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Centre of Excellence for International Law (CEIL),
Institute for Strategic Studies, Research and Analysis (ISSRA),
National Defence University, Sector E-9, Islamabad, Pakistan.
Website: www.ndu.edu.pk
Email: ceil@ndu.edu.pk

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CONTENTS

TITLE	PAGE
Articles	
Accountability for Indian Atrocities in IIOJK through Universal Jurisdiction *Ahsan Qazi*	**01**
Contextualizing Lawfare *Yasir Abbas*	**15**
The Hegemonic Hydro-Politics of South-Asia: Can International Law balance the Geographical Imbalance? *Faraz Khan Yousafzai*	**27**
Pakistan's FATF Experience *Noor Fatima Iftikhar*	**49**
The International Health Security Regime and its Implications for Pakistan *Zoha Shahid*	**63**
State Practice of Pakistan	
Pakistan's State Practice relating to International Law *Ayesha Malik and Ahsan Qazi*	**75**
Book Review	
Dan Kovalik: No More War *Ayesha Malik*	**91**

ACCOUNTABILITY FOR INDIAN ATROCITIES IN IIOJK THROUGH UNIVERSAL JURISDICTION

Ahsan Qazi[*]

Abstract

The past seven decades of humanitarian and human rights violations inside IIOJK have been well documented and highlighted from time to time. However, the conversation often stops there with no mention of the accountability of the perpetrators of the violations and how they can be brought to justice. This paper carries the conversation forward by highlighting the use of Universal Jurisdiction to ensure the accountability of the perpetrators. This paper offers how in the context of IIOJK, traditional approaches of ensuring accountability such as the International Criminal Court or Ad-Hoc Tribunals are not viable and instead the exercise of Universal Jurisdiction becomes essential as the perpetrators may be tried despite their immunity ratione materiae, and even in absentia. The effective exercise of Universal Jurisdiction hinges on the prior establishment of fact-finding mechanisms to ensure collection of evidence that link the crimes with the perpetrators and accordingly steps must be taken to ensure their establishment. The events of 5th August 2019 warrant Pakistan to undertake a new approach and take steps to ensure accountability.

Keywords: Universal Jurisdiction, Geneva Conventions, Illegally Indian Occupied Jammu and Kashmir, Fact Finding Mechanisms, Evidence, Universal Jurisdiction in absentia, Functional Immunity, Customary International Law.

Introduction

The history of oppression inside IIOJK has been well reported – going even past 1947.[1] This centuries long oppression took a new turn in the aftermath of 1947 i.e., occupation by India. This occupation has seen a widespread and systematic campaign of crimes against humanity, war crimes as well as various human rights

[*] Ahsan Qazi works as a Consultant at the Research Society of International Law (RSIL) in addition to being a faculty member at Themis School of Law, Karachi. He has represented Pakistan at the 60th Jessup White & Case International Rounds in Washington D.C.

[1] Al Jazeera, "Kashmir's struggle did not start in 1947 and will not end today", 15 August 2019 <https://www.aljazeera.com/opinions/2019/8/15/kashmirs-struggle-did-not-start-in-1947-and-will-not-end-today> accessed 20 May 2021

violations perpetrated against the ethnic Kashmiris inside IIOJK as have been reported by various international actors from time to time. However, on 14 June 2018, the Office of the United Nations High Commissioner for Human Rights ("OHCHR") released the 'first-ever' report on the situation on human rights in both 'Indian-Administered Kashmir and Pakistan-Administered Kashmir'.[2] The report was significant because it was the first time in the region's history that the aforementioned 'widespread and systematic' nature of the atrocities being perpetrated inside IIOJK were documented such as the use of excessive force by Indian police forces, usage of pellet guns on civilians, civilian killings, arbitrary detentions and torture.[3]

One year later, on 8 July 2019, the OHCHR released a 'second' report which, once again, documented in great depth, incidents of human rights violations inside IIOJK from May 2018 to April 2019.[4]

Shortly thereafter, on 5 August 2019, the Indian Government revoked the 'special status' of Jammu & Kashmir by abrogating Article 370 of the Indian Constitution[5] and imposed a repressive state-wide 'lockdown' wherein internet and telecommunications were shut down, political leaders were arrested, and freedom of movement was severely curtailed.[6] The situation has been likened to a 'siege'.[7]

The back-to-back reports and the events of 5 August 2019 have brought attention to the fact that India has historically and continuously acted with absolute impunity inside IIOJK. Indeed, as the OHCHR reports note "several 'special laws' enacted in the territory such as the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 (AFSPA) and the Jammu and Kashmir Public Safety

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[2] OHCHR, "First-ever UN human rights report on Kashmir calls for international inquiry into multiple violations", 14 June 2018.
<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23198%20>

[3] ibid, p. 4-5.

[4] OHCHR, "No steps taken by India or Pakistan to improve human rights situation in Kashmir – UN", 8 July 2019
<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24799&LangID=E> accessed 20 May 2021.

[5] Al Jazeera, "India revokes disputed Kashmir's special status with rush decree", 5 August 2019, available at: https://www.aljazeera.com/news/2019/8/5/india-revokes-disputed-kashmirs-special-status-with-rush-decree

[6] Guardian, "India set to withdraw Kashmir's special status and split it in two", 5 August 2019
<https://www.theguardian.com/world/2019/aug/05/india-revoke-disputed-kashmir-special-status> accessed 20 May 2021.

[7] RSIL, "Kashmir Under Siege? An International Law Perspective", 19 September 2019 <https://rsilpak.org/2019/kashmir-under-siege-an-international-law-perspective/> accessed 20 May 2021.

Act, 1978 (PSA) 'created structures that obstruct the normal course of law, impede accountability and jeopardize the right to remedy for victims of human rights violations."[8]

This in turn has led to calls for 'accountability' for the perpetrators of the atrocities and accordingly Pakistan's traditional approach regarding IIOJK as a matter that can only be resolved through UNSC Resolutions must be re-evaluated and reconsidered and a different strategy must be employed to ensure that the perpetrators of the atrocities inside IIOJK are held accountable for their actions.

This Article will examine one such legal strategy that may be employed to address the issue of 'accountability' of the perpetrators inside IIOJK i.e., exercise of Universal Jurisdiction. It will first discuss the notion of universal jurisdiction, its relevance and legal basis and then address the potential challenges that would need to be overcome to successfully pursue this option before concluding with what steps should Pakistan take.

1. Universal Jurisdiction

The generally accepted definition of universal jurisdiction is that it is 'the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events'[9] where neither the victims nor offenders are nationals of the forum State. The rationale behind the exercise of universal jurisdiction is that certain crimes are so atrocious in nature that each State has a vested interest in its suppression and punishment despite the absence of a nexus with the forum State, otherwise its perpetrator may escape punishment.[10]Accordingly, universal jurisdiction enables all states to fulfil their duty to prosecute and punish the perpetrators of war crimes, crimes against humanity as well as other human rights violations.

1.1. Importance of Universal Jurisdiction

As described above, the situation inside IIOJK is one where the territorial State of the perpetrator is unable or unwilling to act, and normally in such situations, victims would seek assistance through the intervention of an international jurisdiction or through the permanent International Criminal Court (ICC). However, international jurisdictions are constrained by a limited mandate specific to a territory or to a conflict of a State party, and the jurisdiction of the ICC is

[8] Ibid (n 2 and 4).
[9] Arrest Warrant of 11 April 2000 (DR Congo v Belgium) [2002] ICJ Rep 3, 75 [42] (Joint Sep Op of Judges Higgins, Kooijmans, and Buergenthal); See also, Kriangsak Kittichaisaree, *The Obligation to Extradite or Prosecute* (Oxford University Press 2018), pages 204 - 207
[10] Kriangsak (n 9) page 204.

limited to crimes committed after 01 July 2002. The ICC also only has territorial jurisdiction over states parties to the ICC Statute which India is not. Situations like these result in what the ICC Office of the Prosecutor has termed as 'risk of an impunity gap'[11] and that elimination of this risk requires 'national authorities, the international community and the ICC work together to ensure that all appropriate means for bringing other perpetrators to justice are used."[12] Accordingly, the only way to combat this lacuna is for States to exercise universal jurisdiction over such perpetrators.

1.2. Legal Basis for the exercise of Universal Jurisdiction

Universal jurisdiction may be exercised either through invocation of treaty-based obligations or by invocation of customary international law obligations or through implementation of domestic legislation. When it comes to treaty-based obligations, two distinct crimes are explicitly identified in international conventions over which universal jurisdiction may be exercised: The first concerns grave breaches of the provisions of the four Geneva Conventions of 1949.[13] The second is piracy *iure gentium* under the UN Convention on the Law of the Sea.[14] However, this discussion is only confined to the former crime.

Both offences have been subjected to universal jurisdiction at least since the 19th century under customary international law, each on a different theoretical basis. Grave breaches are not perpetrated on locations beyond the jurisdictional reach of States; however, their heinous and repugnant nature sufficed in order for the international community to consent to clad them with universal jurisdiction.[15]

Additionally, to make this principle effective, States are required to establish universal jurisdiction for war crimes in their national legislation.[16] Currently, a number of States around the world have enforced legislation on universal

[11] Paper on some policy issues before the Office of the Prosecutor, September 2003, page 7 <https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf> accessed 20 May 2021.

[12] ibid.

[13] See Arts 49–51 Geneva Convention I, Arts 50–52 Geneva Convention II, Arts 129–31 Geneva Convention III, Arts 146–48 Geneva Convention IV.

[14] See Art 105 UNCLOS.

[15] Ilias Bantekas, "Criminal Jurisdiction of States under International Law", March 2011, in Rüdiger Wolfrum (ed), Max Planck Encyclopedia of Public International Law (online edn), para 23 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1021#law-9780199231690-e1021-div2-6> accessed 20 May 2021.

[16] ICRC, Casebook, *Universal Jurisdiction* <https://casebook.icrc.org/glossary/universal-jurisdiction> accessed 20 May 2021

jurisdiction to hold perpetrators accountable for their crimes including, Germany,[17] France,[18] Spain,[19] United Kingdom,[20] and Argentina.[21]

2. Violations committed inside IIOJK which are subject to Universal Jurisdiction

At the outset, it must be noted that existing literature already classifies the situation inside IIOJK as an 'occupation' and therefore subject to the Fourth Geneva Convention.[22] Article 147 of GCIV establishes that 'grave breaches' of the Conventions encompass the following acts against protected persons or property:[23]

- wilful killing,
- torture or inhuman treatment, including biological experiments,
- wilfully causing great suffering or serious injury to body or health,
- unlawful deportation or transfer or unlawful confinement of a protected person,
- compelling a protected person to serve in the forces of a hostile Power, or
- wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention,
- taking of hostages and
- extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly.

It is now well established that the Indian Forces have routinely perpetrated such actions inside IIOJK as clearly documented by the aforementioned OHCHR

[17] Völkerstrafgesetzbuch (Code of Crimes against International Law, hereinafter VStGB) of 26 June 2002, Bundesgesetzblatt (Federal Law Gazette) 2002 I, p. 2254; cf. BTDrucksache 14/8524.
[18] French Criminal Code of Procedure (CCP), Title IX.
[19] Organic Law 6/1985, of 1 July, of the Judicial Power (Ley Organica 6/1985, de 1 de julio, del Poder Judicial), as amended by Organic Law 11/1999, art. 23.4 (a) and (g).
[20] Criminal Justice Act 1988, section 134; see also Geneva Conventions Act 1957, section 1, 1A; International Criminal Court Act 2001, section 50.
[21] Constitution of Argentina, Article 118.
[22] RSIL, Legal Memorandum - The Status of Jammu & Kashmir Under International Law <https://rsilpak.org/wp-content/uploads/2019/08/Legal-Memo-Kashmir.pdf>
[23] GCIV Art. 147.

Reports, the works of the Human Rights Watch[24] as well as the Jammu Kashmir Coalition of Civil Society.[25] Accordingly, this article will briefly touch upon the factual aspects of the aforementioned grave breaches and focus primarily on the legal implications.

2.1. Wilful Killing

Wilful killing implies that the alleged perpetrator killed or caused the death of a protected person. The notion of killing has been used interchangeably with causing death. Thus, this grave breach covers not only such acts as shooting a protected person to death, but also such conduct as reducing the food rations or water of protected persons, resulting in their starvation and/or dehydration and ultimately their death.[26]

Similarly, inside IIOJK, Indian Forces routinely engage in civilian killings and between 2008 to 2018, some 1,081 civilians have been killed extrajudicially.[27] Lately at the onset of the spread of COVID-19 inside IIOJK, India had invoked draconian measures such as lack of equipment and health care workers[28] which would ultimately lead to the death of civilian population and amount to wilful killing.

2.2. Torture or Inhumane Treatment

Torture means that the perpetrator inflicted severe pain or suffering, whether physical or mental, upon one or more protected persons. In determining the 'severity' of the conduct, the ICTY has considered a whole series of factors, both objective – relating to the severity of the conduct – and subjective, relating to the particular situation of the victim.[29] The ICRC notes the objective factors, among others: the nature and context of the infliction of pain, the premeditation and institutionalization of the ill-treatment, whether the mistreatment occurred over a prolonged period, and the manner and method used. Whereas, the following subjective factors relating to the particular victim have been used by courts and tribunals when assessing the severity of the conduct: the physical condition of the

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[24] Human Rights Watch, Kashmir <https://www.hrw.org/tag/kashmir> accessed 20 May 2021.

[25] Jammu & Kashmir Coalition of Civil Society, Annual Reports <https://jkccs.net/annual-human-rights-review/> accessed 20 May 2021.

[26] ICRC, Commentary of 2020, GCIII, para 5218 citing ICTY, Prosecutor v. Prilic et al, Trial Judgement, IT-04-74-T, 29 May 2013, Volume 3, paras 745–748

[27] OHCHR, supra note 4, para 61

[28] RSIL, The Coronavirus in Indian-Occupied Kashmir, 26 April 2020 <https://rsilpak.org/2020/the-coronavirus-in-indian-occupied-kashmir/> accessed 20 May 2021.

[29] ICTY, Prosecutor v. Kvočka et al., Trial Judgement, IT-98-30/1, 2 November 2001, para 143

victim, the physical or mental effect of the treatment on the victim, the victim's state of health, the position of inferiority of the victim, the victim's age, the victim's sex and the victim's social, cultural and religious background.[30]

Similarly, the Indian Forces have also engaged in the torture of the civilian population inside IIOJK with the OHCHR noting that 'there have been persistent claims of torture by security forces in Indian-Administered Kashmir, especially during the 1990s and early 2000s.'[31]

2.3. Wilfully causing great suffering or serious injury

The ICTY has interpreted this to mean '[such harm must inflict] grave and long-term disadvantage to a person's ability to lead a normal and constructive life.'[32]

The extensive use of 'pellet-guns' as a crowd control measure has also been well documented as 1,253 people have been blinded as a result which impairs them from leading a normal and constructive life.[33]

2.4. Unlawful deportation or transfer of civilian population

On 6 August 2019, the President of India, through a presidential order rendered Article 370 (which included article 35A) of the Indian Constitution inoperable. Resultantly, the 'special status' of Kashmir within the Indian Constitutional framework was revoked and all laws applicable within India were now also applicable to Jammu & Kashmir. The Indian Parliament passed the Jammu & Kashmir Reorganization Act w.e.f from 31 October 2019. The Act sought to absorb the State of Jammu & Kashmir into a Union Territory. Article 96 of the Act gave the Central Government unbridled powers to alter, amend and modify any legislation with respect to Jammu & Kashmir. Under this provision four orders were promulgated which sought to grant rights with respect to civil service, education and property inside Jammu & Kashmir to all citizens of India. People from the rest of India would have the right to acquire property in Jammu and Kashmir and settle there permanently.[34]

These actions are in a clear violation of the prohibition contained in Article 49(6) of GCIV which states, 'the Occupying Power shall not deport or transfer parts of

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[30] ICRC, Commentary, supra note 26, paras 5229-5230.
[31] Report, supra note 4, para 124.
[32] ICTY, Prosecutor v. Tolimir, Appeal Judgement, IT-05-88/2-A, 8 April 2015, para 201.
[33] Report, supra note 4, para 78.
[34] Just Security, Kashmir: A Place Without Rights, 5 August 2020 <https://www.justsecurity.org/71840/kashmir-a-place-without-rights/> accessed 20 May 2021.

its own civilian population into the territory it occupies.' The ICJ in the *Wall Advisory Opinion* stated that:

> *"[Article 49(6)] prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory."*[35]

2.5. Unlawful confinement and depravation of fair trial

Arbitrary detention, sometimes without even a warrant[36] is routinely undertaken inside IIOJK using the 'Kashmir Public Safety Act (PSA), 1978' which authorizes administrative detention for a broad range of activities that are vaguely defined, including "acting in any manner prejudicial to the security of the State" or for "acting in any manner prejudicial to the maintenance of public order". PSA allows for detention without charge or trial for up to two years in some cases.

The Human Rights Committee has also noted that the PSA contravenes the rights enshrined in the International Covenant on Civil and Political Rights, especially the rights to liberty and to a free and fair trial.[37]

Therefore, there is considerable evidence that Indian conduct inside IIOJK amount to grave breaches of the GCIV as well as that of customary international law and is therefore, amenable to Universal Jurisdiction by any state.

However, the exercise of Universal Jurisdiction is not without its challenges which are discussed in depth below.

3. Challenges to the exercise of Universal Jurisdiction

3.1. Factfinding and collection of evidence

As explained above, the exercise of Universal Jurisdiction requires states to investigate and prosecute crimes that were perpetrated outside their territory. This comes with its own problems such as 'prosecuting authorities being unable to enter the states where atrocities were committed; witnesses being hard to find or

[35] ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 136, para 120.
[36] Report, supra note 4, para 91.
[37] CCPR/C/79/Add.81, para 18.

may be too afraid to testify; geographical distance being a large financial burden on the investigations'[38], etc.

This challenge exists because trials under the exercise of universal jurisdiction must also meet the internationally recognized principles of fair trial and due process which requires proof of guilt to be established 'beyond reasonable doubt'. Accordingly, the collection of evidence and ascertainment of facts is a crucial exercise that needs to be undertaken before the trial can commence.

While the work of the OHCHR, HRW and other human rights organizations is indeed commendable, their fact finding is based on the "reasonable grounds"[39] standard of proof which is not sufficient to seek convictions. However, these reports can form the basis of seeking the establishment of an 'independent investigative mechanism' through the Human Rights Council which can further investigate and collect evidence of the aforementioned crimes.

The Human Rights Council recently established a similar mechanism on 27 September 2018 to collect, consolidate, preserve and analyse evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011.[40] The mandate of the 'Independent Investigative Mechanism for Myanmar' ("IIMM") was the 'preparation of case files to identify specific evidence that may be used by national, regional or international courts or tribunals in potential criminal proceedings against individuals who have allegedly committed serious international crimes and violations of international law in Myanmar.'[41]

The work of the IIMM is crucial as individual criminal responsibility can only be ascertained when a 'link' is established between the crime and the perpetrator as well as the requisite *mens rea*. Accordingly, the IIMM seeks to 'focus on evidence pertaining to *mens rea* and to specific modes of criminal liability, including the principle of command or superior responsibility established under international criminal law.'[42]

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[38] TRIAL International, Universal Jurisdiction Annual Review, 2019, page 9 <https://trialinternational.org/wp-content/uploads/2019/03/Universal_Jurisdiction_Annual_Review2019.pdf> accessed 20 May 2021.
[39] OHCHR Report, note 4, para 49.
[40] A/HRC/RES/39/2 <https://undocs.org/en/A/HRC/RES/39/2> accessed 20 May 2021.
[41] A/73/716, Terms of Reference of the IIMM <https://undocs.org/en/A/73/716> accessed 20 May 2021.
[42] ibid

3.2. Functional Immunity of Indian Officials (Immunity Ratione Materiae)

The OHCHR reports note that:

> *"The Armed Forces (Jammu and Kashmir) Special Powers Act 1990 (AFSPA) remains a key obstacle to accountability. Section 7 of the AFSPA prohibits the prosecution of security forces personnel unless the Government of India grants a prior permission or "sanction" to prosecute.* ***In nearly three decades that the law has been in force in Jammu and Kashmir, there has not been a single prosecution of armed forces personnel granted by the central government****."*[43]

This means that any future prosecution of Indian Officials by another state will be met with the defence of 'functional immunity.' The concept of 'functional immunity' implies that state officials are immune from the jurisdiction of other states in relation to acts performed in their official capacity. As this type of immunity attaches to the official act rather than the status of the official, it may be relied on by all who have acted on behalf of the state with respect to their official acts. Thus, this conduct-based immunity may be relied on by former officials in respect of official acts performed while in office as well as by serving state officials.[44]

However, scholarly opinion and recent developments including state practice of the international law governing individual criminal responsibility have resulted in state officials losing their immunity *ratione materiae* as far as prosecutions for international crimes are concerned.

According to Akande and Shah, 'the very purpose of international criminal law is to attribute responsibility to individuals, including state officials, and to defeat the defence of official capacity or act of state. Since acts amounting to international law crimes are to be attributed to the individual, there is less need for a principle which shields those officials from responsibility for acts which are to be attributed solely to the state.'[45]

Similarly, it may be the case that granting immunity *ratione materiae* may itself be incompatible with a state's obligations under certain international

[43] Report (n 4) para 13.
[44] Dapo Akande, Sangeeta Shah, Immunities of State Officials, International Crimes, and Foreign Domestic Courts, European Journal of International Law, Volume 21, Issue 4, November 2010, Pages 815–852.
[45] ibid.

conventions[46] including the Fourth Geneva Convention.[47] This is also what the House of Lords held in the *Pinochet (No. 3)* case stating that granting immunity *ratione materiae* to the former Chilian dictator 'would have been inconsistent with those provisions of the Torture Convention according to universal jurisdiction for torture.'[48]

3.3. Lack of presence of Accused (Universal Jurisdiction in absentia)

It may very well be presumed that the Indian Officials will not be present in the state exercising universal jurisdiction over them for their role in the atrocities committed inside IIOJK. Admittedly, this is a challenge as lack of voluntary presence of the accused in a trial could, theoretically, be a violation of the principle of universal jurisdiction.

As Pictet notes, 'as soon as a Contracting Party realizes that there is **on its territory a person who has committed such a breach**, its duty is to ensure that the person concerned is arrested and prosecuted with all dispatch.'[49] However, subsequent practice has resulted in the 'watering down' of this requirement and there is debate that 'universal jurisdiction *in absentia*' was even prohibited in the first place to begin with. Judge's Higgins, Kooijmans & Buergenthal in their joint separate opinion of the *Arrest Warrant* Case best encapsulated this debate as follows:

> *"Is it a precondition of the assertion of universal jurisdiction that the accused be within the territory?*
>
> *Considerable confusion surrounds this topic, not helped by the fact that legislators, courts and writers alike frequently fail to specify the precise temporal moment at which any such requirement is said to be in play. Is the presence of the accused within the jurisdiction said to be required at the time*

[46] Article 1, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), 1465 UNTS 85; see also Articles 2, 4, 9 & 11(1), International Convention for the Protection of All Persons from Enforced Disappearance (2006)

[47] ICRC, Commentary of 1958, Article 146, stating: "Full responsibility shall attach to the person giving the order, even if in giving it he was acting in his official capacity as a servant of the State."

[48] *R. v. Bow Street Stipendiary Magistrate and others, Ex parte Pinochet (No.3)* [1999] 2 All ER 97, at 114, 169–170, 178–179, 190 (per Lords Browne-Wilkinson, Saville, Millett, Phillips).

[49] ICRC, Commentary of 1958, Article 146.

the offence was committed? At the time the arrest warrant is issued? Or at the time of the trial itself?"[50]

The separate opinion notes that '[the] incoherent practice [surrounding the rule] cannot be said to evidence a precondition to any exercise of universal criminal jurisdiction' and accordingly, '[Belgian] arrest warrant envisage[ing] the arrest of Mr. Yerodia in Belgium, or the possibility of his arrest in third States at the discretion of the States concerned […] would in principle seem to violate no existing prohibiting rule of international law.'[51]

Similarly, the ICRC in the updated commentary of 2020 to the Third Geneva Convention has also shown a shift in position from the Pictet commentary regarding 'universal jurisdiction *in absentia*':

"[…] the obligations contained in Article 129(2) also imply that a State Party should take action when it is in a position to investigate and collect evidence, anticipating that either it itself at a later time or a third State, through legal assistance, might benefit from this evidence, even if an alleged perpetrator is not present on its territory or under its jurisdiction. Lastly, the wording of Article 129(2) arguably allows for the issuance of an arrest warrant, even if the alleged perpetrator is not present on the territory of the issuing State, and for trials in absentia, if permissible under domestic law. This led the ICRC to conclude that 'States may institute legal enquiries or proceedings even against persons outside their territory."[52]

3.4. India's subsequent non-recognition of the principle (Persistent Objector)

It is likely that India will object to even the investigations of the aforementioned crimes, let alone allow any trials to begin. To that end, India may undermine the 'customary' status of Universal Jurisdiction especially where such universal jurisdiction is based in the 'domestic' laws of the states. This, nonetheless, does not prevent the exercise of Universal Jurisdiction based on the Fourth Geneva Convention i.e., treaty based universal jurisdiction. It may be recalled that India herself recognizes the existence of Universal Jurisdiction:

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[50] ICJ, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, paras 53-54.

[51] ibid.

[52] ICRC Commentary (n 26) para 5137.

"The principle of universal jurisdiction is a legal principle allowing a state to bring penal proceedings in respect of certain crimes irrespective of the place of the commission of crime and the nationality of the perpetrator or the victim. This principle is an exception to the general criminal law principle of requiring territorial or nationality link with the crime, the perpetrator or the victim. This exception is justified due to the grave nature of the crime which affects the international community as a whole and thereby no safe havens are established for those who commit these grave crimes and escape the criminal proceedings using the loopholes in the general criminal law."[53]

While India agrees that 'Maritime Piracy' is a 'classic example of Universal Jurisdiction [sic]', it adds that 'careful analysis of state practice and opinio juris is needed in order to identify the existence of a customary rule of universal jurisdiction over a particular crime.'[54]

In this case, the 'particular crime' being grave breaches of the Geneva Conventions, are indeed recognized as offences over which universal jurisdiction may be exercised as a principle of customary international law.[55] In fact, India's own domestic legislation regarding the Geneva Conventions i.e., the Geneva Conventions Act, 1960 gives effect to universal jurisdiction, stating:

'When an offence under this chapter [i.e. a grave breach of the 1949 Geneva Conventions] is committed by any person outside India, he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found.'[56]

4. Pakistan's Role

The aforementioned OHCHR and HRW reports have already set the stage for a case that additional inquiry is needed inside IIOJK. The OHCHR report has specifically recommended the HRC for the 'possible establishment of a commission of inquiry to conduct a comprehensive independent international

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[53] Statement by First Secretary/Legal Adviser, Permanent Mission of India to the UN, 3 November 2020 <https://www.un.org/en/ga/sixth/75/pdfs/statements/universal_jurisdiction/11mtg_india.pdf> accessed 20 May 2021.
[54] Ibid, para 5.
[55] ICRC, Customary IHL Database <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule157> accessed 20 May 2021.
[56] The Geneva Conventions Act, 1960, Act No.6 of 1960, Article 4 <https://ihl-databases.icrc.org/applic/ihl/ihlnat.nsf/0/aeac4d0de5332b64c12563aa004a6f27/$FILE/GENEVA%20CONVENTIONS%20ACT,%201960.pdf> accessed 20 May 2021.

investigation into allegations of human rights violations in Kashmir.' As described above, it is essential that such an investigation collect evidence and ascertain the facts including the maintenance of case files on the perpetrators. To this end, Pakistan being a member of the Human Rights Council should table a resolution and seek support from its fellow members which includes its allies and/or members of the OIC.

The next immediate step should be identifying potential jurisdictions where the Indian Officials can be investigated. Focus must be given to jurisdictions which have ratified the core human rights treaties as well as adopted domestic laws granting them extraterritorial jurisdiction.

5. Conclusion

Keeping in view that the well-documented evidence of the atrocities inside IIOJK being done and the 'impunity gap' inside IIOJK increasing by the day, steps must be taken by Pakistan to ensure the accountability of the perpetrators. Indeed, pursuing the exercise of universal jurisdiction is the best available option that can achieve this objective. Admittedly, there will be procedural challenges such as those highlighted above, but International Law has clearly evolved in the present day to ensure that such procedural hinderances do not come in the way of accountability and justice.

CONTEXTUALIZING LAWFARE

*Yasir Abbas**

Abstract

There is considerable unanimity of thought among practitioners and academics in international relations that warfare has gone through intense transition. In the 21st century, warfare is not just limited to wars launched by a powerful standing army rather it entails multiple avenues that successive states employ to undermine and challenge their opponents globally. Lawfare is one such mechanism which has become an integral component of the strategic race for domination, subversion, and global isolation. There is persistent reliance on lawfare as a strategy, as not only does it require fewer resources, but it also has the potential to offer solutions which were only previously thought possible through direct military confrontation. It is against this backdrop that this paper highlights the rapid accommodation of lawfare as a policy in the strategic domain, discusses notable examples of lawfare and offers concrete steps for Pakistan to fully realize the potential of law in achieving national security objectives.

Keywords: Lawfare, Warfare, Hybrid Warfare, National Security, International Law.

Introduction

Lawfare as a concept has been defined by Professor David Kennedy as "the use of law as a weapon, as a tactical ally, as a strategic asset and finally as an instrument of war."[1] The use of law as a tool and instrument of war has been a consistent feature in modern international relations.[2] Today, it is increasingly being used as a weapon, as law now shapes the institutional, logistical, and physical landscape of war, resulting in the coinage of the term 'lawfare' in global academic discourse.[3] Strategists and academics are increasingly exploring the

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* Yasir Abbas is a Research Associate at the Centre of Excellence for International Law (CEIL), ISSRA, NDU, and also teaches Human Rights and IR at the National Defence University.

[1] David Kennedy, *Of War and Law* (Princeton University Press, 2009).

[2] Trevor Michael Alfred Logan, 'International Law and the Use of Lawfare: An Argument for the U.S. To Adopt a Lawfare Doctrine' 93.

[3] Joel P. Trachtman, 'Integrating Lawfare and Warfare' (2016) 39 Boston College International and Comparative Law Review 267.

application and scope of 'lawfare' as an instrument of war in leading global universities and think-tanks. The increasing legalization of international relations has made law an increasingly powerful alternative to traditional military means to achieve operational objectives.

The use of law has increasingly become a convenient tool of coercion which includes the use of sanctions, unilateral punitive actions and prosecution before international forums such as the International Criminal Court and International Court of Justice.[4] The scope of such usage can go beyond the aforementioned forums with states' general willingness to widen their domestic jurisdictions through formulating laws and through accommodating trials and tribunals on issues beyond national jurisdictions. For example, the Authorization for the Use of Military Force (AUMF) 2001 is a domestic piece of legislation in the United States (US) which authorizes the US government to detain and try suspects across the world.[5] AUMF later became the principal legal justification for detention and trial of suspects in Guantanamo Bay.

The practice of lawfare has received even more traction given the fact that compared to other means such as military confrontation, lawfare offers the most economically convenient means to protect state objectives.[6] The use of lawfare in the 21st century is not only limited to states; instead, non-state entities such as national and international organizations, companies, and even individuals engage in lawfare practises.[7] For example in Syria the Islamic state (IS) took advantage of the rule of cautious engagement by US forces in order to minimise civilian killings and avoid possible cases of war crimes.[8] The IS fighters chose thickly populated civilian areas as an area of engagement to discourage attacks by the US forces.

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[4] David Kennedy, 'Lawfare and Warfare' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012) <https://www.cambridge.org/core/books/cambridge-companion-to-international-law/lawfare-and-warfare/D6AF7B5EEF9905731B42924B04751322> accessed 13 March 2021.

[5] 'Authorization for Use of Military Force 2001' (*Lawfare*, 22 October 2012) <https://www.lawfareblog.com/authorization-use-military-force-2001> accessed 4 April 2021.

[6] Waseem Ahmad Qureshi, 'Lawfare: The Weaponization of International Law' (2019) 42 Houston Journal of International Law 39.

[7] ibid.

[8] Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford University Press) 19 <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780190263577.001.0001/acprof-9780190263577> accessed 23 March 2021.

The nature of lawfare can both be offensive and defensive.[9] The quest to find loopholes in international law to undermine competing states is offensive lawfare. The offensive utilization of the lawfare is political in its scope as it is waged with a purpose to undermine the adversary through pre-emptive legal measures.[10] The means of employing lawfare at best is manipulative with an ultimate objective of entrapping the adversary in a legal quandary with ramifications. Defensive lawfare on the other hand is the use of law to prevent or ward off any challenge, whether legal or otherwise.

1. Lawfare as a policy option

The 21st century has seen a massive transition in warfare, with conventional military confrontation being replaced by other varying means of warfare. Clausewitz understood war as a *'continuation of politics'*.[11] This has now transformed 'war' into several other practices collectively known as hybrid warfare, which, according to experts, is as effective as war through direct military means.[12]

Rapid technological advancement, rising interdependence, and centralization of the global economic system have minimized the scope of direct military conflict between warring states.[13] Warfare in the current century also requires adherence with several local, regional, and international legal considerations making it a complicated undertaking.[14] Given this, instruments such as sanctions, economic embargoes, and global isolation are increasingly practised. Central to this transition has been the increasing reliance on law.

Lawfare is now embraced as a tactical weapon and a vital instrument of war. It achieves objectives that were only once conceivable through 'bombs and missiles'.[15] Exclusion from global trade and economic engagement and usage of the Security Council for sanctions is the weaponization of law and these methods

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[9] ibid.
[10] ibid.
[11] 'War as a Continuation of Policy by Other Means: Clausewitzian Theory in the Persian Gulf War: Defense Analysis: Vol 17, No 1' <https://www.tandfonline.com/doi/abs/10.1080/07430170120041802?journalCode=cdan19> accessed 26 March 2021.
[12] Andres B. Munoz Mosquera and Sascha Dov Bachmann, 'Lawfare in Hybrid Wars: The 21st Century Warfare' (2016) 7 Journal of International Humanitarian Legal Studies 63.
[13] Waseem Ahmad Qureshi, 'Lawfare: The Weaponization of International Law' (2019) 42 Houston Journal of International Law 39.
[14] Kennedy (n 4).
[15] ibid.

are deemed lawfare.[16] Numerous examples of lawfare moves in the international arena have been employed throughout the years by several states.

1.1. The United States on Iran

The U.S. has imposed sanctions on Iran since the Islamic Revolution of 1979. These have taken the form of executive orders regarding Iranian support for terrorism and have also evolved into a greater lawfare regime concerning Iran's nuclear program. While all previous US administrations used non-kinetic means to counter Iran, it was during Obama's tenure that their use was intensified.[17] In his era, the countering of Iran's nuclear program was primarily waged by the treasury department, which took on the responsibility of launching a multi-pronged assault on Iran's economy.[18] As stated by Orde F. Kittrie, the treasury department took several steps to make banks cease their access to designated people with alleged links to Iran's nuclear program.[19] The treasury department resorted to threats of sanctions and financial penalty on banks and other financial entities.

This speaks volumes about the potential of law. The United States and Iran have not maintained any financial association at a state level since 1995.[20] Therefore, traditional unilateral economic sanctions did little to impede Iran's quest for nuclear weapons. The absence of any direct economic relationship between both states meant the United States had to make efforts to curtail the flow of cash towards Iran from its soil and beyond by private businesses. The scope of such lawfare was gradually expanded to companies and individuals based in third countries with or without any stake in the United States. For example, in 2008 the United States government made the US Export-Import Bank review its loan guarantees to an Indian company known as Reliance Industries owing to its links with Iran's gasoline market.[21] The US made foreign companies choose between

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[16] Mosquera and Bachmann (n 8).

[17] Orde F. Kittrie, *The U.S. Government's Financial Lawfare Against Iran* (Oxford University Press) <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780190263577.001.0001/acprof-9780190263577-chapter-3> accessed 22 March 2021.

[18] ibid.

[19] Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford University Press) <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780190263577.001.0001/acprof-9780190263577> accessed 23 March 2021.

[20] Kenneth Katzman, 'Iran's Foreign and Defense Policies' 71.

[21] Orde F. Kittrie, Lawfare (Oxford University Press) <https://global.oup.com/academic/product/lawfare-9780190263577?cc=us&lang=en&> accessed 18 March 2021.

access to the US market or providing gasoline to Iran. The mechanism of engagement with such companies entailed direct and indirect threat of legal action by state entities in the United States.[22]

The United States pursued a policy of 'maximum pressure' through sanctions leading to severe economic ramifications. The lawfare approach was a mix of state, institutional and private intervention. At a state level, the United States persuaded allies and partners to reconsider their business ties with Iran.[23] At an institutional level, the United States used the forum of the UNSC to impose sanctions.[24] Moreover, the United States launched an aggressive initiative of disengaging non-American Companies from economic involvement with Iran.[25] The United States treasury department successfully identified and sanctioned Iranians directly or indirectly involved in deceptive financial transactions. In these cases, sanctions were placed on selected individuals from the Iranian regime; however, the fear of financial penalty and potential loss of access to US markets led to a domino effect resulting in a massive reduction of trade and financial activities of companies with Iran.[26]

The consequences of lawfare against Iran were not only immediate but also effective. The economic lawfare resulted in the massive retreat of foreign financial companies and banks from Iran, resulting in the disruption of Iranian banking channels, export market and overall impacted the socio-economic situation in the country.[27] As lawfare efforts were intensified, it became virtually impossible to find legitimate banking channels for a transaction involving Iran.[28] As a result, Iran's foreign exchange reserves, its currency, and GDP all plummeted, which collectively contributed to the significant shrinking of the Iranian economy.[29] All these efforts were heavily rooted in Executive Order 13224[30] and 13382[31] (International Emergency Economic Powers Act) (IEEPA), which vest the President of the United States with the authority to act in times of

[22] Kittrie, *The U.S. Government's Financial Lawfare Against Iran* (n 12).
[23] ibid.
[24] ibid.
[25] ibid.
[26] ibid.
[27] 'Six Charts That Show How Hard U.S. Sanctions Have Hit Iran - BBC News' <https://www.bbc.com/news/world-middle-east-48119109> accessed 26 March 2021.
[28] Kittrie, *The U.S. Government's Financial Lawfare Against Iran* (n 12).
[29] ibid.
[30] 'Executive Order 13224 - United States Department of State' <https://www.state.gov/executive-order-13224/> accessed 25 March 2021.
[31] 'Executive Order 13382' <https://2009-2017.state.gov/t/isn/c22080.htm> accessed 30 April 2021.

threat emanating outside the United States allowing the power to *nullify, void, prevent or prohibit* a transaction or any other engagement with a foreign country.[32]

The US was successful in targeting Iran's nuclear program, it's economy and individuals linked with the Iranian regime without employing any kinetic means. The basis of such warfare was rooted in the effective utilization of domestic and international law.

1.2. Russia in Ukraine

Like many other nations, Russia has successfully employed lawfare to achieve its strategic objectives. The Russian annexation of Crimea offers a glaring example where lawfare was used to justify military action and eventual annexation. After the disintegration of the Soviet Union, Russia, the United States, and the United Kingdom, through the Budapest Memorandum of 1994, agreed to respect the territorial integrity of Ukraine.[33]

As per the memorandum, Ukraine was required to remove all nuclear stockpiles from its soil and send them to Russia.[34] Ukraine was also required to sign the Nuclear Non-proliferation Treaty (NPT).[35] In return, the memorandum guaranteed an independent state's status to Ukraine based on the principle of the 1975 Helsinki Final Act.[36] Through the agreement, the United States, United Kingdom and Russia pledged that the territories of Ukraine would not be subjected to occupation.

However, in 2014, Russia attacked Crimea, but never publicly admitted to it rather termed the annexation a by-product of the internal strife within Ukraine.[37] Before the annexation, the Autonomous Republic of Crimea had a special status within Ukraine.[38] After keeping an ambiguous silence over the issue, the Russian government maintained that as the rights of Russian speaking peoples living aboard were infringed, Russia, under international law, was obligated to act. This

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[32] ibid.
[33] 'Explainer: The Budapest Memorandum and Its Relevance to Crimea' <https://www.rferl.org/a/ukraine-explainer-budapest-memorandum/25280502.html> accessed 25 March 2021.
[34] ibid.
[35] ibid.
[36] 'Milestones: 1969–1976 - Office of the Historian' <https://history.state.gov/milestones/1969-1976/helsinki> accessed 26 March 2021.
[37] Thomas D Grant, 'Annexation of Crimea' (2015) 109 American Journal of International Law 68.
[38] 'What's the Deal with Crimea? A Brief History in Links' (*Lawfare*, 5 March 2014) <https://www.lawfareblog.com/whats-deal-crimea-brief-history-links> accessed 4 April 2021.

proclamation gave birth to debate on the spirit of *pacta sunt servanda* in international law as Russia went against the Budapest Memorandum which had clearly prohibited territorial annexation.[39] Russia took advantage of the undefined nature of conflict in Crimea, and national and international legal confusion over the region.[40]

Several statements regarding the scope of the Budapest Memorandum and other treaty obligations through misinformation campaigns was instrumental in swaying and eventually confusing public opinion in the West.[41] The concept of *abus de droit* (civil law – *abuse of rights*) was in clear display as Russia interpreted the treaty to its benefit and was eventually successful in annexing Crimea.[42]

1.3. China and Lawfare

China has made an effective engagement of lawfare going by the dictum that "defeating the enemy without fighting is the pinnacle of excellence''.[43] Legal warfare was adopted as one of the 'three warfares' strategy by the Chinese Central Military Commission.[44] The other warfares adopted by the Chinese are psychological warfare and media warfare. These warfare tools offer China an opportunity to employ propaganda and confusion in the minds of their enemy and disseminate information to shape public opinion in favour of China. Moreover, the aim of incorporating legal warfare is rooted in the quest to manage the legal consequences emanating as a result of the actions by the Chinese state.

The utilization of the said doctrine can be seen as Chinese employment of lawfare in the areas of aviation, maritime, and space. China has used lawfare to keep its shores safe from rival nation's ships' reach through coastal state sovereign authority.[45] The underlining rationale has been a Chinese policy of providing its military 'breathing space'. China has been actively using standard international conventions such as the Convention on the Law of the Sea (UNCLOS) (article

[39] ibid.
[40] Ahmad Qureshi (n 13).
[41] Andres B. Munoz Mosquera and Sascha Dov Bachmann, 'Lawfare in Hybrid Wars: The 21st Century Warfare' (2016) 7 Journal of International Humanitarian Legal Studies 63.
[42] ibid.
[43] Orde F. Kittrie, *The Chinese Government Adopts and Implements a Lawfare Strategy* (Oxford University Press)
<https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780190263577.001.0001/acprof-9780190263577-chapter-4> accessed 25 March 2021.
[44] ibid.
[45] ibid.

12)[46] to its advantage by creating artificial islands and extending its Exclusive Economic zone (EEZ) of 200 Nm by using these islands as the baseline from which to measure.[47] Within such a radius China has claimed the legal right to regulate the passage of ships and flights which several states in the South East Asia and US have termed a violation of international law.[48] Critics of China argue that the Chinese acts in the region are an inaccurate interpretation of the laws regarding EEZs.[49] China has regularly issued diplomatic statements in support of its actions and shown a persistent will to seek and keep control of the bodies of water and islands in the South China Sea.[50] Such steps have been followed by domestic efforts to vitalize the strategic interests associated with EEZs.

Chinese expansion in the South China Sea without the use of military force and its ability to legally withstand the challenges posed by the US, Japan and other competing states is rooted in the use of law to its advantage.[51]

1.4. Israel and Lawfare

When the Gaza strip was put under Naval blockade in the year 2010, the Gaza Freedom Flotilla sailed from Turkey with humanitarian aid.[52] The Flotilla was stormed by Israeli forces which resulted in the death of nine individuals.[53] Later in 2011 Flotillas from Greece set sail towards the Gaza strip. The Government of Israel took several legal steps to ensure that the Flotilla never made it to Gaza's shores.[54] Israel's government engaged legal organizations such as the Shurat Hadin to set legal hurdles for the ships to make it to the Gaza Strip's shores.[55] The government of Israel, through legal organizations, served legal notices to sponsors, participants and insurance providers and warned them that if the ships make it to Gaza, the individuals, organizations and insurance providers will be

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46 'UNCLOS – Table of Contents' <https://www.un.org/Depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm> accessed 26 March 2021.
47 ibid.
48 Orde F. Kittrie, *The Chinese Government Adopts and Implements a Lawfare Strategy* (Oxford University Press) 166 <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780190263577.001.0001/acprof-9780190263577-chapter-4> accessed 25 March 2021.
49 Kittrie (n 8).
50 ibid 169.
51 ibid.
52 'The Gaza Flotilla and International Law' (*Hoover Institution*) <https://www.hoover.org/research/gaza-flotilla-and-international-law> accessed 5 April 2021.
53 ibid.
54 Trevor Michael Alfred Logan, 'International Law and the Use of Lawfare: An Argument for the U.S. To Adopt a Lawfare Doctrine' 93.
55 ibid.

held responsible for terror activities in the Gaza strip.[56] The offensive lawfare launched by the state of Israel made the owners and other related entities aware of the cost associated with taking steps not appreciated by Israel's state. The state of Israel successfully linked the alleged 'terror activities' in Gaza with outsiders who were willing to engage in aid-related activities in Gaza.[57]

The grounds of such lawfare strategies were both the global terror financing laws and other legal mechanisms which Israel was successful in executing.

1.5. Other examples of Lawfare

Other such instances of lawfare include the recognition of Jerusalem as the capital of Israel in 2017[58] by the United States and the revocation of visas to members of the International Criminal Court (ICC) involved in investigating the actions of U.S. troops in Afghanistan or other countries.[59] It is therefore evident that lawfare is increasingly being used as a policy by several states[60] and even non-state actors. The primary actors are independent states such as China, America, Russia etc. However, non-state actors too use lawfare as a policy to undermine their adversary in question. This can be illustrated by the fact that groups such as the Taliban, which do not represent a state, have engaged in lawfare practices by accusing military forces in Afghanistan of gross human rights violations during the military conflict, thus inviting scrutiny of NATO soldiers in Afghanistan and shaping public opinion.[61]

2. Lawfare and Pakistan: Recommendations

In international affairs, lawfare is both viewed positively and negatively. Pragmatists in international relations strongly believe in utilizing all means necessary to achieve state objectives.[62] Thus they look at lawfare as a potent weapon to pursue national security options in an age of hybrid warfare.[63] On the other hand, purists strongly believe in the spirit of international law and firmly maintain that the misuse of law invalidates international law's legitimate principles.[64] As noted by the International Court of Justice in the Oil Platform

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[56] Ahmad Qureshi (n 5).
[57] ibid.
[58] 'Jerusalem Is Israel's Capital, Says Donald Trump' (BBC News 2017).
[59] 'U.S. To Deny Visas for ICC Members Investigating Alleged War Crimes' (The Guardian 2019).
[60] Ahmad Qureshi (n 5).
[61] ibid.
[62] ibid.
[63] Mosquera and Bachmann (n 8).
[64] ibid.

case, the misuse through the misinterpretation of international law is against the spirit of law. Good faith, therefore, stands out as the cardinal principle of the international legal system and vital for its acceptance and implementation.[65]

In the light of the rising shift towards the adaptation of lawfare as a tool of both coercion and defence, Pakistan should be prepared for both offensive and defensive lawfare measures. The following measures are suggested as potential options by the author:

a. There is a critical need to improve capacity in International Law within the public sector in Pakistan. To this end, the relevant governmental departments need to be adequately staffed with experts in international law including, inter alia, the following:[66]

   i. **Office of the Attorney General**
   ii. **Ministry of Foreign Affairs:** Foreign Services Academy, Diplomatic Missions, etc.
   iii. **Ministry of Law:** PCT Wing, Legislation and Drafting Wing, Research and Law Reforms Wing, Contract and Treaty Wing, Opinion Wing
   iv. **Ministry of Interior:** Law/Litigation Department, Political/FIA Department.
   v. **Ministry of Human Rights:** Federal and Regional Offices
   vi. **National Commission for Human Rights**
   vii. **Pakistan Army:** Military Operations Directorate, Inter-Services Intelligence Directorate, Military Intelligence Directorate, Judge Advocate General (JAG), Pakistan Military Academy, Command & Staff College Quetta
   viii. **Pakistan Airforce:** Air Intelligence, Operations Directorate, Intelligence Directorate, Judge Advocate General, Air War College
   ix. **Pakistan Naval Forces:** Judge Advocate General, Naval War College
   x. **National Defence University:** Institute of Strategic Studies, Research and Analysis (ISSRA), National War Gaming Center.
   xi. **Civil Services Academy**
   xii. **Provincial Law & Home Departments.**

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[65] Mosquera and Bachmann (n 8).
[66] Post Seminar Report, *Lawfare Dimensions*: *Issues, Challenges and Way-Forward* (Centre of Excellence for International Law (CEIL), ISSRA, NDU 16 January 2020)

b. Such an improved capacity will allow Pakistan to shift itself from a state upon which international legal rules are imposed to one that can contribute to their development, in turn, providing a strategic direction in its foreign policy and national security choices. Similarly, diplomatic efforts and international outreach/engagement by the government must have a strong academic component based on original, legally viable research.

c. Pakistan's traditional reactive approach to proceedings initiated against it before international forums must end. Instead, it is imperative that a proactive approach be adopted which would aid Pakistan to anticipate threats and vulnerabilities in international law and neutralize them before they become a major dispute or strategic challenge.

d. Linkages with international legal think-tanks, law schools, specialized organizations must be pursued by State entities and collaborations encouraged for private sector.

e. A comprehensive compilation of Pakistan's original historical, legal and political documents regarding areas of national importance including, among others, Kashmir and the Indus Water Treaty, has not been undertaken. Such documents play a vital role in assisting lawyers and policymakers understanding the background and context of legal and political developments in the State, in reaching strong legal analyses, and designing innovative policy solutions. These documents would include, inter alia, official statements by the State, relevant legislations, treaties, regulations, notifications and official correspondence with other states and international organizations, policy papers, advisory opinions and reports by public and private sector institutions, and other public documents. Therefore, it is recommended that an archive of Pakistan's documents, both political and legal, be developed and housed at the public sector university or institution. This will not only prove useful for Pakistan to build consistent strategic narratives and cogent legal arguments before international forums but would also serve as a repository for further scholarship. It is proposed that such an archive be accessible to all relevant State institutions, digitally or otherwise, since it would be an invaluable source for legal analysis which can be utilized by policymakers and lawmakers in their deliberations.

f. Pakistan must recognize the need to develop strategic narratives and highlight its compliance with international obligations to ensure that Pakistan's position in the international arena is suitably represented, in

particular with regards to human rights, countering violent extremism, corruption, terrorism financing and money laundering as well as the cultural and economic domain in general.

g. While building such strategic narratives, Pakistan must remain cognizant of its domestic fault lines being highlighted and exploited by external powers. Pakistan must attempt to dispel the existing international perception of Pakistan being a state sponsor of terrorism and clarify potential misconceptions regarding its role in countering violent extremism including counter-insurgency operations. In particular, Pakistan must deploy a consistent legal and administrative response that accords with the Prime Minister's vision in dealing with non-state actors. On a broader level, Pakistan must ensure that its strategic narratives are legally sound and coherent with its policy priorities and compulsions so that the narratives can be sustained over a longer period of time and develop momentum at the international level.

3. Conclusion

It is well-established that lawfare is increasingly becoming an integral component of warfare in international relations. The use and misuse of law will continue to be a reality as lawfare as a policy and doctrine has significantly reduced the chances of a direct military confrontation. The effective use of lawfare enables international law to make tangible progress. However, the misuse of it can distort the spirit of international law. Several countries have engaged in both 'bad', and 'good' use of lawfare globally and international developments indicate that this practice will be an unavoidable phenomenon of international relations. Given this, lawfare offers Pakistan a cost-effective option of countering strategic threats and politically motivated international scrutiny of its global financial conduct. The pre-requisite for such an undertaking is building domestic capacity in specialist areas of international law and investing in institutionalizing this capacity at key public sector and strategic institutions and departments.

The Hegemonic Hydro-Politics of South-Asia: Can International Law balance the Geographical Imbalance?

Faraz Khan Yousafzai[*]

Abstract

A hydro-hegemon is a state with shared river basins that asserts its power over the other riparian states. As a consequence of being a hydro-hegemon, the State then asserts and retains its positions through bilateralism rather than regionalism. This bilateralism strengthens not just its own needs but also the negotiating power. While there are arguments that hydro-hegemony might be a factor leading to stability, it is seen in the South Asian context that this hydro-hegemony disadvantages the neighbouring countries of Pakistan, Bangladesh and Nepal. In the context of South Asia, the hydro-hegemon is India. The paper will delve further into international law recourse available to neighbours and argue for a more regional approach to be adopted, which will not just benefit the neighbours but also India, as the hydro-hegemon, itself.

Keywords: South Asia, Pakistan, India, Bangladesh, Nepal, Indus Waters Treaty, International Law, Treaty Law, Customary International Law, Transboundary Water Law.

Introduction

Water has become a common global issue of contention between states. Be it the Rio Grande between the US and Mexico, the Nile between Egypt, Sudan and Ethiopia, or the Euphrates between Syria, Iraq, and Turkey, the conflicts and issues amongst states over transboundary watercourses are never ending. The issue has become worse in the presence of a hydro-hegemon. A hydro-hegemon is a river basin sharing state that asserts its power over other riparian states,

[*] Faraz Khan Yousafzai is a Research Associate at the Centre of Excellence of International Law (CEIL), ISSRA, NDU, and also teaches Law and Public Policy at the National Defence University (NDU) and Law (LLB Hons) at University of London.

including upstream ones.[1] What recourse then do the neighbours have and how does international law protect such neighbours?

As notorious as the term sounds, it is argued that hydro-hegemony can even lead to stability in the region instead of chaos. Although a relatively weak argument, this is based on the fact that the hegemon maintains a balanced power relationship due to their own influence. In the age of an exacerbated climate change crisis, every country is already suffering with the often-surprising consequences of climate change. There are worries then of future water wars occurring due to such a crisis, and one wonders how long the international legal order can sustain the peace that has delayed the 'impending water wars.'

The article aims to build upon the existing reality of climate change, water scarcity, and lack of cordial relations amongst South Asian neighbours. It will shed a brief glance over the consequences of the climate change crisis, before jumping into the international law realm. This will be followed by how international law can help mitigate the lack of trust, the burden of responsibility for citizens, and create a friendlier environment for neighbouring states, while keeping in mind the large numbers of people that the hegemon must cater to as well. The relations of the hegemon with co-riparian states (those states which share the transboundary water resources amongst themselves) will be looked over briefly to give context to the issue, followed by the recommendations and way forward for all stakeholders involved.

1. (Hydro) Nationalism vs. Water Scarcity: A Contemporary Threat Analysis

Hydro academics from the public policy and politics realm have helped us understand the terms around hydro-politics conveniently, but their implications remain shrouded in some subjectivity. Hegemony, for instance, is arguably the best option for some scholars, yet the majority's view is that of perceiving the hegemon as a bully. It is pertinent, therefore, to look initially into the crisis from a global perspective, before jumping into South Asia.

1.1. The Global Climate Crisis and the "Impending Water Wars"

The climate change crisis is no longer a contested phenomenon for the majority; globally, efforts are underway to minimise the potentially dire consequences

[1] Christopher Sneddon, 'Water, Governance and Hegemony', in, L. M. Harris, J. A. Goldin and C. Sneddon, *Contemporary Water Governance in the Global South: Scarcity, Marketization and Participation* (London: Routledge, 2013), pp. 15-6.

resulting from climate change. Homer-Dixon, a climate-change expert, predicts that this crisis will help produce 'insurgencies, genocide, guerrilla attacks, gang warfare, and global terrorism.'[2] Mark Notaras of the United Nations University concluded that when it came to sub-Saharan Africa, 'a 1% increase in temperature leads to a 4.5% increase in civil war in the same year and a 0.9% increase in the following year.'[3] Based on 18 models, it is predicted that by 2030, there will be a 54% increase in armed conflict incidence in the region.[4]

1.1.1. For Pakistan, it Gets Worse!

Apart from combating internal and external terrorism, poverty, and a number of other threats which has severely impacted the citizens and the economy of Pakistan,[5] it is also the fifth most climate vulnerable country in the world, as well as the third most water stressed.[6] If India, being the major source of Pakistan's water supply, were to shut off the water (as happened before the Indus Waters Treaty), Pakistan's water storage would only be enough to last 30 days.[7] The Asian Development Bank concluded in their research that Pakistan will be amongst the countries with the lowest water availability per capita in the world, by 2050.[8]

In 2019 alone, a loss of Rs. 14 billion was suffered due to climate change.[9] The primary climate change challenges identified by LEAD Pakistan are drought, flood, and sea intrusions.[10] The Karakoram and Himalayan glacier melt will

[2] Thomas Homer-Dixon, 'Terror in the Weather Forecast', *New York Times* (New York, 24 April 2007), http://www.nytimes.com/2007/04/24/opinion/24homer-dixon.html accessed 05 April 2021
[3] Mark Notaras, 'Does Climate Change Cause Conflict?' *Our World* (United Nations University, 27 November 2009) https://ourworld.unu.edu/en/does-climate-change-cause-conflict accessed 05 April 2021
[4] Ibid.
[5] Ayesha Malik, 'Climate Change and Armed Conflict: Pakistan's Vulnerability in the coming Water Wars', Research Society of International Law (October 2020) https://rsilpak.org/2020/climate-change-and-armed-conflict/ accessed 06 April 2021
[6] Fatima Bhutto, 'Pakistan's most terrifying adversary is climate change' *New York Times* (New York, 29 September 2020)
[7] Staff Reporter, Water storage depleting at alarming level, *Dawn News* (Karachi, 02 April 2019) https://www.dawn.com/news/1473384/water-storage-depleting-at-alarming-level accessed 05 April 2021
[8] Yasmin Siddiqi and Eelco Van Beek, 'Asian Water Development Outlook 2016, Strengthening Water Security in Asia and the Pacific', *Asian Development Bank* (2016) https://www.adb.org/sites/default/files/publication/189411/awdo-2016.pdf accessed 05 April 2021.
[9] News Desk, 'Climate Change cost Pakistan Rs 14 bn in last 20 years', *Pakistan Today* (Karachi, 26 December 2016) *https://archive.pakistantoday.com.pk/2018/12/26/climate-change-cost-pakistan-rs14bn-in-last-20-years-pms-advisor/* accessed 05 April 2021
[10] LEAD Pakistan, 'Basic Guide to Climate Change' (*LEAD Pakistan*) http://www.lead.org.pk/cc/basicguide_climate_change.html accessed 05 April 2021.

initially increase the flow of the river for a period, but will be followed by a reduction afterwards, having long-term freshwater availability consequences.[11] Agriculture (upon which relies a huge number of the population) will suffer greatly and it is predicted that Pakistan's water demand by 2025 will be touching 203 million acre-feet (MAF) while availability will be at a deficit of 35 percent, at 150 MAF.[12]

Pakistanis may have the Indus Waters Treaty as a protection against the hegemon usurping their water rights, however, it might not be enough for the looming climate change crisis ahead, coupled with the rise in nationalism.

1.2. "Impending Water Wars"

While the data available is conflicting, the threat of water wars has been seen as imminent for decades now. In 1995, the World Bank's former Vice-President Ismail Serageldin claimed that 'the wars of the next century will be about water'.[13] Around four decades earlier, conflicts did erupt between Israel and Jordan over water, over the latter's plan of diverting the water of the Jordan River. The issue was resolved through the final conflict involving tanks and aircrafts, resulting in the cessation of the river diversion started by Jordan. While it is claimed that water had little, if any, impact on the 1967 Israel-Arab war,[14] Ariel Sharon, a Commander in the Six-day (Israel-Arab) war of 1967 and later the Prime Minister of Israel, wrote that the diversion of the Jordan river really started the war.[15]

The previous UN Secretary-General Ban Ki-Moon, stated that 'water scarcity threatens economic and social gains and is a potent fuel for wars and armed conflicts.'[16] The threat is considered so severe due to the significance of fresh water, that coupled with poverty, unrest, and weak institutions, it can lead to the

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[11] Dr. Waseem Ahmad Qureshi, 'Political Dimension of Water Paucity in Pakistan' (2018) 19 Florida Coastal Law Review 1

[12] ibid.

[13] Annika Kramer, Aaron T. Wolf, Alexander Carius and Geoffrey D. Dabelko, 'A World of Science' (volume 11, number 1, January 2013)

[14] ibid.

[15] Pacific Institute, Water is a Source of Growing Tension and Violence in the Middle East, August 29, 2018, https://pacinst.org/water-is-a-source-of-growing-tension-and-violence-in-the-middle-east/ accessed 05 April 2021

[16] United Nations Secretary-General Ban Ki-Moon, Asia-Pacific Water Summit (2007) https://unu.edu/media-relations/releases/water-called-a-global-security-issue.html accessed 05 April 2021

threat of a failed state.[17] With 60% of world population but only 36% its water resources, Asia will face the brunt of the water scarcity crisis,[18] especially due to management concerns regarding river basins including the Euphrates and Indus.[19]

However, Annika Kramer also claims that 3,600 water treaties were signed from 805 to 1984 CE, and just since 1820, 680 water treaties and related agreements have been signed, over half of which were concluded in the last sixty years.[20] This is evidence enough for the fact that water treaties and agreements have managed to keep the neighbours at bay from indulging in full-blown water wars. Perhaps, then, it is not the gravely anticipated wars that happened, rather battles of different sorts. In 2018, al-Shabaab (terrorist group) caused a flood in the Jubba river by diverting it and forcing the opposing forces to move to a higher ground, where eventually they were ambushed.[21] In Mali, a displacement of 50,000 people along with massacres occurred due to fighting over grazing land.[22] In almost all regions where there were incidents of warfare recently, Syria and Ukraine for instance, water installations have been in the crosshairs.[23]

Pakistan and India, for instance, have fought a few wars and stay engaged in continuous skirmishes every now and then, with the latest major skirmish occurring in February 2019. Yet Indus Commissioners continue to sit together and discuss the matter, as recently as 25th March 2021. The question of the impending water wars remains unanswered and shrouded in ambiguity due to the water arrangements and treaties in place, but with worsening climate change crisis, the desperateness of the riparian countries might make the answer easier.

1.3. The Resurgence of Hydro-Nationalism

Hydro-Nationalism can be said to have stemmed from both water-scarcity and its significance. While the 21st century saw the resurgence of nationalism and populism in general, it can also be seen in hydro-politics via statements such as 'Blood and water cannot flow together', by Indian Prime Minister Narinder Modi,

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[17] Brian La Shier and James Stanish, 'The National Security Impacts of Climate Change' (2019) 10 J Nat'l Sec L & Pol'y 27

[18] Ben Saul, 'Climate Change, Conflict and Security: International Law Challenges' (2009) 9 NZ Armed F L Rev 1.

[19] Brian La Shier (n 16).

[20] ibid.

[21] Daily Chart, 'Whatever happened to the water wars?', *The Economist* (18 November 2019) https://www.economist.com/graphic-detail/2019/11/18/whatever-happened-to-the-water-wars accessed 05 April 2021

[22] Ibid.

[23] Pacific Institute (n 14).

in 2016.[24] Such statements do not always lead to fruition, yet further exploitation of resources is always an option that is exercised, as shall be seen in the sections below. This exploitation along with such statements is what constitutes hydro-nationalism as water is being used as a nationalistic tool against other states, especially co-riparian states.

Another contemporary case from Africa presents itself as an example of hydro-nationalism: The Grand Ethiopian Renaissance Dam (GERD). In 1896, the then Attorney General of the United States, Judson Harmon, was inquired as to the options available to the United States in the matter of the water-sharing conflict over the Rio Grande River, shared between the US and Mexico. The Attorney General came up with a doctrine, later called the Harmon Doctrine, which stated that 'a country is absolutely sovereign over the portion of an international watercourse within its borders', therefore that country would then be 'free to divert all of the water from an international watercourse, leaving none for downstream states.'[25] While McCaffrey tries to explain that the US never actually followed Harmon Doctrine in its practice, and therefore this doctrine should not be considered part of the international water law, it is still a doctrine nationalist (upper-riparian) leaders rely upon when talking about transboundary water recourses.[26] The recent example being India and Ethiopia.

Ethiopia used the same logic with regards to the Blue Nile river, on which they constructed a dam. The Blue Nile accounts for approximately 80% of the water supply to the Nile river, which then sustains both Sudan and Egypt in the north, as downstream states to the Blue Nile.[27] The dam is projected to produce enough electricity required for domestic demand, with even a surplus to export. On the other hand, Egypt fulfils 90 percent of its water needs through the Nile.[28] The negotiations continued over the last decade but became tense after the US tried to mediate the dispute in 2019. President Trump commented that Egypt will not be

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[24] Indrani Bagchi & Vishwa Mohan, 'Blood and water can't flow together': PM Narendra Modi gets tough on Indus treaty', *Times of India* (Delhi, 27 September 2016) https://timesofindia.indiatimes.com/india/blood-and-water-cant-flow-together-pm-narendra-modi-gets-tough-on-indus-treaty/articleshow/54534135.cms accessed 05 April 2021

[25] Stephen C. McCaffrey, 'The Harmon Doctrine One Hundred Years Later: Buried, Not Praised' [1996] National Resources Journal, Volume 36, Issue 4, Fall 1996

[26] ibid.

[27] GlobalData Energy, 'Tigray conflict threatens the Grand Ethiopian Renaissance Dam' *Power Technology* (6 January 2021) https://www.power-technology.com/comment/tigray-conflict-grand-ethiopian-renaissance-dam accessed 05 April 2021

[28] ibid.

able to survive with the dam in place and might 'blow up' the construction.[29] With on-going internal fighting in Ethiopia, it is speculated that 'Egypt might look to fund dissident groups in Ethiopia, igniting a proxy war over GERD.'[30]

Image: Ethiopia's new Nile Dam. Source: Google/BBC

There exists a 1929 Treaty (and a subsequent one in 1959) giving Egypt and Sudan not just rights to nearly all of the Nile water but also giving Egypt veto powers over any projects by upstream countries that would affect its share of the waters.[31] The colonial-era document mentions nothing of the rights of the other riparian states, including Ethiopia, which disregarded the treaty claiming it does not bind it and went ahead with the construction.[32]

It should be noted here that during this whole event, US President Trump mulled over withholding aid to Ethiopia due to the construction of the dam. While this

[29] ibid.
[30] ibid.
[31] Basillioh Mutahi, 'Egypt-Ethiopia row: The trouble over a giant Nile dam', *BBC News* (London, 13 January 2020)
<https://www.bbc.com/news/world-africa-50328647> accessed 05 April 2021
[32] ibid.

did not come to fruition, it would have been to deter hydro-hegemony and possible hydro-nationalism.[33]

2. The South-Asian Hydro-Hegemon: Understanding the basis of the Hegemony

The Indian sub-continent has access to only around 8.3 percent of global water resources yet is home to 21 percent of the world's population.[34] It has been predicted over and again that the new form of hydro-politics is going to be state-versus-state zero-sum games, meaning no state ultimately wins as the expense (human and otherwise) will always balance the profit.[35] Yet there are critics of this who believe this view to be an 'unsophisticated view' which 'skews assessments of regional security and stability' and that water cooperation and conflict is complex and does not manifest itself in the simplistic binary proposition of peace and war.'[36]

2.1. The South-Asia Hydro-Hegemon: India

A hydro-hegemon, as mentioned above, is a river basin sharing state which asserts its power over the other riparian states, including upstream ones.[37] The hegemony is based on three pillars:

1. **Power**, consisting of;
    a. Political power
    b. Economic power
    c. Military power
2. Riparian **position**

[33] Robbie Gramer, 'Trump Mulls Withholding Aid to Ethiopia Over Controversial Dam', *Foreign Policy* (22 July 2020) <https://foreignpolicy.com/2020/07/22/trump-administration-africa-aid-ethiopia-egypt-gerd-nile-sudan-dispute-negotiations/> accessed 05 April 2021
[34] Brahma Chellaney, *Water: Asia's New Battleground* (Georgetown University Press, 2011), p. 227
[35] Ibid.
[36] Paula Hanasz, *Power Flows: Hydro-hegemony and Water Conflicts in South Asia*, Security Challenges, Vol. 10, No. 3 (2014), pp. 95-112
[37] C. Sneddon, 2013, 'Water, Governance and Hegemony', in, L. M. Harris, J. A. Goldin and C. Sneddon, *Contemporary Water Governance in the Global South: Scarcity, Marketization and Participation* (London: Routledge, 2013), pp. 15-6.

3. **Potential** for water resource exploitation.[38]

With the only constant in this equation being the **position**, the other pillars are variables, thus producing power asymmetry, and are relatively and subjectively perceived. The hegemon has at least four mechanisms to assert their power; mechanism of coercion, utilitarian mechanism, normative mechanism, and the ideological mechanism, which further help us to identify the power dynamic in the region and the hydro-hegemon.[39] Hydro-hegemony goes beyond the simple riparian power equation where the upstream state attains more power through water, and the downstream uses power to get more water.[40] With a number of variables (riparian) in place, the hydro-hegemon uses all available methods to assert its dominance.

In South Asia, if we were to measure the countries against the three pillars of hydro-hegemony, India's score would be clearly at the top. While holding more economical, political, and military strength than the rest, its riparian **position** is strong enough to cripple not just economies but also lives of the other riparian states, with the **potential** it has for water resource exploitation. Apart from Bhutan, as we shall see, it does not have cordial relations with her neighbours when it comes to water-relations. India has, it is believed, established her hydro-hegemony order by eliciting 'consent from its co-riparians', and arguably, her 'superior power position effectively discourages any violent resistance against the order.'[41] It should be, however, kept in mind that the combined populations of Pakistan, Bangladesh, Nepal, and Bhutan add up to 408.37 million (2019), while India was at 1.366 billion.

To better understand the role of international law in South Asian hydro-political context, it is pertinent to address the specific relations India has with her neighbours first.

2.2. Pakistan and India

Pakistan and India's hydro-politics basically originates in the Tibetan plateau of southern China. Indus River is the twelfth largest river system in the world, spanning China, India and Pakistan, while the Indus Basin stretches till central

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[38] Zeitoun and Warner, 'Hydro-Hegemony', pp. 451-452. Originally developed by T. Naff and R. Matson in 1984 (Middle East), expanded onby A. Medzini in 2001 (Jordan River).

[39] Paula Hanasz (n 35).

[40] Zeitoun and Warner (n 37) p. 436.

[41] Paula Hanasz (n 35).

Afghanistan. Nearly two-thirds of Indus River flows in Pakistan,[42] with the basin sustaining around 65 percent of the country.[43] Due to the climate change crisis and the reduction in the flow of Indus, around 300 million people in both Pakistan and India are getting affected by it,[44] with 80 percent of Pakistan's agriculture relying upon the Indus Basin as its primary water source.[45] Approximately 25 percent of the land area of Pakistan is covered by the Indus basin, which includes the most agriculturally important provinces of Punjab and Sindh.[46] For India, it is only 9.8 percent of the total geographical area of the country.[47]

A one-year Standstill Agreement was signed with India in December 1947, months after partition, whereby Pakistan was given time to develop alternative sources and India was not to withhold the flow of water to Pakistan.[48] India stopped the water once the agreement expired, crippling the Economy. Negotiations became necessary, with Pakistan considering going to the Security Council with regards to this matter.[49] Finally, in 1952, the World Bank intervened with an offer to mediate, and by early 1960, the Indus Waters Treaty came into effect.

At the time of the signing of the Treaty, the waters of the Basin were apportioned between the neighbours on the foundational assumption that the water flow in the rivers would remain constant, not counting the two factors which have now altered the dynamics: deforestation and climate change.[50] Due to the increase in the silt load in the river at the Indian side, Indian hydrologists have come to the conclusion that deforestation has been occurring in the Tibetan Autonomous Region (TAR) of China from where the Indus originates and moves into India.[51] With regards to climate change, water levels are fluctuating, with an increase

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[42] Sahana Rao, 'Governance of Water Resources Shared by India and Pakistan under the Indus Waters Treaty: Successful Elements and Room for Improvement' (2017) 25 NYU Envtl LJ 108

[43] Christopher R Rossi, 'Blood, Water, and the Indus Waters Treaty' (2020) 29 Minn J International Law 103

[44] Rao (n 41)

[45] Rossi (n 42).

[46] World Commission on Dams (2000) Pakistan: The Tarbela Dam and Indus River Basin Final Paper - Executive Summary, November 2000 < http://www.dams.org/kbase/studies/pk/>

[47] ibid

[48] Rao (n 41).

[49] Uttam Kumar Sinha, Arvind Gupta and Ashok Behuria (2012) Will the Indus Water Treaty Survive? Strategic Analysis, 36:5, 735-752 <https://www.tandfonline.com/doi/abs/10.1080/09700161.2012.712376 accessed 05 April 2021.

[50] Joydeep Gupta, 'Wanted: bridges over troubled waters' *The Third Pole* (September 8, 2011) https://www.thethirdpole.net/en/regional-cooperation/wanted-bridges-over-troubled-waters/ accessed 05 April 2021.

[51] ibid

expected for now but an eventual decrease, further worsening the water crisis in the region. Meanwhile, on several occasions since the signing of the IWT, there have been instances where India let more water out, causing floods and then instances where they let out less, causing droughts.[52]

On the matter of Indian construction of Kishanganga and Baglihar Dam, negotiations between the countries failed and Pakistan had to go to the Permanent Court of Arbitration and neutral experts for mediation, respectively. The results however are believed to not be favourable to Pakistan, with India being asked to make minor modifications and more data sharing.

2.2.1. Kashmir

It is not a secret that Jammu and Kashmir (J&K) has always had its resentments towards the IWT, to the extent that J&K Legislative Assembly, in 2003, passed a resolution demanding the scrapping of the treaty after reviewing it.[53] This stems from the fact that India and Pakistan had to circumvent the matter of sovereignty of Jammu and Kashmir, a disputed territory at that point, as the only way for both countries to sit and negotiate the treaty.[54] This sidestepping, however, ignores the then Indian Prime Minister Nehru's letter to the President of the World Bank, urging to 'take due care of the needs and requirements of the people of Jammu and Kashmir when finalising the terms of the treaty.'[55] The Treaty's lack of mention is arguably evidence that that did not happen. The government of Jammu and Kashmir also hired a private consultancy firm to assess the losses incurred by the State due to the IWT, in the past five decades.[56] One of the estimates came up with the number of Indian Rs. 6,000 crores per year, based on the 'perceived benefits that are denied to the State from clauses in the IWT that prevent the former from storing water (for generating electricity) and from diverting flows for irrigational needs.'[57] As of 2013, the State had to import over 75% of its

[52] IANS, Flood alert for Pakistan rivers after India releases water, *The Gulf News* (19 August 2019>) https://gulfnews.com/world/asia/pakistan/flood-alert-for-pakistan-rivers-after-india-releases-water-1.1566200138558 accessed 05 April 2021

[53] Shakil Ahmad Romshoo, *Indus River Basin: Common Concerns and the Roadmap to Resolution* (1st edition, Centre for Dialogue and Reconciliation, 2012)

[54] Rossi (n 42).

[55] Uttam Kumar Sinha, Arvind Gupta and Ashok Behuria (2012) Will the Indus Water Treaty Survive? Strategic Analysis, 36:5, 735-752, DOI: 10.1080/09700161.2012.712376

[56] Rohan D'souza, Time to Bridge this River Divide, *The Hindu* (Delhi, 13 September 2013) https://www.thehindu.com/opinion/lead/Time-to-bridge-this-river-divide/article11866196.ece accessed 05 April 2021

[57] ibid

required power needs, and spent Indian Rs. 3,600 crores annually to meet the power needs.[58]

Hydro-politics in this scenario came when the current BJP government, since getting elected, continuously threatened to cut off all water to Pakistan, and instead giving it to Indian held J&K. Seeing the nature of the Kashmir dispute, this tactic would also form rifts between J&K and Pakistan. The situation deteriorated with the recent event of the abrogation of Article 370, which gave a Special Status to Indian held J&K. As the Special Status has been removed, the region has now become a part of the Union Territory of the Republic of India. We have yet to find out what that would mean for the IWT and Indo-Pak hydro-politics.

2.2.2. Pakistan and Afghanistan

The 2,460 kilometres long international border between Pakistan and Afghanistan lets several rivers and streams pass through it, with the significant one being the Kabul river, sustaining millions of citizens of the Khyber-Pakhtunkhwa (KP) province. Apart from that, rivers Kurram, Tochi, Gomal, and Kundar also enter Pakistan from Afghanistan, sustaining a huge chunk of regions previously part of the Federally Administered Tribal Areas (FATA) and KP province. While this makes Afghanistan the upper riparian, it is also the lower riparian when it receives Chitral/Mastuj river, entering Afghanistan from Pakistan's Chitral region. This river is the biggest contributor to Kabul River, and makes Afghanistan a middle riparian.

However, the issue arises due to there being no treaty regulating the flow of water between the countries and diplomatic crises between the neighbours which keep on fluctuating. This is then exacerbated by interferences by India through the funding and initiating of dams across Kabul river, with Shahtoot Dam being the most recent project.[59] Afghan Vice-President, Amrullah Saleh, was recently quoted as saying,

> Pre (President) Ashraf Ghani's vision to turn our waters to a credit card & a diplomatic card has (given) Afghanistan an unprecedented leverage in the

[58] ibid

[59] Sudha Ramachandran, India's Controversial Afghanistan Dams, *The Diplomat* (20 August 2018) https://thediplomat.com/2018/08/indias-controversial-afghanistan-dams/ accessed 05 April 2021

region. Not one drop less. Not one drop more. Every drop per agreement is our moto. As an upstream citizen I always took it for granted. Not now.[60]

While better prospects seem to be on the horizon for Pakistan-Afghanistan relations since the US-Taliban Peace Agreement began, the threat of reduction of water to Pakistan's western regions and Indian interference in that regard is a potential threat, in the absence of a treaty regulating the flow. These issues can only be handled via Pak-Afghan Water negotiations, keeping in mind the UN Watercourses Convention 1997 and the contemporary Customary International Law's principles, once a stable post-Peace Agreement government is in place in Afghanistan.

2.3. Nepal and India

The issues between Nepal and India are said to have begun through the Kosi (1954) and Gandak (1959) Agreements. The agreements were believed to not have been agreed upon on the basis of 'regional co-operation', but rather for India to meet its own requirements and solve its own problems.[61] Even within Nepal, the agreements were criticised for favouring India more than Nepal.[62] The agreements soured future dealings between the neighbours for good, and were followed by the Mahakali Treaty of 1996, regarding the Mahakali River. This agreement has colonial links with an Indo-Nepal 1920s Treaty, but due to the 'complexities of the bilateral relationship', the treaty has remained 'a dead letter'.[63] As of 2014, Nepal only produced 714 MW of electricity for its 30 million citizens, from all the available energy sources, causing several hours a day long power outage,[64] with the lowest per capita energy consumption in South Asia (only 15 percent of the population having access to electricity).[65] With a potential of becoming a major exporter of electricity, Nepal actually imports its power from India.[66] It is believed that Nepal's 'lack of capacity for river diversion or water storage is at the root of disputes with India in relation to both hydropower

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[60] Amrullah Saleh, 2021 [Twitter] 28 January. Available at: https://twitter.com/AmrullahSaleh2/status/1354663052877168640 accessed 05 April 2021.
[61] Ramaswamy R. Iyer, 'Neighborhood Tensions: India's Trans-Boundary Water Relations', *Global Asia* (March 2015, Vol.10, No.1) https://globalasia.org/v10no1/cover/neighborhood-tensions-indias-trans-boundary-water-relations_ramaswamy-r-iyer accessed 05 April 2021
[62] Ibid
[63] Ibid
[64] Brahma Chellaney (n 33) p. 13.
[65] Dipak Gyawali, 'Missing Leg: South Asia's hobbled Water Technology Choices', *Economic and Political Weekly*, vol. 36, no. 39 (29 September-5 October 2001), p. 3748.
[66] Brahma Chellaney (n 33) p. 282.

generation and flood control.'[67] As Iyer sums it up, 'India has been high-handed and insensitive, while Nepal has been hyper-sensitive and resentful, ready to cast India's actions in the worst light.'[68]

In the case of Nepal, India's hegemonic bilateralism has cost Nepal not only in its capacity to produce electricity and the revenue it could have made from that, but also in souring the neighbourly relations with India since the initial treaties. A revisiting of all the treaties, in light of the climate change crisis, is a must for both the countries.

2.4. Bangladesh and India

Bangladesh is deemed to have the weakest negotiating position with India and it also suffers the most when it comes to transboundary water resource management. It has one of the highest external water dependencies, with 91.33 percent water originating from outside of Bangladesh.[69] It receives 54 rivers from India, with the Brahmaputra being the most significant one.[70] Any changes to the external rivers or their sources, from Himalayas to the hydro-engineering projects across Brahmaputra, Ganges, and the rest, directly affect Bangladesh and its water usage, especially in the form of flooding, due to Bangladesh's low elevation.

It is believed that India has 'aggressively asserted its own interest to the detriment of Bangladesh.'[71] The Indian side however argues that Bangladesh exaggerates its need.[72] The Farraka barrage by India is said to 'disregard Bangladesh's ecology, water needs and the survival of its people.'[73] Similarly, India's National River Linking Project (image below) garnered severe criticism from Bangladesh, Pakistan, and Nepal as well.[74] This project intends to link the major rivers across India, with the purpose of, as per India, controlling the flow of water and mitigating damage caused due to flooding and other natural calamities. For the

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[67] Condon et al., 'Resource Disputes in South Asia: Water Scarcity and the Potential for Interstate Conflict', Office of South Asia Analysis, U.S. Central Intelligence Agency (1st June 2009). p. 13.
[68] Iyer (n 60).
[69] Paula Hanasz (n 35).
[70] ibid
[71] ibid
[72] Singh, *Trans-boundary Water Politics and Conflicts in South Asia*, p.35.
[73] Paula Hanasz (n 35).
[74] Pau Khan Khup Hangzo, 'Transboundary rivers in the Hindu Kush-Himalaya (HKH) region: Beyond the 'water as weapon' rhetoric', *Insight* (Centre for Non-Traditional Security Studies) pp. 4-5

rest, however, this is another hegemonic step taken by India to strengthen its control over the shared waters.[75]

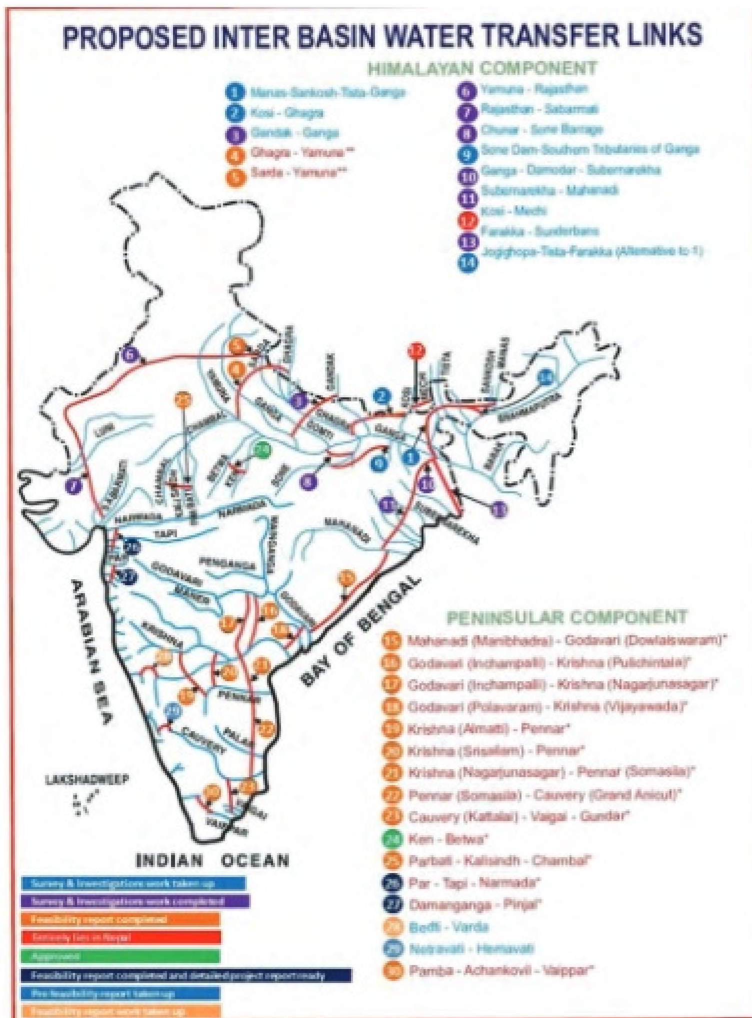

Image: India's proposed National River Linking Project, which aims to link all the major rivers for better control over the water resources.

3. Approaching International Law for a Shift of Balance

To safeguard hegemony, the hegemonic state focuses more on bilateralism in its agreements with other states. A regional or global order cannot sustain such hegemony, even if it makes work easier. As Paula states:

[75] ibid

> India has used soft power, … to elicit compliance from its coriparians while its superior power position effectively discourages any violent resistance against the status quo.[76]

This has been the case with Pakistan, Nepal, and Bangladesh in an adverse manner, and Bhutan in a positive manner, while for India, it seems to have served its desired outcomes in all scenarios. This is not to say that India does not have legitimate needs of its own. As mentioned, the combined population of the four co-riparian states is still almost one-third that of India. If Pakistan, Bangladesh, and Nepal have been hit with climate change and water-scarcity, then so has India. The advantages, however, are those of the superior riparian position, power, and the potential for water resource exploitation, all three residing with India.

While bilateral agreements come under the ambit of international law, and their interpretation comes from international law bodies, like the Permanent Court of Arbitration, such agreements still help with maintaining the hegemony intact in this scenario. The deforestation occurring in TAR of China also impacts the water levels reaching the coastal province of Sindh, in Pakistan, thousands of kilometres away, making this issue go far beyond the realm of bilateralism.

The best approach therefore would be for the key regional countries to ratify the United Nations Watercourses Convention (UNWC). This would legally bind all the ratifying nations to the best principles of water-course sharing, like that of not to "cause significant harm" to other watercourse states, and the "reasonable and equitable use" of the water resources. The case of *Hungary v Slovakia* declared it a 'basic right' to utilise the resources of a watercourse in an equitable and reasonable manner, which is now part of the UNWC.[77] While this might be argued to be detrimental to the hydro-hegemonic status of India, it will make it all the more easier for her in other neighbouring concerns as well, especially with the upper riparian China. India is already facing issues on all fronts relating to water, with another marine life crisis having exacerbated recently with Sri Lanka, where recently Sri Lankan Navy arrested 54 Indian fishermen for illegally fishing in Sri Lankan waters and "poaching close to Sri Lanka."[78] This issue has been

[76] Paula Hanasz (n 35).
[77] Case Concerning the Gabcikovo-Nagyamoros Project (Hungary v Slovakia) (Merits) (1997) ICJ Rep 7, 54
[78] Special Correspondent, 'Sri Lankan Navy arrests 54 fishermen from State', *The Hindu* (26 March 2021) https://www.thehindu.com/news/cities/chennai/sri-lankan-navy-arrests-54-fishermen-from-state/article34165052.ece

ongoing for the last several years between India and Sri Lanka and has soured their relations further.

With such a depoliticised move, another step promulgated by the World Bank and World Wildlife Fund, is that of the Integrated River Basin Management (IRBM) process which 'encourages knowledge sharing, community mobilisation and active stakeholder participation for transparent and fact-based decision making towards water cooperation.'[79] Unfortunately, the Customary International Law's (CIL) Right to Cooperate exists without any institutional enforceability but should be the cornerstone of all arrangements.

Similarly, as of 2010, Access to Water and Sanitation is a recognised human right, acknowledging that clean drinking water and sanitation are essential to every person's life.[80] This, however, is not yet enforceable neither domestically, nor internationally, especially in the case of watercourses, but is an argument in favour of cooperation between the states.

Another international law instrument to use comes in the shape of the Paris Agreement.[81] As a signatory to the Paris Agreement, India should (under Article 8) recognise the importance of averting, minimising, and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events. While the rest of the states cannot lay claim to compensation or liability, India can be urged collectively to be more mindful of the consequences of unilateral acts it conducts against the co-riparian states, affecting the lower riparian states already affected by climate change.

3.1. Customary International Law in the Event of Unilateralism

Apart from the above-mentioned international law recourse India's co-riparian states have, CIL also presents safeguards from resource exploitation, through various principles. For this discussion, we will investigate the most significant ones which can be utilised.

3.1.1. Protection from Significant Harm or the 'No Harm' Principle

[79] Farwa Aamer and Jace White, 'Depoliticising South Asia's Water Crisis', *The Diplomat* (24 February 2019) https://thediplomat.com/2019/02/depoliticizing-south-asias-water-crisis/ accessed 06 April 2021.

[80] UNGA Res 64/292 (28 July 2010) UN Doc A/RES/64/292

[81] The Paris Agreement (2016) (adopted 12 December 2015, entered into force 4 November 2016)

Even in the absence of bilateral arrangements, CIL makes sure that river basins are shared in an equitable and reasonable manner, with enshrined rights of cooperation, sustainable development, peaceful dispute resolution and still maintain territorial sovereignty and fulfilling the state's requirements and desires.

The cases of *Trail Smelter 1941* and *Corfu Channel* give us the principle of '**no harm**' or protection from Significant Harm, which forbids the use of State territory in a manner which causes injury to properties and/or persons situated in another territory.[82] The ICJ's case of *Corfu Channel* expanded and developed it into a general principle whereby State territory cannot be allowed to be used in a manner causing harm to another State.[83] The Stockholm Declaration (1972),[84] the Rio Declaration (1992),[85] and the United Nations Framework Convention on Climate Change (1992) also incorporated this principle, and the principle was confirmed as CIL through the *Nuclear Weapons* Advisory Opinion of the ICJ. The Court stated that the:

> existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States … is now part of the corpus of international law relating to the environment.[86]

Canada, in the *Trail Smelter* case, was found to have caused harm to the US and was held liable in damages. India, on the other hand, through its State Practice, has acknowledged this principle at different points: with China after an artificial dam collapsed in Tibet,[87] by mentioning 'no harm to either party' in the Ganges Treaty,[88] and through a High Court of Allahabad case.[89]

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[82] Trail Smelter Arbitration (*United States v. Canada*), 3 U.N. Rep. Int'l Arb. Awards 1905 (1941)
[83] Corfu Channel (*U.K. v. Albania*), 1949 I.C.J. 4 (Apr. 9)
[84] United Nations Conference on the Human Environment, Stockholm, Swed., June 5– 16, 1972, Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14/Rev.1
[85] United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 12, 1992)
[86] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8), [29]
[87] "Why India is Worried about China's Dam Projects on the Brahmaputra River," *Economic Times* (Delhi, 5 October 2016) https://economictimes.indiatimes.com/news/politics-and-nation/why-india-is-worried-about-chinas-dam-projects-on-the-brahmaputra-river/articleshow/54691589.cms
[88] Ganges Treaty, Art. 3(iii)
[89] *Hanuman Prasad v Mendwa* AIR 1935 All 836 (1935)

Apart from this principle, international law encourages the right to Regular Exchange of Data and Information, right to peaceful settlement of disputes, right to notification and consultation, and the right to cooperation.[90]

4. Using International Law to Bring Balance: Recommendations

Bilateral treaties like the IWT and the Ganges Water Sharing Treaty (1996) have gone through a lot of conflicts and issues which have strained them, especially through the number of questions raised about their efficacy. While the growing number of water agreements between countries hints at increased cooperation[91] and the continuation of IWT despite wars and confrontation is cited as an example of cooperation and water wars not materializing, the ODNI report mentioned above concluded that "where water tensions historically have led to increased water-sharing agreements rather than violent conflict, acute water shortages over the next ten years will likely change this trend."[92] Seeing the rapid speeds through which climate change is occurring, it would be more suitable to choose the way of cooperation between SAARC states, along with the ratification of the UNWC. This would mean incorporation of all major Customary International Water Law's principles throughout these countries which would bring a balance to the hydropower accumulated by India. India's preference of bilateralism has made its relations with almost all its neighbours strained, and future negotiations have been soured. With such an international law mechanism in place, there is a better chance of cooperation across the board as the transboundary water sources of this region are mostly shared by over two countries. The process might be laborious in the beginning but will be beneficial once it is in place. This can be achieved via the platform of SAARC, with UN, World Bank and other international organisations linked with climate change and environment also facilitating the process. For India, while this may lead to a reduction of power, it will make sure that its population of over 1 billion is also catered for.

Coming to existing bilateral treaties, while unilateral cessation of the IWT is forbidden under the Treaty and same with the rest, CIL still guarantees recourse through which equitable and reasonable use of the watercourses can be

[90] Sana Taha Gondal, 'Beyond the Indus Waters Treaty: A study of Pakistan's Transboundary Water Rights against India under Customary International Law' [2020] Vol. XX, No. 2, IPRI Journal <https://doi.org//10.31945/iprij.200204>accessed 06 April 6, 2021.

[91] Jurgen Scheffran, Michael Brzoska, Jasmin Kominek, P Michael Link, and Janpeter Schilling, 'Disentangling the Climate-Conflict Nexus: Empirical and Theoretical Assessment of Vulnerabilities and Pathways' (2012) 4 Rev Eur Stud 1 (supra n.67)

[92] Shannon O'Lear and Adalric H Tuten, 'Environment and Conflict: Security, Climate Change, and Commodity Resources' (2013) 14 Seton Hall J Dipl & Int'l Rel 97

protected. From reasonably and equitably using the resources, and not harming the other users, till the sharing of data, CIL guarantees protection of several rights albeit in different capacities. Without the ratification of UNWC and the bilateral treaties and agreements, CIL might not be the strongest safeguard against hegemony but still stands as a line of defence for less-powerful co-riparian states.

If such initiatives of regional harmony fail considering the looming water and environmental crisis, it would be beneficial for India's co-riparian states to cooperate and bring some balance to the power dynamic. Hegemony rests on power as one of the pillars, and that is a variable in the equation explained above. While keeping in mind the considerations of India with regards to its water usage, the less-privileged states can bring collective action under the limited CIL mechanisms to protect their interests.[93] All three nations, Pakistan, Nepal, and especially Bangladesh, are at the receiving end of the adverse effects of Indian hydro-hegemony and coupled with the climate change crisis, it is very likely that such a scenario might happen eventually if attempts at regional harmony fail.

Conclusion

The international Ganges-Brahmaputra-Meghna basin, along with the Indus Basin, drains approximately half of this region. This fact alone is a significant reason to improve coordination between South Asian countries to cooperate and come together with better watercourse management methods.

Paula Hanasz argues that:

> Tensions certainly exist about the management and development of shared rivers, but declared war or violent skirmishes are likely to undermine the complex system of mutually beneficial arrangements that currently exist. Such a state of affairs can be said to epitomise the ambiguous nature of transboundary water interactions; conflict and cooperation always coexist, but an equilibrium is possible that precludes water war.'[94]

A troubling argument in the age of rapid population growth and climate change crisis, it is not even evidenced that there is a "mutually beneficial arrangement" that currently exists between the countries, except for Bhutan. The case of Bhutan, the smallest country in the region, should be analysed further and factors

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[93] Ayesha Malik, 'Climate Change and Armed Conflict: Pakistan's Vulnerability in the coming Water Wars', Research Society of International Law (October 2020) https://rsilpak.org/2020/climate-change-and-armed-conflict/ accessed 06 April 2021.
[94] Paula Hanasz (n 35).

behind their successful cooperation should be examined in relation to the rest of the neighbours. However, it is not a guarantee that it will fix the strained relationships between the SAARC countries.

It is pertinent, under ideal circumstances, for India and the rest of the co-riparian states to re-sit and revise the Treaties, if not go beyond, but this time also include officials from Kashmir at the table. All relevant climate change provisions should be added, and sanctions put in place for non-compliance. This is of course in case countries do not acquiesce to ratifying the UNWC, under ideal circumstances.

Treaties like the IWT have proven to be resilient treaties in the way they have survived wars, but they will not be able to survive the water and climate crisis looming over all South Asia, one way or the other. International law can only go so far.

PAKISTAN'S FATF EXPERIENCE

*Noor Fatima Iftikhar**

Abstract

In June 2018, the Financial Action Task Force (FATF), a global money laundering and terrorist financing watchdog, placed Pakistan on its list of "Jurisdictions under Increased Monitoring" (grey list) citing 'structural deficiencies' that resulted in a failure to effectively target terrorism financing and money laundering (TF/ML). After extensive law enforcement action on-ground as well as through legislative and regulatory avenues, Pakistan managed to achieve significant progress on the FATF Action Plan, improving its standing with the global governance body. As a result of coordinated legislative overhaul, which spanned the passage of fifteen laws, including key amendments to the Anti-Terrorism Act 1997 and the Anti-Money Laundering Act 2010, as well as over thirty regulations/rules formed therein, Pakistan was successful in achieving significant compliance with the FATF requirements. This paper analyses the scope of action undertaken by Pakistani authorities, and establishes that legislative and regulatory action providing legal cover to on-ground law enforcement action is critical in establishing and demonstrating commitment to international bodies such as the FATF.

Keywords: Global Governance, FATF, International Law, Countering Financing of Terrorism, Anti-Money Laundering, Legal Reform, Lawfare.

Introduction

The Financial Action Task Force (FATF) is the global money laundering and terrorist financing watchdog. As an inter-governmental policy-making body, the FATF sets standards and guidelines that promote the global implementation of legal, regulatory and operational measures for Anti-Money Laundering/Countering Financing of Terrorism Financing (AML/CFT).[1] In 2018, the FATF placed Pakistan on its list of "Jurisdictions under Increased

* Noor Fatima Iftikhar is a Research Associate at the Research Society of International Law (RSIL), specializing in areas of AML/CFT Compliance, Global Governance and Justice Sector Reform.

[1] Financial Action Task Force (FATF) Mandate 2019 <http://www.fatf-gafi.org/publications/fatfgeneral/documents/fatf-mandate.html>

Monitoring" – or the 'grey-list' - citing 'structural deficiencies' that resulted in failure to effectively target terrorism financing and money laundering (TF/ML).[2] In collaboration with the International Cooperation Review Group (ICRG), a technical working group under the FATF specializing in monitoring such jurisdictions, the FATF issued a 27-Point Action Plan for Pakistan aimed at remedying these structural deficiencies. Pakistan's progress on its Action Plan was reviewed by the FATF in its plenary on 23 October 2020. Efforts to remove its structural deficiencies and improve compliance with global AML/CFT standards were acknowledged by the FATF and the ICRG found Pakistan to be largely compliant with 24 of the 27 items of the Action Plan. However, Pakistan was retained on the FATF 'grey-list' pending further compliance.

The objective of this paper is to trace the development of key legislative and administrative measures undertaken by Pakistan to comply with the FATF-ICRG Action Plan. This paper begins by tracing Pakistan's history with the FATF, including past events of grey-listing. It then lays out the scope of progress undertaken from June 2018 onwards, highlighting outstanding areas flagged by the FATF pending compliance as well as identifying the way forward in achieving all objectives under the Action Plan up till February 2021. It provides analysis of Pakistan's response, and concludes with outstanding areas requiring further improvement to get off the FATF grey-list and improve its international standing.

1. Pakistan's History with the FATF

Pakistan's history with the FATF has remained chequered. Pakistan was grey-listed three times in its history with the watchdog – first in 2008, then from 2012 to 2015 and finally in 2018. In 2008, the FATF's evaluation team cautioned that Pakistan's anti-money laundering and counter-terrorist financing scheme is an ML/FT weakness in the international financial system owing to virtually no legal cover to counteract against money laundering offences.[3] The passing of the Anti-Money Laundering Ordinance 2008 was later passed, designating money laundering an offence under the Pakistani legal regime and providing the basis for the Anti-Money Laundering Act to be promulgated in 2010. Pakistan later made a high-level political pledge in June 2010 to collaborate with the FATF and the APG to resolve its strategic AML/CFT shortcomings. The FATF expressed concern that Pakistan's Anti-Money Laundering Ordinance (AMLO) would

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[2] Shahbaz Rana, 'Pakistan Formally Placed on FATF Grey List | The Express Tribune' (*The Express Tribune*, 2018) <https://tribune.com.pk/story/1746079/1-pakistan-formally-placed-fatf-grey-list/>
[3] FATF, 'Mutual Evaluation Report' (*FATF-GAFI*, 9 July 2009)

expire on March 26, 2010 and urged Pakistan to introduce a permanent AML/CFT mechanism and develop a robust AML/CFT framework before the expiration of the AMLO.[4] As a result, the Anti-Money Laundering Act 2010 was finally passed, laying the core foundation of the country's AML framework.

Pakistan was again grey-listed in 2012, owing to a high-risk profile, which presumably jeopardized the financial system globally. In 2013, Pakistan resolved to address the issue and took significant measures to improve its anti-money laundering and counter-terrorist financing regime, including setting up its Financial Intelligence Unit (Financial Monitoring Unit, or FMU), releasing the United Nations Security Council (Enforcement) Order 2012, AML/CFT guidance for exchange firms, and a currency declaration notice for the operation of its cash border controls. Despite Pakistan's high-level political determination to collaborate with the FATF and the APG to resolve its strategic AML/CFT deficiencies, the country could not entirely execute its action plan. Some core CFT deficiencies remained.[5] Pakistan again made a high-level diplomatic pledge in June 2014 to collaborate with the FATF to resolve its technical anti-money laundering and counter-terrorist funding vulnerabilities.[6] Finally, in 2015, the FATF praised Pakistan for making substantial strides in addressing strategic AML/CFT flaws found by the FATF and addressed in their action plans, and moved it off the grey-list.[7]

In June 2018, the FATF placed Pakistan on its list of "High Risk Jurisdictions under Increased Monitoring" (informally known as the 'grey-list') – owing to 'structural deficiencies' that resulted in failure to effectively target terrorism financing and money laundering within its jurisdiction.[8] The FATF-ICRG cited key deficiencies in laws, regulations and oversight mechanisms. It also pointed towards weaknesses and poor coordination between relevant institutions,

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[4] FATF, 'FATF Public Statement - February 2010' (*FATF-GAFI*, 18 February 2010) <http://www.fatf-gafi.org/countries/d-i/ecuador/documents/fatfpublicstatement-february2010.html> accessed 17 March 2021.

[5] FATF, 'FATF Public Statement 22 February 2013' (*FATF-GAFI*, 22 February 2013) <http://www.fatf-gafi.org/countries/s-t/turkey/documents/fatfpublicstatement22february2013.html> accessed 17 March 2021.

[6] FATF, 'Improving Global AML/CFT Compliance: on-going process - 27 June 2014' (*FATF-GAFI*, 27 June 2014) <http://www.fatf-gafi.org/countries/a-c/argentina/documents/fatf-compliance-june-2014.html> accessed 17 March 2021.

[7] FATF, 'Outcomes of the Plenary meeting of the FATF, Paris, 25-27 February 2015' (*FATF-GAFI*, 27 February 2015) <http://www.fatf-gafi.org/countries/a-c/belgium/documents/plenary-outcomes-february-2015.html#AMLCFT_Improvements> accessed 17 March 2021.

[8] Shahbaz Rana, 'Pakistan Formally Placed on FATF Grey List | The Express Tribune' (*The Express Tribune*, 2018) <https://tribune.com.pk/story/1746079/1-pakistan-formally-placed-fatf-grey-list/>

including law enforcement and prosecution agencies, financial entities and regulators. Hence, Pakistan was placed on the FATF 'grey-list', subject to reporting every quarter on its progress on the 27-Point Action Plan.

2. Grey-Listing in 2018: MER Assessment and Ramifications

Pakistan's grey-listing in 2018 was followed by a detailed, enhanced evaluation of its existing frameworks against the 40 FATF Recommendations and 11 Immediate Outcomes under Technical Compliance and effectiveness Compliance respectively. In October 2018, international experts visited Pakistan for an 'on-site evaluation' by the Asia-Pacific Group (APG). The APG subsequently published its findings in a 'Mutual Evaluation Report' (MER) which found a glaring lack of necessary legal frameworks to target TF/ML, lack of coordination amongst critical governmental actors and law enforcement agencies, and no coherent risk-based assessment tools to categorize the vulnerabilities of different sectors of the economy in Pakistan.[9] The MER assessed Low Compliance on 10 out of 11 Immediate Outcomes, with only 1 Immediate Outcome rated as Moderate (IO.2: International Cooperation).[10] On the 40 indicators under Technical Compliance, Pakistan was only fully compliant on 01 indicator, largely compliant on 09, partially compliant on 26 and non-compliant on 04 indicators.[11] Pakistan's adherence to the 27-Point Action Plan, tailored specifically to address the gaps in the country's AML/CFT frameworks and prevent proliferation of terrorist financing across borders[12], was thereby deemed critical.

The poor performance on the MER highlighted critical flaws in Pakistan's AML/CFT frameworks, underscoring the need for immediate and coordinated response to rectify existing gaps. The need for a response was also critical given the FATF's clear warning of placing Pakistan on the List of Jurisdictions subject to Call to Action (or commonly known as the 'black-list'). As of now, the only countries placed on the black-list are Iran and the Democratic People's Republic of Korea (DPRK). The ramifications of being placed on the black-list are severe economically, choking trade and commerce with the rest of the world, as well as within the private sector and other developmental organizations as well. Being placed on the black-list entails countries and the global financial system being

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[9] Mutual Evaluation Report for Pakistan – Financial Action Task Force (FATF) – 2019 <https://www.fatf-gafi.org/media/fatf/documents/reports/mer-fsrb/APG-Mutual-Evaluation-Report-Pakistan-October%202019.pdf> accessed 20 May 2021.

[10] Ibid.

[11] Ibid.

[12] FATF Plenary Meetings – Summaries <http://www.fatf-gafi.org/about/outcomesofmeetings/> accessed 20 May 2021.

called to take measures against the country in question, subjecting transactions to severe scrutiny if not an outright ban altogether. It may also lead to donor institutions, such as the International Monetary Fund (IMF), the Asian Development Bank (ADB) and other loaning institutions to evaluate and potentially limit their financing options. Pakistan, heavily reliant as it is on foreign loans and remittances to keep its economy afloat, would find itself being economically strangled and internationally isolated – severely hindering all potential growth opportunities and tarnishing the country's reputation as a responsible member of the international community. Therefore, a high-level political commitment to target and address these existing AML/CFT deficiencies and improve upon its ranking was a matter of critical importance for Pakistan.

3. Tracing Pakistan's Progress: June 2018 to February 2021

Achieving all points and establishing definitive progress on all of the FATF's Recommendations required a holistic response from the State. The law enforcement machinery within the country was required to work in tandem with other regulators, as well as specialized agencies to implement AML/CFT frameworks. Initially, Pakistan's response to the 27-Point Action Plan comprised of a mixture of law enforcement operations and the creation of governmental bodies and taskforces to promote inter-agency coordination and policy implementation. In early 2019, the militant group Jamaat-ud-Dawa and all affiliated organizations, including charities, were outlawed,[13] with hundreds of properties seized, and key proscribed individuals and other associates arrested.[14] These on-ground law enforcement measures however are required to be complemented by other foundational legislative developments to improve Pakistan's standing as per the FATF's requirements.

Following on-ground action were a series of administrative regulations and guidelines from key ministries, authorities and regulators aimed at streamlining the implementation of UNSC Resolutions 1267 and 1373 and broadly updating the AML/CFT frameworks. These comprised technical guidelines issued by the Ministry of Foreign Affairs (MOFA) to implement the provisions of the United Nations Security Council (UNSC) Resolution 1267, and later by the National Counter-Terrorism Authority (NACTA) on UNSC Resolution 1373. Regulating

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[13] Iftikhar A. Khan, 'May 12, 2019 | 11 Groups Banned For Having Links With Jud, Others' (*Dawn Epaper*, 2019) <https://epaper.dawn.com/DetailImage.php?StoryImage=12_05_2019_001_005> accessed 20 May 2021.

[14] Ibid.

entities such as the State Bank of Pakistan (SBP) and the Securities and Exchange Commission of Pakistan (SECP) also issued rules and guidelines aimed at bolstering the existing AML/CFT Framework in the country. Despite these improvements, widespread legislative and administrative reform remained missing. As a result, in the October 2019 Plenary, Pakistan only managed to become largely compliant on 5 out of 27 Points on the Action Plan.

Threatened by the possibility of 'black-listing', Pakistan was spurred to action after October 2019. Pakistan enacted key legislation, including important amendments to foundational laws such as the Anti-Terrorism Act, 1997 and the Anti-Money Laundering Act, 2010, and updated its risk assessment frameworks in time for the next FATF plenary. An updated National Risk Assessment (NRA)[15] was undertaken which considered the ML/TF threats and inherent vulnerabilities of Pakistan as a whole through "a coordinated approach." In this context, a number of parameters were considered apart from the financial and non-financial sectors, while taking into account the consequences of ML and TF and its impact in Pakistan. This new assessment of ML threats included a review of all crimes based on their seriousness and magnitude, domestically and internationally, the amount of potential proceeds generated, the capacity of the criminal actors to launder proceeds (including third party launderers) and the sectors used to launder proceeds. A threat analysis concerning all crimes, including the 21 designated predicate offences under the FATF Standards, was complemented by a threat analysis of illegal MVTS/ Hawala/Hundi and cash smuggling.

By late 2019, it was clear that swift measures were required for Pakistan to improve its performance on the FATF-ICRG Action Plan which necessitated a holistic approach from the government. Accordingly, a high-powered 12-member committee known as the National FATF Coordination Committee (NFCC) was formed in August 2019. The aim of the NFCC was to execute all FATF-related tasks by December 1st, 2019 – with the ambitious undertaking of bringing all informal sectors of the economy under regulatory control. The ambit of action being undertaken by the NFCC covered policy and legal avenues and served as a core decision-making body pertaining to improving compliance with the FATF regime.

[15] Updated National Risk Assessment 2019 <https://www.scribd.com/document/433987606/Updated-National-Risk-Assessment-Report-2019> accessed 15 May 2021.

A number of legal reforms were undertaken, some of which were under deliberation during the February 2020 Plenary, such as changes to the Anti-Money Laundering Act (AMLA) and the Anti-Terrorism Act (ATA). Nevertheless, the government managed to pass necessary legislation, such as the Foreign Exchange Regulation Act (Amendment) Bill 2020,[16] which governs the movement of foreign currency and other forms of monetary instruments such as securities and bullion. The purpose behind the amendment was to bolster the current regime by making the punishments harsher, and to allow the State Bank of Pakistan to act as a regulator in this field and to implement stricter punishments. Additionally, changes were also made to the National Counter Terrorism Authority (NACTA) Ordinance[17] to streamline the process of coordination with various law enforcement actors. The *Benami* Transactions (Prohibition) Rules 2019[18] and *Benami* Transactions Ordinance 2019,[19] focusing on the transparency define the ambit of *benam*i property, the *benamidar* and the beneficial owner with respect to transactions. The *Benami* Transactions Ordinance 2019 further defines whistle-blowers, allowing entities and agencies to act in the capacity of whistle-blowers, all improving upon core recommendations by the FATF. The beginning of this legislative reform was welcomed by the FATF, allowing Pakistan to become compliant on 14 of the 27 Points on the Action Plan by February 2020.

While a number of factors contributed to Pakistan's increased compliance, enhancing legal frameworks was critical to the effort. In the eight months between February 2020, when the last formal decision to retain Pakistan on the 'grey-list' was taken, and October 2020, the government enacted fifteen new laws to ensure compliance with the FATF's Action Plan. This is a noteworthy development in a Parliament which has been largely dormant in its legislative agenda for the past two years, owing to a combination of factors including political deadlocks. Initially, the lack of oppositional support in passing the FATF-related legislation appeared to threaten the achievement of any progress on the remaining targets on the FATF-ICRG Action Plan. However, the global economic and political fallout

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[16] Foreign Exchange Regulation Act (Amendment) Bill 2020 <http://www.na.gov.pk/uploads/documents/1569853174_550.pdf> accessed 20 May 2021.
[17] National Counter Terrorism Amendment Ordinance 2019 <http://www.senate.gov.pk/1web/ordinance/ordVIIof2019.pdf> accessed 12 May 2021.
[18] Benami Transactions (Prohibition) Rules, Federal Board of Revenue (FBR) – March 2019 http://download1.fbr.gov.pk/SROs/2019311153296811SRO326-2019BenamiTransactionsRules2019.pdf > accessed 20 May 2021.
[19] Benami Transactions (Prohibition) (Ordinance) 2019 – National Assembly Pakistan <http://www.na.gov.pk/uploads/documents/1573190392_853.pdf> accessed 02 May 2021.

from Pakistan's grey-listing has now rendered compliance with FATF requirements a significant political issue in the country. The majority of the FATF legislation was passed with the government and the opposition cooperating on this front. For three laws in particular,[20] there was debate regarding their speedy passage truncating political debate on critical matters – yet broadly, there was consensus between the political elements to enact relevant legislations adhering to the FATF Action Plan as a matter of national interest, political posturing notwithstanding.

Three key amendments were made to the ATA 1997 framework, and two amendments were made to the AML Act 2010. These amendments form the crux of legislative developments, and cohesively enhance the scope of offences, penalties and powers granted to law enforcement agencies, investigators, and other regulators. The ATA amendments pertain to enhancing all existing penalties by increasing imprisonment terms and cash fines, while also enhancing the scope of applicability of UNSC Resolutions under the ATA framework. A new section titled Section 11-OOO[21] was added, enforcing the decisions of United Nations Security Council's Resolutions (1267 and 1373), pertaining to counter-terrorism measures to check terrorism financing by making and enforcing such provisions in domestic laws. According to Section 11-OOO, any refusal or non-compliance with orders of the federal government under section 2 of the United Nations (Security Council) Act 1948 is a punishable offence and the person shall be liable to imprisonment of ten years, or a fine of rupees twenty-five million, or both. This not only strengthened sanctions and penalties against violations, but also entrenched compliance with the UNSC Act, 1948 within the ATA framework and allowed for Pakistan to improve its compliance under the Targeted Financial Sanctions framework required by the FATF. Furthermore, the addition of Section 19-C[22] under the ATA allows for LEAs to use techniques such as going under cover, intercepting communications, assessing computer systems and controlled delivery amongst others in order to tackle cases involving "financing of terrorism under the law in force." These will significantly enhance the scope of investigative options available to investigating officers, allowing for improved collection of evidence in ML/TF cases.

[20] These three laws are as follows: Anti-Money Laundering (Second Amendment) Act, 2020, Anti-Terrorism (Third Amendment) Act, 2020 and ICT Waqf Procedure Act, 2020

[21] The Anti-Terrorism (Amendment) Act 2020 <http://senate.gov.pk/uploads/documents/1597043393_568.pdf>

[22] Anti-Terrorism (Third Amendment) Bill 2020 <http://na.gov.pk/uploads/documents/1600179304_607.pdf>

As with the ATA, the AMLA[23] underwent key transformative changes as well, particularly in enhancing the scope of regulatory action available for supervising previously poorly regulated sections of the economy. In terms of legal clarity, multiple definitions have been amended and enhanced in Section 2, while the National Accountability Bureau (NAB) as an "investigating or prosecuting agency" under Section 2(xvii), in investigating ML cases, along with CTDs, FIA and other agencies investigating all other ML cases. Furthermore, functions and powers of AML/CFT regulatory authorities have been clearly defined with powers to issue licenses, regulate, and perform other ancillary functions to comply with provisions of the AML Act. Importantly, offences under Section 21 of AMLA would now be considered "cognizable" offences as opposed to "non-cognizable" in line with the recommendations of the FATF.

Section 6 further introduces an AML/CFT regulatory authority, as well as mandates international cooperation by regulators while setting up an oversight Body for SRBs (Self-Regulatory Body) for broader oversight. This is critical for the regulation of DNFBPs (Designated Non-Financial Businesses and Professions), which cover lawyers, accountants, real estate agents and jewellers/dealers in precious metals and stones – which were previously highlighted by the NRA as high-risk sectors exacerbating ML/TF concerns in Pakistan. Additions were made to Section 7, with Customer Due Diligence (CDD) mandated, including relying on third parties to ensure CDD. Section 7C specifies the requirement to hold records obtained via CDD up to 5 years, while 7F mandates the integration of risk-based assessments within organizations. Professional training and compliance programs are mandated (7G), and 7I imposes sanctions for reporting bodies not conforming to the new sections. Regulators are now required to ensure that all sectors of the economy, including DNFBPs are regulated and supervised via tiers of regulation to ensure that the provisions of the AML Act are adhered to.

In addition to AMLA and ATA, the passage of the Mutual Legal Assistance (MLA) Act 2020 also contributed to enhancing compliance with the FATF Recommendations. A robust domestic legal framework on Mutual Legal Assessment is a key component for effective investigations involving ML/TF and a key FATF Recommendation. However, in Pakistan there was no comprehensive legal framework which regulated the process of requesting and providing legal assistance to and from foreign governments when investigating criminal conduct.

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[23] Anti-Money Laundering (Second Amendment) Bill 2020
<http://na.gov.pk/uploads/documents/1598354531_313.pdf>

The MLA Act 2020[24] was introduced to formalize the process of requesting and providing legal assistance to and from foreign governments when investigating criminal conduct. Section 3 of the Act states that the manner of MLA may be provided on the basis of a reciprocal agreement or other arrangements. As per Section 7, Pakistan would receive and act upon requests relating to a criminal offence either committed or suspected to have been committed in a foreign country when notified. Section 4 lays out the functions of the central authority in coordinating MLA requests. After an MLA request has been sought by Pakistan, the central authority may authorize temporary detention in Pakistan of the offender, if he has been in detention in the sending state. Section 17 stipulates that Pakistan may refuse the request of assistance to a foreign government if it jeopardizes its national security interests, if the request made is contrary to the laws of Pakistan, if it is prejudicial to an investigation or on-going proceedings, or if it violates international conventions of human rights. This Act was designed to accommodate international cooperation in criminal matters through mutual legal assistance, as well as to bridge existing gaps in investigative action. Primarily based on the above, the October Plenary declared Pakistan largely compliant on 21 out of 27 Points, with varying degrees of progress on the remaining 6 points.[25]

From October 2020 to February 2021, Pakistan continued to further enhance its legal framework by creating detailed regulations to implement the fifteen FATF laws, particularly the AMLA (Second Amendment), Act 2020. Based on these, 34 guidelines/rules/regulations have been identified which primarily update existing guidelines, or further bolster AML/CFT measures by integrating key FATF Recommendations. Rules were passed to enhance AML/CFT frameworks for the banking sector under the State Bank of Pakistan (SBP), the Securities and Exchange Commission of Pakistan (SECP), the Pakistan Post and the Central Directorate for National Savings (CDNS) – the latter two particularly highlighted as high-risk sectors in the NRA.[26] Furthermore, various entities within the broader sector Designated Non-Financial Businesses and Professions (DNFBPs) are also now primarily brought under regulatory domain under the Federal Board of

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[24] Mutual Legal Assistance (Criminal Matters) Act 2020
<http://senate.gov.pk/uploads/documents/1597661983_546.pdf>
[25] October 2020 Plenary Outcome - Financial Action Task Force
<https://www.fatf-gafi.org/publications/high-riskand-other-monitored-jurisdictions/documents/increased-monitoring-october-2020.html>
[26] Updated National Risk Assessment 2019
<https://www.scribd.com/document/433987606/Updated-National-Risk-Assessment-Report-2019>

Revenue (FBR) and other specified regulatory authorities such as the Ministry of Law and Justice and the SECP. Pakistan also continued to demonstrate its strengthened AML/CFT frameworks as evidenced by convictions in key terrorism financing cases.[27]

4. Pakistan's Current Standing Vis-à-vis the FATF Grey-Listing

On February 25th 2021[28], the FATF Plenary deliberated upon Pakistan's progress on the 27-Point Action Plan targeting key deficiencies in the country's AML/CFT frameworks. The Plenary found Pakistan largely compliant on 24 out of the 27 Points on the FATF Action Plan, with partial progress recorded on the remaining three points. As a result, Pakistan was retained on the "Jurisdictions under Increased Monitoring" – or the 'grey-list'.

In a stark departure from its usual tone, the FATF commended Pakistan's unwavering "political commitment" to improving its AML/CFT frameworks, culminating into "significant progress across a comprehensive CFT Action Plan."[29] Notably, the FATF did not re-iterate its oft-repeated warning of calling on remaining members to instil measures against Pakistan, which was a constant feature in the FATF's statements, even up till the previous Plenary in October 2020. The FATF Secretariat also clarified that Pakistan's substantive progress now meant that it had evaded the risk demoted to the 'black-list', even if it fails to fulfil the remaining three points by the next plenary.[30]

Government officials have stated that Pakistan has achieved progress on "close to 90% of the FATF Action Plan" despite being under dual scrutiny from the FATF.[31] Pakistan is subject to stringent reporting requirements to report progress on the FATF Action Plan. Parallel to this, the Mutual Evaluation Process has also commenced, which will measure Pakistan's AML/CFT laws and procedures against the FATF's Technical Compliance and Effective Compliance indicators.[32]

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[27] Mubasher Bukhari, 'Hafiz Saeed Found Guilty On Two More Charges Of Terrorism Financing' (*U.S.*, 2020) <https://www.reuters.com/article/pakistan-court-militancy-financing-idINKBN27Z1SZ>

[28] February 2021 Plenary Outcome - Financial Action Task Force <https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/increased-monitoring-february-2021.html#pakistan>

[29] Ibid.

[30] Being on FATF's Blacklist No Longer A Possibility, Hammad Azhar Assures Nation' (*DAWN.COM*, 2021) <https://www.dawn.com/news/1609516>

[31] Ibid.

[32] FATF – Procedures for the 4th Round of Evaluations

The FATF Plenary identified in particular, the following areas requiring further progress on behalf of Pakistan to fully address "strategically important deficiencies[33]" and achieve full compliance. These include demonstrating that TF investigations and prosecutions target persons and entities acting on behalf or at the direction of the designated persons or entities; demonstrating that TF prosecutions result in effective, proportionate, and dissuasive sanctions; and demonstrating effective implementation of targeted financial sanctions against all 1267 and 1373 designated terrorists, specifically those acting for or on their behalf.[34]

These outstanding areas highlighted by the FATF in its latest statement focus on the element of demonstration. Pakistan is required to effectively illustrate that mechanisms for identifying TF/ML activity are bearing results, and targeted financial sanctions are quickly and directly applied to designated entities and individuals. There is also a need to ensure that the broader criminal justice system is capable of enforcing these regimes, from investigation to prosecution and adjudication. More specifically, adherence to UNSCR 1267 and 1373 frameworks will be essential in achieving the remaining points on the Action Plan.

Conclusion

Pakistan's progress on its 27-Point Action Plan to address the FATF-ICRG's concerns regarding its AML/CFT frameworks is substantive and note-worthy. It illustrates Pakistan abiding by its high-level political commitment as well as its international obligations as a member of the global community by ensuring that there are enough laws and checks in place to curb TF/ML and eliminate any such threats arising from its own jurisdiction. The extensive legal developments undertaken from February 2020 to February 2021, including the passage of various laws as well as rules therein, have positively contributed to Pakistan's progress on the Action Plan. It is expected that these developments will also contribute positively to enhance outcomes under effective compliance and

<https://www.fatf-gafi.org/media/fatf/documents/methodology/FATF-4th-Round-Procedures.pdf>

[33] February 2021 Plenary Outcome - Financial Action Task Force <https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/increased-monitoring-february-2021.html#pakistan>

[34] February 2021 Plenary Outcome - Financial Action Task Force <https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/increased-monitoring-february-2021.html#pakistan>

technical compliance indicators as part of the FATF's broader 40 Recommendations as well.

With legislative, regulatory, and administrative mechanisms for combating TF/ML in Pakistan largely in place, the next challenge is effective implementation. Pakistan is now expected to effectively demonstrate that mechanisms it has put in place for identifying TF/ML activity are bearing results, and that targeted financial sanctions are quickly and directly applied to designated entities and individuals, and that the criminal justice system is capable of enforcement of these regimes, from investigation to prosecution and adjudication. This is a daunting challenge, given that Pakistan's criminal justice system is, in general, plagued with antiquated laws, procedures, and operational failures during investigation and prosecution along with chronic capacity and resource challenges relating to investigators, prosecutors and judges. The nature of terrorism financing and money laundering today requires expertise in specialist investigative techniques and reliance on evidence that goes beyond traditional ocular testimony and confessions. It is therefore critical that large scale capacity building endeavours in AML/CFT are undertaken by Pakistan for all justice sector actors across the country along with entities responsible for the implementation of targeted financial sanctions.

Harking to the FATF's earlier grey-listing, it is also increasingly clear that global governance institutions such as the FATF tend to favourably weigh action taken on legislative and regulatory fronts, leading to cohesive law enforcement policies to implement the former. As opposed to un-coordinated or haphazard action on-ground, it is clear that implementing legislative reforms to enhance existing frameworks, eventually culminating into on-ground action is critical in exhibiting implementation of international standards and demonstrating effectiveness on the same.

Finally, Pakistan's experiences as a frontline state in the war on terror have been of immense value to countries all over the world. Its successes in counter-terrorism and counter-insurgency operations, from the former FATA region to Karachi, are perhaps without precedent and have been lauded globally. The FATF grey-listing may have provided Pakistan with a historic opportunity for sustained, focused institutional reform and capacity-building which will have positive spill over effects for its economy and justice systems in the long run.

THE INTERNATIONAL HEALTH SECURITY REGIME AND ITS IMPLICATIONS FOR PAKISTAN

Zoha Shahid[*]

Abstract

While globalization and increased trade and travel have led to the evolution of the International Sanitary Regulations to the International Health Regulations 2005, existing fault lines within the implementation of the global health security framework have been brought to the fore by the COVID-19 pandemic. These have not only highlighted the importance of complying with mechanisms established to protect global health but have forced States to analyse their domestic frameworks to bring them in line with international standards as well. The COVID-19 pandemic has provided States with a novel situation to identify gaps within the legal and policy landscape surrounding public health infrastructure and to take a cross-sectional approach to public health crises which does not only include introduction of relevant legislation, but focuses on methods to prevent, detect and respond to public health crises. This Article aims to understand the evolution of the current international health framework and outlines Pakistan's status of compliance with the IHR 2005 in light of the COVID-19 pandemic.

Keywords: IHR 2005, Health Security, Public Health Crises, Prevent, Detect, Respond, COVID-19, Disaster Management, Surveillance.

Introduction

Increased globalization has brought with it increased risks of transboundary harm. One such harm may be caused by transmission of diseases across borders through increased trade and travel. This new form of harm led to the emergence of health security – a concept which fuses protection of health and national security and identifies the emergence of public health crises as a threat to a nation's security.[1] The international legal order realized that the protection of health had moved from

[*] Ms. Zoha Shahid is a Senior Research Associate at the Research Society of International Law and has worked on areas including human rights and health and governance in Pakistan. She has drafted an in-depth report on the legal aspects of the international health security framework and Pakistan's compliance with it.

[1] Rebecca Katz, Daniel A Singer, 'WHO | Health and Security in Foreign Policy' (Who.int) <https://www.who.int/bulletin/volumes/85/3/06-036889/en/> accessed 2 April 2021.

a State concern to one of global importance which requires State cooperation. The term 'Public Health Security' is defined as '*the activities required, both proactive and reactive, to minimize the danger and impact of acute public health events that endanger people's health across geographical regions and international boundaries.*'[2] At the international level, Public Health Security is governed by the International Health Regulations 2005 which obliges all member States of the World Health Organization—of which Pakistan is one—to collaborate with the organization in matters related to health security, prevention and control of communicable diseases, preparedness, surveillance, response mechanisms and strengthening of health systems.[3]

1. From the International Sanitary Regulations 1951 to the International Health Regulations 2005

Before the introduction of the International Health Regulations 2005, the emerging global health regime underwent great evolution.[4] This can be traced back to the International Sanitary Conference held in 1851.[5] The Conference, convened in Paris, aimed to underline the importance of introducing a regime to control the international spread of infectious diseases. This led to the introduction of the International Sanitary Regulations (ISR) in 1951 which was a culmination of a century's worth of efforts to establish a legal mechanism to tackle the problem of transmission of communicable diseases across borders.[6] The main aim of the ISR was to ensure that diseases closely associated with international trade and travel were regulated which was to be achieved mainly through two principles: state responsibility to notify other countries of outbreaks of the diseases subject to the ISR, and the maintenance of hygiene and medical capabilities at points of disease entry such as ports, airports etc.[7]

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[2] 'Health Security' (Who.int) <https://www.who.int/health-topics/health-security/#tab=tab_1> accessed 2 April 2021.
[3] 'WHO | International Health Regulations (2005)' (Who.int) <https://www.who.int/ihr/9789241596664/en/> accessed 2 April 2021.
[4] Ya-Wen Chiu and others, 'The Nature of International Health Security' (2009) 4 Asia Pac J Clin Nutr.
[5] Hugh S. Cumming, 'The International Sanitary Conference' (1926) 16 American Journal of Public Health.
[6] David P. Fidler, 'From International Sanitary Conventions to Global Health Security: The New International Health Regulations' (2005) 4 Chinese Journal of International Law.
[7] Pan Conference, I Convention, 'PAHO/WHO | I International Sanitary Convention' (Pan American Health Organization / World Health Organization, 2021) <https://www.paho.org/hq/index.php?option=com_content&view=article&id=13889:i-international-sanitary-convention&Itemid=2261&lang=en> accessed 2 April 2021.

However, the narrow scope of the ISR, its limited implementation and increased concerns to protect international trade and travel, led to the reformulation of the ISR into the International Health Regulations (IHR) 1969. The substantive provisions of the traditional regime remained largely the same, however, emphasis was laid on establishing mechanisms to ensure maximum security against the spread of diseases without disrupting international trade and traffic.[8] The IHR 1969 stressed upon increased epidemiological surveillance and aimed at increasing efforts to detect the outbreak of diseases, and to prevent such outbreaks through reducing the sources of such diseases which required improved public health capacities.[9] Nevertheless, improvement in implementation of the international health framework remained stagnant and during the late 1960s officials from the World Health Organization were already expressing concerns regarding the lack of State compliance with the IHR.[10] Moreover, the IHR 1969 only subjected six diseases mainly; cholera, plague, yellow fever, smallpox, relapsing fever and typhus to its regulatory framework.[11]

A significant reason for the failure of the IHR was a breakdown in surveillance activities wherein member States continually failed to notify the WHO of outbreaks of diseases due to the absence of robust domestic health surveillance systems and a lack of surveillance capacities, a fear of negative perception of national honour or due to fear of reaction of other States regarding a matter that was thought of as a concern of national governance only. For example, during the outbreak of the El Tor type of cholera which emerged in the Eastern Mediterranean region, officials did not have sufficient capacity to identify the outbreak of the disease and did not fulfil their obligations of notification.[12] In addition to this, a general fear of negative response from other States led to some countries not notifying a louse-borne typhus outbreak.[13] Furthermore, ineffectiveness of protection measures at a State level compounded the need to ensure minimum interference with international trade and traffic led to the ineffectiveness of the global public health regime.[14]

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[8] WHO (n 3).
[9] ibid.
[10] David P. Fidler (n 6).
[11] 'Frequently Asked Questions About the International Health Regulations (2005)' (Who.int) <https://www.who.int/ihr/about/FAQ2009.pdf> accessed 2 April 2021.
[12] P. Dorolle, 'Old Plagues in The Jet Age. International Aspects of Present and Future Control of Communicable Disease.' (1968) 4 BMJ.
[13] ibid.
[14] David P. Fidler, 'Emerging Trends in International Law Concerning Global Infectious Disease Control' (2003) 9 Emerging Infectious Diseases.

Additionally, the emergence of new diseases including SARS, avian influenza, ebola, zika, nipah virus, and the rapid transmission of HIV/AIDS which was not regulated by the IHR 1969 highlighted the need for a review of the existing international framework regulating public health.[15] New technologies and an increase in drug-resistant microorganisms, malaria, meningitis and sexually transmitted diseases all led policy makers to attach increased significance to international cooperation on preventing the international spread of diseases. Furthermore, with increased security threats, deliberate use of chemicals and biological weapons[16] emerged as a new form of warfare as evidenced by the release of sarin gas on a Tokyo subway and anthrax in the United States.[17] This led to renewed vigour regarding the introduction of stricter international obligations to protect health and the security of States.

The international community recognized that the gaps within the IHR 1969 rendered it insufficient to tackle the threat presented by new diseases and biological terrorism.[18] In 1995, the WHO expressed an imminent need to revise and update the IHR to address new challenges. In developing the IHR 2005, it was recognized that the substantial elements present within the ISR and the IHR 1969 had to be changed for the international regime to attain its objectives. This was to be achieved through the concept of global health security which was to be based upon an approach of global health governance.[19] Global health governance was to be achieved through cooperation, the strengthening of international organizations and required States to carry out collective action.[20]

2. A Newly Formulated IHR 2005

The new formulation of the IHR was predicated upon a strategy which integrated public health with international law and assimilated various public health concerns stemming from the need to control infectious disease control, human rights, trade and travel, environmental protection and national security.[21] Thus, in light of the preamble of the WHO Constitution which recognizes the right to enjoy the highest attainable standard of health as a fundamental human right, it

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[15] David P. Fidler (n 6).
[16] Ya-Wen Chui (n 4).
[17] Ronald M. Atlas, 'The Medical Threat of Biological Weapons' (1998) 24 Critical Reviews in Microbiology.
[18] Ya-Wen Chui (n 4).
[19] Rebecca Katz (n 1).
[20] Kelley Lee and Adam Kamradt–Scott, 'The Multiple Meanings of Global Health Governance: A Call For Conceptual Clarity' (*Globalization and Health*) accessed 10th March 2021
[21] WHO (n 3).

recognized that public health could not be managed in isolation and an integrated approach towards establishing roles for all key stakeholders had to be taken.[22] To achieve this, the IHR developed the 'a health threat anywhere is a health threat everywhere' approach and widened the scope of application of the international public health regime.

It removed the limitation of being applicable only to specific diseases and stated that the international regime would apply to all public health threats. Moreover, it focused on following pre-set response measures to adapted ones which are adequate and proportionate to the health threat. Finally, it did not only focus on the control of borders or restriction of trade and travel and emphasized containment of the disease at the source due to which it requires Member States to follow a 'prevent, detect, respond' framework to effectively manage public health threats. It engages all member states and provides for the appointment of a national and WHO IHR focal point and competent authorities who can be responsible for the implementation of the IHR at a national and international level. Additionally, it places great emphasis on the core capacities of member states which require consultation, notification, verification and assessment and guides member states as to the standard operating procedures during public health emergencies of international concern.[23]

3. Pakistan's Obligations Under the IHR 2005

Pakistan, as a member state to the IHR 2005 has an obligation to ensure not only the existence of IHR core capacities but the continued strengthening of such capacities as well. Moreover, the impact of the COVID-19 pandemic has led experts on national security to highlight that health security and the protection of public health is a national security issue.[24] As of March 10, 2021, Pakistan has reported 13,324 deaths[25] which highlights the imminent need to explore ways to build internal capacities to effectively prevent, detect and respond to such public health crises. Due to this, healthcare capacities – which form the backbone of any emergency response mechanism, must be improved. Experts have commented that the public health crisis which has evolved into a socio-economic crisis with

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[22] 'Constitution of The World Health Organisation' (Who.int) <https://www.who.int/governance/eb/who_constitution_en.pdf> accessed 2 April 2021.

[23] WHO (n 3).

[24] Oona Hathaway and others, 'COVID-19 Shows How the U.S. Got National Security Wrong' (*Just Security*, 2021) <https://www.justsecurity.org/69563/covid-19-shows-how-the-u-s-got-national-security-wrong/> accessed 11 January 2021.

[25] 'COVID-19 Health Advisory Platform by Ministry of National Health Services Regulations And Coordination' (*Covid.gov.pk*, 2021) <https://covid.gov.pk/stats/pakistan> accessed 10 March 2021.

wide-ranging and long-term implications highlights the importance of universal health care which must now be perceived as a national security issue.[26] This requires diversion of an effective budget to strengthening health systems, building health capacities, and improving compliance with the IHR 2005.[27]

Moreover, commentators have also noted that in responding to a health crisis it is essential for there to be strong governance and leadership. It is necessary to have defined roles and responsibilities across all sectors at all levels of government to adequately deal with a public health emergency.[28] There also needs to be a robust mechanism for the detection and investigation of potential hazards, the maintenance and improvement of systems to test for potential hazards and the provision of mass health care services. Providing the public with accurate and credible information is also crucial when dealing with a public health crisis.[29]

However, the healthcare system in Pakistan suffers from limited capacities. This is due to the devolution of certain subjects to provincial governments. The 18th Amendment envisioned a division of roles between the federation and the provincial governments. While primary responsibility to ensure provision of healthcare services has been devolved to provincial governments, with the creation of the Ministry of National Health Services, Regulation and Coordination in 2012, regulation of healthcare services, development of policy etc. remain a responsibility of the federal government. However, research has shown that achievement of the goals set within the IHR is impeded due to overlapping mandates, non-implementation of existing legislation and introduction of vertical programs which remain outside the provincial public health system.[30]

4. Preventing the Emergence of Communicable Diseases

To prevent the outbreak of a disease, in line with the IHR 2005, Pakistan has introduced various laws, policies and regulations. However, it has been highlighted that Pakistan's capacities to prevent the outbreak of diseases is

[26] Jacob Hacker and others, 'Universal Health Care Is A National Security Issue' (*Just Security*, 2021) <https://www.justsecurity.org/69130/universal-health-care-is-a-national-security-issue/> accessed 11 January 2021.
[27] Ibid.
[28] Oona Hathaway (n 24).
[29] ibid.
[30] Shehla Abbas Zaidi and others, 'Health Systems Changes After Decentralization: Progress, Challenges and Dynamics in Pakistan' (2019) 4 BMJ Global Health. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6357909/#R19.

limited.[31] This is attributable to various reasons which include lack of implementation of a 'One Health' approach to the legal scheme which may integrate all facets of public health including livestock, vaccinations, food safety, drug prescription, health education, nutrition etc. This requires the State to introduce laws to tackle the prevalence of quackery, regulate prescription of drugs, and to ensure that the manufacture of substandard drugs is penalized.[32] An important aspect within the prevention of public health crises is vaccinations and immunizations. The Expanded Program on Immunizations in Pakistan is responsible for vaccinating and has established the Polio Eradication Program as well – which is a robust system aimed at tackling the spread of the polio virus in the Country. The EPI has been regularized through a PC-1 as a Department of the Ministry of National Health Services,[33] Regulation and Coordination which allows for State ownership of the program and can be used to deter criticism of over-reliance on donor funding for such programs in the State. The COVID-19 pandemic has also highlighted the importance of establishing State mechanisms through which dissemination of vaccinations is conducted and the close collaboration between EPI and the MoNHSRC in ensuring that this is achieved is evidence of the importance of building resilient and sustainable health systems.

Moreover, a significant aspect of the need for a healthcare system to prevent outbreaks of diseases is to establish a stringent biosafety and biosecurity framework. This requires regulation of laboratories and hospitals which in Pakistan has been largely overlooked due to the proliferation of private medical facilities. While Pakistan has introduced laws, rules, and policies at a federal and provincial level to protect public health and the environment from accidental exposure to harmful agents, biosecurity and biosafety concerns continue to pose a great risk to the healthcare system owing to lack of strict enforcement. Reports from Karachi reflect the urgency with which biosecurity and biosafety concerns must be dealt with. The city produces the biggest amount of medical waste which stems from unregulated growth and substandard conditions in laboratories, blood banks and other medical facilities.[34] A survey conducted in Karachi also exposes

[31] 'Joint External Evaluation of The Islamic Republic of Pakistan, Mission Report 27 April – 6 May 2016' (Apps.who.int) <https://apps.who.int/iris/bitstream/handle/10665/254614/WHO-WHE-CPI-2017.9-eng.pdf?sequence=1> accessed 2 April 2021.

[32] ibid

[33] 'About EPI – Expanded Program on Immunization, Pakistan' (Epi.gov.pk) <http://www.epi.gov.pk/about-epi/> accessed 2 April 2021.

[34] Azizullah Sharif, 'Violations of biosafety protocols in labs, health facilities observed' DAWN (9 January 2012) <https://www.dawn.com/news/686757/violations-of-biosafety-protocols-in-labs-health-facilities-observed>

the dire need to conduct awareness campaigns, and to ensure that laboratory staff follow biosafety measures. The survey found that out of 353 public and private sector hospitals and laboratories in Karachi, the number of professionals who received regular vaccinations to protect them against the risk of contracting diseases was zero. Moreover, 40% of the staff members recapped syringe needles after using them, and 36% discarded used syringes without cutting them. Additionally, 46% of staff members had never used personal protective equipment while handling class 2 pathogens.[35]

5. Detecting the Outbreak of Communicable Diseases

Recently, the emergence of the severe acute respiratory syndrome (SARS), the avian flu epidemic, swine flu, dengue and COVID-19 underline the importance of the role individual States can play in protecting public health through early detection and timely communication as well. The IHR 2005 and the global health security framework place great emphasis on the need to timely detect the outbreak of a disease and communicate it within the national health-care system, and to the WHO in case of a public health emergency of international concern. This ability to detect is based on the establishment of robust laboratory systems, surveillance and reporting mechanisms and ways to develop a strong epidemiological workforce.

The ability to detect the outbreak of communicable diseases in Pakistan remains very limited. While disease specific laboratories for polio, influenza and TB have been established and standard operating procedures have been set to transport specimens to national laboratories from district level facilities, it has been observed that Pakistan's ability to detect diseases is impeded due to a lack of a centralized system of surveillance where data can be collected, and information shared between the federal and provincial governments. The existing framework responsible for conducting surveillance is event-based and fragmented and with the exception of Khyber Pakhtunkhwa, legislation aiming to establish a system for documentation of disease specific data remains missing. It is important to note, that data collection has not been standardized as well which means that some provinces continue to collect data through written forms, whereas others have established disease-specific online portals for data collation and sharing.

This problem of coordination was highlighted during the COVID-19 pandemic as well wherein the greatest challenge was inter-provincial coordination

[35] ibid

pertaining to data collection and sharing of information. This lack of coordination was owed to lack of financial resources, limited capacity for data collation, absence of standard operating procedures for information sharing and a limited capacity within the health care sector to deal with an event of such a magnitude. It was initially observed that the MoNHSRC in pursuit of its regulatory function aimed to strengthen coordination, however this only became a reality after the creation of the National Coordination Committee (NCC) which was constituted pursuant to a decision of the National Security Committee.[36] The NCC established the National Command and Operation Centre (NCOC)[37] as its implementing body which was made responsible for conducting coordination between the provincial governments and the federation and giving advice to the NCC to make important policy decisions.

During the pandemic, the NCOC worked towards collating, analysing and processing information and implemented the 'Test, Track and Quarantine' Strategy aimed at establishing clear lines of communication between all tiers of government to ensure that policy decisions could be informed. The model adopted during the COVID-19 pandemic is an excellent case study for development of an integrated disease surveillance system at a federal level which allows information to be collected from district level to be fed into an over-arching system of data collection at the federal level. For the purposes of detection of outbreaks, it is essential for an approach to be taken which engages all tiers of government from the tehsil, union, district and provincial level to a federal one.[38] While disease specific integrated disease surveillance and response systems have been established in Punjab (Dengue) and Khyber Pakhtunkhwa (polio) these remain inadequate for the purposes of detecting a disease which could lead to a public health crisis. Additionally, the District Information Health Systems, previously known as the Health Management Information Systems, have also been established to manage data collection from basic health units, public laboratories, district health officers and director general health. However, while provincial level surveillance systems have been established, they fail to be entirely effective due to the absence of an integrated system at a federal level.

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[36] 'High-Level NCC Constituted to Help Curb Coronavirus' (*The Nation*, 2020). https://nation.com.pk/14-Mar-2020/high-level-ncc-constitutes-to-help-curb-coronavirus.

[37] National Command and Operation Centre' (*Ncoc.gov.pk, 2020*) https://ncoc.gov.pk/press-releases.php

[38] 'Inter-Provincial Coordination and Planning on Healthcare in Pakistan - Research Society Of International Law | RSIL' (*Research Society of International Law | RSIL*) <https://rsilpak.org/2020/inter-provincial-coordination-and-planning-on-healthcare-in-pakistan/> accessed 10 March 2021.

In 2005, the disease early warning system (DEWS) had been established to provide for preparedness measures in flood-affected populations. The DEWS was aimed at early detection of communicable diseases in areas that had been affected by floods and aimed at ensuring detection of signs of an epidemic by health care workers at an early stage to ensure effective responses.[39] However, while the system was effective and simple, it does not play the role of an over-arching system of disease surveillance as it was primarily focused on detecting priority diseases in flood-affected areas. Moreover, donor funded programs cannot be relied on to provide long-term solutions to significant public health issues due to which the State must explore the creation of an integrated disease surveillance system – the importance of which has been adequately highlighted during the COVID-19 pandemic as being an imperative step in making informed policy decisions.

6. Responding to a Public Health Crises

Finally, a State's healthcare system must be capable of adequately responding to public health crises as well. The ability to carry out effective response operations has been highlighted by the IHR 2005 and the global health security agenda as well. The Global Health Security Agenda aims to achieve critical health security impacts – including preparing for and responding to emerging health crises effectively and focusing on timely containment of diseases. Global experiences in the field of healthcare have shown that outbreaks can start and transmit globally, in very little time. The outbreak of the SARS virus in 2003 affected approximately 8100 people, killing more than 700 and reaching more than 2 dozen countries.[40] Similarly, the Ebola epidemic in 2014 affected 10 countries, killed more than 11,000 people and adversely impacted trade and travel as well. Recently, the COVID-19 pandemic has become a global phenomenon – one for which all States were not prepared.

Due to the ability of communicable disease to cause devastating results, it is imperative that States work towards developing systems through which they can prepare for and respond to health crises. Pakistan has a fairly adequate framework to prepare for and respond to natural disasters including floods and earthquakes

[39] 'Outbreak Surveillance and Response' (*Who.int*) <https://www.who.int/hac/crises/pak/pakistan_operational_guidance_flooding_august2010.pdf> accessed 10 March 2021.

[40] 'About Global Health Security | Division of Global Health Protection | Global Health | CDC' (*Cdc.gov*) <https://www.cdc.gov/globalhealth/healthprotection/ghs/about.html> accessed 10 March 2021.

which is primarily dealt with by the National Disaster Management Authority, the National Disaster Management Commission and the National Institute on Disaster Management. These entities have been established at a provincial and district level as well which are responsible for grass-root implementation of response strategies. Pakistan has fared well in external evaluations such as the Joint External Evaluation conducted by the WHO in terms of developing capacity to conduct emergency response operations, engaging security agencies to assist in health crises, carrying out medical countermeasures and deployment of personnel.

Within the Respond framework, a significant responsibility is held by district administrations to ensure preparedness for emergency situations as the first response is to be conducted at district level to ensure that delay in carrying out response operations does not lead to unnecessary loss of life. To this end, district disaster management plans have been developed which outline the role of district level and provincial level institutions, rescue and security agencies in responding to a natural disaster.

Conclusion

The greatest flaw adversely impacting the Respond framework for public health crises in Pakistan is that this preparedness and response system only applies to natural disasters and the synergies between disaster management and public healthcare have not been explored to provide standard operating procedures which apply to a public health crisis. While the NDMA was engaged within the COVID-19 pandemic to procure material such as personal protective equipment, medicines, ventilators etc. Pakistan's approach to responding to the pandemic was primarily reactionary and existing plans such as the National Epidemic and Pandemic Preparedness Plan 2014 which were developed to prepare for events such as COVID-19 had never been operationalized. Due to this, the National Action Plan for Coronavirus Disease had to be drafted to streamline response operations to the pandemic.

Nevertheless, in responding to the COVID-19 pandemic, Pakistan has also earned praise for its coordinated policy approaches especially through the mechanism of the NCOC. However, there is a need for institutionalizing such mechanisms and develop their structures in a way which accords with international health security metrics so that they develop the capacity to respond to multifaceted risks beyond communicable diseases like COVID-19.

Since devolution, challenges such as lack of institutional capacity, budgetary constraints, lack of an integrated disease surveillance system and absence of use of technology within health-related mechanisms have led to a fractured healthcare system – mired with political differences, lack of inter-provincial coordination and absence of political will. However, while much discussion has taken place on the inadequacies of the health care sector in Pakistan, the COVID-19 pandemic provides a clean opportunity to revamp the health care infrastructure. Notwithstanding the obligations under the IHR 2005, Pakistan must aim to achieve its international human rights obligations, targets under the Sustainable Development Goals etc. To this end, the COVID-19 model of surveillance, communication and informed decision making must be regularized and must be implemented in all provinces.

PAKISTAN'S STATE PRACTICE RELATING TO INTERNATIONAL LAW

Ayesha Malik and Ahsan Qazi[*]

Pakistan-India Relations

Treaty Compliance

Pakistan and India shared a list of nuclear installations and facilities with each other on January 1, 2020 as required under Article II of the Agreement on Prohibition of Attacks against Nuclear Installations and Facilities between Pakistan and India.[1] The agreement was signed on December 31, 1988 and entered into force in December 1990. The two countries have shared this information consecutively on the first day of the year since 1992.[2]

On January 1, 2020, India and Pakistan exchanged through diplomatic channels the lists of civilian prisoners and fishermen in their custody. Pakistan then released 20 Indian prisoners on January 6, 2020 who were then repatriated via Wagah border.[3] The prisoners were fishermen who had been released upon completion of their sentences.[4] India similarly released 20 fishermen on November 28 who had completed their terms in Indian jails.[5] This release and repatriation is in line with the 2008 agreement on consular access between the two countries which states under provision (vii) that "In special cases, which call for or require compassionate or humanitarian considerations, each side may

[*] Ms. Ayesha Malik is a Research Fellow at the Research Society of International Law (RSIL) and team-lead of the Conflict Law Centre (CLC), at RSIL, and Mr Ahsan Qazi works as a Consultant at RSIL in addition to being a faculty member at Themis School of Law, Karachi. He has represented Pakistan at the 60th Jessup White & Case International Rounds in Washington D.C.

[1] Agreement on the Prohibition of Attack Against Nuclear Installations and Facilities, signed on December 31, 1988 (Islamabad). Instruments of Ratification Exchanged: December 1990 (Entry into Force)

[2] Ministry of Foreign Affairs, Government of Pakistan, Annual Exchange of Nuclear Installations and Facilities List between Pakistan and India, January 1, 2020, available at: http://mofa.gov.pk/annual-exchange-of-nuclear-installations-and-facilities-list-between-pakistan-and-india-5/

[3] Ministry of Foreign Affairs, Government of Pakistan, Pakistan releases 20 Indian Prisoners (Fishermen), January 6, 2020, available at: http://mofa.gov.pk/pakistan-releases-20-indian-prisoners-fishermen/

[4] ibid

[5] Dawn, *20 fishermen released from Indian captivity reunite with families*, November 28, 2020, available at: https://www.dawn.com/news/1592775/20-fishermen-released-from-indian-captivity-reunite-with-families

exercise its discretion subject to its laws and regulation to allow early release and repatriation of persons."[6]

The Government of India declared two officials of the High Commission for Pakistan in New Delhi persona non grata on May 31, 2020 and required them to leave India within 24 hours. Pakistan condemned this action as a violation of the Vienna Convention on Diplomatic Relations and the norms of diplomatic conduct also stating that it was based on false and unsubstantiated charges.[7] Under Article 9(1) of the VCDR, the receiving state may at any time and without explanation, declare any member of a diplomatic mission *persona non grata* or not acceptable.[8] In such cases, the sending state is to either recall the individual in question or terminate their functions within the mission. Under Article 9(2), a refusal to comply with this declaration gives the receiving state the right to refuse recognition of the individual as a member of the mission.[9] These provisions were exercised extensively during the Cold War to remove suspected spies.[10] Today, it is most commonly used for espionage, suspected involvement in terrorist or subversive activities, and other criminal behaviour.[11]

Jammu and Kashmir

On January 16, 2020, at the request of Pakistan and through the support of China, the Security Council considered the situation in Jammu and Kashmir in a closed meeting attended by UN and UNMOGIP representatives.[12] Another closed meeting was held on August 6, 2020, the third in total since India's abrogation of Article 370 on August 5, 2019.[13] The spokesperson of China's Permanent Mission to the United Nations said on the Security Council's discussion on

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[6] Agreement on consular access between the Government of the Islamic Republic of Pakistan and the Government of the Republic of India. Islamabad, 21 May 2008. Entry into force: 21 May 2008 by signature, in accordance with its provisions

[7] Ministry of Foreign Affairs, Government of Pakistan, Pakistan condemns the Indian action of declaring two staff members of Pakistan High Commission as Persona Non Grata (PNG), May 31, 2020, available at: http://mofa.gov.pk/pakistan-condemns-the-indian-action-of-declaring-two-staff-members-of-pakistan-high-commission-as-persona-non-grata-png/

[8] Vienna Convention on Diplomatic Relations (VCDR), 18 April 1961, 500 UNTS 95, Art.9(1)

[9] Ibid Art.9(2)

[10] James Crawford, Brownlie's Principles of Public International Law (9th edn), (OUP, 2019) 492

[11] ibid

[12] Ministry of Foreign Affairs, Government of Pakistan, Foreign Minister's Remarks to the Media on Discussions on Jammu and Kashmir Dispute in UNSC, January 16, 2020, available at: http://mofa.gov.pk/foreign-ministers-remarks-to-the-media-on-discussions-on-jammu-and-kashmir-dispute-in-unsc/

[13] The Wire, *Kashmir: After China's Third Call for UNSC Meeting, India Rejects 'Interference'*, August 6, 2020, available at: https://thewire.in/diplomacy/china-unsc-kashmir-meeting-india-reject-internal-matters-interfernce

Kashmir that "China is committed to growing friendly relations with both countries and calls on the two countries to focus on national development, set store by peace and stability in South Asia, properly handle historical grievances, abandon the zero-sum thinking, avoid unilateral actions, resolve disputes peacefully through dialogue and consultation, and jointly uphold peace and stability of the region".[14]

On December 18, an UNMOGIP vehicle carrying two UN observers was targeted by an unidentified object on the Pakistan side of the Line of Control.[15] The observers were on their way to a village in Azad Jammu and Kashmir to meet the victims of ceasefire violations.[16] Pakistan wrote a letter to the UN Secretary General and the President of the Security Council stating India was responsible for the attack and urged them to initiate an investigation into the incident.[17] The letter also stated that Pakistan had credible information that the Indian government was planning to stage a 'false flag' attack which, if it were to happen, would result in Pakistan exercising its right to self-defence.[18] The letter also stated that the siege of Jammu and Kashmir had now lasted for over 500 days, it declared that India was intending to change the demographic structure of the territory, and it alleged that India had committed 3000 unprovoked ceasefire violations which resulted in 276 casualties.[19]

The Kulbushan Jadhav Case

In the Jadhav case, Pakistan invited India on July 8, 2020 to file a review and reconsideration petition to give effect to the Judgment of the International Court of Justice after Jadhav refused to do so.[20] This petition can be filed by Jadhav, a legally authorised representative, or a consular official of the Indian High Commission. Jadhav was also given the right to consular access for a second time on July 16, 2020 (the first was on September 2, 2019) and two consular officers

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[14] ibid

[15] Dawn, *UN confirms attack on its vehicle in Kashmir*, December 20, 2020, available at: https://www.dawn.com/news/1596767/un-confirms-attack-on-its-vehicle-in-kashmir

[16] ibid

[17] Ministry of Foreign Affairs, Government of Pakistan, Pakistan takes up the reprehensible attack on UNMOGIP Observers by India with the U.N., December 20, 2020, available at: http://mofa.gov.pk/pakistan-takes-up-the-reprehensible-attack-on-unmogip-observers-by-india-with-the-u-n/

[18] ibid

[19] ibid

[20] Ministry of Foreign Affairs, Government of Pakistan, Pakistan invited India to file review and reconsideration petition in Commander Kulbushan Jadhav Case, July 8, 2020, available at: http://mofa.gov.pk/pakistan-invited-india-to-file-review-and-reconsideration-petition-in-commander-kulbushan-jadhav-case/

of the Indian High Commission in Islamabad were given unimpeded and uninterrupted consular access to him.[21]

Afghan Peace Process

Pakistan has played a role in the Afghan peace process which culminated in the signing of a historic peace deal between the US and the Taliban on February 29, 2020 titled 'Agreement for Bringing Peace to Afghanistan'. Pakistan consistently supported direct negotiations between the U.S. and Taliban and facilitated the process.[22] The peace deal was described as a win-win for Pakistan as the US' concession vindicated Pakistan's peacemaker stance which has long supported a dialogue between the two sides from as early on as the invasion of Afghanistan in 2001. The salient features of the agreement which are relevant to Pakistan include the start of arrangements to withdraw sanctions imposed on Taliban functionaries by removing their names from reward and sanction lists and the launch of intra-Afghan negotiations to arrive at a negotiated settlement among Afghan parties. The first ever intra-Afghan talks between the Afghan government and the Taliban took place in Qatar in September 2020. It has also been acknowledged that Pakistan has had an 'important role' in facilitating the start of reconciliation talks between the two Afghan sides.

Pakistan issued orders in August 2020 enforcing UN sanctions on the Taliban to avoid being blacklisted by the Financial Action Task Force. The orders were seen as a move to pressure the Taliban into starting intra-Afghan negotiations and even include sanctions on the Taliban's chief peace negotiator Abdul Ghani Baradar. Whilst progress with intra-Afghanistan talks has been slow they have still continued despite delays and it seems that both sides are willing to abide by any agreements they may yield. As attention is likely to shift away from the Taliban after US withdrawal, it is anticipated that Pakistan's soft power, peace-brokering approach should also shift to one which supports the delisting of entities based in Pakistan and more transparent sanctioning procedures. In doing so, it will be able to remain an important stakeholder in peace talks and not have to sanction the negotiators at the FATF's behest.

On the day the agreement was signed, the Foreign Minister drew attention to Afghan refugees in Pakistan stating that there was a need to assist the Afghan

[21] Ministry of Foreign Affairs, Government of Pakistan, Pakistan provides second consular access to Commander Jadhav, July 16, 2020, available at: http://mofa.gov.pk/pakistan-provides-second-consular-access-to-commander-jadhav/

[22] Ministry of Foreign Affairs, Government of Pakistan, Press Release, February 21, 2020, available at: http://mofa.gov.pk/press-release-241/

government in creating an enabling environment for their return with dignity and honour.[23] The Pakistani state's policy has also over the years changed from a generously welcoming one towards refugees to one which is hostile and focused on one overarching goal; repatriation. This repatriation has been facilitated by UNHCR despite the fact that Afghanistan remains a state with a precarious security situation and some of the lowest socio-economic rankings in the world. It is hoped that any such 'solution' for the Afghan refugee crisis should come when there is a fundamental change of circumstances in Afghanistan and enough time has passed for this to solidify offering refugees a stable country to which to return and one in which they have opportunities.

Pakistan-Israel Ties

Pakistan also released a statement on January 29, 2020 after the Peace Plan for the Middle East was announced by the US.[24] The peace plan which was titled "Peace to Prosperity: A Vision to Improve the Lives of the Palestinian and Israeli People" was a proposal by the Trump administration to resolve the Israeli-Palestinian conflict. Trump promised that the plan will keep Jerusalem as Israel's capital, offers the opportunity for an independent Palestinian state, and recognises Israel's sovereignty over its settlements in the West Bank.[25] The deal was heavily criticised for being an "annexation smokescreen".[26] The Arab League also rejected the plan stating that it would not lead to a just peace and that its member states would not cooperate with the United States to execute the plan.[27] Pakistan's statement on the plan emphasises that it has consistently supported a two-state solution as enshrined in the relevant Security Council and General Assembly resolutions, which realises the right of Palestinians to self-determination. It called for the establishment of a viable and independent state of Palestine along pre-1967 borders.

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[23] Ministry of Foreign Affairs, Government of Pakistan, Pakistan welcomes signing of the U.S.-Taliban Peace Agreement, February 29, 2020, available at: http://mofa.gov.pk/pakistan-welcomes-signing-of-the-u-s-taliban-peace-agreement/

[24] Ministry of Foreign Affairs, Government of Pakistan, Peace Plan for the Middle East, January 29, 2020, available at: http://mofa.gov.pk/peace-plan-for-the-middle-east/

[25] BBC News, *Trump releases long-awaited Middle-East peace plan*, January 28, 2020, available at: https://www.bbc.com/news/world-middle-east-51288218

[26] J Street, *It's Not A Peace Plan, It's An Annexation Smokescreen*, January 29, 2020, available at: https://jstreet.org/its-not-a-peace-plan-its-an-annexation-smokescreen-trump-netanyahu/#.YFxgkV0zaLo

[27] Reuters, *Arab League rejects Trump's Middle East plan: communique*, February 1, 2020, https://www.reuters.com/article/us-israel-palestinians-arabs/arab-league-rejects-trumps-middle-east-plan-communique-idUSKBN1ZV3QV?

Following the agreement normalising relations between the UAE and Israel in August 2020, Pakistan released another statement on its ties with Israel. The Abraham Accord between the UAE and Israel promises to establish normal relations between the two countries, including business relations, tourism, direct flights, scientific cooperation, and full diplomatic ties at the ambassadorial level.[28] The accord also suspends Israeli plans to annex parts of the West Bank and, supposedly, provides an opportunity for Israel and the Palestinians to renew negotiations to end their conflict.[29] Pakistan released a statement reaffirming that its approach "will be guided by our evaluation of how Palestinians' rights and aspirations are upheld and how regional peace, security and stability are preserved."[30] On November 20, in response to speculations that Pakistan would also follow suit and recognise Israel, the Prime Minister reaffirmed that "unless a just settlement of the Palestine issue, satisfactory to the Palestinian people, is found, Pakistan cannot recognize Israel".[31]

The Nagorno-Karabakh Conflict

Heavy fighting broke out in September 2020 over the disputed Nagorno-Karabakh region in the Caucasus which is disputed by two former Soviet Republics, Armenia and Azerbaijan.[32] A ceasefire was brokered on October 26 by the US which did not end hostilities. A later, Russian-brokered ceasefire on November 10 culminated in a deal signed by Armenia, Azerbaijan and Russia to end the conflict.[33] The territory, whose population is majority Armenian, is considered to be a part of Azerbaijan and under the occupation and control of Armenia. After the peace deal, Armenia ceded territory back to Azerbaijan and 2,000 Russian peacekeepers were deployed to the region who will remain there for the next five years.[34]

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[28] Council on Foreign Relations, *What's Behind the New Israel-UAE Peace Deal?*, August 17, 2020, available at: https://www.cfr.org/in-brief/whats-behind-new-israel-uae-peace-deal
[29] ibid
[30] Ministry of Foreign Affairs, Government of Pakistan, Press Release, August 14, 2020, available at: http://mofa.gov.pk/press-release-325/
[31] Ministry of Foreign Affairs, Government of Pakistan, Recognition of Israel not under consideration, November 24, 2020, available at: http://mofa.gov.pk/recognition-of-israel-not-under-consideration/
[32] BBC News, *Nagorno-Karabakh Conflict: Armenia and Azerbaijan Agree US-Brokered Ceasefire*, October 25, 2020, available at: https://www.bbc.com/news/world-europe-54686284
[33] DW, *Armenia, Russia, Azerbaijan sign deal to end Karabakh war*, November 9, 2020, available at: https://www.dw.com/en/armenia-russia-azerbaijan-sign-deal-to-end-karabakh-war/a-55550069
[34] DW, *Armenia-Azerbaijan: Putin urges 'next steps' after peace*, January 11, 2021, available at: https://www.dw.com/en/armenia-azerbaijan-putin-urges-next-steps-after-peace/a-56194856

During the Nagorno-Karabakh conflict, Pakistan extended diplomatic, moral and political support to Azerbaijan stating that it supported Azerbaijan's right of self-defence against Armenian aggression and restoration of its territorial integrity over Armenian-occupied territories.[35] Pakistan also called for the implementation of UN Security Council resolutions and the withdrawal of Armenian forces from Azerbaijani territories.[36] Pakistan is one of the few countries in the world that do not recognise Armenia as a state.[37] The Armenian Prime Minister in an interview on October 15 referred to unsubstantiated reports that Pakistani special forces were fighting alongside the Azerbaijani army in the conflict with Armenia. Pakistan rejected these claims.[38]

Sanctions on Turkey

On December 14, the US imposed sanctions on Turkey under the Countering America's Adversaries Through Sanctions Act (CAATSA) over its deployment of a Russian-made missile defence system.[39] The US argues that the system is incompatible with NATO technology and a threat to the alliance.[40] US Secretary of State Mike Pompeo stated that "[t]he United States made clear to Turkey at the highest levels and on numerous occasions that its purchase of the S-400 system would endanger the security of US military technology and personnel and provide substantial funds to Russia's defence sector, as well as Russian access to the Turkish armed forces and defence industry."[41] Turkey meanwhile rejoindered this calling the decision unfair, asking the US to reconsider, and stating it was ready to address the issue through dialogue and diplomacy.[42] It is possible that this may lead to Turkey's exit from NATO.[43]

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[35] Ministry of Foreign Affairs, Government of Pakistan, Pakistan rejects baseless Armenian Statement, October 17, 2020, available at: http://mofa.gov.pk/pakistan-rejects-baseless-armenian-statement/ and Ministry of Foreign Affairs, Government of Pakistan,Foreign Minister's Telephone Call with the Foreign Minister of Azerbaijan, October 20, 2020, available at: http://mofa.gov.pk/foreign-ministers-telephone-call-with-the-foreign-minister-of-azerbaijan/

[36] ibid

[37] Express Tribune, *Why Is Pakistan the Only Country That Does Not Recognise Armenia?*, July 21, 2020, available at: https://tribune.com.pk/article/97102/why-is-pakistan-the-only-country-that-does-not-recognise-armenia

[38] Supra (n 26)

[39] BBC News, *US imposes sanctions on Turkey over Russia weapons*, December 14, 2020, available at: https://www.bbc.com/news/world-us-canada-55311099

[40] ibid

[41] ibid

[42] ibid

[43] Al Jazeera, *What do US sanctions on Turkey mean for NATO?* December 14, 2020, available at: https://www.aljazeera.com/news/2020/12/17/what-do-us-sanctions-on-turkey-mean-for-nato

Pakistan released a statement highlighting its concern at the imposition of sanctions on Turkey by the United States.[44] It stated that the country remains opposed to the use of unilateral coercive measures against any country in principle, emphasised its support for Turkey stating it would stand by it as it works to achieve its goals of national security, peace and prosperity, and noted that the solution to all issues lies in dialogue, diplomacy and mutual understanding.[45]

Pakistan's Participation in International Forums

Pakistan has been relatively active in international forums in 2020. It was elected as the President of the UN's Economic and Social Council for the year of 2020-2021, the sixth time Pakistan has been elected as ECOSOC President.[46] Pakistan's representative, Ambassador Akram, stated that the Presidency's objectives would be to support UN Member States in facing the challenges of coronavirus, the realisation of the UN's Sustainable Development Goals and the existential threat of climate change.[47] Pakistan was also then elected to ECOSOC's Committee for Programme and Coordination (CPC) for a three-year term from 2021-2023.[48] The CPC reviews UN programmes and makes recommendations to the UN Secretary General on translating legislative mandates into programmatic activities. Pakistan was also re-elected onto the Human Rights Council for a period of three years from 2021, the fifth time it has served on the Council since it was established in 2006.[49] Pakistan states that it will "remain actively engaged with the Council as well as its related processes to continue to highlight the plight of Kashmiris and other oppressed people all over the world."

Pakistan also co-sponsored with the Philippines a resolution at the United Nations General Assembly on the "Promotion of interreligious and intercultural

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[44] Ministry of Foreign Affairs, Government of Pakistan, Unilateral sanctions on Turkey, December 16, 2020, available at: http://mofa.gov.pk/unilateral-sanctions-on-turkey/
[45] ibid
[46] Ministry of Foreign Affairs, Government of Pakistan, Pakistan Elected as President of the Economic and Social Council, July 23, 2020, available at: http://mofa.gov.pk/pakistan-elected-as-president-of-the-economic-and-social-council/
[47] ibid
[48] Ministry of Foreign Affairs, Government of Pakistan, Pakistan wins election to the Committee for Programme and Coordination (CPC) at the United Nations, September 17, 2020, available at: http://mofa.gov.pk/pakistan-wins-election-to-the-committee-for-programme-and-coordination-cpc-at-the-united-nations/
[49] Ministry of Foreign Affairs, Government of Pakistan, Pakistan wins election to the UN Human Rights Council, October 13, 2020, available at: http://mofa.gov.pk/pakistan-wins-election-to-the-un-human-rights-council/

dialogue".[50] The resolution emphasizes the importance of realising the UN Sustainable Development Agenda 2030, especially the promotion of peaceful and inclusive societies. Pakistan also published a booklet entitled "Pakistan's Nuclear Security Regime" which was distributed to participants of the third International Conference on Nuclear Security (ICONS) organized by the International Atomic Energy Agency (IAEA) in Vienna on 10-14 February 2020.[51] This step was taken to "further strengthen nuclear security and to demonstrate the high-level attention that nuclear security continues to receive in Pakistan".[52]

Domestic Court Decisions

There are three decisions by Pakistan's domestic courts in 2020 which deal with international law:

Khadim Hussain v. Secretary, Ministry of Human Rights, Islamabad & others[53]

This case invoked the constitutional jurisdiction of the High Court to seek redressal of below-par living conditions and treatment of prisoners inside prisons. The prisoners had complained about alleged violations of their fundamental rights during their incarceration. The Islamabad High Court recalled the fact that the treatment of prisoners is not in line Pakistan's international obligations stating that:

> *"3. This Court was informed by the officials who had initially appeared on behalf of the Ministry of Human Rights, Government of Pakistan that various international treaties, conventions and other instruments have been ratified, setting out obligations required to be fulfilled by the State of Pakistan. It was also informed that the prevailing conditions in the prisons were not in conformity with the minimum standards set out in the ratified international conventions and treaties."*

The Court also noted that a commission headed by the Federal Minister of Human Rights had been constituted to investigate and submit a report regarding the human rights violations of incarcerated petitioners as well as other prisoners and

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[50] Ministry of Foreign Affairs, Government of Pakistan, United Nations General Assembly adopts Pakistan-led resolution on "Promotion of interreligious and intercultural dialogue", December 3, 2020 <http://mofa.gov.pk/united-nations-general-assembly-adopts-pakistan-led-resolution-on-promotion-of-interreligious-and-intercultural-dialogue/> accessed 20 May 2021.

[51] Ministry of Foreign Affairs, Government of Pakistan, Press Release, February 10, 2020 http://mofa.gov.pk/press-release-237/ > accessed 20 May 2021.

[52] Ibid.

[53] (PLD 2020 Islamabad 268), Athar Minallah, CJ.

their treatment, with regard to Pakistan's obligations under the ratified conventions and treaties. The Court highlighted that the final report of the commission was to be an 'integral' part of the judgement. The Court then noted the specific international treaties under which Pakistan is to ensure fair treatment of Prisoners:

> *"10. The Government of Pakistan has ratified seven crucial conventions having relevance to the rights of prisoners and which are as follows.-*
>
> *i. International Convention on the Elimination of All Forms of Racial Discrimination.*
>
> *ii. Convention on the Rights of the Child.*
>
> *iii. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.*
>
> *iv. International Covenant on Civil and Political Rights.*
>
> *v. International Covenant on Economic Social and Cultural Rights.*
>
> *vi. Convention on the Elimination of All Forms of Discrimination against Women.*
>
> *vii. Convention on the Rights of Persons with Disabilities."*
>
> *"11. The preamble of the International Covenant on Civil and Political Rights recognizes that the rights described therein derive from the inherent dignity of the human person while Article 10 (3) explicitly provides that the object of incarceration of a prisoner is reformation and rehabilitation. Moreover, it makes it an obligation of the State to ensure that juvenile offenders are segregated from adults and provided with appropriate treatment according to their age and legal status. The United Nations Standard Minimum Rules for the Treatment of Prisoners was adopted in 1957 and later amended in 2016 in recognition of the great struggle of the South African legend, Nelson Mandela, who had spent 27 years in incarceration. The said rules were adopted as the "Nelson Mandela Rules". Rule 1 describes that all prisoners shall be treated with respect due to their inherent dignity and value as human beings and that no prisoner shall be subjected to and all prisoners shall be protected from torture and other cruel, inhuman or degrading treatment or punishment for which no circumstances whatsoever may be invoked as a justification."*

"12. The august Supreme Court in the case titled "Human Rights case No.29388-K of 2013" [PLD 2014 SC 305] has observed and held in the context of forced disappearance as follows:

> *"It is pertinent to note that Pakistan has also not ratified this Convention. The Supreme Court of Nepal applied the principles of the 2006 Convention in light of the right to life guaranteed in the Interim Constitution of Nepal, 2007. Our Constitution at Article 9 lays down the right to life which has received an expansive interpretation from this Court. Moreover, Article 10 provides direct protection from enforced disappearances. Thus the crime against humanity* [sic] *of enforced disappearances is clearly violative of the Constitution of Pakistan. Therefore, this Court can also apply the principles enshrined in the 2006 Convention in order to achieve the ends of justice."*

"14. It is, therefore, settled law that a ratified convention or treaty can be relied upon as long as it is not in conflict with the law enacted in Pakistan. However, in the case in hand, the provisions of the aforementioned, rather than being in conflict are in conformity with the fundamental rights guaranteed under the Constitution. The fundamental rights under Articles 9 and 14 in fact contemplate the obligations of the State under the aforementioned ratified conventions."

The Court also relied on the interpretation of the CESCR to determine the scope of the right to 'health' of the prisoners stating that:

"18. The United Nations Committee on Economic, Social and Cultural Rights, which monitors States' obligations under the International Economic, Social and Cultural Rights has stated that 'health is a fundamental human right indispensible from exercising of other human rights'. The International Covenant on Civil and Political Rights provides in Article 6(1) that every human being has the inherent right to life and that this right shall be protected by the law."

In conclusion, the Court declared that the conditions of the prisoners are in contravention to Pakistan's international obligations:

"27. a) It is declared that overcrowding of prisons, failure to segregate prisoners in accordance with the provisions of the Jail Manual, inhuman and degrading treatment, denial of prompt and timely health assistance, denial of access to proper legal advice and courts, is unconstitutional and a violation

of the commitments of the State of Pakistan under the ratified conventions and the constitutionally guaranteed rights.

(b) The Federal Government is directed to take immediate steps, pursuant to its jurisdiction vested under item 13 of Part II read with items 3 and 32 of Part I of the Federal Legislative List under the Fourth Schedule of the Constitution, to ensure that prisoners incarcerated in the prisons across Pakistan are dealt with and treated in conformity with the obligations of the State of Pakistan pursuant to ratification of the conventions."

<u>Dr. Hasan Fatima Jaffery v. Royal Saudi Consulate Karachi</u>[54]

This case concerned a monetary claim arising out of a tenancy dispute between Dr. Hasan (plaintiff) and the Saudi Consulate (respondent). The plaintiffs had leased his premises to the Saudi Consulate, and alleged that the Saudi Consulate had defaulted in paying rent and utility bills and had also caused damage to the premises. In contrast, the Saudi Consulate claimed that they enjoyed diplomatic immunity and, therefore, the claim of the plaintiffs was barred as per Article 43 of the Diplomatic and Consular Privileges Act, 1972. In response, the plaintiffs claimed that such immunity cannot be extended to commercial transactions as set out in Sections 5 and 7 of the State Immunity Ordinance, 1981 which read:

"5. Commercial transactions and contracts to be performed in Pakistan.

(1) A State is not immune as respects proceedings relating to,---

(a) a commercial transaction entered into by the State; or

(b) an obligation of the State which by virtue of a contract, 7 which may or may not be a commercial transaction, falls to be performed wholly or partly in Pakistan.

(2) Sub-section (1) does not apply to a contract of employment a between a State and an individual or if the parties to the dispute are States or have otherwise agreed in writing; and clause (b) of that sub-section does not apply if the contract, not being a commercial transaction, was made in the territory of the State concerned and the obligation in question is governed by its administrative law.

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[54] (PLD 2020 Sindh 352) Muhammad Faisal Kamal Alam, J

(3) In this section "commercial transaction" means___

(a) any contract for the supply of goods or services;

(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and

(c) any other transaction or activity, whether of a commercial, industrial, financial, professional or other similar character, into which a State enters or in which it engages otherwise than in the exercise of its sovereign authority."

"7. Ownership, possession and use of property. (1) A State is not immune as respects proceedings relating to,--

(a) any interest of the State in, or its possession or use of, immovable property in Pakistan; or

(b) any obligation of the State arising out of its interest in, or its possession or use of, any such property.

(2) A State is not immune as respects proceedings relating to any interest of the State in movable or immovable property, being an interest arising by way of succession, gift or bona vacantia.

(3) The fact that a State has or claims an interest in any property shall not preclude any Court from exercising in respect of such property any Jurisdiction relating to the estates of deceased persons or persons of unsound mind or to insolvency, the winding up of companies or the administration of trusts.

(4) A Court may entertain proceedings against a person other than a State notwithstanding that the proceedings relate to property,---

(a) which is in the possession of a State; or

(b) in which a State claims an interest,

if the State would not have been immune had the proceedings been brought against it or, in a case referred to in clause (b) if the claim is neither admitted nor supported by prima facie evidence."

The Court held that:

> *"10. With the passage of time, the principle governing immunity has undergone a change. National Courts in different jurisdictions, specially where there exists constitutional dispensation, have generally narrowed down the scope of immunity, whether constitutional, diplomatic or any other type of immunity. One of the reasons for adopting such view, while interpreting the law or clauses relating to immunity is that the concept of immunity is to be balanced with the accountability and those rights guaranteed as fundamental and human rights. The learned Division Bench in the above High Court Appeal has held that to the transaction in question the Diplomatic Immunity is not extended to, but at the same time has observed that an issue with regard to maintainability of the suit should be decided first after recording the evidence. Admittedly, the Plaintiffs and Defendant No.1 had a relationship of landlord and tenant in respect of the suit property. The main claim of Plaintiffs is that the tenancy continued after 31.03.2000 when Defendant No.2 being a staff member of Defendant No.1 shifted in the suit premises, whereas, the main defence of Defendant No.1 is that the tenancy came to an end on 31.03.2000 and thereafter the relationship ceased to exist. The claim of Plaintiffs has arisen out of certain obligations directly relating to the Lease / Tenancy Agreement.* ***Such nature of claim and transaction squarely falls within the exceptional clauses of Sections 5 and 7 of the above referred Immunity Law."***

However, it may be added that the reasoning of the Court was flawed in this case as proceedings arising out of ownership, possession or use of property where such property is being used for diplomatic purposes are not covered under Section 7 of the State Immunity Ordinance.

EFU General Insurance Ltd., vs. M/s. Emirates Airline / Emirates Sky Cargo and Others[55]

This case concerned an attack which took place on June 8, 2014 when 10 militants disguised as security forces attacked the cargo terminal at Jinnah International Airport, Karachi. The attack lasted for six hours and involved gunmen firing automatic guns and using hand grenades until the army regained control of the terminal. A total of 36 people were killed, and the Tehrik-i-Taliban Pakistan (TTP) claimed responsibility for the attack. In 2016, a number of cases were filed

[55] Sindh High Court 2020 and see generally RSIL, Non-International Armed Conflicts in Pakistan and the Recent Judgment by the Sindh High Court, August 28, 2020, available at: https://rsilpak.org/2020/non-international-armed-conflicts-in-pakistan-and-the-recent-judgment-by-the-sindh-high-court/

by insurance companies claiming compensation against airline carriers for destroyed cargo during the attack. Under Rule 18(2)(c) of the Carriage by Air Act 2012, airline carriers are not liable for destroyed cargo if it has resulted from an act of war or armed conflict. The airline carriers argued that they were exempt from liability because the attack constituted an armed conflict. The court held that Pakistan was involved in a non-international armed conflict against the TTP at the time of the attack and that, therefore, airline carriers were precluded from liability.

The Sindh High Court ruled that the attack at the Karachi Airport was not an isolated act of terrorism, but rather a concerted incident within the context of a non-international armed conflict, or a hybrid of a terrorist attack and armed conflict i.e., where recurring acts of violence further the defined objectives of a proscribed organization translates into a non-international armed conflict. As a result, the airline carriers were not liable to pay compensation. The court acknowledged that acts of terrorism are distinguished from the definition of an armed conflict and stated that most actions against terrorist groups are not part of an armed conflict. The counsels before the court had rather alarmingly at one point referred to dictionary definitions for the terms 'terrorism', 'armed', and 'conflict'. However, the court later did rely on secondary source material for the definitions of an armed conflict. The judgment does not, disappointingly, refer to the *Tadić* case but rather to an ICRC report which provides the criteria mentioned above for the existence of a NIAC. It held that the attack was committed by an organised group which had engaged in a series of hostilities spread over many years, therefore, the criteria stand fulfilled. The court also ended the judgment with the rather abstract conclusion that the country was in a state of war with terrorist militias.

It is unfortunate that no adequate analysis of the existence of a non-international armed conflict under the *Tadić* criteria was undertaken. Instead, the court appears to place much importance on the fact that the TTP is a proscribed terrorist organisation. This ignores the fact that a group's designation as 'terrorist' under the framework applicable to terrorism does not factor into the IHL qualification for a NIAC. While TTP's ability to sustain and mount coordinated operations in Pakistan meets the ICTY's criteria of the degree of organisation required from a non-state armed group, the requirement that the hostility must attain a minimum level of intensity remains unfulfilled. The judgment relies on the Supreme Court's decision in the *District Bar Association vs. Federation of Pakistan*, 2015 and instances such as the attack on the Army Public School in Peshawar in December

2014 to fulfil the requirement of intensity of violence. However, these are all acts that took place after the attack on Karachi Airport and so cannot be used to satisfy the intensity requirement retroactively.

The judgement also relies on the *Abella Case* to establish the existence of a non-international armed conflict. In that case, 42 armed persons attacked a military barracks at La Tablada, Buenos Aires on January 23, 1989 which was followed by intense hostilities between the attackers and the Argentine military in which 29 people died. According to the Inter-American Commission on Human Rights, the attack could not be characterized as a situation of internal disturbance given the conflict was a direct confrontation between non-state actors and government armed forces, it targeted a military objective, and the fact that the armed attack on the base was diligently planned, coordinated and executed. The Commission held that even though the violent attack lasted for only 30 hours, it was of such intensity that it triggered the application of Common Article 3.[56] However, there is a significant distinction to be made between the attack on La Tablada military base and Karachi Airport as the attack was against a civilian airport rather than a military base and only lasted for six hours. While the Sindh High Court attempted to grapple with these issues the judgment rendered falls short in adequately clarifying the law and its application in this particular case.

[56] 'Inter-American Commission on Human Rights, Tablada' (*Casebook.icrc.org*). <https://casebook.icrc.org/case-study/inter-american-commission-human-rights-tablada> accessed 20 May 2021.

BOOK REVIEW

No More War: How the West Violates International Law by Using 'Humanitarian' Intervention to Advance Economic and Strategic Interests by Dan Kovalik

Ayesha Malik[*]

Dan Kovalik's book[1] compellingly argues against 'humanitarian' intervention contending that it allows the West to enforce human rights through the scourge of war. The book is critical of the United States' role in purveying violence around the world as it purports to stop or prevent human rights problems. The author believes instead that lofty reasons are ascribed to the real motive of controlling resources. As a recent addition to a long list of books which do the same, Kovalik's is a valuable inclusion in that it analyses Western interventions through the lens of neoliberalism. It premises its critique on the fact that in a capitalist society, peace is impossible, rendering all states as either predator or prey. This is a useful basis as it contextualises the argument within the broader spectrum of a world much changed by globalisation and a liberal pursuit of free markets.

No More War analyses the West's interventionist thrust through examples where this has led to greater harm than that it is supposed to prevent; namely in Syria, Libya, and Iraq. These wars have all had something in common; a military which continues to peddle endless wars through a media which is wedded to US interventionism. As such, Kovalik analyses Trump's legacy as someone who correctly read the American public as having a deep distaste for forever wars. There was a fear that he would abandon the post-war imperial consensus when in actual fact he signed the biggest weapons deal with Saudi Arabia, with American war merchants growing rich on the war in Yemen. The military industrial complex being as powerful as it is and given the vastness of America's armed interventions abroad; he neatly summarises the US' role in the phrase "the United States is not on the wrong side, it **is** the wrong side".

The book's analysis of NATO's intervention in Libya in 2011 is a fascinating, if somewhat depressing, read. Kovalik notes that the Security Council Resolution 1973 authorised NATO to enforce a no-fly zone over Libya to protect civilians.

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[*] Ms. Ayesha Malik is a Research Fellow at the Research Society of International Law (RSIL) and team-lead of the Conflict Law Centre (CLC), at RSIL.

[1] Kovalik, Dan. *No More War: How the West Violates International Law by Using 'Humanitarian' Intervention to Advance Economic and Strategic Interests*. Hot Books, 2020. 376 pages. ISBN-13: 978-1510755291.

However, it did not authorise the full-scale invasion that was carried out and quickly became aimed at regime change. He argues that NATO's operation, while grounded on a legal basis, became illegal. Clinton's emails showed that her team had already recognised that any humanitarian problems in Benghazi had passed by the time it was bombed. As such, the intervention created more human rights issues than it solved, particularly that of slavery which was brought back to the country after NATO left. In Libya, like in Iraq, the US devastated the country, created a demand for infrastructure projects and then required the country to pay for the projects out of its own oil revenues. Kovalik humorously and astutely points out that this is not even vulture capitalism, as vultures feed off carrion that is already dead. Indeed, since 2001, the US has spent 5.9 trillion USD waging war in Iraq, Afghanistan, Syria and Pakistan. War is lucrative for some.

Some of the blame for Libya, he argues, lies at the feet of feminist war hawks such as Hilary Clinton and Samantha power who advocated for Libyan human rights as a just reason for intervention. Moreover, Kovalik is also very critical of human rights organisations such as Amnesty International which applauded NATO for making significant efforts to minimise the risk of civilian casualties when NATO had actually deliberately targeted civilians and civilian infrastructure. He points out that human rights organisations often become apologist shills for Western imperialism with neither Human Rights Watch nor Amnesty International ever taking a stance on whether the Iraq War was illegal. These organisations' stance on human rights seems to be selective.

No More War also discusses the issue of Palestine, a situation which Kovalik states that a case for humanitarian intervention could potentially legitimately be made in favour of, but never will. He notes that Gaza will likely become unliveable in the next few years asserting in the context of Israeli settlements that "for the past fifty years, the international community has been playing checkers while Israel plays chess". UN Secretary General Guterres even proposed sending a military or police force to Gaza and the West Bank to protect the Palestinians from Israel's intensifying predations and especially the Israeli security forces' targeting of civilians, particularly children. However, he concludes that humanitarian intervention for Palestinians will never happen.

Kovalik is a scholar who is well primed to write about Western interventionism having already authored critically acclaimed books on US foreign policy titled *The Plot to Scapegoat Russia*, *The Plot to Attack Iran*, *The Plot to Control the World*, and *The Plot to Overthrow Venezuela.* He is also a labour and human rights lawyer who has represented plaintiffs in cases arising out of egregious

human rights abuses in Colombia. His illustrious career is also rooted in experience, as he states that after travelling to Nicaragua in 1987, and seeing U.S. intervention up close, he has been "against U.S. intervention in other countries and against the process of vilifying other countries in order to justify such intervention". This belief prompted his first book and the many that came after.

Few scholars are able to elaborate so captivatingly on complex issues of foreign policy as Kovalik. The book itself is a must-read for anyone wanting a critical, cogent analysis of Western interventionism. In my experience, few scholars have adequately demonstrated the links between neoliberalism and human rights abuses in the guise of humanitarian intervention abroad. Despite a few minor errors (e.g., some confusion as to whether armed combatants can be summarily executed under the Geneva Conventions - they can under the principle of distinction even though Kovalik argues they cannot) his main argument is sound, well-researched and powerfully argued. The examples he gives, and his conversational writing style makes the book a heavy but easy read and one which I, for one, will definitely be assigning to my students.

Although *No More War* is a critical look at Western foreign policy and a takedown of the conventional wisdom as it relates to human rights, liberal intervention, and humane reasons for war, Kovalik is, however, hopeful throughout the book. There is a way for the US which is the arsonist of the world pretending to be a firefighter to be held to account. This may be through a revival of emphasis on UN Charter provisions which require states to resolve issues or differences peacefully which have fallen into disuse. Or a push for the American public to reform its governments' policies. He is optimistic that a radical shift of values is possible in which we change the conditions of today. That optimism is clear throughout the book and is a welcome relief from its otherwise enlighteningly critical contents.

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