international

11. Huntington, *The Third Wave*, p. 231.

12. Snyder and Vinjamuri, “Trials and Errors,” pp. 6, 12; and Stephen John Stedman, “Spoiler Problems in Peace Processes,” *International Security*, Vol. 22, No. 2 (Fall 1997), pp. 5–53.

13. Snyder and Vinjamuri, “Trials and Errors,” pp. 19, 20. See also Julian Ku and Jide Nzelibe, “Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?” *Washington University Law Quarterly*, Vol. 84 No. 4 (2006), pp. 777–833; and Jack L. Goldsmith, “The Self-Defeating International Criminal Court,” *Chicago Law Review*, Vol. 70, No. 1 (January 2003), pp. 89–104.

14. O’Donnell and Schmitter, *Transitions from Authoritarian Rule*, Vol. 4, pp. 29, 30.

15. Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge

negotiations, peace may be predicated on immunity for the defeated country, except in those rare cases where military victory is so overwhelming that the vanquished power cannot assert itself. Even after World War II, Elster writes, the Allies felt pressure to treat Germany and Japan with some restraint, if only to shore up bulwarks against Soviet communism.¹⁶

In contrast to realists, liberals and many international legal experts have higher expectations for justice.¹⁷ They see principled, legal, and strategic reasons for governments to pursue war criminals. Beth Simmons wrote, “Democracies are the natural allies of human rights.”¹⁸ While O’Donnell and Schmitter know the risks, they support trials as a “‘least worst’ strategy.”¹⁹ In earlier work, I delineated the conditions under which liberal governments will pursue international criminal justice.²⁰ Allison Danner and Beth Simmons contend that it is not just peaceful democracies that join the ICC, but also that “some governments rationally use the ICC to tie their hands as they make tentative steps toward conflict resolution”—particularly states emerging from domestic political violence but with weak domestic institutions for holding perpetrators accountable.²¹ They find that the ICC helps some governments offer credible commitments to reassure wary opponents, thus increasing the likelihood of peace.²²

In an influential recent book, Kathryn Sikkink argues that there has been a “justice cascade” toward national and international criminal prosecutions, meaning “a shift in the *legitimacy of the norm* of individual criminal accountability for human rights violations and an increase in criminal prosecutions

University Press, 2004), p. 190. On the concept of transitional justice, see Jeremy Waldron, “Super-seding Historic Injustice,” *Ethics*, Vol. 103, No. 1 (October 2001), pp. 4–28; Neil J. Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, 3 vols. (Washington, D.C.: United States Institute of Peace Press, 1995); and Ruti G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000). For an important corrective, see Eric A. Posner and Adrian Vermeule, “Transitional Justice as Ordinary Justice,” *Harvard Law Review*, Vol. 117, No. 3 (January 2004), pp. 761–825.

16. Elster, *Closing the Books*, p. 207. See also John W. Dower, *Embracing Defeat: Japan in the Wake of World War II* (New York: W.W. Norton, 1999).

17. Abram Chayes and Anne-Marie Slaughter, “The ICC and the Future of the Global Legal System,” in Sarah B. Sewall and Carl Kaysen, eds., *The United States and the International Criminal Court* (Cambridge, Mass.: American Academy of Arts and Sciences, 2000), pp. 237–247; and David J. Scheffer, “Staying the Course with the International Criminal Court,” *Cornell International Law Journal*, Vol. 35, No. 1 (November 2001/January 2002), pp. 47–100.

18. Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009), p. 25.

19. O’Donnell and Schmitter, *Transitions from Authoritarian Rule*, Vol. 4, p. 30.

20. Gary J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, N.J.: Princeton University Press, 2000).

21. Simmons and Danner, “Credible Commitments and the International Criminal Court,” p. 227.

22. *Ibid.*, pp. 246–252.

on behalf of that norm." This norm was established at Nuremberg and later diffused across the globe.²³ Sikkink also studies cases where prosecutions were foiled or never attempted, such as Spain after Franco, where a "pacted" transition to democracy sacrificed prosecutions.²⁴ Furthermore, in a quantitative study, she finds an independent effect of justice: countries that carry out human rights prosecutions have better human rights records than those that do not carry out prosecutions.²⁵

The important case of Bangladesh provides a bridging point for these literatures. It demonstrates the pressures for impunity during transitions, but also some of the adverse long-term consequences of such bargains. Following O'Donnell and Schmitter, when a foreign army is responsible for committing massacres, it may become a threat to peacemaking and can only be mollified with robust commitments of immunity from punishment.

In Bangladesh, this understandable short-term impunity has had long-term costs. It left poisonous resentments that have been exploited by nationalist politicians in recent years, particularly after a return to democratic politics in the 1990s. Bangladesh fits the empirical pattern described by Sikkink: the country had no trials and went on to have a poor human rights record.²⁶ As O'Donnell and Schmitter wrote, "It is difficult to imagine how a society can return to some degree of functioning which would provide social and ideological support for political democracy without somehow coming to terms with the most painful elements of its own past."²⁷

Of course, it would be simplistic to draw a straight line from impunity to Bangladesh's many problems today. But while there are numerous reasons for Bangladesh's current human rights abuses—including terrible poverty, corruption, mismanagement, and bloody military coups²⁸—the legacy of 1971 remains a significant obstacle. Bangladeshis have widespread memories of atrocities, providing an irresistible opportunity for nationalist politicians. This in turn can lead to a deepening alienation of the Islamist opposition, hardening some of the worst fractures that have divided Bangladeshi society. As

23. Sikkink, *The Justice Cascade*, pp. 5–6 (emphasis in the original). See also Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization*, Vol. 52, No. 4 (Fall 1998), pp. 887–917; Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders: Transnational Advocacy Networks in International Politics* (Ithaca, N.Y.: Cornell University Press, 1998), pp. 16–25; and Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights through International Law* (New York: Oxford University Press, 2013).

24. Sikkink, *The Justice Cascade*, pp. 56–59.

25. *Ibid.*, pp. 184–185.

26. *Ibid.*, p. 185.

27. O'Donnell and Schmitter, *Transitions from Authoritarian Rule*, Vol. 4, p. 30.

28. Anthony Mascarenhas, *Bangladesh: A Legacy of Blood* (London: Hodder and Stoughton, 1986).

Martha Minow warns, a “vengeful motive often leads people to exact more than necessary, to be maliciously spiteful or dangerously aggressive, or to become hateful themselves by committing the reciprocal act of violence.”²⁹ Such vengeance has become all too familiar in Bangladesh’s politics today.

PEACEMAKING AND INTERNATIONAL JUSTICE

Building on this literature, this article makes four core arguments about the politics of prosecuting war criminals.

First, and perhaps most importantly, as realists would expect, international security imperatives trumped the pursuit of justice for the victims of mass atrocities.³⁰ As Hans Morgenthau put it, “[T]he principle of the defense of human rights cannot be consistently applied in foreign policy because it can and it must come in conflict with other interests that may be more important than the defense of human rights in a particular instance.”³¹ In many ways, Bangladesh would seem a propitious case for prosecuting war criminals: there was a military victory by a liberal democracy; that democracy was appalled by the recent atrocities; it held many war crimes suspects in custody; and the perpetrator regime had collapsed. Even so, India, although victorious in the 1971 war, was not dominant enough to force Pakistan to accept humiliating trials of its troops. Instead, India sought its security through seizing a rare opportunity for making peace with Pakistan, embodied in the generous Simla agreement of 1972. With that strategic prize at stake, India proved ready to bargain away the trial of Pakistani war criminals. This was the kind of bargain that Huntington, Snyder, and Vinjamuri would expect.

In Bangladesh, too, international security concerns trumped the drive for retribution against the killers. Newly separate from Pakistan, Bangladesh desperately needed global acceptance as an independent state. With China and the United States hostile to the newborn country, Bangladesh feared lingering in a nether space of nonrecognition, which could tempt revanchism from Pakistan. Pakistan, however, insisted that the price of its recognition—a precedent-setting act of legitimation that would allow other states to follow—

29. Minow, *Between Vengeance and Forgiveness*, p. 10.

30. Hans Morgenthau, “Human Rights and Foreign Policy,” in Kenneth W. Thompson, ed., *Moral Dimensions of American Foreign Policy* (New Brunswick, N.J.: Transaction, 1984), p. 344; Kenneth N. Waltz, *Theory of International Politics* (Lexington, Mass.: Addison-Wesley, 1979), p. 112; George F. Kennan, *American Diplomacy* (Chicago: University of Chicago Press, 1984), p. 95; Snyder and Vinjamuri, “Trials and Errors,” pp. 13–15; and Bass, *Stay the Hand of Vengeance*, pp. 29–30, 277.

31. Morgenthau, “Human Rights and Foreign Policy,” p. 344.

was impunity for war criminals. Bangladesh had little real choice but to acquiesce.

At root, the problem was that India's military dominance was not comparable to that of the Allies after winning the unconditional surrenders of Germany and Japan in World War II. It was not even as resounding as some less conclusive victories, such as the Allied victory over Germany and the Ottoman Empire in World War I or NATO's 1995 victory in Bosnia.³² India could not impose its will on a helpless foe; it did not occupy West Pakistan, and could not have. Pakistan, even stripped of Bangladesh, remained capable of defying and provoking India. Under these strategic circumstances of a relatively inconclusive victory, with the defeated foe's cooperation needed for future security, some kind of amnesty was likely.

Second, the degrees of victimhood drove the political commitment to justice.³³ Governments everywhere are likely to be more concerned with their own citizens, and these same dynamics emerged in South Asia. Bangladesh, having suffered the most, was the most determined to punish Pakistani war criminals. India had endured the ordeal of sheltering some 10 million Bengali refugees, and though outraged by the killings, was still less insistent on justice than Bangladesh. And the rest of the world was largely indifferent to the issue, in keeping with a tepid global response to the 1971 atrocities when they were happening.³⁴

Third, India was constrained by its concern for international law.³⁵ While strategic considerations came first, a sense of legalism restrained Indian vengeance.³⁶ This legalism grew partially from some respect for international law among Indian officials in a liberal democracy, but more importantly from reputational concerns: India did not wish to be seen flouting international

32. Bass, *Stay the Hand of Vengeance*, pp. 59, 82, 108, 118–119, 127, 282.

33. *Ibid.*, pp. 30–31. See also James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (Westport, Conn.: Greenwood, 1982), p. 12; and Airey Neave, *Nuremberg: A Personal Record of the Trial of the Major Nazi War Criminals in 1945–6* (London: Hodder and Stoughton, 1978), p. 63.

34. Gary J. Bass, *The Blood Telegram: Nixon, Kissinger, and a Forgotten Genocide* (New York: Alfred A. Knopf, 2013); and Srinath Raghavan, *1971: A Global History of the Creation of Bangladesh* (Cambridge, Mass.: Harvard University Press, 2013).

35. Harold Hongju Koh, "Why Do Nations Obey International Law?" *Yale Law Journal*, Vol. 106, No. 8 (1997), pp. 2599–2659; and Thomas M. Franck, *The Power of Legitimacy among Nations* (New York: Oxford University Press, 1990).

36. Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, Mass.: Harvard University Press, 1986), pp. 1, 123–143. Shklar defines legalism as "the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules." See *ibid.*, p. 1. In the context of international justice, this means a belief that "it is right for war criminals to be put on trial." See Bass, *Stay the Hand of Vengeance*, p. 7.

standards.³⁷ Moreover, India was hemmed in by restrictive UN Security Council resolutions and by the Geneva Convention Relative to the Treatment of Prisoners of War, which Pakistan argued mandated that India release its Pakistani prisoners of war. In the end, despite the hopes of some lawyers that compliance with international law would help to bring justice, India's grudging respect for the law became more of a practical force for freeing its Pakistani prisoners en masse than for bringing the guilty ones to justice.

Fourth, a lack of accountability seems to have provided tinder for nationalists in Bangladesh to exploit in later years. The post-1971 impunity for mass atrocities committed against Bangladeshis has become politically volatile within both Pakistan and Bangladesh. Instead of the demand for justice dwindling, as realists would expect, it has remained a neuralgic issue. Pakistan has developed widespread amnesia about its army's record, missing the opportunity to challenge the dominating military after its bloodiest repression. In Bangladesh, the absence of war crimes trials for decades has made it all but impossible to differentiate individual criminal accountability from a more collective opprobrium. The unexorcised past continues to destabilize the politics of this gigantic nation.

From War to Peace

Out of the Partition of British India in 1947, Pakistan was created as a geographically splintered state: West Pakistan (today Pakistan) was separated from East Pakistan (today Bangladesh) by 1,000 miles of Indian territory. The maltreated Bengalis of East Pakistan grew to resent their domination by West Pakistan, and in a 1970 election voted overwhelmingly for a Bengali nationalist party. This electoral result stunned the military dictatorship based in West Pakistan, which had been ruling the entire country.

On March 25, 1971, after a failed series of constitutional talks, Pakistan's military tried to smash the rebellious Bengalis into submission by launching a harsh military crackdown across East Pakistan. In a secret estimate midway through the killing, the Central Intelligence Agency (CIA) conservatively

37. See Beth A. Simmons, "International Law and State Behavior: Commitment and Compliance in International Monetary Affairs," *American Political Science Review*, Vol. 94, No. 4 (December 2000), pp. 819–835; Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (New York: Oxford University Press, 2005), pp. 100–104; George W. Downs, David M. Rocke, and Peter N. Barsoom, "Is the Good News about Compliance Good News about Cooperation?" *International Organization*, Vol. 50, No. 3 (Summer 1996), pp. 379–406; and Charles Lipson, "Why Are Some International Agreements Informal?" *International Organization*, Vol. 45, No. 4 (Autumn 1991), pp. 508–509.

assessed that about 200,000 people had died.³⁸ Many more would perish as millions of Bengali refugees flooded into India, which could not possibly handle such an influx. Overwhelmed by the burden of trying to look after so many refugees, the Indian government weighed its military options to stop Pakistan, and covertly sponsored a Bengali insurgency from inside India's porous borders.³⁹

From the start of Pakistan's military crackdown, Indian officials and politicians vehemently condemned the bloodshed, accusing Pakistan of genocide.⁴⁰ Rather than merely branding Pakistan an enemy, Indians made a legal case against its criminal conduct. In a prominent article in the *Indian Journal of International Law*, a distinguished international lawyer laid out the case for war crimes trials. Following the examples of the post-World War II Nuremberg and Tokyo war crimes tribunals as well as Israel's trial of the Nazi war criminal Adolf Eichmann, and using the standards of the Genocide Convention and the Geneva Conventions, this Indian lawyer argued that Pakistanis bore individual criminal responsibility for war crimes, crimes against humanity, and genocide. Although Bangladesh was not yet a party to the Genocide Convention, the prohibition on genocide comprised customary international law, allowing for Bangladeshi trials or an international tribunal including Indian and Bangladeshi jurists as well as perhaps some other foreign judges.⁴¹

Despite such Indian legalism, Prime Minister Indira Gandhi did not mention war crimes trials in her major parliamentary addresses during the 1971 crisis. Instead, Gandhi's speeches focused on the more urgent tasks of stopping the killing in East Pakistan and halting the ongoing exodus of millions of

38. CIA Office of National Estimates, "The Indo-Pakistani Crisis," September 22, 1971, Box 570, Indo-Pak Crisis, South Asia, NSC Files, Nixon Presidential Library and Museum, Yorba Linda, California. For other estimates of the massive death toll, see Tad Szulc, "U.S. Military Goods Sent to Pakistan Despite Ban," *New York Times*, June 22, 1971; Sydney H. Schanberg, "Long Occupation of East Pakistan Foreseen in India," *New York Times*, December 26, 1971; and Richard Sisson and Leo E. Rose, *War and Secession: Pakistan, India, and the Creation of Bangladesh* (Berkeley: University of California Press, 1990), p. 306 n. 24. A study based on world health surveys suggests about 269,000 deaths. See Ziad Obermeyer, Christopher J.L. Murray, and Emmanuela Gakidou, "Fifty Years of Violent War Deaths from Vietnam to Bosnia," *British Medical Journal*, June 28, 2008, pp. 1482–1486. Pakistani nationalists usually claim much lower numbers. A postwar judicial inquiry, using situation reports from the Pakistan army's Eastern Command, estimated 26,000 people killed in action, although it conceded that local commanders "tried to minimise the result of their own actions." See Government of Pakistan, *The Report of the Hamoodur Rehman Commission of Inquiry into the 1971 War* (Lahore: Vanguard, 2001), pp. 317, 340, 513.

39. See Bass, *The Blood Telegram*; Raghavan, 1971; and Sisson and Rose, *War and Secession*.

40. Surendra Mishra, ed., *Indira Gandhi: Speeches in Parliament* (New Delhi: Lok Sabha Secretariat, 1996), p. 888.

41. S.C. Chaturvedi, "The Proposed Trial of Pakistani War Criminals," *Indian Journal of International Law*, Vol. 11, No. 4 (October 1972), pp. 645–654.

Bengali refugees into India.⁴² Gandhi herself may have had some personal reservations about the desirability of trials. When discussing Pakistan's treason trial of the elected Bengali nationalist leader, Sheikh Mujib-ur-Rahman, she expressed distaste for "a summary trial" for a political opponent⁴³—a familiar and ugly feature of South Asian politics.

In December 1971, war erupted between India and Pakistan, with India winning a swift victory in East Pakistan. India's military plans concentrated on seizing East Pakistan, while the combat on the other front against West Pakistan was fierce but inconclusive, allowing no prospect of capturing senior Pakistani leaders in Islamabad for prosecution. Although Indian leaders understood that their military triumph would likely precipitate the overthrow of the military regime in Islamabad, any punishment of the junta would be left to the successor Pakistani government. If there were trials, they could only be for lower-level Pakistani troops who had been captured in East Pakistan by Indian or Bangladeshi forces.

India made no wartime statements about the possibility of prosecutions, which could have made it harder to secure a cease-fire with Pakistan. While Gandhi thundered that Pakistan had "barbarously trampled upon freedom and basic human rights in Bangladesh" and carried out the "annihilation of a whole people," she was conspicuously silent about prosecutions.⁴⁴ When Indian officials discussed Pakistani war crimes,⁴⁵ there was no practical suggestion of punishment.

While India hedged its bets, Bangladeshis demanded justice. Bangladeshi fury was so intense that it led to revenge killings of Pakistanis and their local collaborators. Fearing that India's battlefield achievement would be tarnished by such acts of vengeance, P.N. Haksar, Prime Minister Gandhi's most important adviser, privately urged Bangladeshi leaders to "deal with their opponents with humanity as a civilised State. Bangla Desh is emerging as a State in the family of nations. Their representatives have everything to

42. Indira Gandhi, speech, March 31, 1971, in Mishra, *Indira Gandhi*, pp. 882–883; Indira Gandhi, speech, May 24, 1971, in Mishra, *Indira Gandhi*, pp. 884–886; Indira Gandhi, speech, May 26, 1971, in Mishra, *Indira Gandhi*, pp. 887–890; Indira Gandhi, speech, June 15, 1971, in Mishra, *Indira Gandhi*, pp. 891–894; Indira Gandhi, speech, August 12, 1971, in Mishra, *Indira Gandhi*, pp. 895–899; Indira Gandhi, speech, November 15, 1971, in Mishra, *Indira Gandhi*, pp. 900–906; and Indira Gandhi, speech, December 6, 1971, in Mishra, *Indira Gandhi*, pp. 907–908.

43. Gandhi, speech, August 12, 1971, p. 898.

44. Indira Gandhi, speech, December 4, 1971, in Mishra, *Indira Gandhi*, pp. 808–809.

45. Sen statement to Security Council, December 4, 1971, HI/121/13/71, Vol. 2, Ministry of External Affairs Papers (hereafter MEA), National Archives of India, Delhi.

gain by appearing dignified, calm, and self-possessed."⁴⁶ India pressured the Bangladeshi authorities into publicly declaring that they would respect the Geneva Conventions, guaranteeing humane treatment for prisoners of war and civilians.⁴⁷

As the war was ending, Bangladeshi officials pressed a top Indian general to demand to Pakistan that Bengali "quislings" who had remained loyal to Pakistan be sent to Bangladesh to face trial.⁴⁸ But even when Pakistan surrendered unconditionally on December 16, 1971, Gandhi remained silent about the possibility of holding war crimes trials, emphasizing instead India's "limited" war objectives of freeing Bangladesh from Pakistani rule.⁴⁹

To forestall Bangladeshi revenge, Swaran Singh, India's foreign minister, explained that his government had sent to India the captive Lt. Gen. A.A.K. Niazi, commander of Pakistan's Eastern Command, as well as another senior Pakistani official.⁵⁰ Remarkably, India initially allowed the surrendering Pakistani troops to keep their personal arms to protect themselves and Pakistani civilians from furious Bangladeshis.⁵¹

Still, as the CIA secretly wrote soon after the war ended, "There is no indication that the Indians plan to bow to Bengali demands that West Pakistani prisoners-of-war should be tried as war criminals for the killing of a large number of Bangla Desh intellectuals shortly before the fall of Dacca."⁵² Instead, Singh reassured the Security Council that captured Pakistani troops should be repatriated swiftly, and until then would be treated "in accordance with the Geneva Convention."⁵³ When Indira Gandhi was asked at a Delhi press conference about war crimes trials, she replied simply, "This is up to the Government of Bangladesh."⁵⁴

46. Haksar to Sen, December 11, 1971, Subject File 174, Haksar Papers, Installment 3 (hereafter Haksar Papers), Nehru Memorial Museum and Library, Delhi (hereafter NMML). See also Haksar to Dutt, December 13, 1971, Subject File 174, Haksar Papers, NMML.

47. Haksar to Kaul, December 15, 1971, Subject File 173, Haksar Papers, NMML; and Ahmad statement, December 13, 1971, HI/121/13/71, Vol. 2, MEA, National Archives of India.

48. CIA situation report, December 16, 1971, Box 573, Indo-Pak War, NSC Files, Nixon Presidential Library and Museum.

49. Indira Gandhi, speech, December 16, 1971, in Mishra, *Indira Gandhi*, pp. 812–813.

50. Singh-Douglas-Home memorandum of conversation (hereafter memcon), December 23, 1971, Subject File 217, Haksar Papers, NMML.

51. A.A.K. Niazi, *The Betrayal of East Pakistan* (Karachi: Oxford University Press, 1998), p. 233.

52. CIA situation report, December 20, 1971, Box 573, Indo-Pak War, NSC Files, Nixon Presidential Library and Museum.

53. Kaul to Haksar, December 23, 1971, WII/109/31/71, Vol. 2, MEA, National Archives of India.

54. Indira Gandhi, press conference, December 31, 1971, in Gandhi, *The Years of Endeavour: Selected*

PAKISTANI DEFIANCE

As a result of its military victory in Bangladesh, India was left holding some 90,000 Pakistani fighters, some of whom could have been charged with atrocities against Bengalis. These detainees immediately became a hotly contested issue between India and Pakistan. Zulfiqar Ali Bhutto, who became Pakistan's civilian president (and later prime minister) soon after the war, complained that India was holding 88,000 Pakistani prisoners of war, as well as 5,000 policemen, 3,000 civil servants, and 2,000 family members.⁵⁵ Although India's figures were slightly lower, they were still humiliatingly large.⁵⁶

Rather than leaving these prisoners in Bangladesh where they were captured, India moved them into camps on its own soil. According to the defeated General Niazi, who was being detained by India at POW (prisoner of war) Camp No. 100 in Madhya Pradesh, the conditions were "tolerable and amicable," with adequate medical care and respectful treatment from the Indian staff. The Pakistanis exercised and strolled, wrote letters home (which were heavily censored by the Indians), prayed and studied the Quran, read books and magazines, and sullenly endured indoctrination lectures from Indian diplomats. But as the months passed, the Pakistanis grew lonely and impatient. After what would be two and a half years behind barbed wire, Niazi found it "hellish."⁵⁷ A Pakistani judicial panel would later condemn India for showing "chronic hatred and prejudice against the Muslims," with "harsh" guards and tough interrogations. While accusing India of torturing Pakistani intelligence officers, the inquiry admitted that Indians grew "more mellow with time" and some Indians "were not bigoted and permitted fairly reasonable treatment."⁵⁸

India's custody of these Pakistanis was a matter of legal necessity and military prudence. Whereas India was a party to the Geneva Conventions, Bangladesh was not, which meant that India could not lawfully transfer Pakistanis to Bangladeshi custody. More significantly, as the Indian foreign ministry's legal adviser noted, India feared the revenge that Bangladeshis might inflict upon their former Pakistani overlords. As the legal adviser secretly admitted, under the Geneva Convention, prisoners of war were to be held safely far from the combat zone, which was why they had "been removed

Speeches of Indira Gandhi, August 1969–August 1972 (Delhi: Ministry of Information and Broadcasting, 1975), p. 173.

55. Haksar to Lall, February 28, 1972, Subject File 179, Haksar Papers, NMML.

56. Lall to Haksar, March 3, 1972, Subject File 179, Haksar Papers, NMML.

57. Niazi, *The Betrayal of East Pakistan*, p. 241.

58. Government of Pakistan, *The Report of the Hamoodur Rehman Commission of Inquiry into the 1971 War*, pp. 494–495.

to India, namely to protect them from the wrath and vengeance of the people of Bangladesh."⁵⁹

Although Bhutto led a new civilian government, taking power after the military dictatorship collapsed following the embarrassment of its defeat, he still faced India with bitterness and defiance. Pakistan sought to replace its battlefield losses, modernize its tank units, and strengthen its infantry,⁶⁰ while Bhutto made the fateful decision to produce an atomic bomb.⁶¹ "We must take a leaf or two out of North Vietnam's military textbook," he said.⁶²

Moreover, Bhutto and Pakistan's military were deeply distrustful of each other, which made any rapprochement with India difficult. While in Indian custody, General Niazi came to believe that Bhutto was delaying the repatriation of the captive soldiers in order to break their will and make them compliant to civilian authority when they finally returned to Pakistan. Moreover, the general wrote, Bhutto "was very keen for the prisoners of war to stay in the camps in India, so that none could expose his role" in the loss of East Pakistan.⁶³

Fearing a military coup, Bhutto was usually cautious in his condemnations of the Pakistan army for its atrocities in Bangladesh, but he did sometimes mention this sensitive subject to discredit the military: "The world saw what they were doing. They witnessed their cruelty."⁶⁴ He guardedly told a reporter, "I am not apologising for what our Generals did in East Pakistan. I repeatedly spoke out against their excesses. But you should remember that it was a vital question of protecting our territorial integrity and sovereignty as a nation. All civil wars are bloody."⁶⁵

59. Jagota memorandum, "Can Pak POWs Be 'Transferred' to Bangladesh for Trial for War Crimes?" December 7, 1972, Subject File 95, Haksar Papers, NMML. The Geneva Convention states, "Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger. Only those prisoners of war who, owing to wounds or sickness, would run greater risks by being evacuated than by remaining where they are, may be temporarily kept in a danger zone. Prisoners of war shall not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone." See Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force October 21, 1950, art. 19.

60. Manekshaw-Kulikov talks, February 24–25, 1972, Subject File 235, Haksar Papers, NMML.

61. Sumit Ganguly, "Nuclear Stability in South Asia," *International Security*, Vol. 33, No. 2 (Fall 2008), pp. 45–70; Stephen P. Cohen, *The Pakistan Army* (Karachi: Oxford University Press, 1998), pp. 152–158; and Zalmay Khalilzad, "Pakistan and the Bomb," *Survival*, November/December 1979, pp. 244–250.

62. Zulfikar Ali Bhutto interview, *Newsweek*, April 3, 1972, in *Pakistan Horizon*, Vol. 25, No. 2 (1972), p. 114.

63. Niazi, *The Betrayal of East Pakistan*, p. 244.

64. Zulfikar Ali Bhutto, speech, March 19, 1972, in *Pakistan Horizon*, Vol. 25, No. 2 (1972), p. 110.

65. Bhutto interview, p. 114.

Soon after the cease-fire, Bhutto created a judicial commission to investigate the army's defeat, sidelining the humiliated generals. The Hamoodur Rehman Commission of Inquiry, led by Pakistan's chief justice and two other distinguished judges, issued a report blasting the military's corruption and brutality, with some harsh Pakistani testimony about the massacres. The Hamoodur Rehman Commission urged the government to create a "high-powered court or commission of inquiry" to "hold trials of those who indulged in these atrocities, brought a bad name to the Pakistan Army and alienated the sympathies of the local population by their acts of wanton cruelty and immorality against our own people."⁶⁶ Although no such Pakistani trials ever happened, the report was so scathing that it was suppressed for decades, until it was enterprisingly published in India by *India Today* in 2000 and in Pakistan by *Dawn* in 2001.⁶⁷

BANGLADESH'S CALL FOR JUSTICE

Bangladeshis demanded justice for the slaughter of so much of their populace, but the new country's politics were fractious.⁶⁸ With such anger against Bangladeshis who were accused of collaborating with Pakistan, there was a risk of widespread massacres. Although that did not happen, there were some summary executions by the guerrillas, prompting the government to launch formal trials through the weakened remnants of the country's judiciary.⁶⁹ In January 1972, the Bangladeshi government decided to convene a tribunal to judge and punish collaborators, including people accused of participating in pro-Pakistani death squads and paramilitary militias, as well as looters and informants.⁷⁰ The country's new constitution included an article barring anyone convicted by that tribunal from public office.⁷¹

Bangladesh's state and society had been devastated by the Pakistani crackdown and the civil war. With powerful, radicalized young guerrillas still armed from the conflict, the new government scrambled to assert its author-

66. Government of Pakistan, *The Report of the Hamoodur Rehman Commission of Inquiry into the 1971 War*, pp. 340, 535–536, 539.

67. Samar Halarnkar, "Behind Pakistan's Defeat," *India Today*, August 21, 2000; and Swapan Dasgupta, "History Creates Hell," *India Today*, August 28, 2000, p. 42.

68. Dutt to Haksar, August 19, 1972, Subject File 236, Haksar Papers, NMML.

69. Kamal Hossain, *Bangladesh: Quest for Freedom and Justice* (Karachi: Oxford University Press, 2013), p. 128.

70. Willem van Schendel, *A History of Bangladesh* (Cambridge: Cambridge University Press, 2009), p. 172; and Dilara Choudhury, *Constitutional Development in Bangladesh: Stresses and Strains* (Karachi: Oxford University Press, 1994), p. 102. This was the Bangladesh Collaborators' (Special Tribunals) Order of 1972.

71. Choudhury, *Constitutional Development in Bangladesh*, p. 102.

ity.⁷² Fearing communists and Maoist revolutionaries, Sheikh Mujib-ur-Rahman—the charismatic Bengali nationalist who emerged from a Pakistani jail to become Bangladesh’s founding prime minister—privately relied on India to train his own security forces and supply tear gas.⁷³ His government also faced threats from pro-Pakistan paramilitaries known as Razakars, as well as from the Islamist party Jamaat-e-Islami and from other Muslim nationalists who had preferred to remain as part of Pakistan, some of whom were considered collaborationists.⁷⁴

In India’s shadow, many Bangladeshis were wary of their gigantic neighbor and benefactor. While Prime Minister Mujib and his ruling party were friendly to India, he cautioned P.N. Haksar, the most powerful Indian government functionary, that most Bangladeshi bureaucrats were “pro-Pakistan and anti-Indian in their outlook.”⁷⁵ Haksar secretly warned Indian Prime Minister Indira Gandhi, “The Chinese would operate within Bangladesh through the Left and the Americans would operate through the Right. And both will feed upon the remnants in the soil of Bangladesh of sentiments of suspicion, even opposition to India and communalism.”⁷⁶ Haksar proposed that Indian and Bangladeshi intelligence agencies work together, hoping that Bangladesh would “root out ruthlessly the social soil out of which factors hostile to India constantly sprout.”⁷⁷

Above anything, Bangladesh needed worldwide recognition of its independence, which had cost so much blood to achieve. Indian lawyers pointed to the terms of the well-known Montevideo Convention on the Rights and Duties of States (1933).⁷⁸ Yet widespread global acceptance of the new state could only be achieved with the acquiescence of Pakistan, its former ruler. Among Pakistan’s major allies, China was hostile to Bangladesh; and the United States, strongly anti-Indian under President Richard Nixon, seemed reluctant

72. Hossain, *Bangladesh*, pp. 123–125.

73. Haksar memo, n.d. [April 1973], Subject File 217, Haksar Papers, NMML.

74. Roy to Haksar, March 16, 1972, Subject File 179, Haksar Papers, NMML.

75. Haksar memo.

76. Haksar to Gandhi, “Points on Prospective Relations between China, United States, and Bangladesh,” March 15, 1972, Subject File 179, Haksar Papers, NMML.

77. Haksar to Gandhi, March 16, 1972.

78. Montevideo Convention on the Rights and Duties of States, December 26, 1933, 49 Stat. 3097, 165 U.N.T.S. 21, art. 1, <http://www.cfr.org/sovereignty/montevideo-convention-rights-duties-states/p15897>. The Convention stipulates, “The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.” See Gary J. Bass, “The Indian Way of Humanitarian Intervention,” *Yale Journal of International Law*, Vol. 40, No. 2 (Summer 2015), pp. 258–268.

to accept it.⁷⁹ Most foreign governments were cautious. Bhutto, building his support with the Arab states and Iran,⁸⁰ was indignant when France and Germany “recognised ‘Bangla Desh’ in a hurry.”⁸¹ One senior British official wondered if Pakistan and Bangladesh might form a confederation,⁸² while another warned India not to press premature demands for recognition.⁸³

India urged Pakistan and other countries to recognize Bangladesh promptly.⁸⁴ But when India suggested that Bangladesh might join the Commonwealth, Britain replied that that would depend on Pakistan’s consent and other countries’ recognition. Stymied, India recommended that, “to force the pace of recognition,” Bangladesh should develop working relationships with other governments even without formal recognition, rather than refusing to deal with them.⁸⁵

Bhutto said that Pakistan should be reunited. “‘Bangla Desh’ was created by Indian guns, by Indian aggression,” he defiantly told a Lahore crowd.⁸⁶ His initial stance was what a British diplomat called “a sort of Hallstein doctrine regarding Bangla Desh”—referring to West Germany’s refusal to maintain diplomatic relations with any state that recognized East Germany.⁸⁷ In this climate, the prospect of war crimes trials could derail any momentum toward regional peace. “I am quite prepared to recognize Bangla Desh,” Bhutto bluntly told a reporter, “but there must be a *quid* for my *quo*.”⁸⁸

INDIA’S MILITARY IMPERATIVES

India had an unstated motive for detaining Pakistani prisoners of war, which was far more important than international criminal justice: the Indian military feared that freed Pakistani soldiers would return to active duty against India. In February 1972, Gen. Sam Manekshaw, India’s chief of the army staff, secretly told Soviet military officials, “Mr BHUTTO is very keen to get back the 80,000 odd prisoners we are holding. If political considerations dictate that these prisoners are returned, it will mean augmentation in trained

79. Haksar to Gandhi, “Points on Prospective Relations between China, United States, and Bangla Desh.”

80. Zulfiqar Ali Bhutto, speech, March 28, 1972, in *Pakistan Horizon*, Vol. 25, No. 2 (1972), p. 115.

81. Bhutto, speech, March 19, 1972, p. 113.

82. Singh-Douglas-Home memcon.

83. Kaul-Greenhill talks, December 23, 1971, Subject File 217, Haksar Papers, NMML.

84. *Ibid.*; and Swaran Singh interview, March 20, 1972, in *Pakistan Horizon*, Vol. 25, No. 2 (1972), p. 154.

85. Singh-Douglas-Home memcon.

86. Bhutto, speech, March 19, 1972, p. 113.

87. Kaul-Greenhill talks.

88. Bhutto interview, p. 114.

manpower to the PAKISTAN Army to the extent of about four divisions. Militarily, therefore, it is inadvisable to return the prisoners unless a durable peace is guaranteed."⁸⁹

Haksar, the powerful principal secretary to Prime Minister Gandhi and the driving force behind India's diplomacy, was dedicated to achieving a generous peace. Privately, however, he believed that "President Bhutto was still pursuing the line of confrontation with India. The advisers around him had a very dark record vis-a-vis India and . . . his reluctance to democratise the political life of Pakistan made us suspect that his principal aim was still to establish himself in power as a dictator."⁹⁰ Writing to Gandhi, Haksar concluded, "If the worse comes to the worst, we may have to live with a hostile Pakistan as we have done for the last 25 years, but naturally it is in India's interest and would presumably be in Bangladesh's interest to help in the evolution of Pakistan toward a social and political structure which need not depend upon hostility towards India for its survival."⁹¹

The diplomacy of peacemaking began inauspiciously on February 17, 1972, when India sent Bhutto its first postwar entreaty, offering direct talks without preconditions. Despite some squabbling, with Haksar complaining that Bhutto seemed to "approach these negotiations in a propagandistic manner,"⁹² Bhutto soon accepted India's offer, declaring himself eager for normalization of relations.⁹³

His expectations low, Haksar preferred that Indians and Pakistanis "start talks at a lower level, prepare them thoroughly and have a meeting at the Heads of Government level in the last round." He feared that Bhutto would use a summit meeting with Gandhi "as an exercise of propaganda and to convey to the people of Pakistan that he tried his best to parley with India at the highest level and did not succeed."⁹⁴ Pakistan's recent atrocities deepened India's mistrust. Haksar wrote that Bhutto should "recognise these wrongs which his predecessors in office had perpetrated against innocent men, women and children. Deep scars inflicted on the body and mind of Bangladesh have to be removed. All this requires statesmanship and wisdom of the highest order."⁹⁵ Visiting Bangladesh, Gandhi spoke at a public rally in Dhaka of "the

89. Manekshaw-Kulikov talks.

90. Haksar to Gandhi, March 2, 1972, Subject File 179, Haksar Papers, NMML.

91. Haksar to Gandhi, "Negotiations with Pakistan," March 15, 1972, Subject File 179, Haksar Papers, NMML.

92. *Ibid.*

93. Haksar to Gandhi, March 2, 1972.

94. *Ibid.*

95. Haksar draft for Gandhi speech, March 20, 1972, Subject File 179, Haksar Papers, NMML.

agony you have suffered, and especially the fierce atrocities of the past year," although without mentioning war crimes trials.⁹⁶

The war's outcome left India negotiating from a position of strength. As Haksar secretly told Gandhi, Bhutto "feared that as a victorious country India might be in a mood to dictate some conditions."⁹⁷ It was precisely this military dominance, however, that allowed Haksar to envision a breakthrough. "We would like to settle for ever the question of Jammu & Kashmir," he told Gandhi. "Although we have in our possession some thousand square miles of Pakistani territory, we really have no desire to retain this territory, but we would like to have a peaceful, viable frontier between Pakistan and ourselves, including of course the State of Jammu & Kashmir."⁹⁸

Despite India's might, Bhutto sought the return of Pakistan's soldiers. In a Lahore speech, he asked, "Why does not Mrs. Indira Gandhi release our POWs? Mrs. Indira Gandhi professes to be our friend. Why does she not prove her friendship?"⁹⁹ He privately asked the Soviet Union to pressure its Indian friends.¹⁰⁰ Hinting at a possible quid pro quo, Bhutto pointedly told a Soviet ambassador of his "desire to normalise relations with Bangladesh as well as his readiness to exchange Pakistani nationals in Bangladesh with the Bangladesh nationals in Pakistan."¹⁰¹

Haksar secretly explained to Indira Gandhi that Bhutto hoped that the release of the prisoners of war would bolster his domestic stature.¹⁰² As Haksar noted, the Pakistani leader "felt that it might help him a great deal domestically if the negotiations were to be preceded by India unilaterally releasing prisoners of war." India would not go that far, however. Echoing General Manekshaw, Haksar wrote to Gandhi, "[W]e cannot release the prisoners of war until we have some tangible assurance that these prisoners who constitute an equivalent of 4 Divisions would be going to [a] Pakistan which is not bent on pursuing the old policy of hostility with India."¹⁰³

LAW AND DIPLOMACY

Preparing for peace talks with Pakistan, India's foreign and defense ministries secretly scrambled to establish a policy on repatriating prisoners of war.¹⁰⁴

96. Indira Gandhi, speech, March 17, 1971, in Gandhi, *The Years of Endeavour*, p. 623.

97. Haksar to Gandhi, March 2, 1972.

98. Haksar to Gandhi, "Negotiations with Pakistan."

99. Bhutto, speech, March 19, 1972, p. 112.

100. Haksar to Lall.

101. Haksar to Gandhi, March 2, 1972.

102. *Ibid.*

103. Haksar to Gandhi, "Negotiations with Pakistan."

104. Lall to Haksar.

While the Indian government's lawyers drew up briefs to back up the country's strategic posture, they confronted a significant problem: as a matter of international law, India should promptly return the prisoners to Pakistan. But this would have undone General Manekshaw's desire to keep four Pakistani divisions effectively neutralized for a while.

As Pakistan was quick to point out, the 1949 Geneva Convention stated, "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."¹⁰⁵ Both India and Pakistan were parties to the Geneva Conventions, and India had showcased its adherence to them during the war. In a resolution, the UN Security Council called upon India and Pakistan to observe the Geneva Conventions and "apply in full" their provisions" about prisoners of war.¹⁰⁶ Seeking to deflect Pakistani legal criticism, the Indian foreign ministry dug up examples of other countries failing to obey the Geneva Convention's "categorical provision" for repatriation. The foreign ministry noted that many states had taken years to repatriate enemy prisoners of war, notably the Allies after World War II (China, France, and the Soviet Union held German prisoners of war as late as 1954), concluding conveniently that "the humanitarian considerations involved have had to be balanced against the national interests of the States concerned."¹⁰⁷

More concerned with military imperatives than legal strictures, Indian officials asserted that Pakistan should not get its soldiers back until it had made an enduring peace with India. Citing the great jurist L.F.L. Oppenheim, Indian foreign ministry staffers claimed that repatriation depended on a "stable peace" precluding new Pakistani attacks.¹⁰⁸ Because the prisoners of war made up "almost 4 Divisions" of "well-trained veterans," it would be "less than prudent to insist that the phrase 'without delay' . . . in the Geneva Convention should be followed in letter, ignoring the spirit of that provision."¹⁰⁹ Formulating a lawyers' argument that would satisfy General Manekshaw, the foreign ministry—in a report widely circulated throughout the Indian government¹¹⁰—bluntly concluded that the principle of repatriation would have to wait for an agreement with Pakistan ending the con-

105. Geneva Convention Relative to the Treatment of Prisoners of War, art. 118.

106. Security Council Resolution 307, UN SCOR, 26th sess., 1621st mtg., UN Doc. S/RES/307 (December 21, 1971).

107. Historical Division memorandum, March 13, 1972, HI/121/1/72, MEA, National Archives of India.

108. Ibid. The foreign ministry invoked Lassa Oppenheim, *International Law: A Treatise*, Vol. 2: *Disputes, War, and Neutrality*, 7th ed., ed. Hersch Lauterpacht (London: Longmans, 1952), p. 613.

109. Historical Division memorandum.

110. Ruggal to deputy minister, May 16, 1972, HI/121/1/72, MEA, National Archives of India; and Basu to UN director, October 4, 1972, HI/121/1/72, MEA, National Archives of India.

flict: “[H]asty and instantaneous repatriation of POW’s might exacerbate war conditions.”¹¹¹

India soon realized, however, that it could not detain these Pakistani prisoners indefinitely. Whatever India’s military chiefs thought, the civilians who ran India’s government felt constrained by international law and global public opinion. The foreign ministry admitted that in conflicts since the 1949 Geneva Conventions—such as the Korean War, the 1967 Six-Day War, and India’s own 1965 war against Pakistan—prisoners of war had been more promptly repatriated.¹¹² Haksar, a lawyer who considered himself an expert on international law, told Prime Minister Gandhi that Pakistani troops who were not charged with war crimes would have to be freed. Both India and Bangladesh “should bear in mind that unless we could lay specific charges against prisoners of war and therefore detain them for trial, international opinion as well as the Geneva conventions require that the prisoners of war be returned to the side to which they belong and that we cannot detain them for a very long time without generating a great deal of sympathy for them in the world at large. Hence, the importance of Bangladesh Government taking immediate steps to set up their tribunal.”¹¹³

This led India to weigh various legal options for war crimes trials. In detailed historical reports, the foreign ministry surveyed precedents from Allied prosecutions of German, Italian, and Japanese war criminals after World War II,¹¹⁴ as well as Allied efforts to prosecute German war criminals after World War I.¹¹⁵ Haksar secretly sent Gandhi briefings from the foreign ministry on “[t]rials for genocide, war crimes and crimes against humanity.”¹¹⁶

India laid the legal groundwork for Bangladesh to hold its own trials. India argued that it did not have sole authority to repatriate Pakistani prisoners of war, because they had surrendered to a joint command of Indian soldiers and Bangladeshi rebels. Given how much stronger India was than Bangladesh, this was a rather threadbare contention, not least because late in the war the Bangladeshi guerrillas had been put under Indian command.¹¹⁷

111. Historical Division memorandum.

112. *Ibid.*

113. Haksar to Gandhi, “Negotiations with Pakistan.”

114. Historical Division memorandum, April 3, 1972, HI/121/1/72, MEA, National Archives of India.

115. Historical Division memorandum, April 4, 1972, HI/121/1/72, MEA, National Archives of India.

116. Haksar to Gandhi, March 15, 1972, Subject File 179, Haksar Papers, NMML.

117. Haksar to Gandhi, “Negotiations with Pakistan”; and Sukhwant Singh, *India’s Wars since Independence: The Liberation of Bangladesh*, Vol. 1 (New Delhi: Vikas, 1980), pp. 192–193.

At the same time, Haksar pressed Bangladesh about “the importance and the urgency of Bangladesh Government formally ratifying the Geneva Conventions in accordance with the prescribed procedure,” to be done “without any delay.”¹¹⁸ The Conventions prohibited India from transferring any prisoners to another state that was not party to them, but once Bangladesh became a party, India could transfer Pakistanis to Bangladesh for trial. Bangladesh had declared its respect for the Geneva Conventions during the war; now, goaded by India, in April 1972, Bangladesh formally acceded to the Geneva Conventions.¹¹⁹

With these legal duties handled, India and Bangladesh moved together toward war crimes prosecutions. Pakistan’s General Niazi, who was held by India along with three other Pakistani generals, made sure to bring along one of his senior officers, rather than leave him “at the mercy of the Bengalis—he was wanted by the Indians and the Bengalis for investigation into his misdeeds.” At India’s POW Camp No. 100 in Madhya Pradesh, Niazi was scandalized when Indian authorities tried to interrogate a Pakistani general about war crimes for possible trial by Bengalis. This, Niazi protested, was a clear violation of both the Geneva Convention and the cease-fire agreement. When a senior Indian general was reminded of his cease-fire pledges, he desisted and left the Pakistani general alone.¹²⁰

Pakistan too utilized legal arguments. Bhutto hoped that international legal pressure would dissuade India from holding trials. “Isn’t half our country enough?” he asked a reporter. “The 93,000 Pakistani prisoners of war have to come back sooner or later. They are a waning asset for India. The international community will demand their return.”¹²¹ In Islamabad, he told the National Assembly that about “93,000 Pakistan prisoners of war being held by India in patent violation of the Geneva Convention and all norms of international conduct. . . . Our prisoners are being ill-treated and provoked by the Indians. There are threats of war crime trials.”¹²² In another speech, he said that India’s detention of Pakistan’s prisoners of war defied the UN and was “against the International Law and against the Third Geneva Convention. . . . [T]he United Nations is not the voice of one nation. It is the voice of the whole world. It is

118. Haksar to Dhaka embassy, March 30, 1972, Subject File 179, Haksar Papers, NMML.

119. Jagota memorandum, “Can Pak POWs Be ‘Transferred’ to Bangladesh for Trial for War Crimes?”

120. Niazi, *The Betrayal of East Pakistan*, pp. 238–239.

121. Bhutto interview, p. 114.

122. Zulfiqar Ali Bhutto, speech, April 21, 1972, in *Pakistan Horizon*, Vol. 25, No. 2 (1972), p. 116.

the world court of law. We respect law. Even backward countries like ours respect law."¹²³

While insisting on the return of Pakistan's troops, in his most forthcoming statement, Bhutto left the door open for some limited number of lower-level soldiers to go on trial as war criminals in Bangladesh, although refusing a major tribunal. "If Mujib wants to try some of the people who went berserk, we are prepared to oblige," he told a reporter. "But not another Nuremberg, heaven forbid. It would only heighten tension."¹²⁴ Soon after, however, he toughened his opposition, saying that "if the trials are held it would arouse the worst of feelings and it would make my task almost impossible."¹²⁵

The Simla Agreement

In an extraordinary moment of hope for South Asian peace, India arranged a major summit meeting in late June and early July 1972.¹²⁶ Prime Minister Gandhi went to Simla, in northern India, determined to offer President Bhutto a generous peace. She hoped to resolve the Kashmir issue once and for all, securing a safer regional environment for India for decades to come.¹²⁷ In these talks, the question of war crimes trials was eclipsed by vital strategic issues: the return of Pakistani territory recently occupied by India, the opportunity for a historic breakthrough in Kashmir, and possible Pakistani recognition of Bangladesh.

Despite India's military advantage, Gandhi did not seek to impose a harsh peace. Haksar led the negotiations with a generous attitude, recalling the dire consequences of the punitive peace after World War I.¹²⁸ In a draft speech, he wrote, "We do not propose to negotiate in the spirit that these negotiations are between the victor and the vanquished."¹²⁹ Nor did he want to seize Kashmir only to breed bitter revanchism in Pakistan. Explaining India's "soft approach," another one of Gandhi's top aides, P.N. Dhar, later wrote, "Haksar repeatedly referred to the baneful consequences of the harsh terms the Treaty of Versailles had imposed on the vanquished."¹³⁰

123. *Ibid.*, p. 121.

124. Bhutto interview, p. 114.

125. Zulfiqar Ali Bhutto interview, April 25, 1972, in *Pakistan Horizon*, Vol. 25, No. 2 (1972), p. 125.

126. P.N. Dhar, *Indira Gandhi, the "Emergency," and Indian Democracy* (Oxford: Oxford University Press, 2000), p. 187.

127. Inder Malhotra, "The Collapse of the Shimla Accord," *Indian Express*, June 9, 2014.

128. Pupul Jayakar, *Indira Gandhi: An Intimate Biography* (New York: Pantheon, 1992), p. 188.

129. Haksar draft for Gandhi speech.

130. Dhar, *Indira Gandhi, the "Emergency," and Indian Democracy*, pp. 192, 205.

Most urgently, Pakistan needed to recover some 5,000 square miles of its territory and its prisoners of war from India.¹³¹ The Indians were impressed with Bhutto's desire to resolve the intractable problem of Kashmir, accepting the current status quo as a solution. The Pakistani president emphasized, however, the constraints from his domestic enemies, especially the army, which could overthrow him if he bargained away too much to India.¹³² This potential risk reinforced Haksar's concern that dictating tough peace terms could inflame Pakistan's nationalists and drive its military to launch a coup against Bhutto—as indeed it eventually would do in 1977. A few months before the Simla meeting, Bhutto had said, “[N]o true Pakistani will ever accept . . . a dictated, imposed peace. Such a settlement . . . will mean subjugation and servitude, a living death. I shall never be a party to such an ignominious settlement.”¹³³ As Swaran Singh noted, “[P]rivately Bhutto has been saying that it is the military which has ruined Pakistan and he himself wants to start afresh and wants friendship with India. However, it is doubtful whether he can do anything because in order to consolidate his position in West Pakistan he may be obliged to adopt an anti-Indian posture.”¹³⁴

Haksar's generous approach was not universally shared among Indians. There were influential anti-Pakistan hard-liners in India's government, including Jagjivan Ram, the defense minister, and Y.B. Chavan, the finance minister. Ram, echoing General Manekshaw, argued that by detaining the prisoners of war, India kept several enemy infantry divisions incapacitated. While Ram and Chavan sought a substantial quid pro quo for giving up Pakistani territory and prisoners of war, they failed to win over Gandhi. Dhar, too, opposed a swift return of Pakistan's territory, hoping to “retain some leverage” to induce Bhutto to implement any deal. Dhar's position infuriated Gandhi, who blew up at him.¹³⁵

As for war crimes trials, Haksar's conciliatory approach seemed to rule that out. After all, war crimes prosecutions had been part of the Treaty of Versailles, much resented by Germans.¹³⁶ Gandhi at first sounded punitive about Pakistani atrocities. As her friend Pupul Jayakar noted, the prime minister faced a public “demand for war trials for crimes against the people of

131. Jayakar, *Indira Gandhi*, p. 187.

132. See Robert D. Putnam, “Diplomacy and Domestic Politics: The Logic of Two-Level Games,” *International Organization*, Vol. 41, No. 3 (Summer 1988), pp. 427–460.

133. Bhutto, speech, March 28, 1972, p. 117.

134. Singh-Douglas-Home memcon.

135. Dhar, *Indira Gandhi, the “Emergency,” and Indian Democracy*, pp. 206–208.

136. Bass, *Stay the Hand of Vengeance*, pp. 75–105.

Bangladesh.”¹³⁷ When a Pakistani reporter asked Gandhi about Indian compliance with the Geneva Convention, she replied that “they do make provision for trials for war crimes.” She noted that Pakistan’s troops had surrendered to a joint India-Bangladesh command, emphasizing that Bangladesh would have to participate in decisions about releasing them. When pressed about Pakistani soldiers in Indian custody, she threateningly replied, “Bangladesh said that if you have any problem you send them back here and we will look after them.”¹³⁸

Behind the scenes, though, some Indians disavowed the suggestion of war crimes trials. Dhar argued for releasing the Pakistani prisoners, despite knowing that “Mujib was unwilling to let the POWs go without Bangladesh being recognized as an independent state by Pakistan.” Dhar later wrote, “The opinion I gave Indira Gandhi was that we should persuade Mujib to abandon the project of a war-crimes trial but make the return of POWs to Pakistan conditional on the immediate recognition of Bangladesh as well as the creation of a mechanism for dividing the assets and liabilities of undivided Pakistan among the two countries.”¹³⁹

Late on July 2, 1972, the final day of the Simla meeting, Gandhi and Bhutto met one-on-one after dinner, fueling lasting speculation about secret deals. The two leaders emerged smiling.¹⁴⁰

The Simla agreement, signed that day, primarily aimed at resolving the India-Pakistan conflict. Both states agreed to withdraw their troops and to respect the cease-fire “line of control” in Kashmir.¹⁴¹ This was a significant step toward a possible solution to the Kashmir conflict, with the Line of Control potentially evolving into an enduring border. Srinath Raghavan, an eminent diplomatic historian of South Asia, asserts, “The agreement in Simla was arguably Indira Gandhi’s finest hour.”¹⁴²

The brief text did not discuss war crimes trials, mentioning only future meetings for “the questions of prisoners of war and civilian internees,” as well as a final deal on Kashmir. What this phrase really meant, Gandhi’s friend Jayakar later suggested, was that “India had also agreed to return the ninety-three thousand Pakistani prisoners of war, but only with the approval of the Bangladesh Government.”¹⁴³

137. Jayakar, *Indira Gandhi*, p. 187.

138. Indira Gandhi, press conference, July 1, 1972, in Gandhi, *The Years of Endeavour*, p. 632.

139. Dhar, *Indira Gandhi, the “Emergency,” and Indian Democracy*, pp. 207–208.

140. Jayakar, *Indira Gandhi*, p. 188.

141. Simla Agreement, July 2, 1972, Subject File 90(a), Haksar Papers, NMML.

142. Srinath Raghavan, “Indira Gandhi: India and the World in Transition,” in Ramachandra Guha, ed., *Makers of Modern Asia* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2014), p. 241.

143. Jayakar, *Indira Gandhi*, p. 188.

Following Haksar's guidance, the Indian foreign ministry trumpeted the Simla agreement as a magnanimous peace, the opposite of the humiliating Treaty of Versailles.¹⁴⁴ When Gandhi's bellicose critics in the Lok Sabha, the lower house of Parliament, complained that she had gone soft on Pakistan, she declared, "[H]ad the countries of Europe treated Germany with the understanding that India has shown to Pakistan, there would not have been a Hitler and there would not have been a Second World War."¹⁴⁵

For Pakistan, the summit was a considerable success. The deal allowed the return of some 5,000 square miles of occupied Pakistani land,¹⁴⁶ which would be finished by the end of the year.¹⁴⁷ Bhutto extracted a pledge of peace from India without being forced to recognize Bangladesh or put Pakistani troops on trial as war criminals. And eventually, the deal might lead to the repatriation of India's Pakistani prisoners.¹⁴⁸

For India, possible peace in Kashmir was more important than prosecuting Pakistani war criminals. Still, Gandhi cannily used Pakistan's concern for its troops as an inducement for Bhutto to recognize Bangladesh: "So far as the prisoners-of-war are concerned, there is a third country which is very much concerned, that is, Bangladesh, and that problem cannot be solved unless they are also in the picture." When asked about a statement by Bhutto that future talks might be impossible if India sent Pakistanis to stand trial in Bangladesh, Gandhi highlighted Bangladesh's importance: "There is nothing much we can do about it because the troops did surrender to a joint command in Bangladesh . . . and therefore, the Bangladesh Government has got a say in what should happen and the holding of war crime trials is not against the Geneva Conventions."¹⁴⁹

Although Bangladesh was not present at the Simla talks, India successfully maintained that it be involved in subsequent negotiations about the Pakistani detainees.¹⁵⁰ In a follow-up meeting in Delhi in August 1972, the Indian and Pakistani delegations secretly linked India's return of its Pakistani prisoners to Pakistan's recognition of Bangladesh.¹⁵¹ While Bangladeshis still clamored for

144. "The New Situation in the Sub-Continent," n.d. [1972], Subject File 19, part 1, Kaul Papers, NMML.

145. Indira Gandhi, speech, July 31, 1972, in Mishra, *Indira Gandhi*, pp. 816–817.

146. Jayakar, *Indira Gandhi*, p. 188.

147. Dhar, *Indira Gandhi, the "Emergency," and Indian Democracy*, pp. 184, 211.

148. Farzana Shaikh, "Zulfikar Ali Bhutto: In Pursuit of an Asian Pakistan," in Guha, *Makers of Modern Asia*, pp. 267–302.

149. Indira Gandhi, press conference, July 12, 1971, in Gandhi, *The Years of Endeavour*, pp. 640–641.

150. Aide mémoire, June 7, 1973, Subject File 90(a), Haksar Papers, NMML.

151. Haksar and Ahmed, "Agreed Recommendations," August 29, 1972, Subject File 90(a), Haksar Papers, NMML.

justice, India and Pakistan were quietly well on their way to scrapping any war crimes tribunals.

INTERNATIONAL PRESSURE

The Simla agreement left little motivation for India to prosecute Pakistani prisoners as war criminals. By the end of 1972, India had seemingly given up on holding its own war crimes trials. Instead, it planned to send some Pakistani prisoners to Bangladesh to be tried there.

As the months dragged on, India's detention of Pakistani troops became more embarrassing as a matter of international law. Discomfited because some of the Pakistanis were injured or sick, Haksar secretly asked if India was "really under very great compulsion" to consider freeing them.¹⁵² A senior foreign ministry official replied, "Legally and tactically, seriously wounded and sick prisoners should be returned."¹⁵³

Revealingly, a prominent diplomat, K.P.S. Menon—India's first foreign secretary and a former ambassador to China—argued that India should not rebuff the International Committee of the Red Cross and would not want the sickest Pakistani prisoners to perish in Indian custody. Menon feared for India's reputation: "[A]t this of all times it would be counterproductive to stop this process because we shall be putting ourselves in the wrong with the international community at a time when we should least expect to run foul of that community." He noted that a UN Security Council resolution from December 1971 "calls upon us to apply in full the provisions of the Geneva Conventions" for wounded and sick prisoners of war. "According to our legal adviser, these Conventions oblige us to return wounded and sick POWs." Finally, Menon warned against antagonizing a hostile China on the Security Council: "Even if this can be argued, it would not seem to be the appropriate moment to raise argument about it: we shall only be giving a handle to the Chinese in their contention that the U.N. Resolutions have not been fulfilled."¹⁵⁴

India and Bangladesh then suffered two stinging rebukes from the United Nations. First, in September 1972, although eighty-five countries had recognized Bangladesh, China vetoed its admission to the United Nations.¹⁵⁵ Then in November 1972, the UN General Assembly passed a resolution calling for

152. Haksar to Banerji, August 16, 1972, Subject File 236, Haksar Papers, NMML.

153. Banerji to Haksar, August 19, 1972, Subject File 236, Haksar Papers, NMML.

154. Menon to Haksar, August 17, 1972, Subject File 236, Haksar Papers, NMML.

155. "China's First Veto," *Time*, September 4, 1972, <http://content.time.com/time/magazine/article/0,9171,910396,00.html>.

repatriating prisoners of war in compliance with the Geneva Conventions and that 1971 Security Council resolution.¹⁵⁶

Stung by this slap from the General Assembly, India's foreign secretary privately wondered if Pakistani detainees held by India could be "'transferred' to Bangladesh for trial for war crimes."¹⁵⁷ The foreign ministry's legal adviser replied with a detailed position paper arguing that they could be. Bolstered by a recent report by the International Commission of Jurists,¹⁵⁸ the Indian legal adviser argued that Bangladesh could hold its own national war crimes trials.¹⁵⁹

In this analysis, India's legal adviser studied two key articles in the Geneva Convention Relative to the Treatment of Prisoners of War, inferring that these articles allowed trials for wartime breaches of existing law.¹⁶⁰ India was entitled to hold its own war crimes trials, but would relinquish that obligation to Bangladesh. While the Geneva Convention mandated the repatriation of enemy prisoners once active hostilities were over, it also stipulated that prisoners could be detained for criminal proceedings and subsequent sentences. Thus, as the legal adviser wrote, under the Convention, "Bangladesh is entitled to hold trial of POWs for war crimes, crimes against humanity, genocide, and other offences committed by them, *prior to capture*."¹⁶¹

Next, the legal adviser argued that India could send suspects to Bangladesh for trial for war crimes, crimes against humanity, and genocide. Both India and Bangladesh were joint detaining powers after the Pakistan army's surrender in Dhaka, so war crimes suspects could be moved between them. Brushing aside Pakistani objections that this joint command was a "legal fiction" since the Pakistanis had obviously surrendered to an Indian commander, the legal adviser wrote, "Bangladesh is a co-captor and co-detaining power in relation to the POWs."¹⁶²

Finally, the legal adviser dismissed the complaint that Bangladesh was neither a state nor a party to the Geneva Convention when Pakistani surrendered. While it was prohibited from transferring prisoners to a state that was not a party to the Geneva Convention, Bangladesh—at India's urging—had de-

156. General Assembly Resolution 2938(XXVII), UN GAOR, 27th sess., Supp. No. 30, UN Doc. A/RES/2938 (November 29, 1972); and UN Security Council Resolution 307.

157. Jagota to Chib, December 7, 1972, Subject File 95, Haksar Papers, NMML.

158. International Commission of Jurists, *The Events in East Pakistan, 1971: A Legal Study* (Geneva: International Commission of Jurists, 1972), pp. 63–64.

159. Jagota memorandum, "Can Pak POWs Be 'Transferred' to Bangladesh for Trial for War Crimes?"

160. Geneva Convention Relative to the Treatment of Prisoners of War, arts. 85, 99.

161. Jagota memorandum, "Can Pak POWs Be 'Transferred' to Bangladesh for Trial for War Crimes?" (emphasis in the original).

162. *Ibid.*

clared its respect for the Convention three days prior to the surrender and had become a party in April 1972: “[T]here should be no legal difficulty in handing over the Pak POWs to Bangladesh for trial for war crimes etc.”¹⁶³ But despite all this lawyering, any trials would be at the mercy of considerations of Indian strategy.

PAKISTAN PUSHES BACK

The spirit of Simla did not last long. Once India’s troops were withdrawn from Pakistan’s territory, Dhar writes, Bhutto began to drag his heels on other issues, still refusing to recognize Bangladesh.¹⁶⁴

Whatever hopes India might have had for rapprochement with Pakistan, Bangladesh’s government remained bitter toward its former rulers. In top-secret talks with Haksar held in Dhaka, Prime Minister Mujib accused Pakistan of trying to destabilize Bangladesh, and refused to talk to Bhutto.¹⁶⁵ Mujib secretly urged India to rip apart what remained of Pakistan by backing insurgencies there: “India should give moral and material help to the Sindhis, the Baluchis and the Pathans to win their freedom.”¹⁶⁶

Bangladesh put war crimes trials at the very top of a list of items for Haksar to bring before Indira Gandhi. Although Bangladesh initially sought more than 1,000 war crimes suspects, it cut that figure down to 195.¹⁶⁷ Haksar privately noted, Mujib “proposes to bring up for trial about 100 prisoners of war in February or March next and hoped that the Prime Minister would agree with this.”¹⁶⁸

Still, Bangladesh was in no position to force its will upon Pakistan, while India was eager for a peace deal. So at this point, according to Dhar, Bangladesh offered a major compromise: it temporarily shelved the issue of Pakistani recognition of its independence.¹⁶⁹ As Haksar explained, Bangladesh “made a big concession by setting aside recognition to pave way for resolving all humanitarian issues.”¹⁷⁰

Thus on April 17, 1973, Bangladesh and India issued a joint declaration from Delhi seeking the simultaneous humanitarian release of everyone held captive in the messy aftermath of the war: Pakistan’s prisoners of war and some other

163. Ibid.

164. Dhar, *Indira Gandhi, the “Emergency,” and Indian Democracy*, p. 211.

165. “Malik Offers to Mediate on the Subcontinent,” *Straits Times*, April 3, 1973, p. 2.

166. Haksar memo; and Cohen, *The Pakistan Army*, pp. 158–161.

167. Haksar to Hossain, August 19, 1973, Subject File 105, Haksar Papers, NMML.

168. Haksar memo.

169. Dhar, *Indira Gandhi, the “Emergency,” and Indian Democracy*, p. 211.

170. Haksar to Hossain, August 19, 1973.

civilians held by India, Bangladeshis in Pakistani custody, and what India termed “Pakistanis in Bangladesh”¹⁷¹—that is, people there who had declared themselves loyal to Pakistan. These included stranded West Pakistanis, but were mostly people known as Biharis, an Urdu-speaking and Muslim minority in Bangladesh, who were despised by Bangladeshi nationalists as collaborators with the Pakistanis.¹⁷² All told, there were roughly 92,000 Pakistani prisoners of war held in India, some 250,000 Biharis in Bangladesh who had opted for Pakistan, and 400,000 Bengalis in Pakistan.¹⁷³ The last group was relatively uncontroversial: Pakistan wanted them gone, and Bangladesh was willing to take them. The fate of the Biharis, however, would become a stubborn sticking point between Pakistan and Bangladesh: neither country wanted them.

In their joint declaration, India and Bangladesh foregrounded the recognition of Bangladesh by insisting on “the basis of sovereign equality” for all parties. (Bangladesh demanded that any talks with Pakistan be conducted on “sovereign equality,” although India did not.) As for war criminals, the declaration stated that these mass repatriations would not include those wanted by Bangladesh “for trial on criminal charges.”¹⁷⁴ To Pakistan’s horror, Kamal Hossain, Bangladesh’s foreign minister, declared publicly that his government would put 195 Pakistanis on trial as early as May 1973. As a Pakistani diplomat wrote, “It was clear . . . that India was proposing to surrender to Bangla Desh those Prisoners of War who were wanted for trial on alleged acts of genocide and other offences by Bangla Desh.”¹⁷⁵

Pakistan’s government recoiled at these imminent Bangladeshi trials. India’s “illegal captivity” had dragged on for sixteen months, potentially setting “a calamitous precedent” that “will nullify all obligations under the Geneva Conventions, which civilized nations have laboured for over a century to evolve and to make binding on all states.” Bhutto, refusing to legitimize Bangladesh’s independence, would not accept that “the authorities in Dacca” could prosecute Pakistanis, declaring that “repugnant to a nation’s sovereignty.” Instead, Pakistan proposed a tribunal of its own: “According to an established principle of international law, only a competent tribunal of Pakistan can have jurisdiction in this matter since the alleged criminal acts were committed in a part of Pakistan and since also the persons charged are the citizens

171. Joint Indo-Bangladesh Declaration, April 17, 1973, Subject File 90(a), Haksar Papers, NMML.

172. Dhar, *Indira Gandhi, the “Emergency,” and Indian Democracy*, p. 211.

173. India aide mémoire, June 7, 1973, Subject File 90(a), Haksar Papers, NMML; and Pakistan aide mémoire, May 25, 1973, Subject File 90(a), Haksar Papers, NMML.

174. Joint Indo-Bangladesh Declaration.

175. Kharas to Lachs, July 11, 1973, Subject File 95, Haksar Papers, NMML.

of Pakistan.”¹⁷⁶ To Pakistan’s government, the massacres were a domestic matter between West Pakistanis and East Pakistanis, with no international aspect.

Unsubtly hinting that war crimes trials would prevent Pakistan’s recognition of Bangladesh, Bhutto’s government warned that “if the authorities in Dacca begin to hold these trials, it will poison the atmosphere and seriously retard the establishment of that climate of peace and reconciliation.” Pakistan threatened to retaliate for any trials by prosecuting some of the Bengalis in its custody for subversion, espionage, and high treason.¹⁷⁷

Pakistan’s top negotiator, Aziz Ahmed, privately sent Swaran Singh, India’s foreign minister, a more conciliatory note, inviting India to send a delegation to Pakistan for talks.¹⁷⁸ India, however, was stung by Pakistan’s public statement, which Singh angrily called “tantamount to a rejection” of India and Bangladesh’s joint call for negotiations.¹⁷⁹ India was painfully learning how difficult it would be to achieve any justice for Bangladesh.

How Pakistan Won Impunity

While Pakistan thundered against war crimes trials, India feared getting mired in legal quarrels—particularly because India did not seem confident of its legal position. As Foreign Minister Singh frankly told Ahmed, “We propounded no legal arguments; indeed, we had eschewed them to achieve the humanitarian objective.” He hoped that Pakistan would avoid “political and legal argumentation.”¹⁸⁰

Instead, Pakistan lashed back, reversing from its conciliatory diplomacy at Simla. Breaking off direct talks with India, Pakistan instead began to communicate through Switzerland, sending two frosty aides mémoire to India hoping that “the world community in general and Switzerland as depository State of the instruments of ratification of the Geneva Conventions in particular will assist and support Pakistan.” Through its Swiss channel, Pakistan warned, “The trials of Pakistani prisoners of war by Bangladesh would take the situation to a point of no return. There would be a great resentment and revulsion in Pakistan and the atmosphere would be vitiated and the efforts of the President of Pakistan for reconciliation and recognition of Bangladesh would be foiled.”¹⁸¹

176. Pakistan statement, April 20, 1973, Subject File 90(a), Haksar Papers, NMML.

177. *Ibid.*

178. Ahmed to Singh, April 23, 1973, Subject File 90(a), Haksar Papers, NMML.

179. Singh to Ahmed, May 6, 1973, Subject File 90(a), Haksar Papers, NMML.

180. *Ibid.*

181. Pakistan government aide mémoire, May 11, 1973, Subject File 90(a), Haksar Papers, NMML.

Aziz Ahmed, Pakistan's foreign and defense minister, refused to accept the India-Bangladesh joint statement's provision that might allow Bangladesh to try Pakistani war criminals.¹⁸² Pakistan accused India of seeking to "divert the mounting world criticism against the continued captivity of 92,000 Pakistani POWs nearly 17 months after the cessation of hostilities between India and Pakistan."¹⁸³

Unsurprisingly, Singh's implicit admission of India's legal vulnerability only encouraged Pakistan to double down on its legal claims about the paramount importance of the Geneva Conventions. To forestall Indian transfers of war criminals to Bangladesh, Pakistan turned to the International Court of Justice (ICJ), hoping that it might be swayed by an eminent Pakistani jurist on the bench there, Judge Muhammad Zafrulla Khan: Pakistan's first foreign minister, its advocate before the UN Security Council during Partition, and a former president of the UN General Assembly.¹⁸⁴

On May 11, 1973, Pakistan formally asked the ICJ to protect its 195 prisoners of war from being transferred from India to Bangladesh.¹⁸⁵ Pakistan asserted its exclusive jurisdiction over those prisoners, denied that the Genocide Convention applied to them, and warned that an "atmosphere of hate" in Bangladesh made it impossible to convene a competent tribunal there. Meanwhile, a Pakistani judge at the High Court in Lahore argued that Pakistanis could not be tried for suppressing "internal revolt in their own country" and that Pakistan had not committed genocide.¹⁸⁶

Pakistan's invocation of national sovereignty won immediate results. When the ICJ notified India that it was formally considering the case,¹⁸⁷ India froze. Pakistan's government believed that the Court had halted India's "arbitrary action."¹⁸⁸ On June 4, 1973, India assured the ICJ that the war criminals issue would be resolved through the negotiations promised in the Simla agreement. Satisfied that India had been thwarted, Pakistan asked the Court to postpone its consideration while those talks proceeded.¹⁸⁹

While India-Pakistan diplomacy resumed, there were dramatic repercussions in The Hague. Judge Zafrulla Khan tried to create a legal roadblock. Sug-

182. Ahmed to Singh, May 16, 1973, Subject File 90(a), Haksar Papers, NMML.

183. Pakistan aide mémoire.

184. Nisid Hajari, *Midnight's Furies: The Deadly Legacy of India's Partition* (Boston: Houghton Mifflin Harcourt, 2015), pp. 227, 246–247.

185. Kharas to Lachs.

186. Nasim Hasan Shah, *Geneva Conventions and the Pakistani Prisoners of War* (Lahore: Progressive Publishers, July 1973), pp. 2, 11–14.

187. Kharas to Lachs.

188. *Ibid.*

189. *Ibid.*

gesting that the judges might have to make a construction of two articles of the Genocide Convention, he claimed that, under the ICJ's Statute, the Court's registrar would have to notify all states that were parties to the Genocide Convention, letting them intervene in the Court's proceedings. The ensuing mess would, he admitted, cause "considerable inconvenience" to several judges. His fellow judges "argued vehemently" against him, seemingly having already decided that the Court had no jurisdiction. Outraged, the Pakistani judge said that the other judges had closed minds and no scruples; his own continued participation would be "farcical." He apparently stormed out, and the next day, resigned from the International Court of Justice.¹⁹⁰

LAWFARE

India was stung by this legal onslaught, with Swaran Singh affronted by Pakistan's "offensive" notes.¹⁹¹ India resented the abrupt turn to Swiss channels and Pakistan's "highly distorted, misleading and in some case, factually incorrect rendering of India's position." India bristled at Pakistan's "threat to start retaliatory trials" for some Bengalis held by Pakistan, who "can hardly be treated on the same footing as the 195 soldiers wanted by Bangladesh against whom [there] is clear evidence of involvement in heinous crimes, such as murder, rape, etc. The world at large is already aware of the magnitude of and nature of crimes committed by Pakistani soldiers in the campaign of 1971."¹⁹²

From Pakistan, Aziz Ahmed sent a startling reply. Those harsh notes were "not meant for transmission to the Government of India. Apparently they were transmitted to your Government through some misunderstandings and I am still trying to find out who was responsible." This admission strongly suggested that Pakistani military hard-liners had tried to torpedo the peace talks—and hinted at the danger of a coup in Pakistan. Ahmed invited India for immediate talks "from a pure humanitarian angle."¹⁹³ India, seemingly shaken by the legal fracas, was all the more keen for a settlement. Singh swiftly accepted Ahmed's explanation, without asking uncomfortable questions about whether the civilians or the military were really in charge in Pakistan.¹⁹⁴

Haksar and Dhar spent July 24–31, 1973, negotiating with Ahmed in Rawalpindi.¹⁹⁵ In a top-secret draft of a possible agreement, the emerging

190. Zafrulla Khan to Lachs, July 3, 1973, Subject File 95, Haksar Papers, NMML.

191. Singh to Ahmed, June 11, 1973, Subject File 90(a), Haksar Papers, NMML.

192. India aide mémoire.

193. Ahmed to Singh, June 23, 1973, Subject File 90(a), Haksar Papers, NMML.

194. Singh to Ahmed, July 3, 1973, Subject File 90(a), Haksar Papers, NMML.

195. Singh to Ahmed, July 10, 1973, Subject File 90(a), Haksar Papers, NMML; and Ahmed to Singh, July 11, 1973, Subject File 90(a), Haksar Papers, NMML.

bargain on war criminals was made brutally clear. Those 195 Pakistani suspects would remain in Indian custody, and if Pakistan recognized Bangladesh, India would drop its pressure for trials, which would presumably compel Bangladesh to give up as well: "As soon as Pakistan has recognised Bangladesh, the question of disposition of 195 POWs will be discussed bilaterally between Bangladesh and Pakistan together with other matters between the two Governments."¹⁹⁶

While publicly supporting Bangladesh's "just and legitimate" wish to prosecute Pakistani "prisoners of war against whom they have strong evidence," Haksar dodged Indian reporters asking about the emerging split between India and Bangladesh over war crimes trials.¹⁹⁷ Although India claimed that Mujib "cannot give up the idea of trials," Pakistan suggested the compromise of "skirting the issue for the time being." In a sign of its weakening position, Bangladesh was open to considering the Pakistani compromise. Ahmed later "admitted the Bangladesh Government's willingness to consider skirting around the war trials was a step forward—. . . almost 'break through.'"¹⁹⁸ Rather than let the talks stall, India floated a proposal to ask Bangladesh to postpone possible trials.¹⁹⁹ With every round of diplomacy, the chances for justice were fading away.

THE BIHARIS

On one point, Pakistan never relented: the fate of the Biharis, the Urdu-speaking Muslim minority in Bangladesh, vilified by Bangladeshi nationalists as a pro-Pakistan fifth column. Bangladesh's government unsuccessfully sought to send them to Pakistan. Over years of talks, despite repeated Indian blandishments, Pakistan flatly refused to take them in.²⁰⁰ In the end, they would be left where they were in Bangladesh.

For Pakistan, the Biharis were simply a minority population within Bangladesh who deserved humane treatment, not expulsion. Pakistan accused Bangladesh of "harassing and persecuting its ethnic, linguistic and political minority." The Biharis were not Pakistani nationals; that they spoke Urdu was, for Pakistan, irrelevant. So was the fact that many of them had come from India during Partition. Although Pakistan would allow ethnic

196. Draft tripartite agreement, July 26, 1973, Subject File 95, Haksar Papers, NMML.

197. P.N. Haksar, *Premonitions: Imperatives of Change* (Bombay: Interpress, 1979), pp. 85–89.

198. Haksar to Hossain, August 19, 1973. See also Dhar, *Indira Gandhi, the "Emergency," and Indian Democracy*, p. 211.

199. "Bhutto for Taking Back Only 50,000 Non-Bengalees," *Sangbad*, August 1, 1973, Subject File 95, Haksar Papers, NMML.

200. Bhutto, speech, March 19, 1972, p. 112.

Bengalis to depart Pakistan for Bangladesh if they wished, it would not accept Biharis in return, even those who said they wanted a future in Pakistan.²⁰¹

Pakistan's government declared, "Bangladesh has no right, legal or moral, to subject its ethnic, linguistic and political minority to discrimination and then to give it an option to leave their homes." Pakistan, still coping with refugees from Partition, was not about to shelter more.²⁰² Pakistan refused India's demands for sending some 250,000 Biharis from Bangladesh to Pakistan,²⁰³ denouncing the notion that it should take in Biharis as "prejudice and bigotry."²⁰⁴

India disputed the "hollowness" of Pakistan's claims. There were, India claimed, some 600,000 minority non-Bengalis in Bangladesh, and "thanks to the statesmanlike and humane policy" of Bangladesh's government, only 250,000 had "declared their allegiance to Pakistan." Their choice for Pakistan, India said, was not coerced and they did not face "arbitrary expulsion." Nor was India impressed with Pakistan's complaints about the difficulty of absorbing 250,000 refugees, given that India had had to shelter millions of Bengali refugees during Pakistan's "campaign of terror against the civilian population" of Bangladesh in 1971.²⁰⁵ In the end, these claims and counterclaims made no difference: India could not force open Pakistan's borders, so the Biharis remained in Bangladesh.²⁰⁶

BANGLADESH YIELDS

The final round of India-Pakistan talks, in Delhi in August 1973, are documented in unusual detail in Haksar's archival papers. They offer an extraordinary window into how the possibility of war crimes trials was bartered away. While the talks were furious, punctuated by Pakistani threats to walk out, there was an emerging bargain: dropping war crimes trials in exchange for Pakistani recognition of Bangladesh. As Haksar noted, "Pakistan delegation appears to be strongly under the impression that Bangladesh was so desperately interested in admission to U.N. that if Pakistan were to facilitate it a great benefit would be conferred on Bangladesh."²⁰⁷

Haksar wrote, "Now Pakistan was insisting on trials of 195 being frozen even though this was a sensitive political issue for Bangladesh leadership." In

201. Pakistan government aide mémoire.

202. *Ibid.*

203. Pakistan aide mémoire.

204. Pakistan statement.

205. India aide mémoire.

206. Haksar to Hossain, August 19, 1973.

207. *Ibid.*

retaliation, Pakistan had detained 203 Bangladeshis and threatened to prosecute them for treason, dereliction of duty, espionage, and defiance of authority.²⁰⁸ Haksar bluntly noted, "Pakistan wanted to keep 203 Bangalee officials and military personnel as hostages."²⁰⁹ In case Pakistan would not make a deal, Haksar privately asked Bangladesh to take custody at last of the 195 accused war criminals held in India.²¹⁰ He also quickly spotted the obvious quid pro quo, however: if India freed its 195 Pakistanis, Pakistan would release its 203 Bangladeshis.²¹¹ He told Aziz Ahmed that Bangladesh might "consider the concept of 'skirting round' the trials. But this was impossible to consider if Pakistan insists on keeping 203."²¹²

Refusing to compromise further, Pakistan's civilian government pointed to its own domestic political constraints.²¹³ According to Haksar's notes, Ahmed "spoke emotionally about suffering of relatives of 90,000 POWs detained in India for over 20 months which would continue to mar relations between the two countries for years to come." Ahmed was "totally adamant" about keeping the 203 Bangladeshis charged with treason, declaring that "treason is a very serious crime, especially since treason had succeeded and the country had been split up. How can Pakistan Government justify to its public the retention of 195 POWs in India if these 203 Bangalees are also released[?] Even the returning POWs will condemn Pakistan Government for leaving behind 195 in that event."²¹⁴

Haksar declared himself unimpressed. "As to the plea of internal difficulties, this applied not only to Pakistan but to Bangladesh as well," he said. "[T]ask of every Government is to govern and to get over political difficulties."²¹⁵ He concluded privately, however, that Pakistan's civilian government had "to explain to the public at large in their country" that it had used all available leverage to forestall war crimes trials.²¹⁶

208. "Bhutto for Taking Back Only 50,000 Non-Bengalees."

209. Haksar to Hossain, August 19, 1973.

210. Haksar to Dhaka high commissioner, August 20, 1973, 12:15 p.m., Subject File 105, Haksar Papers, NMML.

211. Although no one in the South Asian negotiations seemed aware of it, both Wilhelmine Germany and the Ottoman Empire had successfully used much the same tactic with British hostages in the World War I era, with Britain abandoning plans for war crimes trials to free its personnel. See Bass, *Stay the Hand of Vengeance*, pp. 61–62, 139–143.

212. Haksar to Hossain, August 19, 1973.

213. For a classic discussion, see Putnam, "Diplomacy and Domestic Politics."

214. Haksar to Hossain, August 19, 1973.

215. *Ibid.*

216. Haksar to Dhaka high commissioner, August 20, 1973, 7:30 p.m., Subject File 105, Haksar Papers, NMML.

To exert foreign pressure on Pakistan, India turned to the United States, Pakistan's superpower patron. India's foreign secretary, Kewal Singh (who had replaced T.N. Kaul), met with Henry Kissinger, the U.S. national security adviser, at the Western White House in San Clemente, California. Although Kissinger was harshly anti-Indian when alone with Nixon,²¹⁷ here he obligingly tried to broker a deal trading war crimes trials for Pakistan's recognition of Bangladesh.²¹⁸ Kewal Singh suggested a swap where "Bangladesh agreed to give up war crimes trials in exchange for recognition by Pakistan." Kissinger said that he would ask Bhutto to drop his insistence on keeping the 203 Bangladeshis, and, according to Indian notes, "admitted that they were being held as reprisals." Kissinger would assure Bhutto that "the question of trial of 195 Pakistani POWs could be skirted around and kept pending until discussion between Pakistan and Bangladesh regarding this question and recognition." He offered to ask Bangladesh's leaders "to soften their attitude to war criminals trials." If Kissinger could get Bhutto's approval, he requested that India not embarrass the United States by transferring the 195 suspects to Bangladesh until every diplomatic avenue had been exhausted.²¹⁹

At this point, under Indian pressure, Bangladesh capitulated.²²⁰ In a breakthrough concession, the fledgling country agreed to freeze the issue of war crimes trials and leave the Pakistani suspects in Indian custody.²²¹ Impressed, Haksar privately told Indian diplomats that "Bangladesh has been persuaded to make very great concession to 'freeze the question of trials.'" ²²²

The negotiations lurched forward. India formally told Pakistan that "Bangladesh agrees to consider that no trial of the 195 Prisoners of War shall take place" during the repatriations. Once all the other transfers of detainees were completed, then "Pakistan and India will discuss the matter of 195 Prisoners of War," with Bangladesh participating.²²³ For Bangladesh, what counted was "sovereign equality" among all negotiating parties.²²⁴ Haksar told Kamal Hossain, Bangladesh's foreign minister, "Our overall impression is that in consideration of 195 remaining in India, Pakistan might drop retaining 203."²²⁵

217. Bass, *The Blood Telegram*, pp. 143–144, 156, 207–208, 252, 255, 271, 319.

218. Singh to Haksar, August 24, 1973, Subject File 105, Haksar Papers, NMML.

219. Singh to Haksar, August 21, 1973, Subject File 105, Haksar Papers, NMML.

220. Dutt to Haksar, August 24, 1973, Subject File 105, Haksar Papers, NMML.

221. Haksar to Dhaka high commissioner, August 20, 1973, 12:15 p.m.

222. Haksar to ambassadors, August 22, 1973, Subject File 105, Haksar Papers, NMML.

223. *Ibid*; and Haksar to Hossain, August 22, 1973, Subject File 105, Haksar Papers, NMML.

224. Hossain to Haksar, August 27, 1973, Subject File 90(a), Haksar Papers, NMML.

225. Haksar to Hossain, August 22, 1973, 8:45 p.m., Subject File 105, Haksar Papers, NMML.

Sensing compromise on the opposing side, Ahmed tried to bargain down the number of war crimes suspects to merely five or six. Haksar refused.²²⁶ To the shock of the Indians and Bangladeshis,²²⁷ the Pakistanis then said that they wanted to keep only eleven Bangladeshi prisoners, while India in turn would detain just twenty-one Pakistani prisoners of war. "How they arrived at this figure only Pakistanis know," fumed Haksar. "They did not even care to explain. We charged the Pakistani delegation with double dealing and double talk."²²⁸

After speaking with Bhutto, Kissinger suggested that the Pakistani president might return the 203 Bangladeshis if the other side showed flexibility in a package deal.²²⁹ As Haksar wearily wrote to Hossain, the Pakistani delegates at last were ready to accept India's proposal to return the 203 Bangladeshis.²³⁰ In a top-secret message, Haksar told Hossain, "Despite Pakistan's volte face we have been unrelenting about 203 and are fighting to win our point on 203 and keeping 195 where they are."²³¹ Hossain toughly suggested that "the only language that might bring Pakistan to the senses would be to indicate to them that in case the talks are not successful Bangladesh would be compelled to proceed with the war crimes trials. . . . A hint to AZIZ AHMED that immediate action would be taken to transfer the war criminals to Bangladesh may soften him up."²³²

This threat seemingly worked. After what Haksar called an "extremely stormy session,"²³³ the three countries struck a comprehensive deal, announced on August 28, 1973. Pakistani prisoners of war and civilian internees were to be sent home promptly from India, as would Bangladeshis in Pakistan and Pakistanis in Bangladesh.²³⁴ Returning to Rawalpindi, Ahmed made a statement that his country's recognition of Bangladesh would soon follow. Although India's government faced some criticism, overall the Indian press welcomed the agreement.²³⁵ At Bangladesh's urging, there was supposed to be one final round of negotiations among Bangladesh, India, and Pakistan to "settle the question of 195 prisoners of war."²³⁶

226. *Ibid.*

227. Hossain to Haksar, August 24, 1973, 1:30 p.m., Subject File 105, Haksar Papers, NMML.

228. Haksar to Hossain, August 23, 1973, 8:25 p.m., Subject File 105, Haksar Papers, NMML.

229. Kaul to Haksar, August 24, 1973, Subject File 105, Haksar Papers, NMML.

230. Haksar to Hossain, August 24, 1973, Subject File 105, Haksar Papers, NMML.

231. Haksar to Hossain, August 25, 1973, Subject File 90(a), Haksar Papers, NMML.

232. Hossain to Haksar, August 26, 1973, Subject File 105, Haksar Papers, NMML.

233. Haksar to Hossain, August 24, 1973.

234. Final joint draft agreement, August 27, 1973, Subject File 90(a), Haksar Papers, NMML.

235. Press round-up, August 30, 1973, Subject File 95, Haksar Papers, NMML.

236. Final joint draft agreement.

With that, most of the prisoners of war were released, heading home by air-lift or train.²³⁷ To hedge against Pakistani cheating, India repatriated its 90,000 Pakistani prisoners of war in six phases of roughly 15,000, spread out over months. As an Indian foreign ministry official secretly explained, "After each phase there will be a period of pause to give time for repatriation for a proportionate number of Bangalees and Pakistanis," which should allow "the last Bangalee from Pakistan to return to Dacca at about the same time as the last Pakistani soldier leaves India."²³⁸

Finally, the idea of war crimes trials was definitively extinguished. In October 1973, the Indian, Pakistani, and Bangladeshi foreign ministers met one last time in Delhi, and, as Dhar wrote, "decided that the 195 Pakistani POWs held for trial would be repatriated to Pakistan. This enabled a three-way movement of prisoners and civil internees." After a face-saving interval, Pakistan recognized Bangladesh in February 1974.²³⁹

AFTER IMPUNITY

Without international support, Bangladesh had few viable alternatives for seeking justice for the 1971 atrocities. While Bangladesh's parliament had in 1973 passed the International Crimes (Tribunals) Act to create a domestic court for accused collaborators with Pakistan, these prosecutions floundered.²⁴⁰ The country's judiciary had been decimated by Pakistan's wartime onslaught against the Bengali intelligentsia. The prosecutions were impeded by pleas for clemency from family members and sympathizers, as well as fears that the trials would undermine a shaky national unity. In November 1973, Mujib's government—hoping to unify the country—granted a general amnesty for everyone except those accused of murder, rape, or genocide.²⁴¹ This meant freeing some 33,000 alleged war criminals, many with Islamist leanings.²⁴²

After a military coup in 1975, the prospects for justice diminished still further. Ziaur Rahman, Bangladesh's first military dictator, aligned himself with Jamaat-e-Islami and other Islamist parties, allowing them to return to political

237. Bakshi memorandum, September 17, 1973, Subject File 95, Haksar Papers, NMML; Singh to Shahi, September 18, 1973, Subject File 95, Haksar Papers, NMML; Shahi to Singh, n.d. [September 1973], Subject File 95, Haksar Papers, NMML; and Menon to Haksar, September 17, 1973, Subject File 95, Haksar Papers, NMML.

238. Bakshi memorandum.

239. Dhar, *Indira Gandhi, the "Emergency," and Indian Democracy*, p. 211.

240. Van Schendel, *A History of Bangladesh*, p. 172.

241. Hossain, *Bangladesh*, p. 128.

242. David Lewis, *Bangladesh: Politics, Economy, and Civil Society* (Cambridge: Cambridge University Press, 2011), p. 103.

life and undercutting the likelihood of any prosecutions for war crimes.²⁴³ He removed the article in the Pakistani constitution that barred from office anyone convicted by the collaborators' tribunal.²⁴⁴

Still, many Bangladeshis remained affronted by the immunity of their former tormentors in Pakistan, fuming at the 1989 ascension of Gen. Tikka Khan—notorious among Bangladeshis as one of the most brutal Pakistani commanders in the 1971 slaughter—to be governor-general of Pakistan's Punjab province.²⁴⁵ Pakistani civil society has made some steps in recent years to remember the slaughter, but it was not until 2002 that a Pakistani military ruler mentioned the 1971 atrocities, when Gen. Pervez Musharraf, Pakistan's military ruler, gingerly expressed his regrets in a visit to Dhaka.²⁴⁶ While Bangladesh seeks an official apology, Pakistan refuses. In November 2015, Pakistan's foreign ministry bluntly "rejected the baseless and unfounded assertions" by Bangladesh's government, as well as its "insinuation of complicity in committing crimes or war atrocities."²⁴⁷

In the 1990s, a return to civilian rule and democracy in Bangladesh allowed fresh efforts to punish war criminals from 1971.²⁴⁸ In 1992, a resurgent Jamaat-e-Islami, the leading Islamist party, promoted as its leader Golam Azam, an anti-separatist politician who had fled to Pakistan after the war of independence and now returned to Bangladesh.²⁴⁹ The return of Azam sparked demonstrations demanding that he be prosecuted for war crimes from 1971, which spiraled into an opposition boycott of Parliament and two countrywide strikes in November 1992 and May 1993.²⁵⁰ Frustrated at the impunity of war criminals, the writer Jahanara Imam and other Bangladeshi activists convened a symbolic "people's court" against Azam, accusing him of having led death squads. While the government tried to prosecute Imam and her partners for treason, these activists put the issue of war criminals back on the polit-

243. Chopra, "The International Crimes Tribunal in Bangladesh," p. 212.

244. Choudhury, *Constitutional Development in Bangladesh*, p. 102.

245. Lewis, *Bangladesh*, p. 72.

246. Beena Sarwar, "Should Pakistanis Apologise to Bangladesh?" *Scroll*, December 9, 2015, <http://scroll.in/article/773523/should-pakistanis-apologise-to-bangladeshis-an-online-appeal-reopens-old-wounds>.

247. Ministry of Foreign Affairs, Pakistan, "Bangladesh Acting High Commissioner Summoned to Foreign Office" (Islamabad: Ministry of Foreign Affairs, Pakistan, November 30, 2015), <http://mofa.gov.pk/pr-details.php?mm=MzI5MQ>.

248. Van Schendel, *A History of Bangladesh*, p. 172; and Chopra, "The International Crimes Tribunal in Bangladesh," p. 212.

249. Lewis, *Bangladesh*, p. 92.

250. Craig Baxter, *Bangladesh: From a Nation to a State* (Boulder, Colo.: Westview, 1997), p. 123.

ical agenda.²⁵¹ This popular advocacy set the stage for Sheikh Hasina's trials after 2009—and Bangladesh's current turmoil.

Conclusion

The tale of the undoing of justice for the Bengalis since the end of the 1971 war is a tragic one. Bangladesh, caught in the grip of persistent patterns of international relations, proved unable to escape them. The result was one of the most consequential cases of impunity in modern history.

Returning to the four core arguments of this article, first, national security trumped international justice. Although India was bargaining from a position of strength, and had elites and a public who were sympathetic to the Bengalis, Indira Gandhi's government ultimately yielded to the primacy of India's own national security imperatives. Pakistan, though momentarily subdued and humiliated, was still too strong to be forced to submit to the trials of its soldiers as war criminals. Gandhi sought a breakthrough peace with Pakistan at Simla, which could have brought a new era for India's own security. Despite having accused Pakistan of genocide to justify going to war in 1971, she abandoned prosecutions for those same atrocities in order to safeguard India's security. For India, the prospect of peace in Kashmir came ahead of justice in Bangladesh.

While Bangladesh's government demanded punishment for its former Pakistani overlords, it was limited by its military and political relative weaknesses. War crimes trials would require approval from India, which held the Pakistani prisoners of war. Pakistan, despite its battlefield defeat, was still powerful enough to make regional diplomacy contingent on amnesty for its troops. Nor could Bangladesh rely on other foreign allies to tip the balance in its favor, while Pakistan had support from the United States, China, and Arab and Muslim countries.²⁵² Indeed, even during the bloody months of Pakistan's crackdown in 1971, the Nixon administration and China had staunchly stood behind Pakistan, joined by the Arab states and members of the Non-Aligned Movement such as Indonesia.²⁵³ Bangladesh had little reason to think that the world had grown more friendly since then. This was an era well before the creation of the International Criminal Court, which in recent years has pressured some war crimes suspects into surrendering to its custody even without mili-

251. Van Schendel, *A History of Bangladesh*, pp. 217, 275, 277.

252. Bhutto, speech, March 19, 1972, p. 113.

253. Bass, *The Blood Telegram*, pp. xii–xvii, 134–177.

tary conquest; Bangladesh had no such alternatives for international institutions beyond the region. Relatively weak and desperate for recognition, Bangladesh could not resist the mounting pressures for impunity.

Second, the most victimized countries were the most dedicated to justice. Bangladesh's government sought retribution for atrocities committed against its own traumatized citizenry, but it stood all but alone. India, a liberal democracy that had sheltered some 10 million Bengali refugees and then fought a war as a consequence of Pakistan's crackdown in East Pakistan, was sympathetic to Bangladesh's demands for justice. But India's concern waned fast once the Bangladeshi refugees returned from India's volatile border states to their new country.

Beyond South Asia, the rest of the world did almost nothing to support Bangladesh's calls for prosecutions. In recent years, there has been considerable foreign pressure for international justice,²⁵⁴ but Bangladesh received no such succor. The most direct involvement came from the Nixon administration, which only interceded to help to broker Bangladesh's abandonment of trials in exchange for Pakistani recognition, and did so in part by pressuring Bangladesh.

Third, as is discussed more below, international law had a noticeable impact, but not simply as a goad to prosecutions. Had there been trials, Bangladeshi prosecutors would have been frustrated by the demands of due process, particularly in gathering valid evidence and following the chain of command. While Bangladeshis and Indians pointed to Nuremberg as a precedent, India was also constrained by the Geneva Conventions and Security Council resolutions. Largely for reputational reasons, India wanted to be seen as upholding international law. India's respect for international law, though limited, ultimately contributed to the freeing of Pakistan's prisoners of war.

Fourth, this important case of justice thwarted suggests that the nostrums of both realists and liberals are true and also in some ways inadequate. As realists rightly argue, the pressures for impunity may prove overwhelming; as liberals rightly argue, impunity may be damaging in the long term.

Today and in the future, Bangladeshi nationalist politicians can all too easily exploit the unexorcised specter of past atrocities to rally domestic political sup-

254. Sikkink, *The Justice Cascade*; Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999); Carlos S. Nino, "The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina," *Yale Law Journal*, Vol. 100, No. 8 (June 1991), pp. 2619–2640; and Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia: University of Pennsylvania Press, 2005).

port and marginalize the opposition. In Pakistan, there is something close to national amnesia about the slaughter of Bengalis.²⁵⁵ A more thorough airing of the atrocities could have been used to discredit the most illiberal elements of the military, which could have had welcome consequences for Pakistan's politics and its relations with its neighbors. This calls to mind O'Donnell and Schmitter's argument for undoing "the armed forces' messianic self-image as *the* institution ultimately interpreting and ensuring the highest interests of the nation." As O'Donnell and Schmitter warned, "[T]he worst of bad solutions would be to try to ignore the issue," leaving brutal armies with a "sense of impunity."²⁵⁶

IMPUNITY AND INTERNATIONAL LAW

To elaborate on the third main argument of this article, India was constrained both by the technical requirements of the law and by a reputational concern about, in the words of a top Indian leader, "international opinion."²⁵⁷ When there was a clash between military imperatives and legal requirements, the former trumped—most dramatically in the Indian army's insistence that four divisions worth of Pakistani troops not be repatriated before the conclusion of a peace deal with Pakistan, regardless of international law. But when the trade-off was less stark, India sought to abide by international legal standards.

There are several indications of a modest Indian respect for international law. Rather than merely branding Pakistan as a political enemy, India framed its complaints in legal terms, planning "[t]rials for genocide, war crimes and crimes against humanity."²⁵⁸ Joining in what Sikkink has termed the "justice cascade," Indians believed they could follow the Nuremberg and Tokyo precedents. As one prominent Indian politician wrote, "Bigger powers, including even our friends, are preaching all kinds of conciliatory conduct to us, whereas in similar circumstances they were themselves most harsh on their defeated enemies—Germany in 1918 and 1945, Italy in 1945 and Japan in 1945."²⁵⁹ Moreover, the Indian government evidently felt constrained by the Geneva Conventions of 1949, making considerable efforts to couch its policies within their legal parameters. In the end, despite the military's qualms, India repatriated the prisoners of war, rather than holding them indefinitely.

255. "How Did West Pakistan Treat East Pakistan?" *Herald Annual*, January 2010, p. 101.

256. O'Donnell and Schmitter, *Transitions from Authoritarian Rule*, Vol. 4, pp. 30–31 (emphasis in the original).

257. Haksar to Gandhi, "Negotiations with Pakistan." See also Hans J. Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (New York: Alfred A. Knopf, 1964), pp. 275–331.

258. Haksar to Gandhi, March 15, 1972.

259. Desai to Kaul, March 25, 1972, HI/121/1/72, MEA, National Archives of India.

Law played a double role, however, not just encouraging prosecution but also restricting it. In fact, the stringencies of international criminal law made it harder for India to punish Pakistani war criminals. It would be difficult to constitute a suitable court and to make legal charges stick. Moreover, India's concern for the Geneva Convention Relative to the Treatment of Prisoners of War proved a restriction: the Convention mandated the prompt repatriation of the Pakistani prisoners of war, giving India less leeway to prosecute them.

Neither India nor Bangladesh sought to innovate much in any potential trials. Whereas the victorious Allies sought to fundamentally rewrite the laws and norms of world politics at the end of World War I and World War II, India was a middleweight power with no such clout over the creation or casting of international humanitarian law. Even as India's diplomats drew up reports noting how the Allies had forced demilitarization and reparations upon Germany after World War I,²⁶⁰ and detailing the Allied disarmament of Germany and Japan after World War II,²⁶¹ the senior ranks of India's government—having won a far less conclusive battlefield victory—knew that no such impositions would be possible against Pakistan. Instead of the kind of pathbreaking projects that international lawyers had in mind at Nuremberg and Tokyo, Indian and Bangladeshi officials had to content themselves with operating within the comparatively narrow confines of existing international law—the familiar strictures of both the Genocide Convention and the Geneva Convention Relative to the Treatment of Prisoners of War. India was considering only quite standard trials for genocide, war crimes, and crimes against humanity.²⁶²

On balance, Indian officials seem to have been driven more by Security Council resolutions and the well-established rules of the Geneva Conventions than by the uncertain procedures that would be necessary to prosecute Pakistani war criminals. In the unsettled era after Nuremberg, Tokyo, and the Eichmann trial but before the UN tribunals for the former Yugoslavia and Rwanda, India was wary of testing the ambiguities of international criminal law. In the end, the loftier aspirations of international criminal law were left unfulfilled.

TRAGEDY IN BANGLADESH

Given all these strategic constraints, could India or Bangladesh have done more to secure criminal accountability? Should they have persisted in their de-

260. Historical Division memorandum, April 4, 1972.

261. Historical Division memorandum, April 3, 1972.

262. Haksar to Gandhi, March 15, 1972.

mands for trials despite opposition by Pakistan? Today it is conventional wisdom in India that the Simla agreement was a naïve deal, with Gandhi suckered by Bhutto, winning the war but losing the peace. On that account, perhaps India and Bangladesh should have remained firm and put some Pakistanis on trial. True, this might have undone efforts at regional peacemaking, but the advocates of a harder line would presumably argue that since Bhutto would ultimately prove useless for peacemaking, there was no point in accommodating him.

It is possible—although hardly guaranteed—that war crimes trials would have had a beneficial impact on Bangladesh's politics, soothing the victims' desire for retribution. Of course, the proceedings would necessarily have been inadequate. Nobody was in a position to put the military leadership in Rawalpindi in the dock; many Bengalis would have wanted more justice than could be supplied by a weak state; some would have still sought vengeance afterward. These shortcomings, however, are inherent to all war crimes tribunals, and do not exclude the possibility of some kind of catharsis or pacification—not an ideal solution, but perhaps a modest improvement over impunity.

Any such trials, however, could have had dire consequences in Pakistan and thus for regional peacemaking. India's military victory in December 1971 did not allow India to dictate terms to Pakistan's defiant generals. It is highly unlikely that Pakistan's military would have accepted the prosecution of its soldiers by a Bangladeshi tribunal. If India had sent Pakistani prisoners to a Dhaka tribunal, the Pakistan army could have scrapped peace talks with India. Pakistan's military, which eventually overthrew Bhutto in 1977, could have ousted him earlier. Moreover, many Pakistani civilian politicians would have resisted trials as well. Bhutto gave few indications that he would accept war crimes prosecutions—not least because he had supported the military crackdown in 1971.²⁶³ Even after the war, he insisted that some kind of crackdown had been necessary, although with less brutality.²⁶⁴

In short, although there is no certainty in counterfactuals, it is hard to believe that India or Bangladesh could have held war crimes trials without paying a substantial price in Pakistani diplomacy. Their bargain deserves a certain amount of credit: it helped secure the widespread recognition of

263. Bakshi to Acharya, April 6, 1971, HI/1012/31/71, MEA, National Archives of India; Bakshi to Acharya, March 18, 1971, HI/1012/31/71, MEA, National Archives of India; and Kosygin-Singh conversation, June 8, 1971, Subject File 203, Haksar Papers, NMML.

264. Oriana Fallaci, *Interviews with History and Conversations with Power* (New York: Rizzoli, 2011), pp. 286–288.

Bangladesh, and allowed rounds of India-Pakistan peacemaking that, while ultimately unsuccessful, were worth exploring. For some Indians, subsequent decades of conflict with Pakistan demonstrate the futility of Indira Gandhi's attempt to grasp an enduring peace. The costs of interminable enmity, however, could equally well be taken to vindicate her drive to exploit a moment of flux to make peace when she could. Had India or Bangladesh prosecuted war criminals, the hostility between India and Pakistan might have become even more bitter.

The awful fact that much of South Asia remains mired in hostility does not imply that there were viable alternative policies. Understandably, this harsh reality left Indians and Bangladeshis profoundly frustrated. Recalling the Allied prosecutions after World War I and World War II, a prominent Indian politician wrote to India's foreign secretary, "What is sauce for the goose should be sauce for the gander. What was good enough in 1918 and 1945 should not be objected to in 1972. There cannot be different codes of conduct for bigger powers and poorer countries."²⁶⁵ But of course there were, at least as a practical matter, if not in moral terms. Much as Indians might have wished otherwise, the prospect of a subcontinental Nuremberg faded away—leaving the wounds of Bangladesh unbound to this day.

265. Desai to Kaul.