

Miriam Beringmeier

The International Crimes Tribunal in Bangladesh

Critical Appraisal of Legal Framework
and Jurisprudence



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Miriam Beringmeier

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List of abbreviations

AD	Appellate Division
Additional Protocol I	Protocol Additional to Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977
AC	Appeals Chamber
BNP	Bangladesh Nationalist Party
CCL	Control Council Law No. 10 of 20 December 1945
Collaborators Order	Bangladesh Collaborators (Special Tribunal) Order, 1972
Declaration on Torture	Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment of 9 December 1975
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECCC Law	Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia
ECHR	European Court for Human Rights
ed./eds.	editor(s)
edn.	edition
e. g.	for example (<i>exempli gratia</i>)
et al.	and others (<i>et alii</i>)
ff.	and the following pages
General Assembly	United Nations General Assembly
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948
HCD	High Court Division
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICLR	International Criminal Law Review
ICT	International Crimes Tribunal
ICT Act	International Crimes (Tribunals) Act, 1973
ICTR	International Criminal Tribunal for Rwanda
ICTR Statute	Statute of the International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTY Statute	Statute of the International Criminal Tribunal for the former Yugoslavia

List of abbreviations

i. e.	that is (<i>id est</i>)
IMT	International Military Tribunal at Nuremberg
IMT Charter	Charter of the International Military Tribunal at Nuremberg
Indemnity Order	Bangladesh National Liberation Struggle (Indemnity) Order, 1973
JCE	Joint Criminal Enterprise
marginal no.	marginal number
n. pag.	no pages
no.	number
OTP	The Office of the Prosecutor at the ICC
PTC	Pre-Trial Chamber
PP	Patterns of Prejudice
PPP	Pakistan People's Party
p./pp.	page(s)
para./paras.	paragraph(s)
RAB	Rapid Action Battalion
Repeal Ordinance	Bangladesh Collaborators (Special Tribunals) (Repeal) Ordinance, 1975
Rome Statute	Rome Statute of the International Criminal Court
RoP	Rules of Procedure
Rome Statute	Rome Statute of the International Criminal Court
SC	Supreme Court
SCSL	Special Court Sierra Leone
SCC	Supreme Court Chamber
Security Council	United Nations Security Council
STL	Special Tribunal for the Lebanon
STL Statute	Statute of the Special Tribunal for the Lebanon
TC	Trial Chamber
Tribunal 1	Tribunal 1 of the International Crimes Tribunal
Tribunal 2	Tribunal 2 of the International Crimes Tribunal
Tripartite Agreement	Agreement on the Repatriation of Prisoners of War and Civilian Internees, 1974
UDHR	Universal Declaration of Human Rights, 10 December 1948
UNCAT	United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment of 10 December 1984
UN	United Nations
UN Doc.	Documents of the United Nations

UNHRC
Vienna Convention
v.
vol.

United Nations Human Rights Committee
Vienna Convention on the Law of Treaties of 23 May 1969
versus
volume

Part I: Introduction and outline of the investigation

1 Introduction and statement of the problem

Bangladesh is situated in South Asia and shares borders with Myanmar and India. The country ranks among the 10 most densely populated countries in the world: 159.1 million people¹ live within 144,000 km². The population in rural areas constitutes 66.5% of the total.² Approximately 89.1% of Bangladeshis are Muslims but there are several other religious minorities in the country, of which Hindus constitute the biggest group at approximately 10%.³

The country came into existence after the Liberation War in 1971 when Bangladesh, at that time East Pakistan, seceded from West Pakistan. After independence, the perpetrators of the atrocities committed during the nine-month Liberation War were subjected to few if any legal procedures. International politics tolerated the impunity of the main perpetrators, whereas the domestic political situation after 1974 impeded any process of transitional justice. It was not until 2010, with the establishment of the International Crimes Tribunal (ICT), that the process of ending the impunity started.

International criminal tribunals have gained importance over the last few decades. Various tribunals and the underlying conflicts that they address have been discussed around the world and have attracted public attention. The case of Bangladesh has been absent from most of these discussions. The Tribunal in Bangladesh has hit the headlines primarily because of the violent protests in answer to the verdicts and the criticism from several human rights organisations. Unfortunately, detailed information on the Tribunal's work is poorly disseminated outside of the country.

The decision to set up the ICT was taken in 2009 after the Awami League came to power. The establishment of the Tribunal was part of the Awami League's election manifesto and was of great interest to the party since it was one of the main targets of Pakistani repression in the war of 1971. During the process of establishment, Bangladesh explicitly decided against the involvement of international stakeholders and so rejected the trials being conducted through an internationalised tribunal.

The legal framework of the ICT, the International Crimes (Tribunals) Act, 1973 (ICT Act), was drafted and enacted as domestic law in 1973 and was extensively amended in 2009, 2012 and 2013. In 2010, the ICT passed the International Crimes

1 *The World Bank*, data from 2014, <http://data.worldbank.org/country/bangladesh>, accessed 20 March 2016.

2 *The World Bank*, data from 2014, <http://data.un.org/CountryProfile.aspx?crName=Bangladesh#Social>, accessed 20 March 2016.

3 The World Fact Book of the Central Intelligence Agency of the USA, data from 2013, <https://www.cia.gov/library/publications/the-world-factbook/geos/bg.html>, accessed 22 December 2016.

Tribunal Rules of Procedure (RoP), as provided for in Section 22 of the Act. Hence, the ICT is a domestic court that applies domestic law for the prosecution of perpetrators of international crimes. At the same time, the general domestic criminal procedure regulations, the Criminal Procedure Code and the Evidence Act are declared inapplicable under the Act.

The Tribunal finally took up its work in 2011. To date, numerous judgments have been delivered, among them several death and life imprisonment sentences. The accused are Bangladeshi nationals who cooperated with the Pakistani military during the Liberation War. The ICT Act enjoys a special status under the Constitution of Bangladesh, which was amended for this purpose in 1973. The amendment repeals certain constitutional safeguards for those accused of international crimes. Article 47(3) of the Constitution determines that those charged with genocide, crimes against humanity or war crimes as well as other crimes under international law cannot challenge the relevant laws as being void or unlawful on the grounds that they are inconsistent with the Constitution. Beyond that, Article 47A denies those accused of international crimes several fundamental rights as guaranteed under the Constitution. Those rights include the right to a speedy and public trial by an independent and impartial court, the right to the protection of the law and the ability to enforce fundamental rights safeguarded under the Constitution.

Yet, at the same time, Bangladesh has acceded to several international treaties which stipulate important rights of the accused during criminal trials and also define international crimes. Although, under the domestic law of Bangladesh, international treaties cannot be applied directly but require implementation at the national level, this cannot be utilised as an excuse for non-compliance with international law.

As a domestic accountability mechanism, the ICT is also fraught with practical country-specific challenges. The judges appointed to the Tribunal are not experienced in dealing with cases of international criminal law, an area of law with significant challenges because of the complexity of the cases. Beyond that, the lack of financial resources engenders a poor infrastructure that certainly influences many aspects of the trials. Undoubtedly, the long lapse of time between the Liberation War and the initiation of the trials constitutes one of the major hurdles and has had a huge impact on the evidence. Many victims, witnesses and perpetrators have passed away since the war or are very old, and the journey from the rural areas to Dhaka to give testimony is a heavy burden.

The politically-tense environment in the country and the divided society also encumber the Tribunal's work. The trials led to mass protests in 2013, provoked by the verdict against Abdul Quader Molla who was sentenced to life imprisonment.⁴ The

4 ICT 2, *The Chief Prosecutor v. Molla*, case no. 02/2012, Judgment, 5 February 2013.

participants of the so-called Shahbag protests demanded capital punishment for the convict. The protests escalated when protesters were confronted by a countermovement led by Islamic groups. Several other verdicts have led to countrywide 'hartals' (general strikes), called out by opposition parties in protest against the convictions of their party leaders.

The political situation and the fact that the Liberation War as well as the trials before the ICT continue to be a very sensitive and politically-loaded issue also have a strong impact on the research environment. While one of the essential difficulties consists in accessing documents, and the Tribunal, challenges also arise from the restrictions on freedom of speech imposed on any criticism of the Tribunal's work. This has inevitably created a tense research environment that has impeded an open exchange of ideas on the issue. Since the ICT has been criticised strongly by foreign organisations, foreigners encounter particular distrust from within the Tribunal. Despite these difficulties, it must be highlighted that Bangladeshis are extremely friendly, open and extraordinarily hospitable, especially towards foreigners. None of the tensions surrounding the professional environment have influenced the incredible personal warmth with which I was received in all quarters during my stay at the Tribunal. Many Bangladeshis were also rather pleased by the idea of foreigners showing an interest in their ICT.

2 Objectives of the study and considered jurisprudence

The overall objective of the study is to examine the compliance of the ICT with rule of law standards. To this end, the applicable legal sources as well as jurisprudence are scrutinised by means of standards stipulated by international treaties in order to show the extent to which the Tribunal is able to deliver justice in compliance with these recognised human rights standards. Beyond that, the study aims to examine the interpretation of the internationally-recognised crimes by this domestic accountability mechanism despite restrictions in the applicability of international law. The study also evaluates the Tribunal's contribution to the process of transitional justice in Bangladesh.

For the analysis of jurisprudence, all cases that were completed with the delivery of a judgment⁵ in April 2015 have been considered. In total, 17 judgments were available at that point. Appeal judgments have been taken into account in those cases in which they were published until end of October 2015.⁶

5 With exception of the case ICT 2, *The Chief Prosecutor v. A. K. M. Yusuf*, case no. 02/2013, in which the accused died before the delivery of the judgment. This case was considered insofar as orders were available and relevant.

6 It has to be noted that in some cases the time span between the announcement of the verdict by the Appellate Division and the publication of the appeal judgment is extremely

Although judgments and charge framing orders are now publicly available, this is not the case with interlocutory appeals and orders. The latter are thus not available through official channels and could only be considered in some cases. The orders in contempt proceedings have been examined in cases of specific interest.

3 Outline of the investigation

The study is divided into six parts. Part I introduces the subject as well as the objectives of the study and outlines the framework of the investigation. Part II illustrates the historical background and provides an understanding of the circumstances that led to the Liberation War in 1971. Beyond that, the first attempts to deal with the war crimes are outlined, and the circumstances that finally favoured the establishment of the Tribunal more than 40 years after the war are highlighted.

Part III scrutinises the different accountability mechanisms applied in post-conflict situations from the angle of their possible implementation in Bangladesh. The decision-making process and the considerations that finally led to the choice of a domestic tribunal are outlined. The focus lies on the consequences for the structure and the applicable legal sources that arise from the domestic character of the ICT.

Part IV analyses the legal framework of the ICT as well as its jurisprudence and the findings of the Appellate Division by means of international standards. In order to determine the criteria of examination, the international obligations assumed by Bangladesh are outlined. This part provides a detailed analysis of the application of the material and procedural law by the Tribunal and identifies discrepancies between the domestic law and its interpretation on the one hand and the standards set by international criminal law on the other. The scrutiny focuses on the application of the elements of crimes as well as the modes of liability. With regard to procedural law, the study emphasises the procedural rights of the accused. At the same time, the application of the law in practice also sheds light on the extent to which the country complies with the obligations it assumed under several international instruments.

Part V and Part VI conclude the study. Part V locates the ICT in the context of transitional justice and examines the extent to which this accountability mechanism is able to contribute to the process of transitional justice in Bangladesh. It also sets out whether, and the extent to which, the Tribunal contributes to the reconciliation process. Part VI of the dissertation summarises the research results and discusses prospects for the future of the ICT.

long. For that reason, the appeal judgment in the case of *Sayeedi* could not be considered for this study. While the Appellate Division announced the verdict in September 2014, the judgment was only published in December 2015.

Part II: Towards an International Crimes Tribunal

The ICT was established in 2010, almost 40 years after Bangladesh's Liberation War. The Awami League coming to power through the elections in 2008 was a crucial event in its formation. However, the idea to set up a tribunal to try war criminals dates back to 1973 when the statutory source, the ICT Act, 1973, was drafted. Yet, the national and international political situation impeded its implementation and led to a policy of oblivion and forgiveness for many years. The issue returned to the political agenda in the 1990s when different civil society organisations began to advocate for the trial of war criminals.

1 Historical background

The ICT tries perpetrators of crimes committed during the Liberation War with Pakistan in 1971, through which Bangladesh, at that time East Pakistan, seceded and emerged as a state. In order to understand the underlying conflict of the war, the historical background must be viewed from the Partition of British India, which played a major role in the foundation of contemporary Bangladesh.⁷

1.1 *The province of Bengal*

The territories of Bangladesh and Pakistan were part of British India until the country's partition in 1947 when British colonial rule ended. Within British India, the territory of modern-day Bangladesh belonged to the province of Bengal. The province experienced its first partition in 1905 when the plan by Lord George Curzon of Kedleston to divide the region to improve its administration and better develop the district of Assam was implemented.⁸ While the new province of Eastern Bengal and Assam (comprising the territory of today's Bangladesh) was ruled by a governor based in Dhaka, the province's western region was governed from Calcutta.⁹ Many perceived the division as a strategy to weaken the strong anti-colonial movement in the province.¹⁰

The Bengali Muslim community, which constituted the majority in East Bengal and Assam, welcomed the division, expecting to find good career opportunities in the new administrative capital of Dhaka¹¹ without the unfair competition with Hindus

7 *Van Schendel*, *History of Bangladesh*, p. 96.

8 *Ali*, *Understanding Bangladesh*, p. 4; *Baxter*, *Bangladesh*, p. 39.

9 *Ali*, *Understanding Bangladesh*, p. 5; *Baxter*, *Bangladesh*, p. 39.

10 *Al-Masum*, *JPHS*, 2003, LI(4), p. 95, at 96.

11 *Murshid*, *Sacred and Secular*, p. 27; *Van Schendel*, *History of Bangladesh*, p. 81.

they had previously experienced¹². This was due to the community's economic, educational and political disadvantages in the united state of Bengal.¹³ The anti-division movement, instead, was led mainly by high-caste Hindus from Kolkata.¹⁴ Hindus and Muslims increasingly became political categories.¹⁵ Although parts of the Muslim community initially opposed the division as well, the Hindu community later dominated the protests when they started to utilise religion for their political aims.¹⁶ The Muslim community began to organise itself and founded the All-India Muslim League in Dhaka in 1906 as a counter-movement to the protests against the partition by the Indian National Congress.¹⁷ Political mobilisation began to be based on religious affiliation, a phenomenon known as communalism.¹⁸ Revolutionary groups were formed and the protests and violent riots led to the annulment of the partition in 1911.¹⁹ The state of Bengal then remained united until 1947.

1.2 *The Partition of British India*

In the 1945 election in Great Britain, the Labour Party, which advocated India's independence, came to power.²⁰ From then on, the preparation for the implementation of the transfer of power began.²¹

The idea of dividing India into two different countries to separate Muslims and Hindus was based on the 'two-nations theory': Muslims were considered not just a community in the Indian nation but rather a separate nation from Hindus with the need for self-determination.²² This theory was concretised in the late 1930s and was first announced officially in 1940 in the Lahore Resolution by the Muslim League.²³ The concrete implementation of this idea was, however, not yet determined and it was still not clear whether there should be one or several states.²⁴

12 *Melane*, in: *Islam* (ed.), History of Bangladesh, Vol. 1, p. 126, at 130.

13 *Melane*, in: *Islam* (ed.), History of Bangladesh, Vol. 1, p. 126, at 129.

14 *Van Schendel*, History of Bangladesh, p. 81.

15 *Van Schendel*, History of Bangladesh, p. 80.

16 *Van Schendel*, History of Bangladesh, p. 81.

17 *Melane*, in: *Islam* (ed.), History of Bangladesh, Vol. 1, p. 126, at 127; *Van Schendel*, History of Bangladesh, p. 83.

18 *Van Schendel*, History of Bangladesh, p. 83.

19 *Baxter*, Bangladesh, p. 40; *Dil/Dil*, Bengali Language Movement, p. 44.

20 *Baxter*, Bangladesh, p. 55.

21 *Baxter*, Bangladesh, p. 55; *Talbot/Singh*, Partition of India, p. 7.

22 *Van Schendel*, History of Bangladesh, p. 89.

23 *Pandey*, Remembering Partition, p. 21; *Van Schendel*, History of Bangladesh, p. 88.

24 *Van Schendel*, History of Bangladesh, p. 89.

A plan designed by Lord Mountbatten in May 1947 concretised the division of the Indian territory.²⁵ In the beginning, no clear decision was made on how to proceed with the province of Bengal, a state with a strong presence of both religious groups. In the discussions about the country's partition, even demands for a separate united and independent state of Bengal arose.²⁶ However, this idea was vehemently opposed by the Hindu majority who feared the loss of their economic and intellectual advantages in an independent state of Bengal.²⁷

The Mountbatten Plan provided for a division of the Bengal Legislative Assembly into the representatives of the Muslim-majority districts and the representatives of the Hindu-majority districts so that each of the two assemblies could decide on the partition of the region.²⁸ Whereas most of the representatives of Hindu-majority districts voted in favour of the partition, the Muslim-majority districts mainly opposed it.²⁹ Yet, the overall majority voted in favour of the partition of Bengal. In answer to this result, the Bengal Boundary Commission was founded to determine the precise partition borders in the province of Bengal, which became known as the Radcliffe Line.³⁰

Based on the Mountbatten Plan, the British Parliament passed the Indian Independence Act that set 15 August 1947 as the date of independence and the foundation of the dominions of India and Pakistan. Partition caused the largest uprooting of people in the twentieth century and hundreds of thousands died during the riots preceding it.³¹ Approximately four million Muslims remained in West Bengal and almost 11.5 million Hindus in East Pakistan.³²

After Independence on 15 August 1947, Pakistan was a country consisting of two territories separated by 1,600 kilometres: West Pakistan (today's Pakistan) and East Pakistan (today's Bangladesh).

1.3 *The Liberation War*

Though East Pakistan had become independent from India, the majority of East Pakistanis still felt as though they were under colonial rule, this time headed by West Pakistan.³³ The nine-month Liberation War from March to December 1971 led to the

25 *Pandey*, *Remembering Partition*, p. 39.

26 *Baxter*, *Bangladesh*, p. 56.

27 *Baxter*, *Bangladesh*, p. 56.

28 *Chatterji*, in; *Talbot/Singh* (eds), *Region and Partition*, p. 168, at 170.

29 *Chatterji*, in; *Talbot/Singh* (eds), *Region and Partition*, p. 168, at 170–171.

30 *Baxter*, *Bangladesh*, 57; *Chatterji*, in; *Talbot/Singh* (eds), *Region and Partition*, p. 168, at 171.

31 *Talbot/Singh*, *Partition of India*, pp. 62, 90.

32 *Talbot/Singh*, *Partition of India*, p. 100.

33 *Baxter*, *Bangladesh*, p. 61.

secession of East from West Pakistan and to the foundation of Bangladesh. Different circumstances played a significant role in the breaking-up of Pakistan. Cultural, economic, territorial and political factors can be highlighted as the main ones that contributed to the national independence movement.³⁴

From the beginning of Pakistan's emergence, it was difficult to create a united Pakistani nation. The different languages spoken in the two parts made the development of a lingua franca impossible because none of the languages had a general acceptance in both parts of the country.³⁵ This created a major conflict when Urdu was introduced as the official language of Pakistan in 1948.³⁶ Though the language was spoken by only 3.5% of the Pakistani population, the Urdu-speaking minority held 21% of the civil service jobs.³⁷ On the other hand, the East Pakistani population, 54% of Pakistan's total population,³⁸ spoke predominantly Bengali and demanded the use of their language in the Assembly alongside Urdu³⁹. The idea of imposing Urdu as the only national language was part of the government's intended Islamisation of Pakistan.⁴⁰ Urdu was the first South Asian language in which interpretations of the Quran were made in the late eighteenth century.⁴¹ In a speech made on a visit to Dhaka in 1948, Governor-General Muhammad Ali Jinnah stated that Urdu embodied Islamic culture and Muslim tradition and was nearest to the languages in other Islamic countries and, therefore, had to be the national language of Pakistan.⁴² The Bengali language as well as numerous practices of Bengali Muslim culture were considered 'un-Islamic' by many Muslims of West Pakistan.⁴³ Like Hindi, the Bengali language derives from Sanskrit and was therefore regarded as the language of the Hindus, who were the main target group of the 'Islamisation' programme.⁴⁴ For that reason, the population of East Pakistan was frequently associated with the Hindu culture.⁴⁵ In 1952, a language movement, headed mostly by students, started in East Pakistan and led to violent riots in which many students were killed.⁴⁶ The protests were, nevertheless, successful with regard to their aim and the Constituent Assembly decided in 1954

34 *D'Costa*, Nationbuilding, p. 83.

35 *Jahan*, Pakistan, p. 13.

36 *D'Costa*, Nationbuilding, p. 86; *Saikia*, Making of Bangladesh, p. 35.

37 *Saikia*, Making of Bangladesh, p. 251, n. 4.

38 *Jahan*, in: Totten/Parsons (eds), Centuries of Genocide, 4. edn, p. 249, at 251.

39 *Van Schendel*, History of Bangladesh, p. 110.

40 *Van Schendel*, History of Bangladesh, p. 110.

41 *Uddin*, Constructing Bangladesh, p. 77.

42 *Ahmad*, Speeches and Writings of Jinnah, Vol. 2, pp. 496–497.

43 *Uddin*, Constructing Bangladesh, p. 119.

44 *Saikia*, Making of Bangladesh, p. 38.

45 *Saikia*, Making of Bangladesh, p. 38.

46 *Jahan*, Pakistan, p. 44.

that Urdu and Bengali would be the official languages of Pakistan.⁴⁷ Language, however, was not the only conflict. The populations in the two parts of the country were also culturally different. Many traditions, dressing habits and their admiration for Rabindranath Tagore in East Pakistan were close to Hindu culture and thus not accepted by West Pakistan.⁴⁸

While the language issue was the core of the conflict during the 1950s, economic problems came to the fore afterwards.⁴⁹ East Pakistan was the main supplier of raw materials and thereby financed the industrial accumulation in the western part.⁵⁰ It earned approximately 60% of the country's foreign currency but obtained less than 30% of Pakistan's imports.⁵¹ These circumstances led to economic exploitation as occurred under colonial rule.⁵²

The territorial conditions likewise hampered the building of a common Pakistani nation. The absence of any direct land communication between East and West Pakistan prevented social mobilisation and hindered the process of nation-building.⁵³ The territorial isolation also nurtured the economic disparity between the two regions.⁵⁴ Any socio-economic investment in one part of the country had no effect on the other part so that a dual economic and administrative apparatus was required.⁵⁵

At the beginning of the conflicts between East and West Pakistan, a new political party was created. The Awami League⁵⁶ was founded in 1949 and at that time mainly opposed the government's decision to declare Urdu the national language.⁵⁷ The party was formed by several factions and was the first Muslim opposition party.⁵⁸ With the growing discontent in East Pakistan, the party's request for autonomy arose in 1966 when it presented its Six-Point-Programme. This included the demand for a confederation of East and West Pakistan in which only defence and foreign affairs would remain issues of the central government.⁵⁹ The Six-Point-Programme proposed solu-

47 *Baxter*, Bangladesh, p. 63.

48 *Uddin*, Constructing Bangladesh, p. 120.

49 *Gerlach*, Societies, p. 125.

50 *D'Costa*, Nationbuilding, p. 83; *Gerlach*, Societies, p. 126.

51 *D'Costa*, Nationbuilding, p. 83.

52 *Gerlach*, Societies, p. 126; *Jahan*, in: Totten/Parsons (eds), Centuries of Genocide, 4. edn, p. 249, at 252.

53 *D'Costa*, Nationbuilding, p. 83; *Jahan*, Pakistan, p. 10.

54 *D'Costa*, Nationbuilding, p. 83.

55 *Jahan*, Pakistan, p. 10.

56 The party was founded with the name 'East Pakistan Awami Muslim League' and renamed to 'East Pakistan Awami League' in 1955, *Nair*, Politics, p. 49.

57 *Uddin*, Constructing Bangladesh, p. 121; *Van Schendel*, History of Bangladesh, p. 111.

58 *Jahan*, Pakistan, p. 38.

59 *Umar*, Emergence of Bangladesh, p. 110; *Van Schendel*, History of Bangladesh, p. 121.

tions for the main conflicts between the East and West regions. To improve East Pakistan's economic situation, the Programme demanded separate accounts of the foreign exchange earnings of each of the federating units.⁶⁰

The situation escalated with the growth of the Bengali independence movement after the election in 1970. This was the first free national election held in Pakistan, and the Awami League, under its Bengali leader Sheikh Mujibur Rahman, won the majority of the parliamentary seats. While the Awami League obtained 160 of the 300 national seats (162 seats for East Pakistan and 138 for West Pakistan), the Pakistan People's Party (PPP), under the leadership of Zulfikar Ali Bhutto, won only 81 seats.⁶¹ Both parties achieved their results due only to their success in their respective parts of the country; neither party won any seats in the other part.⁶²

Soon after the elections, the Awami League announced its intention to create a constitution based on the Six-Point-Programme.⁶³ Although the party claimed to represent a national majority, its programme fulfilled only the demands of the eastern part and did not include a political programme for the rest of the country.⁶⁴ Bhutto's reaction was aggressive and confrontational.⁶⁵ The crisis came to a head in December 1970 when Bhutto publicly announced that no government could be formed and no constitution drafted without the participation of the PPP.⁶⁶ President Yahya Khan postponed the scheduled parliamentary session in March 1971.⁶⁷ In answer to this postponement, Sheikh Mujibur Rahman declared a five-day general strike in the eastern part lasting every day from six in the morning until two in the afternoon.⁶⁸ Although he called for non-violent, non-cooperation protests, violent riots soon ensued between demonstrators and the armed forces.⁶⁹

The Pakistani government decided to sanction a military intervention during the night of 25/26 March 1971. The government considered military intervention the only solution to stop the political crisis and the increasing loss of control over the East Pakistan military units.⁷⁰ So-called 'Operation Searchlight' was aimed at the elimination of the political power of the Awami League and the reestablishment of public

60 In *Sisson/Rose, War and Secession*, p. 20 the full text of the Six-Point-Programme is provided.

61 *Bose, Dead Reckoning*, p. 21.

62 *Bose, Dead Reckoning*, p. 21.

63 *Rahman, My Bangladesh*, p. 21.

64 *Sisson/Rose, War and Secession*, p. 61.

65 *Sisson/Rose, War and Secession*, p. 59.

66 *Sisson/Rose, War and Secession*, p. 60.

67 *Jahan*, in: Totten/Parsons (eds), *Centuries of Genocide*, 4. edn, p. 249, at 253.

68 *Ali, Understanding Bangladesh*, p. 51.

69 *Ali, Understanding Bangladesh*, p. 51.

70 *Sisson/Rose, War and Secession*, p. 157.

order.⁷¹ Targets were Dhaka University, which was the centre of the liberation activists' activities; the old part of Dhaka, which was mostly inhabited by Hindus; the police; the Bengali armed forces; and Awami League leaders.⁷² West Pakistani propaganda had declared Hindus the enemy of an Islamic Pakistan and the Pakistani army became convinced that Hindus played a significant role in the independence movement.⁷³ On 26 March 1971, Rahman was arrested at his home and brought to West Pakistan where he was imprisoned and accused of treason.⁷⁴ Most of the Awami League leaders fled to India where they formed a government-in-exile.⁷⁵ From India, they also proclaimed Bangladesh's independence under the presidency of Rahman on 10 April 1971.⁷⁶

Despite the strong support for the independence struggle in East Pakistan, some sections of the population also backed the idea of a united Islamic Pakistan: members of the Muslim League and the Jamaat-e-Islami party, as well as many Biharis residing in East Pakistan, opposed independence.⁷⁷ The term 'Bihari' is frequently used to refer to a group of non-Bengali Urdu-speaking Muslims who migrated to Bangladesh after 1947 although many were not originally from Bihar.⁷⁸ Most of them supported the idea of a united Pakistan and many also assisted the Pakistani army in its military interventions in East Pakistan.⁷⁹

The Pakistani military replaced the local councils, traditionally led by local leaders, with so-called Peace Committees under the leadership of orthodox Muslims.⁸⁰ As a consequence, tensions between Muslims and Hindus increased drastically at the communal level.⁸¹ To implement its military operations, the Pakistani army needed assistance from East Pakistan and created paramilitary groups. Local volunteers, so-called Razakars, were recruited to serve as an auxiliary force to fight the freedom

71 *Sisson/Rose*, War and Secession, p. 157.

72 *Ali*, Understanding Bangladesh, pp. 56–57; *Gerlach*, Societies, p. 128; *International Commission of Jurists*, Events in Pakistan, pp. 27–30; *Sisson/Rose*, War and Secession, pp. 157–158.

73 *International Commission of Jurists*, Events in Pakistan, p. 29.

74 *Van Schendel*, History of Bangladesh, p. 162.

75 *Baxter*, Bangladesh, p. 86; *International Commission of Jurists*, Events in East Pakistan, p. 30.

76 For the full text of the proclamation, see: *International Legal Materials*, 1972, 11(1), pp. 119–120.

77 *International Commission of Jurists*, Events in East Pakistan, p. 31.

78 *Paulsen*, RSQ, 2006, 25(3) p. 54, at 68, n. 1. Also, the ICT applies the term 'Bihari' to refer to Urdu-speaking people. See, for instance, ICT 2, *The Chief Prosecutor v. Azad*, case no. 05/2012, Judgment, 21 January 2013, para. 174.

79 *Paulsen*, RSQ, 2006, 25(3), p. 54, at 54; *Van Schendel*, History of Bangladesh, p. 173.

80 *Ali*, Understanding Bangladesh, pp. 74–75.

81 *Ali*, Understanding Bangladesh, p. 75.

fighters in the inner areas of the country.⁸² With this support, the Pakistani army gained manpower and local knowledge in East Pakistan⁸³ but, in practice, the Razakars also acted as the death squads of the Pakistani army⁸⁴.

The legal basis for the establishment of the Razakar force, the East Pakistan Razakars Ordinance, was promulgated on 2 August 1971. The Razakars replaced many former auxiliary police (so-called Ansars).⁸⁵ Two different wings of Razakars were established: the Al-Badr (Arabic: the full moon) and the Al-Shams (Arabic: the sun).⁸⁶ The former consisted of well-educated students from schools and madrasas (Islamic schools), and these were employed for the implementation of special operations.⁸⁷ The latter were mainly used to secure strategically important points such as bridges.⁸⁸ Many Biharis also joined the Razakars.⁸⁹ By September 1971, 50,000 Razakars had been recruited.⁹⁰

Rape and other forms of sexual violence were extensively employed by the Pakistani army and the Razakars to intimidate civilians, to destroy the enemy's community honour and for retaliation.⁹¹ Sexual violence was also committed by the other side and many Bihari women were raped⁹² in the course of the war, although their experiences remained mostly undocumented⁹³.

Initially, the government believed that it would be able to re-establish public order after a short military intervention but the resistance in East Pakistan was a lot stronger than expected.⁹⁴ The Pakistani army targeted Awami League supporters, intellectuals, students and Hindus with their attacks.⁹⁵ The resistance against the Pakistani army became more organised after the first few months of aggression and more people joined the '*mukti bahini*' (freedom fighters).⁹⁶ By November 1971, the number of freedom fighters was 100,000.⁹⁷

82 *International Commission of Jurists*, Events in East Pakistan, pp. 41–42.

83 *Gerlach*, Societies, p. 130.

84 *Van Schendel*, History of Bangladesh, p. 167.

85 *Gerlach*, Societies, p. 130.

86 *Niazi*, East Pakistan, p. 78; *Sisson/Rose*, War and Secession, p. 165.

87 *Niazi*, East Pakistan, p. 78; *Sisson/Rose*, War and Secession, p. 165.

88 *Niazi*, East Pakistan, p. 78; *Sisson/Rose*, War and Secession, p. 165.

89 *International Commission of Jurists*, Events in East Pakistan, p. 41.

90 *Haqqani*, Pakistan, p. 79.

91 *D'Costa/Hossain*, CLF, 2010, 21(3), p. 331, at 334.

92 *Brownmiller*, Against Our Will, p. 81.

93 *D'Costa*, Nationbuilding, p. 103.

94 *International Commission of Jurists*, Events in East Pakistan, p. 31; *Sisson/Rose*, War and Secession, pp. 158, 160.

95 *International Commission of Jurists*, Events in East Pakistan, p. 31.

96 *Van Schendel*, History of Bangladesh, p. 164.

97 *Van Schendel*, History of Bangladesh, p. 167.