Lack of Civilian Protection in 1971: Was it a military necessity to attack on civilian population during Bangladesh Liberation War of 1971 or a violation of the Geneva Convention?

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December 2017
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Preface

Certain acts are devoid of moral justice. There must exist some authorities who will prevent the death of innocent people. Grotius primarily identified that ‘there must have some specific groups against whom war should not waged, presumably leaving other unprotected’\(^1\). It is clear that Grotius intends to impose legal obligations on all persons except combatants.

> “From the moment we are at war, all those who belong to the hostile state become our enemies, and we have a right to act against them as such; but our right to wound and kill being founded on self-defence, or on the resistance opposed to us, we can with justice wound or take the life of none except those who take an active part of the war.”\(^2\)

International Humanitarian Law classifies two possible categories of persons in times of war. One is Civilian, and the other is Combatant. For military attacks, combatants and military objectives are legitimate targets. During the Second World War, “civilian populations were seen as the industrial and ideological engines of the war machine.”\(^3\)

Common Article 3 of the Geneva Conventions of 1949 indicates the concept that civilians are the subject of protection in case of war, regardless of whether it is international or non-international armed conflict. Common Article 3 is common to all four conventions. Before the Second World War, the laws of armed conflict existed very sporadically, but after the war, the treatment of civilian populations was specifically spelled out in the Geneva Convention IV (relative to the treatment of civilians in times of war) and Additional Protocol I 1977.

Background of the study

In 1971, Bangladesh, then known as East Pakistan, was caught up in a brutal war for independence from Pakistan. On 26th March 1971, the war broke out against the civilians, particularly nationalists, intellectuals, the youth, women and religious minorities, through a military operation by the Pakistan army known as 'Operation Searchlight'. On that very day, there was a declaration of the independence of Bangladesh in response to Operation Searchlight. The war continued for nine months between the Pakistan army and Bengali military, paramilitary, and civilian forced called the 'Mukti Bahini'. Bangladeshi collaborators, along with Pakistani occupation forces, ruthlessly sought to suppress this demand for autonomy in East Pakistan. It is estimated that during this bloody nine-month period, close to three million individuals were killed, hundreds of thousands of women were raped, and millions were displaced. Thus, the proposed research argues that the massive civilian casualties that occurred in 1971 was the result of atrocities committed by the Pakistan Army, which did not in any way conform to the principle of proportionality, distinction and military necessity. Therefore, they amounted to grave violations of International Humanitarian Law.

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\(^1\) Gehring, R., ‘Law and Contemporary Problems’ (1986) spring Vol. 42 No. 2
Gradual development of Civilian Protection

At an early stage, the primary focus of international agreements was the treatment of the combatants rather than civilians. For the first time, a small reference relating to civilians was found in the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies, which was afterwards annexed into the 1899 Hague Convention II and 1907 Hague Convention IV, where there were express references to the protection of civilians in occupied territories. However, the First World War experienced a shortage of principles regarding civilian protection. The matter was then addressed in the 1923 Hague Draft Rules of Aerial Warfare, followed by the approval of the 40th Conference of International Warfare for protection of civilian populations against New Engines of War. Later on, the resolutions passed by the League of Nations General Assembly on 30 September, 1938 introduced three principles which are all related to protection of the Civilian. Finally, in the interwar period Red Cross movement, various international conferences of the Red Cross led to the International committee of Red Cross preparing a draft convention on the protection of civilians. Finally, the ICRC prepared the ‘Draft International Convention on the Condition and Protection of Civilians of Enemy Nationality who are on Territory Belonging to or Occupied by a Belligerent’ which was approved at the 15th International Conference of the Red Cross, held in Tokyo. In January, 1939 the Swiss government transmitted the ICRC draft convention since it was planning to convene in Geneva in early 1940, but the outbreak of the Second World War did not allow for the new binding agreement. Hence, the few provisions on civilians in the 1907 Hague Convention remained treaty-based rules in force. The brutality of the Second World War led the whole world to accept the adoption of an international agreement for the protection of civilians in times of war. The 1949 Geneva Convention basically supplements the relevant provisions of the Hague Regulations. The Convention’s provisions have been extensively supplemented in the 1977 Geneva Protocol 1 in Part IV. In addition, the 1980 Convention on certain conventional weapons, 1996 Amended Protocol II on mines and the 1997 Ottawa Convention on anti-personnel mines also address the provisions on civilian protection.  

Civilians are entitled to seek protection in two circumstances; the first is against violent and arbitrary acts under the control of the adversary, and the second is protection from the effects of military operations and hostility. The first situation is handled by ‘The Law of Geneva’ or ‘Red Cross Law’, whereas the second situation is handled by ‘The Law of the Hague’, since the Hague Conventions of 1907 were the first comprehensive codification in this area. This principle of international humanitarian law outlines that civilians should be ‘respected’ and that “the essence of the whole corpus of international humanitarian law as well as human rights law lies in the human dignity of every person.” Systematic and pre-arranged attacks by the Pakistan Army were not in any way concerned with the protection of civilians, and thus they violate the international humanitarian law.

Who are ‘civilians’

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5Bothe. M., The Handbook of Humanitarian Law in Armed Conflicts (edited by Dieter Fleck, 1st edn, Oxford University Press 2009)
6ibid
According to Article 50, para 1 of the Additional Protocol, “a civilian is a person who is not a member of the armed forces.” The following people are also considered to be civilians:

1. War correspondents
2. Members of labour units or of services responsible for soldiers’ welfare.
3. Civilian members of military aircraft crews and crews of merchant ships.
4. Workers in armaments factories (their work is not considered as military necessity), however, their workplace is a permissible military objective.
5. Civilians serving as military advisors to the armed forces.

Civilians are under no obligation to identify themselves, rather it is the duty of the combatants to distinguish themselves by wearing uniforms. In fact, civilians are not bound to carry identity cards in order to claim protection. Even in case of doubt, a person shall be treated as a civilian, and members of the armed forces must first ascertain whether a person is a civilian or a combatant. “The mere fact of having engaged in hostilities does not confer the status of a civilian as a civilian, who remains civilian with all corresponding rights and duties.” In the case of Chief Prosecutor Vs Golam Azam, it is stated that “a population may qualify as ‘civilian’ even if non civilians are among it, as long as it is predominantly civilian. The presence within a population of members of armed resistance groups, or former combatants, who have laid down their arms, does not as such alter its civilian nature.” However, there is only one exception. If civilians openly take up arms to resist the invading troops and engage in hostilities like combatants: the *levee en masse*, in these circumstances, civilians are treated as combatants when they are captured.

**Military objectives in International Humanitarian Law**

The term ‘Military objective’ is a very crucial development of modern international law, and it is closely linked with the principle of distinction. The concept of military objective is basically to protect civilians in combatant situation. Military objective is a cast amidst the combat situation. It has been defined that “if a certain object may not be targeted at a certain moment because of a prospect of excessive collateral damages, that object remains nonetheless throughout a military objective”. Furthermore, the following are considered as military objectives according to the principles of international humanitarian law.

(a) **Armed forces:**

This also includes *levee en masse* who take up arms to prevent the invading forces. Here, armed forces also include guerrilla forces in occupied territory. According to article 43 para 3 of Additional Protocol I, ‘lawful combatants’ include paramilitary or armed law enforcement agencies.

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7 Ibid p.76
8 Article 50 para (1) 1977 Additional Protocol I.
9 supra note 5, p. 211
10 Chief Prosecutor Vs Golam Azam, (International Crimes Tribunals-1) ICT BD 06 of 2011
11 Art 2 of Hague Regulations 1899. See also, 4(A) (6) of Geneva Convention III.
(b) Military aircraft and warships;

(c) Buildings and objects for combat service support:
It is essential to determine which installations and objects can be considered to be of a military nature. These are barracks, fortifications, staff buildings, military command and control centres, military airfields, port facilities of the navy, stores of arms or military supplies, munition dumps, fuel stores, military vehicles parks etc.

(d) Commercial objectives which make an effective contribution to military action (transport facilities, industrial plants etc.):

Commercial objectives used for military action, like radio and television stations, are permissible to attack. For example, in April 1999, NATO bombed Serbian state television and radio station in Belgrade, and US forces attacked the main television station in Baghdad in March 2003. However, an expert of committee of ICTY assessed that an attack is permissible in so far as it aims to disrupt the command, control and communications network.13

The above list of military objectives drafted by the ICRC are an annex to the Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War, adopted in 1956 by the Red Cross Conference in New Delhi.14

Geneva Conventions and the protection of civilians

Civilians are protected under the umbrella of Geneva Conventions. This paper has discussed all rights and immunity that has been granted to civilian populations, along with the consequences if a civilian is deprived of his right and liberty under the existing principles of international law. The large civilian population of Bangladesh were being the subjects of uncivilised and inhumane practices of the Pakistani Army in 1971. According to Article 27, para 1 of Geneva Convention IV and article 46, para 1 of The Hague Regulation, ‘civilians who do not take part in hostilities shall be respected and protected’. They are entitled to be respected for their persons, their honour, their family rights, their religious convictions, and their manners and customs. Hence, the civilian population and individual civilians enjoy “general protection against dangers arising from military operations.”15

Even the presence of individual combatants within the civilian population does not take away the protection of civilians as granted by international humanitarian law.16 Additionally, their property is also protected as per Article 46, para 2 of The Hague Regulation. Furthermore, it is enumerated in Article 51, para 2 of Additional Protocol I and Article 13, para 2 of the Additional Protocol II that neither the civilian population as such, nor individual civilians, shall be attacked, killed, wounded, or taken prisoner without sufficient reason. Therefore, ‘duty to respect civilians’ indicates that unjustifiable acts should be avoided, and on other hand, ‘duty to protect’ indicates that everything necessary must be done to ward off harm. During the war period, women are protected from any kind of attack, particularly, from rape, enforced prostitution or any form

13 supra note 5, p.183
14 supra note 5, p.181
15 Article 51 para (1) of 1977 Additional Protocol I.
16 Article 50(3) of 1977 Additional Protocol I.
of indecent assault, whereas it is historically established that three million people were killed, more than two lakh women raped, about 10 million people departed to India as refugees and millions others were internally displaced. Thousands of children and women were subject to extreme torture during the Liberation War of Bangladesh, although international humanitarian law says that “if a pregnant woman or a mother with small children is detained on suspicion of an offence, then her case is to be treated with priority and particular dispatch.” In the book Birangonar Kotha, Susan Brownmiller stated that “in 1971, Pakistan Army raped women merely not because of their beauty, rather all groups of women including a 8 years child to 75 years old women were the victim of their atrocities. Pakistan army took with 10 women out of 100 in their camps. They tortured upon the women throughout the whole night. Few women were being raped more than 80 times’. During the Liberation War, there was widespread hunger amongst civilians and the atrocities of the Pakistan army meant there was a shortage of food, whereas starvation of civilians as a method of warfare is prohibited, and thereby unlawful as per Article 54 Para 1. Trial Chamber also stated in the Mucic Case that unlawful confinement of civilians is prohibited. It is held by the Trial Chamber that “the detention of civilians in the Čelebići prison-camp was not in conformity with the relevant provisions of Geneva Convention IV”, and it was found that Mucić had the “primary responsibility for, and had the ability to affect, the continued detention of civilians.” How women were being tortured and confined in the Pakistani army camps was reflected in the statement of Jebunnessa Haque while she was working for a project on ‘Rehabilitation of Tortured Women’ during the Liberation War. She explained how she saved two tortured and distressed women confined in the bunkers of the Pakistani army in Sylhet Airport. The law of armed conflict provides that in every state, the adversary is obliged to grant such relief actions free transit, subject to its right of control. In 1971, Pakistan was the adversary party who in all aspects should have had the responsibility to protect the innocent citizens of Bangladesh, whereas they targeted the unarmed and innocent civilians. According to a report by the Asia Times, Yahya Khan declared that “kill three million of them and the rest will eat out of our hands.” Therefore, it is clear that their target was to disable the whole nation and that it was well-planned. However, it is enshrined in international principles that “none of the parties to the conflict shall use civilians as a shield to render certain points or areas immune from military operations,” in fact, the immunity granted to the civilian shall not be in any way be abused. Objects which may be military objectives must not be installed in a civilian area in order to gain protection, whereas during the whole period of the Liberation War, the Pakistan military unlawfully occupied civilian territories for committing their heinous crimes. Malek Miah, a resident of Faridpur, testified in the case ‘Chief Prosecutor vs Ali Ahsan Mujahid’ that the Pakistan army set up camps in civilian areas such as at police line stadium, Rajendra College to continue committing atrocities with the help of Biharis and Rajakars. Along with other

17 Article 27 para 2 of Geneva Convention IV; Art 76 para (1) of 1977 Additional Protocol I.
18 Chief Prosecutor vs Salahuddin Quader Chowdhury, (International Crimes Tribunals Bangladesh-1)ICT-BD-02 of 2011
19 Shorma A, Birangonar Kotha (Shahitto Publication, 2013)
20 Prosecutor vs Zdravko Mucic (Appeals Chamber), IT-96-21-Abis (8 April 2003)
21 Supra note 19
22 Article 23 of Fourth Geneva Convention and Article 70of 1977 Additional Protocol I.
23 Article 28 of Geneva Convention IV, Article 51 (7) of 1977 Additional Protocol I.
24 The Chief Prosecutor Vs Ali Ahsan Muhammad Mujahid (International Crimes Tribunals Bangladesh-2) ICT-BD-04 of 2012
prohibitive degrees, it is also enshrined in international humanitarian law that “Collective penalties and measures of intimidation or terrorism, reprisals against civilian population and its property, and pillage all are prohibited”. In addition, civilians of occupied territory and their property is absolutely prohibited from reprisals\(^\text{25}\), and even threats with reprisal are also prohibited and considered as attempts to intimidate.

**Standards set by International Humanitarian Law while attacking a military objective**

In armed conflicts, every effort should be made to spare the civilian population as much as possible from the ravages of the war\(^\text{26}\). According to Article 57 para 2 (a) ii, AP I, when launching an attack on a military objective, all feasible precautions shall be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians, and damage to civilian objects. This rule particularly focuses on the obligation to protect civilians and civilian objects for those who are, in fact, planning or deciding to conduct military operations. Precautionary measures shall have to be carried out while preparing military actions, to spare the civilian population and civilian objects\(^\text{27}\). This is a very general rule of International Law - that a distinction should be made between civilians and combatants. Therefore, each party to a conflict has the duty to remove the civilian population, individual civilians, and civilian objects under its control from the vicinity of the military objectives ‘to the maximum extent feasible’\(^\text{28}\). In interpreting the term ‘feasible’, the German Federal Government in its declaration set the term down as “that which is practicable or practically possible, taking into account all humanitarian and military considerations”\(^\text{29}\). Each party to the conflict has the obligation to do everything feasible to cancel or suspend an attack if it becomes apparent that the target is not a military objective or that the attack may be expected to cause excessive incidental damage\(^\text{30}\). In most cases, it is the occupying authority who must take all responsibilities to protect the civilians of occupied territory, in fact, they bear the ultimate responsibility to protect civilians from all kind of violence\(^\text{31}\). Military objectives should not be in densely populated areas\(^\text{32}\). Military objectives should not be located within or in the vicinity of hospitals and safety zones. These zones are neither used for military purposes, nor defended\(^\text{33}\). Basically, all necessary precautions should be taken to avoid injury, loss and damage to the civilian population\(^\text{34}\). It has been held in ICTY judgment that “it is now a universally recognized principle ... that deliberate attacks on civilians or civilian objects are absolutely prohibited by international humanitarian law”. On the other hand, the distinction between combatants and civilians is considered to be a cardinal principle of international humanitarian law\(^\text{35}\), and this principle gets the status of customary international law. Hence, no country in war denies its binding nature since it has already been incorporated into the

\(^{25}\) Article 33 (3) of Fourth Geneva Convention  
\(^{26}\) UN General Assembly Resolution 2675  
\(^{27}\) Article 24 (2) of the Draft Additional Protocol II  
\(^{28}\) Article 58 (a) of Additional Protocol I. See also, US Air Force Pamphlet 1976  
\(^{29}\) Section 2 of the German Declaration of Independence  
\(^{30}\) Article 57 (2) (b) of the Additional Protocol I  
\(^{31}\) Article 13 of Geneva Convention IV. See also, Article 46 of the Hague Regulation  
\(^{32}\) Article 50 (c) of Geneva Convention IV  
\(^{33}\) Article 14 of Geneva Convention IV  
\(^{34}\) UN General Assembly Resolution 2675  
\(^{35}\) ICJ Reports (1996)
1. The intentional bombing of civilians is illegal.
2. Objectives aimed at from the air must be legitimate objectives and must be identifiable.
3. Any attack on legitimate objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence.\(^{37}\) During armed conflict, the government and all other authorities should conform to the prohibition of launching attacks against civilian populations\(^{38}\).

**Civilian's right to life and the principle of distinction in 1971**

This is considered a general principle of armed conflict - there must be a distinction between the civilian and the combatant\(^ {39}\). The principle of distinction is closely linked with indiscriminate attacks. An indiscriminate attack is “of a nature to strike military objectives and civilians or civilians objects without distinction”\(^ {40}\). According to Rule 14 of the Customary International Humanitarian Law, launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is indiscriminate attack. In the advisory opinion of the Nuclear Weapon case, the International Court of Justice stated that the weapon incapable of distinguishing between civilian and military targets violates an ‘intransgressible’ principle of international customary law\(^ {41}\). The following weapons that are still in use are considered as indiscriminate in certain and all contest - chemical, biological and nuclear weapons, anti-personnel landmines, mines, poison, explosives discharged from balloons, cluster bombs, booby traps, Scud missiles, Katyusha rockets, incendiary weapons and environmental modification techniques. Furthermore, Miletic challenges the ICTY Trial Chamber’s distinction between civilians and combatants within the column, stating that the column which consisted of the 28th Division of the ABiH was legitimate, and the civilians who joined in the column and took part in combat were military objectives since the column itself was a military threat to the Serbs; but the civilians who were not separated from the soldiers in the column is a violation of international humanitarian law\(^ {42}\). However, in 1971 the legality of the use of force by the Pakistan army as a means or method of warfare, without distinguishing between civilians and combatants, cannot be considered to be attacks on specific military objectives; it can only be considered as indiscriminate attacks. Therefore, the systematic killing by the Pakistani army and their


\(^{37}\) supra note p. 21

\(^{38}\) 20th International Conference of Red Cross, Resolution No- XXVIII

\(^{39}\) Article 48 of the 1977 Additional Protocol I, See also preamble of Ottawa Convention.

\(^{40}\) Article 51 of the 1977 Additional Protocol I.

\(^{41}\) ICJ, Nuclear Weapon Case, Advisory opinion. See also, Jean-Philippe Kot ‘Israeli civilians versus Palestinian combatants? Reading the Goldstone report in light of the Israeli conception of the principle of distinction’ 2011, LJIL 961

\(^{42}\) Prosecutor vs Radivoje Miletic (Appeals Chamber)IT-05-88-A (30 January 2015)
indiscriminate attacks upon civilians is a violation of international humanitarian law. Even the Israeli Military Court at Ramallah considered the immunity of the civilian from direct attack to be a basic principle of international humanitarian law\textsuperscript{43}.

**Absence of nexus between the Necessity and the Principle of Proportionality: 1971 perspective**

The term ‘necessity’ is closely linked with the principle of proportionality. Thus, the phrase ‘use all necessary means’ as declared by the UNSC resolution 1973 authorises the use of force considering the requirements of necessity. What would be the requirements of necessity also has to be decided by the nexus between the objectives achieved and actions undertaken\textsuperscript{44}. The real scenario of 1971 is in no way able to show any reasons that involved the requirements of necessity. The only purpose they had was to destroy the innocent people of the newly created country of Bangladesh. R.J Rummel, in his book *Statistics of Democide: Genocide and Mass Murder since 1990*, states that

“In east Pakistan (General Agha Mohammad Yahya Khan and his top generals) also planned to murder its Bengali intellectual, cultural and political elite. They also planned to indiscriminately murder hundreds of thousands of its Hindus and drive the rest into India. And they planned to destroy its economic base to insure that it would be subordinate to West Pakistan for at least a generation to come\textsuperscript{45}.”

Here it is also mentionable that only the term 'necessity' is not sufficient to justify the nexus; it also has to be supported by the word 'indispensable'\textsuperscript{46}. On the other side of the spectrum, necessity is identical to proportionality in the law of self defence. The Pakistan military clearly failed to apply proportionality in between armed attacks and subsequent counter-actions. Their cruel attacks on innocent people in all age groups are clearly prohibited according to the principles of Necessity.

Furthermore, the principle of proportionality in attacks is also mentioned in the Additional Protocol II and amended Protocol II of the Convention on Certain Conventional Weapons. Considering the status of civilians, the Rome Statute of the International Criminal Court also stated that “intentionally launching an attack in the knowledge that such attacks will cause incidental loss of life or injury to civilians or damage to civilian objects...which would be excessive in relation to the concrete and direct overall military advantage anticipated” constituted as a war crime in international armed conflicts\textsuperscript{47}. The principle of proportionality is applicable to three specific forms of just war: ad bellum, in bello and post bellum. This paper is justifying the principle of proportionality in *jus in bello*\textsuperscript{48}, since the purpose of international humanitarian law is to limit the sufferings of victims; it involves examining whether the

\textsuperscript{43} Kassem Case 1969, Military Court at Ramallah, Israel
\textsuperscript{44} Lehmann J ‘All Necessary Means to protect Civilians: What the intervention in Libya Says about the Relationship between the Jus in Bello and Jus ad Bellum’(2012) JCSL17 (1):117
\textsuperscript{45} supra note 24
\textsuperscript{46} supra note 44
\textsuperscript{47} Article 8 (2) (b) (iv) of Rome Statute
\textsuperscript{48} Larry, M., ’Jus post bellum proportionality and the fog of war”’ (2013) EJIL 315
expected collateral damage to civilians and civilian objects of an attack on a legitimate military target is more excessive than the direct and concrete military advantage anticipated.\(^\text{49}\) Violation of the principle of proportionality is a direct violation of international humanitarian law. Article 51.5 (b) of the Additional Protocol I describes proportionality violation as “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objectives, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”. Regarding proportionality, the Commentary to the protocols says that “in combat areas it often happens that purely civilian buildings or installations which are occupied or used by the armed forces and such objectives may be attacked, provided that this does not result in excessive losses among the civilian population... but outside the combat area the military character of objectives that are to be attacked must be clearly established and verified.”\(^\text{50}\) The Israeli Court analyses military necessity by labelling proportionality tests; “firstly, it asks whether the chosen military tactic bears a rational relationship to its goal, and second, whether that goal might be attained by an alternative that inflicts less damage on civilians.” The US Army, in the 1956 Law of Land Warfare Field manual, puts the definition of proportionality simply as “Loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained”, whereas unfortunately during the whole period of the Liberation War, unarmed innocent people were the military objectives of the Pakistan army to fulfil their concrete and direct advantage, which is in complete violation of international humanitarian law. This included the destruction of civilians and their property to gain a military advantage and defeat the opposing forces.

Lack of nexus between proportionality and collateral damages

Proportionality is often closely related to ‘collateral damages’. Collateral damage is the damage of surrounding human and nonhuman resources, either military or non-military, as a result of action or strikes directed specifically against enemy forces or military forces\(^\text{51}\). When launching an attack on a military objective, all feasible precautions shall be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians, and damage to civilian objects\(^\text{52}\). Civilians must be properly warned in advance of military actions that may affect them “unless circumstances do not permit.“\(^\text{53}\) Military operations require sound information, military experience and respect for the civilian population, but indiscriminate attacks without respecting what military operation requires and disobeying the rights and interests of the innocent civilian population is an explicit violation international humanitarian law\(^\text{54}\). Therefore, what has been done by the Pakistan military army in compliance with the collaborators of Bangladesh is a grave violation of human rights as well as international humanitarian law. They inflicted direct and immediate damages on the civilian population of Bangladesh. Indiscriminately attacking houses, surrounding villages, torturing and inhumanely killing civilians is obviously more than just collateral damages. In the case of ‘The Chief


\(^{51}\) Safire. W., Safire’s New Political Dictionary (Random House, 1993) 682-3

\(^{52}\) Article 57 para 2 (a) of the 1977 Additional protocol I.

\(^{53}\) Article 57 para 2 (c) of the 1977 Additional protocol I.

\(^{54}\) Supra note 5
Procuretor vs Motiur Rahman Nizami', one of the witnesses testified that on 14th May, 1971, the Pakistan Army and their collaborators surrounded the villages of Ruposhi, Baousgari and Demra and killed around 450 civilians, burnt 137 houses and shops, and raped 30 to 40 women.

Atrocities carried out by the Pakistan army are some of the most heinous crimes committed in the history of the world. After the launching of genocide on 25th March 1971, according to a New York Times report till 28th March 1971, a total of 10,000 people were killed, with 5000-7000 deaths occurring in Dhaka alone. The Sydney Morning Herald reported the killing of 10,000-100,000 people till 29th March, 1971. However, although there is no absolute limit in international humanitarian law on the acceptable limit of damages, the laws express a ratio between two quantities; according to Article 51, para 5 (b) of the Additional Protocol I, the greatest permissible potential losses among the civilian population during a military action are measured in proportion to the extent of the anticipated military advantage. Therefore, attacks must not be carried out if anticipated damage is excessive in relation to the desired military outcome.

Illegitimate Military Targets in 1971

This paper argues that the intention of the Pakistan military army was to plan in advance and systematically kill innocent civilians in Bangladesh. Disobeying the rules and principles of international law is the grave violation of International Humanitarian Law. Their main target was the killing of intellectuals and other civilians and destruction of the Hindu-dominated eastern parts to gain political and economical power over then East Pakistan. The marauding Pakistani military, in a barbaric manner, attacked Jagannath Hall, the Hindu residential hall of the University of Dhaka. In the case of ‘The chief Prosecutor vs Motiur Rahman Nizami’, the witness Md. Shahjahan Ali testified regarding the cruelty of the Pakistan army towards the Hindu people and the way they burnt whole Hindu villages, whereas Articles 25, 26 and 28 of the Hague Regulations states that there should not be any bombardment of undefended places, the attacking officer should warn the authorities before commencing bombardment, and there exists a ban on the pillage of towns, even if taken by assault. The prohibition on attacking undefended places was also included in the Brussels Declaration and Oxford Manual. The application of the convention is limited to civilians in the hands of or under the physical control of an adverse party or an occupying power. It was decided by the Trial Chamber in the tadic case that “the expression in the hands of is not restricted to situations in which the individual civilian is physically in the hands of a party or occupying power, effectively occupied by a party to the conflict can be considered in the hands of that party. But the exact time when the victims fell into the hands of opposing forces is highly relevant.” The Pakistan

55www.genocidebangladesh.org/ last accessed on 17.01.2016.
56‘The chief Prosecutor vs Motiur Rahman Nizami’ (International Crimes Tribunals Bangladesh-1) ICT-BD 03 of 2011.
58Leslie C., The contemporary law of armed conflict (Manchester University Press, 2008)
59Prosecutor vs DuskoTedic, (In the Trial Chamber) IT-94-1-T (7 May 1997)
army in 1971 were under obligation to provide all effective measures to protect the civilian population since civilians were outside the reach of military action, whether in international or non-international armed conflict. Here, it is important to clarify that civilians are also protected in non-international armed conflicts by Common Article 3 which embodies the “minimum principles of humanitarian law, forbidding violence to life and person, particularly murder, mutilation, cruelty and torture; hostage taking; outrages on personal dignity, especially humiliating and degrading treatment”.

**International threshold of Military Necessity**

Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel submission of the enemy with the least possible expenditure of time, life, and money - this is particularly known as the hostages formulation\(^{60}\). It is a well established principle of humanitarian law that the belligerent is only allowed to use the amount of force that is necessary to defeat the enemy, and prohibits unnecessary and wanton application of force. Besides, an armed attack must be accompanied by the right of self-defence. However, an important question left open by the International Court in the *Nicaragua Case* is “whether a state must wait until it is attacked before it can respond in self-defence or it is entitled to pre-empt an attack by taking measures of anticipatory self-defence.” Therefore, the pertinent question is - on what basis did the Pakistan military attack the civilians of East Pakistan on 25th March 1971? Was there any imminent danger, or was the attack against East Pakistan necessary as anticipatory self-defence? Neither of these requirements existed at the time.

Their main target was to kill Bengali intelligentsia, academics and Hindus with significant indiscriminate attacks. International humanitarian law is applicable in the case of Operation Searchlight as well, since a significant development in humanitarian law states that it is applicable even if the party to the conflict does not recognise that they are in a conflict situation, or they do not declare war. A complete rupture of normal relations between the parties is presumed to be a state of war\(^{61}\). Therefore, by the night of 25th March 1971, the then East Pakistan (Bangladesh) was in a situation of war.

In addition, what should be the highest use of force with regard to the submission of enemy forces is enumerated in the United States Naval Commander’s Handbook, which states that “only that degree and kind of force, not otherwise prohibited by the law of armed conflict required for the partial or complete submission of the enemy with a minimum expenditure of time, life and physical resources may be applied.”\(^{62}\)

**Absence of Precautionary Principles in 1971**

According to Article 15 of the Customary International Humanitarian Law, “in the conduct of military operations, constant care must be taken to spare civilian population, civilian and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects.” Precautionary steps against the attack of civilians were first set out in Article 2(3) of the 1907 Hague

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\(^{61}\) supra note 5

Lack of Civilian Protection in 1971

Regulations (IX), which later became included in Article 57(1) of the Additional Protocol I. Later on, this principle was supported by and contained in military manuals of different countries, for example, the military manuals of Benin, Croatia, Ecuador, Germany, Libraria, Malaysia, Madagascar, Nigeria and Togo. In 1971, West Pakistan was absolutely reluctant to take any kind of feasible precautions in attacks, although it is an international obligation to take all ‘feasible’ precautions, after taking into consideration all existing circumstances, including humanitarian and military ones.

Knowledge and intention of the Pakistan Military

A general requirement of The Hague Convention is that “Hostilities should not be started without prior and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war.” However, on the night of 25th March 1971, the Pakistan Army launched Operation Searchlight upon the civilian population with a specific intent to destroy the Bengali nation. On that night, unarmed civilian people were subject to mass killing, extermination, deportation, abduction, torture, rape and genocide.

This paper will now discuss some critical issues regarding the ‘actus reus’ and ‘mens rea’ of the Pakistan army. It is historically established that the massacre of 1971 was committed with the full knowledge and intention to destroy the innocent people of Bangladesh. Under the Elements of Crime, it has been stated that “The perpetrator can only intend to attack? such personnel, installations, material, units or vehicles so involved to be the object of the attack.” However, killing people, rape, looting and arson were the main targets of the Pakistan Army. For example, on 4th May 1971, the Pakistan army, with the help of collaborators, pre-planned and killed 20 unarmed civilians behind the Madhya Masimpur bus stand. Intent is a part of the mental element of a crime. Criminal liability arises when the person carries out the prohibited conduct with a given state of mind; that is, a psychological element is required by the legal order for the conduct to be blameworthy and consequently punishable. Intentionally setting fire to unarmed Hindu houses and then gunning them down is nothing but targeted killing.

The terms "intent" and "knowledge" as referred to in Article 30(2) and (3) of the Statute to reflect the concept of dolus. ‘Dolus’ falls under one of the forms provided in Article 30 of the Statute. Article 30(2) and (3) of the Statute embraces the first degrees of dolus. Dolus directus in the first degree (direct intent) requires that the suspect knows that his or her acts or omissions will bring about the material elements of the crime, and he carries out these acts or omissions with the purposeful will (intent) or desire to bring about those material elements of the crime. Therefore, in the first degree of the dolus directus, there exists an element of volition, since the suspect purposefully wills or desires to attain the prohibited result. In the Blaskic case, the Trial Chamber observed in relation to actus reus that “the attack must have caused death or serious bodily injury within the civilian population and damage to civilian property... targeting civilian and civilian property is only an? offence when not justified by military necessity.” On the other hand, with reference to mens rea, it found

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63 supra note 61 page. 127
64 The Chief prosecutor vs Delwar Hossain Sayeedi, (International Crimes Tribunals Bangladesh-1) ICT-BD 01 of 2011
that “such attack must have been conducted intentionally in the knowledge that civilian and
civilian property were not being targeted through military necessity”.

**Origin of the Crimes due to Violation of the Fourth Geneva Convention: Impact of Customary International Law**

Customary international law developed the body of international crimes that has been
committed mostly due to a violation of the Fourth Geneva Convention. The Charter of Nuremberg Tribunal listed three kinds of crimes - crimes against peace, war crimes and crimes against humanity, as violations of international humanitarian law. Until the Second World War, to what extent these crimes were under the purview of customary international law was still a matter of contention, but by 1950 all of them had been brought under the jurisdiction of customary international law. Moreover in 1993, the United Nations also accepted grave breaches of the Geneva Conventions, violations of the laws and customs of war, genocide and crimes against humanity as international crimes under the umbrella of customary law. The ICC has also listed four crimes but all of them were not confirmed by customary international law.

**Crimes against humanity**

The concept ‘crime against humanity’ first received international legal recognition in the St. Petersburg Declaration of 1868. It received further recognition when the First Hague Peace Conference in 1899 unanimously adopted the Martens Clause as part of the Preamble to the Hague Convention respecting the laws and customs of war on land. Then on 24th May 1915, the Declaration of France, Great Britain and Russia gave its first formal indication regarding some crimes that were considered to be crimes against humanity. The 1919 Versailles Peace Conference included murders, massacres, systematic terrorism, execution of hostages, torture of civilians, deliberate starvation of civilians, rape, abduction of girls and women for the purpose of enforced prostitution, deportation of civilians, internment of civilians under inhumane conditions, forced labour of civilians in connection with the military operations of the enemy, imposition of collective penalties and deliberate bombardment of undefended places and hospitals as crimes against humanity. These crimes are all considered to be violations of the Fourth Geneva Convention. And thus the nature of the crimes against humanity is customary international law which has been recognised by the writers, municipal courts in Eichmann case, in General Assembly and in ICTY and ICTR statute as approved by the Security Council Resolution 827 of 1993 and 955 of 1994 respectively. These crimes were first defined in the Statute of the Nuremberg Tribunal as “murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds

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65 **Prosecutor v. Tihomirn Blaskic** *(Trial Judgement)*, IT-95-14-T (3 March 2000)
in execution of or in connection with any crime within jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where perpetrated.”70 The General Assembly accepted the conclusion reached by the Nuremberg Tribunal as customary international law and used the term ‘crime against humanity’ in order to condemn the violation of economic and political rights of the indigenous population71 in one hand, and apartheid on the other72. The International Criminal Court has contained the definition of crime against humanity in Article 73 of the Rome Statute in accordance with the traditional concept of crime against humanity under customary international law.

Genocide

Generally the term genocide is used to describe a crime that is perpetrated on “a national, ethnic, racial or religious group, as such.”74 The term genocide was first coined by Raphael Lemkin who combined the Greek word for race or tribe (geno) with the Latin word cide (killing)75. The Pakistan army’s intention to kill the national group of Bangladesh is clear all over world. The most heinous act of genocide perpetrated by the Pakistan army was on 14th December 1971, when they exterminated leading left wing professors, journalists, litterateurs and even doctors, whereas the Fourth Geneva Convention says that “Journalists engaged in dangerous professional missions in areas of armed conflict are protected as civilians, provided that they take no action adversely affecting their status as civilians, and civilian concerned shall be treated humanely.”76 A group of people killed or intend to be killed is enough for the crime to count as genocide, whatever the number is. In 1971, the unarmed Hindu civilians of Chittagong were killed on a large scale, and they were also subject to torture, abduction, looting and deportation77. The legal definition of genocide can be found in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide of 194878. Article 2 of the Genocide Convention has been replicated in Article 4(2) of the ICTY

70 Article 6 (C), London Charter
71 General Assembly Resolutions 2184 (XXV) of 15 December 1970
72 General Assembly Resolutions 2202 (XXI) of 16 December 1966
73 Definition of the Crime against Humanity in Rome Statute
74 Article II, The Convention on the Prevention and Punishment of the Crime of Genocide of 1948 ‘In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
• (a) Killing members of the group;
• (b) Causing serious bodily or mental harm to members of the group;
• (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
• (d) Imposing measures intended to prevent births within the group;
• (e) Forcibly transferring children of the group to another group
75 Raphael Lemkin ‘Genocide as a Crime Under International Law’ (1947) 41 AJIL 145.
76 Article 79 of the Additional Protocol I.
77 Chief Prosecutor vs Salahuddin Quader Chowdhury, (International Crimes Tribunals Bangladesh-1)ICT-BD-02 of 2011
78 Article 2, CPPCG 1948 says “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life, calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; [and] forcibly transferring children of the group to another group.”
Statute, Article 2 (2) of the ICTR Statute and Article 6 of the Rome Statute. In this regard, the definition of ‘genocide’ in the Genocide Convention reflects the rule of customary international law that is now widely accepted across the world. Therefore, it is conceivable that genocide is a crime under customary international law and the ICJ also indicated that its definition reflects customary rules.\textsuperscript{79}

**War Crime**

War crimes are the violations of the laws and customs of war, commonly known as violations of international humanitarian law. Generally, a conduct can amount to a war crime if there is any violation of international humanitarian law or if it is criminalised under a treaty or customary international law.\textsuperscript{80} Various means and methods of conducting war has gradually developed under customary law. For example, ‘perfidy’ previously only existed within the civilized states but later on, this ‘custom’ was, for the first time, codified in the Hague Regulation 1899 and 1907.\textsuperscript{81} The Hague branch of international humanitarian law establishes rules and methods of armed conflicts, whereas fundamental IHL principles included principles of distinction and proportionality for regulating the conduct for war. Furthermore, during international armed conflicts, giving effective advance warning for attacks that may affect the civilian population is a well-established principle in customary international law that has already been recognised in the Lieber Code, Brussels Declaration and Oxford manual.\textsuperscript{82}

The Geneva branch of international humanitarian law deals particularly with the protection of those people who did not take part in hostilities and those who are no longer taking part in hostilities; for example, the wounded, sick, shipwrecked, prisoners of war, detained persons, civilians in time of war etc. The Geneva Convention is basically treaty law, and in fact, some provisions of this treaty law are the codification of pre-existing customary norms.\textsuperscript{83} On the other hand, laws of war crimes are basically the laws of customs in war, the evolution of which took a long time. Customary rules of international law still retain a great deal of influence on it. Before the 1990s, an individual was only held to be criminally liable for international armed conflicts, but after the 1990s in the *prosecutor v Tadic* case, the ICTY held that “All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules regarding means and methods of combat in civil strife.” Therefore, there is a clear precedent for practicing and applying customary

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\textsuperscript{81}Article 29, Hague Regulation-1899.


\textsuperscript{84}Case No IT-94-1-AR72, (Appeals Chamber, Decision on the defence motion for Interlocutory Appeal) 2 Oct 1995, para 128-137.
international law not only to international armed conflict situations, but also to internal armed conflicts\textsuperscript{85}.

**Conclusion**

This paper can help in understanding the extent of the injustices of the war, especially against the civilians of Bangladesh. The Pakistan army intentionally refused to apply the ‘minimum yardstick’ test applicable in all armed conflicts. The International Court of Justice held that Common Article 3 of the Geneva Convention reflects an ‘elementary considerations of humanity’\textsuperscript{86}. During the Liberation War, civilians were neither part of any military force, nor did they actively take part in hostilities. The Pakistani military’s illegitimate use of force in 1971 did not adhere to the principle of proportionality during attacks. According to theories of war, the principle of proportionality has long been regarded as one the determining factors of whether a war is justified or not\textsuperscript{87}.

\textsuperscript{85} supra note 80, p. 285.

\textsuperscript{86} ICJ, *Nicaragua Case*.

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