

INTERNATIONAL LAW BENCHBOOK FOR PAKISTAN

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I. PREFACE

The following Benchbook demonstrates the nature of the engagement of Pakistan's domestic courts with public international law. The primary audience for this document is the superior judiciary, including members of the special courts (i.e. Anti-Terrorism Court). Though the contents of the Benchbook are intended to be informative to all members of the judiciary, the superior judiciary is considered the primary audience because it exercises the most expansive jurisdiction over those issues that involve questions of international law.

The first section of the Benchbook encompasses an introduction to basic principles of public international law. Public international law is distinguished from private international law, which will not be considered in this book. The introduction includes an analysis of sources of international law, both primary and secondary.

The Benchbook then addresses the concept of the rule of law and the incorporation of international law within the domestic rule of law. This is followed by an examination of the role of the domestic judiciary with respect to international law. The Benchbook then examines the manner in which international law is incorporated in Pakistan's domestic law. This includes through legislative and judicial measures, including in relation to a conflict between domestic and international law. Also addressed is the value of understanding and interpreting the substance of an international treaty, particularly one to which Pakistan is a party. Finally, examples of the use of international law in Pakistan's domestic jurisprudence and the manner and method by which select other states incorporate domestic law is provided in the annexes.

To maintain a user-friendly approach, the Benchbook is written in an outline format similar to the Benchbook on International Law written by the American Society of International Law.¹ It includes in its conclusion case law examples from Pakistan's superior courts. These cases reflect international law issues ranging from human rights to the use of force to access to justice and thus demonstrate the significant depth and breadth of domestic issues that relate to international law.

¹ Diane Marie Amann, *Benchbook on International Law*, Am. Soc. of Intl. Law (2014) available at: https://www.asil.org/sites/default/files/benchbook/ASIL_Benchbook_Complete.pdf [hereinafter ASIL Benchbook].

I. INTRODUCTION TO BASIC PRINCIPLES OF INTERNATIONAL LAW

A. International Law Defined

International law as it is used in this Benchbook refers specifically to public international law. Public international law is the set of legal rules that govern international relations between public bodies that include states (i.e. Pakistan) and international organizations (i.e. the United Nations).² The narrowest understanding of international law thus reflects a set of obligations between and upon states.³ These obligations, by and large, are the direct result of consent by states through conventions, treaties, etc.

B. Sources of International Law

The general sources of international law are identified in Article 38 of the Statute of the International Court of Justice (ICJ), the primary judicial body within the United Nations system. They include:

- 1) International conventions recognized between states
Treaties are binding upon those states that have either accepted the obligations through ratification, the state parties, or to the extent they represent customary international law. Examples of international conventions include the International Covenant on Civil and Political Rights (ICCPR) and the four Geneva Conventions of 1949.

In relation to treaties, ratification or accession represents a state's acceptance of a treaty's binding obligations. The common term for states that ratify or accede to conventions is "state parties." Signature by a state of a treaty does not make the treaty binding upon the state and thus states do not become state parties. Rather, signature signals an intent to observe the treaty's provisions domestically, which may lead to eventual ratification. Pakistan, for example, is a signatory to the 1977 Protocols Additional to the Geneva Conventions.

- 2) Customary law derived from the general accepted practice of States
Customary law is not codified per se. Rules of customary international law are derived from a combination of widespread and consistent state practice and "opinio juris," a belief in the existence of a legal obligation⁴

Peremptory norms or jus cogens are principles of customary international

2 Public International Law, EUROPEAN COMMISSION, available at: http://ec.europa.eu/justice/glossary/public-international-law_en.htm.

3 ASIL Benchbook, supra note 1 at LA-1.

4 Christopher Greenwood, Sources of International Law: An Introduction, UNITED NATIONS, available at: http://legal.un.org/avl/pdf/ls/greenwood_outline.pdf.

law that are absolute and binding. Not all customary international law rises to this level, but all peremptory norms are considered customary international law. These norms include prohibitions on genocide, slavery and torture and may not be derogated from under any circumstances.

- 3) General principles of law recognized by civilized nations
These principles are derived from concepts commonly present in domestic law systems.
- 4) Judicial decisions
The decisions of the ICJ are binding only upon the parties to the case to the extent of the applicability of the case itself.⁵ The ICJ (along with several international tribunals) nevertheless frequently references previous ICJ decisions in decisions.⁶ It is also important to note that judicial decisions as sources of international law in the ICJ Statute are not limited to international courts (though international court decisions have greater authority).⁷ Domestic court decisions represent the practice of a state, providing evidence for the development of customary international law.⁸
- 5) Scholarly writings of the “most highly qualified publicists”
Sources 1 through 3 may be considered binding or “hard” law, while judicial decisions and scholarly writings, though influential, are considered non-binding or “soft” law.

The sources of international law are not limited to those identified in Article 38 of the ICJ statute. Other non-binding sources include, but are not limited to: United Nations General Assembly (UNGA) resolutions (especially those that contribute to the treaty-making process); the position of states within the United Nations system; and international law studies produced by the International Law Commission for the UNGA.⁹

C. Branches of International Law

International human rights law and international humanitarian law are complementary branches of public international law. While human rights law generally applies at all times, including during periods of armed conflict, humanitarian law applies only in situations of armed conflict and/or occupation. Both human rights and humanitarian law provide protection to

5 Id. at ¶ 5.

6 Id.

7 Id.

8 Id.

9 Id. at ¶ 7.

the lives, health and dignity of individuals. This is why, while very different in formulation, the basis of some of their respective rules is similar.

Human Rights Law:

Human rights are rights inherent to all human beings. Human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.¹⁰

Humanitarian Law:

Known as the law of armed conflict, humanitarian law is a set of rules designed to limit the effects of armed conflict. It protects persons who are not or are no longer participating in hostilities and restricts means and methods of warfare. Humanitarian law does not regulate whether a State may actually use force; this is governed by an important, but distinct, part of international law set out in the United Nations Charter. It also does not cover internal tensions or disturbances such as isolated acts of violence. The law applies only once a conflict has begun, and then equally to all sides regardless of who started the fighting.¹¹

The ICJ identified the relationship between these two branches of law in its case, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, as follows:

*As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law¹²*

Human rights law applies continuously (including during armed conflict as previously mentioned), but certain rules may be derogated from in situations of public emergency threatening the life of a nation. This branch of law also binds state parties to the treaties and not individuals, groups, provinces, etc. beyond the state level.

10 "WHAT ARE HUMAN RIGHTS?" OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, available at: <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx>.

11 International Committee of the Red Cross, *What is International Humanitarian Law*, ADVISORY SERVICE ON INT'L HUMANITARIAN LAW, available at: https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf.

12 *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004.

Humanitarian law on the other hand only applies during an armed conflict and there is no permitted derogation. Humanitarian law binds parties to the conflict, which may be states or non-state actors. A number of factors must be taken into account before characterizing a situation of armed conflict, subject to the rules of IHL. An armed conflict may either be “international” (between two or more states) or “non-international” (between government authorities and organized armed groups or between such groups within a State). There can be instances of international and non-international armed conflicts simultaneously applying in a situation.

International Armed Conflict:

Under humanitarian law, an international armed conflict (IAC) exists whenever there is recourse to armed force between two or more States. The threshold for determining the existence of an IAC is therefore fairly low, and factors such as duration and intensity are generally not considered to enter the equation. For instance, the mere capture of a soldier or minor skirmishes between the armed forces of two or more States may spark off an international armed conflict and lead to the applicability of IHL, insofar as such acts may be taken as evidence of genuine belligerent intent. In this context, it is important to bear in mind that an armed conflict can arise where a State uses unilateral force against another State even if the latter does not or cannot respond with military means. The attacking State's resort to force need not actually be directed against the armed forces of another State. IACs are fought between States. The government is only one of the constitutive elements of a State, while the territory and the population are others. It is the resort to force against the territory, infrastructure or persons in the State that determines the existence of an IAC and therefore triggers the applicability of IHL.¹³

Non-International Armed Conflict:

A NIAC is an armed conflict in which hostilities take place between the armed forces of a State and organized non-State armed groups, or between such groups. For hostilities to be considered an NIAC, they must reach a certain level of intensity and the groups involved must be sufficiently organized.

13 International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 8 (2015), available at: <https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts>.

D. Relevant International Law Instruments

Human Rights Law Treaties and Conventions:

INSTRUMENT NAME	STATUS IN PAKISTAN
Universal Declaration of Human Rights (1948)	Widely accepted as customary international law
Convention on the Elimination of All Forms of Racial Discrimination (1965)	Ratification (1966)
International Covenant on Civil and Political Rights (1966)	Ratification (2010)
International Covenant on Economic, Social and Cultural Rights (1966)	Ratification (2008)
Convention on the Elimination of All Forms of Discrimination against Women (1979)	Ratification (1996)
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)	Ratification (2010)
Convention on the Rights of the Child (1989)	Ratification (1990)
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2002)	Ratification (2011)
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1999)	No Action
International Convention for the Protection of All Persons from Enforced Disappearance (2006)	No Action
Convention on the Rights of Persons with Disabilities (2008)	Ratification (2011)

Humanitarian Law Instruments:

INSTRUMENT NAME	STATUS IN PAKISTAN
Convention on the Prevention and Punishment of the Crime of Genocide (1948)	Ratification (1957)
Four Geneva Conventions of 1949	Ratification (1951)
The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954)	Ratification (1959)
Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their destruction (1972)	Ratification (1974)
Convention on the Prohibition of Military or Any other Hostile Use of Environmental Modification Techniques (1976)	Ratification (1986)
Two Protocols Additional to the four 1949 Geneva Conventions	Signature (1977)
Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects (1980)	Ratification (1985)
Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993)	Ratification (1997)
Revised Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II [revised] to the CCW of 1980) (1996)	Ratification (1999)
Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997)	No Action
Rome Statute of the International Criminal Court (1998)	No Action
Protocol (V) on Explosive Remnants of War (added to the CCW of 1980) (2003)	Ratification (2009)
Arms Trade Treaty (2013)	No Action

III. INTERNATIONAL LAW AND THE DOMESTIC RULE OF LAW

A. What is the Rule of Law?

The Rule of Law, as a concept, has deep roots within the socio-political, democratic legal tradition. Though there is no fixed definition, the Rule of Law entails numerous obligations on the government and its citizens. The Rule of Law generally supports the following:

- People in positions of authority should exercise their power within the narrow framework of well-established public norms rather than acting in an arbitrary, ad hoc or discriminatory manner on the basis of their own preferences or ideology¹⁴
- Generally, government should adhere to a particular framework in all its operations, remaining accountable through law when actions demonstrate and overreach of power¹⁵
- Citizens should respect and comply with legal norms, even if they do not agree with them¹⁶
- Regardless of conflict of interest, citizens should accept legal determinations of their rights and duties¹⁷
- Law should be normative and public so as to facilitate citizens in understanding their rights and duties¹⁸
- Legal institutions should be available to ordinary people to uphold rights, settle disputes and protect them from abuse of public or private power, which requires the independence of the judiciary, accountability and transparency of government and integrity within the legal system¹⁹

The phrase “Rule of Law” was coined by Albert Venn Dicey (though the concept itself may be traced back much further) and his theory, reproduced in large part above, is widely accepted as a dominant expression of its parameters. Beyond transparency and equality before the law however, Dicey also rationalized that in the British context, the rule of law is sourced by the protections offered by the courts and not solely constitutional constructs.²⁰

14 Contestedness of the Rule of Law, Rule of Law, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, available at: <http://plato.stanford.edu/entries/rule-of-law/>.

15 Id.

16 Id.

17 Id.

18 Id.

19 Id.

20 Stephane Beaulac, The Rule of Law in International Law Today, 197, 199 (2009) available at: <https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/3093/International-Rule-Law-Final.pdf?sessionid=A2E9E7F48AD3B1D72FE7298CACAF1B70?sequence=1>.

Stated another way, Dicey's proposition implies that the outcomes of the applications of rights of individuals are the source of the Rule of Law as opposed to a written document alone and thus the role of the courts is critical in applying the Rule of Law. If there is then a willingness to legally protect individual's rights in a society, the source of such protections may better occur through the courts.

These concepts in their totality underpin the notion of what is the Rule of Law, but they do not limit the particular rights that are accorded to individuals under that umbrella. This being the case, whether an individual's rights emanate from the jurisprudence of courts or a written constitution, they are not limited in their scope or origin. It is only for the government to specify which rights exist and grant them equally, while fostering their protection through domestic courts. This being the case, international law is not barred as a source of rights of individuals, which then comprise the Rule of Law in a domestic legal framework.

B. International Law as a Source within the Domestic Rule of Law

In any state, the sources of law (conveniently also the sources of rights) are most commonly derived from central and provincial constitutions and statutes and the jurisprudence of courts. This list is not exhaustive and in fact regional laws or foreign laws, cultural or religious norms and international instruments and customary laws also contribute significantly to domestic law and the recognized rights of individuals.

International law itself is comprised of approximately 180,000 treaties, spanning from 1648 to the present.²¹ Though many of these treaties guarantee particular rights either directly or indirectly to individuals, nine core treaties represent the central framework of human rights present in international law:

- International Convention on the Elimination of All Forms of Racial Discrimination
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

21 This is an estimation provided by a number of international law treaty databases.

- Convention on the Rights of the Child
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
- International Convention for the Protection of all Persons from Enforced Disappearances
- Convention on the Rights of Persons with Disabilities

Pakistan is a party to hundreds of multilateral treaties and several thousand bilateral treaties, Memorandums of Understanding, unilateral commitments, etc.²² Further, Pakistan is a party to seven of the nine core human rights treaties, reproducing in large part the rights enshrined in the International Covenant on Civil and Political Rights (ICCPR) within the chapter on Fundamental Rights in the Constitution of Pakistan [See Section C of this Chapter].

The depth and breadth of Pakistan's engagement with international law, as evidenced by the sheer number of international instruments in which Pakistan is a participant, would suggest that international law should not be trivialized. There is little to suggest in Pakistan's domestic legal framework, including the Constitution, that international law is not a valid source of law to be considered in enforcing the Rule of Law. For example, "existing laws" are interpreted by the Constitution of Pakistan²³ in accordance with Article 268(7) to mean "all laws (including Ordinances, Orders-in-Council, Orders, rules, by-laws, regulations and Letters Patent constituting a High Court, and notifications and other legal instruments having the force of law) in force in Pakistan or any part thereof, or having extraterritorial validity..."²⁴ This definition may not explicitly mention international law, but the inclusion of international law within the text is strongly implied.

There is also no strict limitation placed on the superior judiciary during their oaths of office where they are sworn to perform their duties in accordance with the Constitution of Pakistan and the "law."²⁵

The use of law carries only the meaning that may be assigned to it in other portions of the Constitution or codified law. The definition of "existing laws" may be indicative of what this use of "law" may mean. Nonetheless, it is not exclusionary and thus, superior judges in discharging their duties may freely

²² This estimation is derived from a combination of multilateral treaties Pakistan participates in as documented by the United Nations, along with the treaties included in the Pakistan Treaty Series.

²³ PAKISTAN CONST.art. 260(1) (1973).

²⁴ Id.at art. 268(7).

²⁵ Id.at Third Schedule (Oaths of Office).

consider international law as a source of law. The Code of Conduct established for the superior courts reaffirms this expansive interpretation of law:

The Constitution, by declaring that all authority exercisable by the people is a sacred trust from Almighty Allah, makes it plain that the justice of this nation is of Divine origin. It connotes full implementation of the high principles, which are woven into the Constitution, as well as the universal requirements of natural justice. The oath of a Judge implies complete submission to the Constitution, and under the Constitution to the law.²⁶

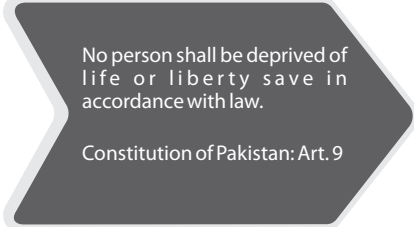
This excerpt demonstrates that Pakistan's domestic law is derived, in part, from divine principles and universal notions of natural justice. Submission to the Constitution and its subordinate law is no barrier to this interpretation. Presumably, any law adopted into a domestic framework must operate in accordance with the structures already in place. The Code of Conduct continues:

Subject to these governing obligations, his function of interpretation and application of the Constitution and the Law is to be discharged for the maintenance of the Rule of Law over the whole range of human activities within the nation.²⁷

Like the oath of office, the Code of Conduct does not specify what "law" means in addition to the Constitution, only that it must be applied for the maintenance of the Rule of Law. Employing international law in the courts as a secondary source of rights in line with the Constitution plainly follows this reasoning.

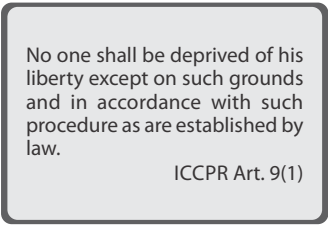
C. Upholding International Law is Fundamental to Upholding the Domestic Rule of Law

International law is not alien to Pakistan's domestic law. There are significant portions of domestic law text that replicate international law almost verbatim. As mentioned above, the chapter on Fundamental Rights in the Constitution of Pakistan echoes many provisions present in the ICCPR. Some of those provisions are reproduced as follows:



No person shall be deprived of life or liberty save in accordance with law.

Constitution of Pakistan: Art. 9



No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

ICCPR Art. 9(1)

²⁶ Code of Conduct to be Observed by Judges of the Supreme Court of Pakistan and of the High Courts of Pakistan, SUPREME COURT OF PAKISTAN (2009) available at: <http://www.supremecourt.gov.pk/web/page.asp?id=435>.

²⁷ id.

No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest

Constitution of Pakistan: Art. 10(1)

Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

ICCPR Art. 9(2)

Every person who is arrested and detained in custody shall be produced before a magistrate within a period of twenty-four hours of such arrest

Constitution of Pakistan: Art. 10(2)

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power

ICCPR Art. 9(3)

For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.

Constitution of Pakistan: Art. 10A

In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

ICCPR Art. 14(1)

Slavery is non-existent and forbidden and no law shall permit or facilitate its introduction into Pakistan in any form.

Constitution of Pakistan: Art. 11(1)

No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

ICCPR Art. 8(1)

All forms of forced labor and traffic in human beings are prohibited.

Constitution of Pakistan: Art. 11(2)

No one shall be required to perform forced or compulsory labor

ICCPR Art. 8(3)(a)

No law shall authorize the punishment of a person for an act or omission that was not punishable by law at the time of the act or omission;

Constitution of Pakistan: Art. 12(1)(a)

No one shall be held guilty of any criminal offence on account of any act or omission, which did not constitute a criminal offence [...] at the time when it was committed.

ICCPR Art. 15(1)

No person shall be prosecuted or punished for the same offence more than once

Constitution of Pakistan: Art. 13(a)

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

ICCPR Art. 14(7)

The dignity of man and, subject to law, the privacy of home, shall be inviolable.

Constitution of Pakistan: Art. 14(1)

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.

ICCPR Art. 17(1)

Every citizen shall have the right to remain in, and, subject to any reasonable restriction imposed by law in the public interest, enter and move freely throughout Pakistan and to reside and settle in any part thereof.

Constitution of Pakistan: Art. 15

Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

ICCPR Art. 12(1)

Every citizen shall have the right to assemble peacefully and without arms, subject to any reasonable restrictions imposed by law in the interest of public order.

Constitution of Pakistan: Art. 16

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

ICCPR Art. 21

Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan, public order or morality.

Constitution of Pakistan: Art. 17(1)

Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

ICCPR Art. 22(1)

Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defense of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, commission of or incitement to an offence.

Constitution of Pakistan: Art. 19

Everyone shall have the right to freedom of expression. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

ICCPR Art. 19(2)-(3)

Subject to law, public order and morality: every citizen shall have the right to profess, practice and propagate his religion

Constitution of Pakistan: Art. 20(a)

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

ICCPR Art. 18(1)

All citizens are equal before law and are entitled to equal protection of law

Constitution of Pakistan: Art. 25(1)

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

ICCPR Art. 26

There shall be no discrimination on the basis of sex

Constitution of Pakistan: Art. 25(2)

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

ICCPR Art. 3

[T]he law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as [...]sex...

ICCPR Art. 26

The chapter on Fundamental Rights in the Constitution of Pakistan is only one example of how international law pervades Pakistan's law. Numerous other domestic laws, even those codified prior to Pakistan's participation in certain

international instruments, closely correspond with treaty provisions to which Pakistan is currently a party. The following is only a representative sample of the depth and breadth of these laws:

DOMESTIC LAW	RELATED INTERNATIONAL LAW
General Clauses Act, 1897	Vienna Convention on the Law of Treaties
Carriage of Goods by Sea Act, 1925	United Nations Convention on the Carriage of Goods by Sea
United Nations (Security Council) Act, 1948	Chapter VII of the United Nations Charter and all subsequent Security Council Resolutions
Industrial Relations Ordinance, 1969	Freedom of Association and Protection of the Right to Organize Convention, 1948 & Right to Organize and Collective Bargaining Convention, 1949
Diplomatic and Consular Privileges Act, 1972	Vienna Convention on Diplomatic Relations 1961
Antiquities Act, 1975	Convention for the Protection of Cultural Property in the Event of Armed Conflict
Territorial Waters and Maritime Zones Act, 1976	United Nations Convention on the Law of the Sea
Pakistan Prison Rules, 1978	International Covenant on Civil and Political Rights & United Nations Standard Minimum Rules for the Treatment of Prisoners
Civil Aviation Authority Ordinance, 1982	Chicago Convention on International Civil Aviation
Anti-Terrorism Act, 1997	Convention for the Suppression of Financing of Terrorism, International Convention for the Suppression of Terrorist Bombings & Security Council Resolutions 1267, 1373, 1456

Environmental Protection Act, 1997	United Nations Framework Convention on Climate Change & Kyoto Protocol
Chemical Weapons Convention Implementation Ordinance, 2000	Chemical Weapons Convention
Prohibition of Smoking and Protection of Non-Smokers Health Ordinance, 2002	Framework Convention on Tobacco Control
Anti-Money Laundering Act, 2010	United Nations Convention against Transnational Organized Crime, United Nations Convention against Corruption & Financial Action Task Force (FATF) Recommendations
Actions (in Aid of Civil Power) Regulations, 2011	Common Article 3 to the Geneva Conventions & Customary International Humanitarian Law
Afghanistan-Pakistan Transit Trade Rules, 2011	Afghanistan-Pakistan Transit Trade Agreement
Anti-Dumping Duties Act, 2015	General Agreement on Tariffs and Trade

Legislation in Pakistan is comprised of thousands of acts, ordinances, orders and notifications, dating back to the 1860s. These laws do not, by and large, reference international law directly in their text. However, it is estimated that nearly 60% of these domestic legal documents represent or implement international law provisions in some capacity.

Legislators, in many cases, now choose to directly reference international instruments within the actual text of the law. This is also indicative of a growing acceptance of international law by the legislative branch of the Government of Pakistan.

D. Domestic Judiciary's Obligation to Implement International Law

The domestic judiciary, while free in the state, is not free from the state and its obligations.²⁸ Internally, the judicial branch of government may be distinct from the executive and the legislative branches. Judicial decisions externally, however, represent a subsidiary act of the state as a whole.²⁹ The judiciary is under equal obligation with the executive and legislative branches to fulfill its role in the domestic implementation of international law. As a subset of the federal government, the judiciary may not evade its responsibilities in maintaining Pakistan's adherence to international agreements. Tacit acceptance of international law through application of municipal law is also not enough. The judiciary should practically demonstrate a proactive approach to determining the scope and depth of application of international legal provisions upon Pakistan.

The judgments of Pakistan's superior judiciary in particular have repercussions beyond the parties involved, not just nationally, but internationally.³⁰ The following cases demonstrate a diversity of judgments that express the superior judiciary's interpretation of various aspects of international law, along with some assessment of the international repercussions and reactions:

- The Supreme Court in the *Zewar Khan* case,³¹ reaffirmed the status of the Durand Line as a recognized international border between Pakistan and Afghanistan. This position reaffirms the stance of the executive with regards to the legitimacy of the Durand Line and the Government of Pakistan is able to proactively employ it in this regard.
- The Azad Kashmir Supreme Court found that the Northern Areas, though part of the state of Jammu and Kashmir, is not a part of Azad Kashmir and thus the government has no need to take administrative control of these areas.³² The Supreme Court of Pakistan, in 1999, issued the following ruling in response:

“...Northern Areas were constitutional part of the state of Jammu and

28 Ahmer Bilal Soofi, *Inextricably Linked*, DAWN, May 25, 2014, available at: <http://www.dawn.com/news/1108468>.

29 *Id.*

30 *Id.*

31 *Superintendent, Land Customs Torkham (Khyber Agency) v. Zewar Khan* (1969) PLD SC. 485.

32 Muhammad Fayyez, *Pakistan-Azad Jammu & Kashmir Politico-Legal Conflict*, PILDAT, 13 (2011) available at: <http://progress.org.pk/wp-content/uploads/2013/03/Pakistan-AJKPoliticoLegalConflictSep2011.pdf>.

Kashmir... that the people of the Northern Areas are citizens of Pakistan for all intent and purposes”

The government of Pakistan should ensure that basic human rights and other political and administrative institutions are provided in the areas within six months. *However, the action should not adversely affect Pakistan's stand concerning the Kashmir dispute.*³³

- In a landmark ruling on drone strikes in the Tribal Areas,³⁴ the Peshawar High Court employed the United Nations Charter and the Geneva Conventions to declare drone operations conducted by external forces in Pakistan a violation of international law. This decision is frequently cited as support by the Federal Government as part of its own position on drone strikes.
- The Supreme Court both in 2015 and 2016 issued judgments in relation to providing licenses to hunt the houbara bustard. The 2015 case³⁵ placed a ban on issuing licenses by either the federal or provincial governments. The Court also directed the Federal Government to adhere to relevant treaty obligations as required by law. The provinces were required to amend wildlife laws in line with international treaty obligations and to prohibit the hunting of species threatened with extinction or categorized as vulnerable

Only a few months later, the Court initiated a limited review of its own judgment,³⁶ finding that the grant of limited licenses to representatives of Arab states to hunt the houbara bustard was not in violation of Pakistan's international treaty obligations. The Court also cited the economic benefits of a limited lift on the ban, along with acknowledging the position of the Government of Pakistan and the Ministry of Foreign Affairs that the invitation to Arab dignitaries to hunt was a “cornerstone of foreign policy” with these states.

- The Supreme Court judgment upholding the use of military courts clarified the notion of “threat of war.”³⁷ This term is not “superfluous and must be attributed proper meaning and effect” and it includes “a situation

33 Id.

34 Foundation for Fundamental Rights v. Federation of Pakistan (2013) PLD SC. 94.

35 Const. Petition No. 12 of 2010 [hereinafter 2015 Military Court Judgment].

36 Civil Petition No. 842 of 2016.

37 2015 Military Court Judgment, supra note 35.

where external aggression is threatened and appears to be imminent but actual hostilities have not commenced.”³⁸ The judgment further noted that Article 245(1) of the Constitution of Pakistan requires that the situation be categorized as a “threat of war” requiring extraordinary measures through particular action(s).³⁹ The actions here included the summoning of the Armed Forces by the executive to “deal with terrorists” and the enactment of the 21st Amendment of the Constitution by the legislative branch.⁴⁰ The concurring opinion by Justice Umar Ata Bandial extensively referenced the Geneva Conventions with regards to the rights of belligerents in custody.

- The Lahore High Court relied upon the expertise of the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the international law relating to preserving cultural and historical heritage within its judgment.⁴¹ The Court acknowledged that not only was national law available and applicable, but also international law:

“Being Member State [to the Convention concerning the Protection of the World Cultural and Natural Heritage], it mandates Pakistan to foster respect for international obligations regarding protection and preservation of heritage sites.”⁴²

The Court also explicitly states that the Antiquities Act, 1975 was established pursuant to the ratification of the Convention. Both international and national law restrict construction rights in and around heritage sites, the implications of any judgment associated with these actions will be felt internationally.

More in depth examples of Pakistan's engagement with international law may be found in Annex I.

Upholding international law does not require total submission to the executive. Ideally, the executive and judicial branches of the federal government express overlapping approaches to international law obligations. Where an interpretation differs, the judiciary must nonetheless

38 Id. at ¶ 139.

39 Id. at ¶ 144.

40 Id.

41 Kamil Khan Mumtaz v. Government of Punjab (2016) PLD Lah. 699.

42 Id. at ¶ 19.

be free to uphold an international obligation in light of domestic law as it sees fit. This is the quintessential task of the judiciary, distinct from the executive (the separation of their powers is discussed in Section B of the following chapter).

The judiciary must, in performing its role, execute a balancing test between national interests and the parameters of justice to determine the most appropriate procedures and outcomes for cases that address national security, in particular. This requires an awareness of the fact that public trials, hearings, tribunals, etc. related to the adjudication of national security issues are reproduced and referenced in foreign countries and before international bodies like the United Nations. For example, where there are questions regarding the nature and existence of a conflict in the Federally and Provincially Administered Tribal Areas, the cases both accepted and decided by the courts may inadvertently influence the state's position regarding whether or not it is considered a non-international armed conflict. Another example may be the Balochistan law and order case⁴³ regarding the recovery of missing persons decided by the Supreme Court of Pakistan, later circulated at the United Nation's European headquarters in Geneva.

E. Where International Law Should Prevail

The current popular interpretation is to disregard public international law while proclaiming the supremacy of the domestic law. This notion that domestic law must be explicitly chosen over international law is an antiquated and archaic interpretation of two systems that, in reality, overlap and compliment each other extensively. International law in application at the very least facilitates the interpretation of domestic law. If more proactively employed, however, international law may even offer a robust prevailing alternative to encumbered, outdated or nonexistent provisions of domestic law.

The use of international law as a prevailing alternative in some cases is referred to as *lawfare*. A prime example of the use of lawfare is the United States harnessing international law to advance the unable or *unwilling*⁴⁴

43 Const.Petition No.77 of 2010, available at: http://www.supremecourt.gov.pk/web/user_files/File/Const.P.77of2010_dt_27-8-2013.pdf.

44 "The still controversial test offers a justification for unilateral use of force in self-defense on behalf of a victim state on the territory of a host state that is unwilling or unable to prevent a non-state actor located on its soil from carrying out attacks against the victim state." Dr. Kinga Tibori-Szabo, *Fundamental Rights in International and European Law* (2016) at 73.

threshold to bypass the sovereignty of non-cooperating states to unilaterally use force as needed. A similar notion of lawfare may be used in the domestic sphere by the superior judiciary as a bold means of upholding the rule of law, particularly in those areas where domestic laws are underdeveloped. A prime example of judicial lawfare would be the joint application of international humanitarian law and human rights law during post-conflict, anti-terrorism trials. If the judiciary, in light of all the facts, were to verify the existence of an armed conflict, particularly a non-international armed conflict, application of the principles of customary international humanitarian law first and then limited domestic human rights law second, would potentially provide a strong framework for adjudication.

Applying international law as a prevailing legal text does not undermine domestic law. Rather, it simply extends the notion of domestic law to those international instruments, which Pakistan has fully agreed [the same is discussed in Section B of this chapter]. Thus, international law is not some abstract legal doctrine challenging domestic law, it is domestic law alternatively presented. Pakistan has agreed to uphold obligations under these instruments and even as a dualist nation, it is not necessarily barred from considering international law provisions beyond the scope of what domestic law addresses.

IV. ROLE OF DOMESTIC JUDICIARY IN ENFORCING INTERNATIONAL LAW

A. Increasing Relevance of International Law in Domestic Affairs

Though judges play identical roles as impartial decision-makers in both domestic and international law, the role of domestic judges has only recently gained increased relevance within the international law sphere. This is because the nature of international law is now changing. Where once international law resided primarily within interactions between states as a whole, it is now trickling down into the interactions of individuals and between states and individuals.

International law is now more prevalent in domestic affairs, particularly as awareness of human rights and states' international obligations increases. It is not just human rights law that has evolved the nature of international law in

the domestic sphere. As the nature of armed conflict shifts from international between states to non-international within a state, the decisions of domestic courts as they relate to these conflicts gain substantial relevance.

Globalization and transnational crime both play primary roles in the diversification of international law.

[T]he challenges facing states and the international community alike demand very different responses from and thus new roles for the international legal system. The processes of globalization and the emergence of new transnational threats have fundamentally changed the nature of governance and the necessary purposes of international law in the past few years. From cross-border pollution to terrorist training camps, from refugee flows to weapons proliferation, international problems have domestic roots that an interstate legal system is often powerless to address. To offer an effective response to these new challenges, the international legal system must be able to influence the domestic policies of states and harness national institutions in pursuit of global objectives⁴⁵.

Not only should international legal systems influence domestic affairs, but the inverse as well. The line between what is domestic and what is international law is slowly blurring. Decisions of domestic courts with regards to international law should thus be equally influential in combating new challenges. An individual accused of terrorism is far more likely to be prosecuted, for example, by a domestic court rather than an international tribunal. Additionally, threats to international security are more likely to originate from non-state actors than from states themselves. The application by domestic courts of human rights and humanitarian law, weighed against national security issues, should be approached with greater deference proportionate to that given to international judicial mechanisms, as they are the next frontier in developing international law.

B. Understanding the Primary Role of the Judiciary

In any democratic society, a separation of power must exist between branches of government, both on and between the federal and sub-federal level. The extent of overall separation may vary between presidential and

⁴⁵ Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (or, the European Way of Law)*, 47 HARV. INT'L L.J. 327, 328 (2006).

parliamentary-style democracies, but between the executive and the judiciary it remains distinct nonetheless. This separation is also present in Pakistan's state architecture:

*The Constitution of Pakistan is based on the principle of trichotomy of powers where legislature is vested with the functions of law making, the executive with its enforcement and judiciary of interpreting the law*⁴⁶.

The Court is prohibited from assuming the role of policy maker or of law maker.⁴⁷ The Constitution of Pakistan, in Article 175(3), expressly requires the separation of the judiciary from the executive. The Preamble and the Objectives Resolution of the Constitution both state "[T]he independence of the Judiciary shall be fully secured."⁴⁸ Additional laws promulgated by the legislature and the jurisprudence of the courts further determine the parameters of this separation of powers beyond the Constitution.

The role of the judiciary is also illuminated within the jurisprudence of the courts, a sample of which is reproduced below:

*[O]ne of the most important differences between developed countries on one hand and developing or under developed countries on the other is the respect for adherence to and enforcement of the rule of law. I have no doubt in my mind that this ideal can only be achieved through an independent and capable judiciary, which is beyond reach, control and influence of other branches of the State. The judicature has to act as a neutral umpire who keeps a check on the exercise of power by other organs of the State so as to ensure that the rights of citizens/persons are not affected and trampled contrarily to law.*⁴⁹

*However, the Constitution makes it the exclusive power/responsibility of the Judiciary to ensure the sustenance of system of "separation of powers" based on checks and balances. This is [the] legal obligation assigned to the Judiciary. It is called upon to enforce the Constitution and safeguard the Fundamental Rights and freedom of individuals. The Judiciary in Pakistan is independent.*⁵⁰

⁴⁶ Rahim Ud Din v. Sabahuddin (2016) MLD Pesh. 20, ¶ 7.

⁴⁷ Id.

⁴⁸ PAKISTAN CONST. Preamble & Objectives Resolution (1973).

⁴⁹ MFMY Industries LTD v. Pakistan (2015) SCMR SC. 1550, ¶ 3.

⁵⁰ Dr. Asadullah Khan Tareen v. Government of Balochistan Health Department (2016) PLC (C.S.) 195.

C. Expanded Jurisdiction of Domestic Judiciary through International Law

Comity, as a principle of international law, reflects a willingness on the part of states to give deference or respect to the laws and judicial decisions of other states. Originally, the term “comity” referred to a narrower interpretation in which certain conflict cases resulted in foreign law clashing with or being more pertinent than domestic law. It was therefore applied out of respect for the foreign state.⁵¹ Now, “comity” has developed in some sense to also refer to situations in which courts apply or give deference to foreign laws and judgments for public policy reasons.⁵² Thus, comity conceptually operates as a policy tool as much as a resolution mechanism in cases of conflict of law. With the more modern interpretation taken into account, comity principally approaches international law in its broadest sense of both traditional international law and foreign law originating in other states.

This notion of comity vests squarely within the powers of the judiciary in cases that involve international and foreign law. Comity is neither an absolute rule under international law nor an absolute requirement. It may even present a conflict of interest if deference to foreign law conflicts with positions taken by the executive branch on a particular issue.⁵³ The judiciary, with regards to comity as a tool has, nevertheless, a great degree of latitude under the law and must thus perform a balancing test that takes these considerations into account.

Nevertheless, the power to employ comity and give deference to international and foreign law if appropriate to the case is a useful tool that expands the jurisdiction of the judiciary beyond domestic law alone. Thus, the role of the judiciary with regards to international law in its broadest sense is not based solely on the application of legal obligations born out of international treaties or agreements. There is a certain degree of liberal discretion that a judge may employ in selecting the most appropriate legal framework for the case at hand.

D. Judicial Deference to the Executive

There is a tradition amongst the judiciary in many democratic states to defer

⁵¹ Joel R. Paul, *The Transformation of International Comity*, 71 *LAW & CONTEMP. PROBS.* 19, 20 (2008).

⁵² *Id.*

⁵³ *Id.* at 32.

with regards to issues of national security and international relations to the judgment of the executive.

One of the core tenets of national security doctrine is that courts play a deeply modest role in shaping and adjudicating the executive's national security decisions. In most cases, courts use abstention doctrines and other tools to decline to hear such cases on the merits. When courts do hear these cases, they often issue decisions that are highly deferential to executive choices⁵⁴.

The same school of thought promotes absolute deference to the executive in treaty interpretation as well.⁵⁵

Other schools of thought, however, disregard the absolute deference approach in finding that the amount of deference given to the executive branch is a matter of judicial policy.⁵⁶ To scholars that support this reasoning, the executive has ample incentives to promote national security goals over the rights of individuals and only a strong judiciary can prevent an abuse of power.⁵⁷ Absolute deference to the executive in these matters critically weakens the mechanism that places a check on the unilateral power exercised by any single branch of government.⁵⁸

Where the executive is aware that the judiciary is more proactive in reviewing policies, even in conflict situations, the incentive exists to establish policies the court is inclined to uphold. If the judiciary, especially with regards to issues of national security, maintains a strong policy of deference, the executive may take greater liberties in establishing policies that are more precarious. The knowledge, for example, that the Supreme Court would most likely review its policies promoted changes in policy by the executive branch of the U.S. Government:

[T]he [U.S.] government repeatedly has amended its detention review procedures in Afghanistan, each time granting detainees increased levels of procedural protections— even though courts have never mandated

⁵⁴ Ashley S. Deeks, Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference, 82 FORDHAM L. REV. 827, 829 (2013).

⁵⁵ See i.e. John Yoo, Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation, 89 CAL. L. REV. 851 (2001); John C. Yoo, Treaty Interpretation and the False Sirens of Delegation, 90 CAL. L. REV. 1305 (2002).

⁵⁶ David Sloss, Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective, 62 NYU ANN. SURV. AM. L. 497, 522 (2006).

⁵⁷ Deeks, *supra* note 54, at 830.

⁵⁸ *Id.*

that it do so. [...] It has revealed details about the long-classified process by which it determines when and under what conditions it would transfer security detainees to foreign governments. And it has established more rigorous procedural hurdles for itself before it will seek to use secret evidence in deportation cases...

This, again, supports the notion that where judicial review is likely, the executive will proactively defer to the courts and establish policies that will be upheld.⁵⁹ Where judicial review is unlikely, the executive will be manifestly concerned with national security and not individual liberties, or upholding the rule of law or international law.⁶⁰

E. Enforcement of International Law by the Domestic Judiciary

International law is traditionally viewed with suspicion by those with a conservative approach to what is defined as law. The common misinterpretation is that international law cannot be enforced because unlike domestic law, it lacks law enforcement bodies to uphold its provisions. While international law does not entirely replicate the enforcement structures of domestic law, it is also not without any enforcement. Chapter VII of the United Nations Charter, for example, empowers the United Nations Security Council to take action through the imposition of economic, diplomatic or military sanctions. These sanctions are only imposed in the most extreme cases. Short of Security Council action, unilateral conduct by one or several states or mechanisms established by international organizations or regional courts provides some measure of enforcement.

As the scope of international law expands to cover anything from environment to labor to armed conflict to human rights, the potential role the domestic judiciary plays in enforcing international law also expands. Purely international enforcement mechanisms are bolstered not just by the interpretation, but also the literal enforcement of international law by domestic courts within individual states. The domestic judiciary is an equal if not better position to apply and interpret international law as compared to their international judicial counterparts:

Unlike international tribunals, which are preoccupied by the constant threat of further fragmentation and loss of business to competing

⁵⁹ *Id.* at 834.

⁶⁰ *Id.*

tribunals [...] Judges in national courts are relatively more independent than judges in international tribunals, and enjoy broader public support for their decisions. Their independent source of authority – the domestic constitutions– serves as the basis of an autonomous legal system, one that no international norm has the authority to affect⁶¹.

The most effective way to meld international law and domestic law is to have a domestic court that declares a provision of international law binding as domestic law.⁶² Domestic courts, in acting as an enforcement mechanism of international law, may also give effect to international law provisions that do not traditionally operate as domestic law (i.e. ungratified treaties, customary norms and international interpretations of domestic law provisions).⁶³ Domestic courts that openly engage with international law in their judgments find fertile ground for the interpretation and evolution of the state's own law.⁶⁴

The diversity of international law must be taken into account to the extent that the influence the domestic judiciary is able to exert on enforcing international law in the domestic sphere may be more significant in certain instances and limited in others. International law, particularly within this Benchbook, is not to be perceived as a monolithic legal framework. Thus, the enforcement of international law may be exerted in several ways:⁶⁵

1. "silent application:" where courts apply domestic law derived from international law without direct reference to the international law source
2. "indirect application:" where courts apply international law as a guide to interpreting domestic law
3. "direct application:" where courts apply international law directly

The domestic judiciary plays a very limited role in domestic or international law making, but they play an expansive role in its interpretation. The continued engagement of domestic courts with, in many cases, very broad provisions of international law promote the continued development of both

⁶¹ Eyal Benvenisti & George W. Downs, National courts, domestic democracy, and the evolution of international law, 20 EUROPEAN JOURNAL OF INTERNATIONAL LAW, 59, 68 (2009).

⁶² David Sloss & Michael Van Alstine, International Law in Domestic Courts, Handbook on the Politics of International Law, 5 (2015).

⁶³ Id.

⁶⁴ Id. at 5-6.

⁶⁵ Id. at 29-30.

domestic and international legal norms, “Determining the meaning of treaties leaves considerable discretion for domestic courts in their primary duty 'to say what the law is.’”⁶⁶

V. INTERNATIONAL LAW AND PAKISTAN'S DOMESTIC LEGAL FRAMEWORK

A. Incorporating International Law into Pakistan's Domestic Law

The scope of the power of the Federal Government is defined within Article 97 of the Constitution, which states:

Subject to the Constitution, the executive authority of the Federation shall extend to the matters with respect to which Majlis-e-Shoora (Parliament) has power to make law, including exercise of rights, authority and jurisdiction in and in relation to areas outside Pakistan.⁶⁷

The subjects with regards to which Parliament may make laws are enumerated in the Fourth Schedule of the Constitution. Perhaps the most relevant portions of the Fourth Schedule Federal Legislative List are items three and thirty-two as follows:⁶⁸

3. External affairs; the implementing of treaties and agreements, including educational and cultural pacts and agreements, with other countries; extradition, including the surrender of criminals and accused persons to Governments outside Pakistan.⁶⁹

32. International treaties, conventions and agreements and international arbitration⁷⁰

Regarding Article 97, the Supreme Court held that the Federal Government has the power to “exercise executive authority” to ratify a treaty, but not the power to legislate, a role that remains firmly with the Parliament.⁷¹ Article 142(a) of the Constitution also confirms that Parliament has the exclusive power to make laws with respect to any matter on the Federal Legislative

⁶⁶ Id. at 25.

⁶⁷ PAKISTAN CONST. art. 97 (1973).

⁶⁸ Items 1, 6, 7, 18, 20, 22, 24, 25, 27, 58 of the Fourth Schedule are indirectly relevant as well.

⁶⁹ PAKISTAN CONST. Fourth Schedule, item 3 (1973).

⁷⁰ Id. at item 32.

⁷¹ *Societe General De Surveillance S.A. vs. Pakistan* (2002) SCMR SC. 1694, ¶ 26.

List.⁷² Thus, items three and thirty-two anchor the power of ratification and domestic implementation of international instruments with the executive and legislative branches of the Government of Pakistan. This is relevant to the extent that the courts perpetually interpret the legal status of a treaty in a manner in which the rights and obligations arising directly from these international instruments may not form a legal cause of action in the domestic courts unless legislatively adopted.⁷³

Domestic courts are, in accordance with this reasoning, constitutionally limited in their scope to accepting a cause of action that arises from domestically enacted law. Article 175(2) plainly states that the courts shall have no jurisdiction save as is or may be conferred by the Constitution or by or under any law. The jurisdiction of the superior courts, the Supreme Court and the High Courts is outlined in the Constitution of Pakistan in substantial detail.

The Supreme Court has jurisdiction over the following:

- Inter-governmental disputes (Art. 184(1))
- Enforcement of fundamental rights involving an issue of public importance (Art. 184(3))
- Appeal from a judgment or order of a High Court in civil and criminal cases (Art. 185(2))
- Advisory jurisdiction on any question of law involving public importance, referred by the President (Art. 186)
- Review of a Supreme Court judgment or order (Art. 188)
- Appeal from the Federal Shariat Court (Art. 203F)
- Appeal from administrative courts or tribunals (Art. 212)

The High Courts have jurisdiction over the following:

- Issuing writs: mandamus, prohibition, certiorari, habeas corpus and quo warranto (Art. 199(1))
- Enforcement of fundamental rights (Art. 199(2))
- Oversight of subordinate courts (Art. 203)
- Appeals in accordance with the Code of Civil Procedure (Sects. 100, 114 and 115)
- Appeals in accordance with the Code of Criminal Procedure (Sects. 410, 417, 491)
- Appeals from special courts
- Intra-court appeals and original jurisdiction over civil cases exceeding a specified amount in dispute

72 PAKISTAN CONST. art. 142(a) (1973).

73 *Societe General De Surveillance S.A. v. Pakistan*, supra note 71, at ¶ 20.

Though the courts are not explicitly directed to exercise jurisdiction over the enforcement of international instruments to which Pakistan is a party under the Constitution, there is also little to suggest that they are entirely barred from considering principles or provisions of international law in issuing a judgment. For example, the enforcement of fundamental rights involving issues of public importance directly stems from the Constitution and indirectly stems from Pakistan's international law obligations. In a judgment addressing a fundamental right, a holding may be more profound if it takes into account the state's international obligations and the parameters of such rights within treaties and accepted treaty interpretations. The Supreme Court, in *Al-Jehad Trust v. Federation of Pakistan*, also held:

The Fundamental Rights enshrined in the Constitution in fact reflect what has been provided in some of the Articles of Universal Declaration of Human Rights. Supreme Court, while construing the former, refer to the latter if there is no inconsistency between the two with the object to place liberal construction as to extend maximum benefits to the people and to have uniformity with the comity of nations.

This holding indicates recognition of the same by the Supreme Court. Where international law is viewed as consistent with the principles of the Constitution, it may serve as a source of further interpretation or support for enforcing fundamental rights.

The definition of "existing laws" within the Constitution [See Chapter III, Section B] reinforces this interpretation of the role of international law within the domestic system. As previously mentioned, "existing laws" are defined in the Constitution of Pakistan⁷⁴ in accordance with Article 268(7) to mean "all laws (including Ordinances, Orders-in-Council, Orders, rules, by-laws, regulations and Letters Patent constituting a High Court, and an notifications and other legal instruments having the force of law) in force in Pakistan or any part thereof, or having extraterritorial validity..."⁷⁵ The inclusion of "other legal instruments having the force of law" and laws "having extraterritorial validity" in the definition of existing laws at the very least implies that international instruments to which Pakistan is a party and accepted customary international law formulate soft law, which may be considered by courts when executing judgments. A bolder interpretation would suggest that this

74 PAKISTAN CONST.art.260(1)(1973).

75 Id.at.art.268(7).

definition supports the notion that international legal instruments to which Pakistan is a party and accepted customary international law are domestic law as they are in monist countries because they may be considered "legal instruments having the force of law." Countervailing arguments promoting the exclusive power of Parliament to legislate may be assuaged with the knowledge that where Parliament has the exclusive power to make legislation, the executive has the power to introduce ordinances and enter into international instruments, which need not be made at all.

The executive comprised of the Prime Minister, President and the Cabinet actually exercises a great deal of authority with respect to adopting international law in Pakistan. The Government of Pakistan is to take all action in the name of the President as regards the "authentication of orders and instruments in connection with the representation of Pakistan in foreign countries or at international conferences and of international agreements and treaties."⁷⁶ No order is to be issued without the approval of the Prime Minister when a proposal arises for the implementation of an international agreement in the provinces.⁷⁷ The Cabinet is required to approve all proposals for entering into any cultural or other agreements with any foreign government prior to any negotiations.⁷⁸ The Federal Rules of Business also extensively document the areas of work in which the various divisions of the Cabinet exercise authority:

AREAS OF CABINET WORK	
DIVISION	AREA OF WORK
<i>The following provisions are taken from Schedule II on the Distribution of Business Among the Divisions under Rule 3(3) of the Federal Rules of Business</i>	
Commerce	Imports and exports across customs frontiers including: treaties, agreements, protocols and conventions with other states and international agencies bearing on trade and commerce (Sect. 2(1)(i))

⁷⁶ Rules of Business § 7(3) (1973).

⁷⁷ Id. at § 15(1)(c).

⁷⁸ Id. at § 16 (proviso).

Defence	Geneva Conventions so far as they effect belligerents; air service agreements with other states; liaisoning with the International Civil Aviation Organization and other international agencies concerned with aviation; international aspects of matters arising with concern to the law of the sea and maritime affairs including international negotiations, agreements and treaties (Sects. 5(6),(21),(28)(i)-(ii))
Economic Affairs	International organizations and agreements relating to tourism; dealings and agreements with other states and international organizations relating to health, drugs and medical facilities; dealings and agreements related to labor and security(Sects. 7(14),(21),(24))
Finance	Negotiations with international organizations and other states and implementation of subsequent agreements(Sect. 11(27))
Foreign Affairs	Matters relating to agreements and treaties with other countries(Sect. 13(2))
Human Rights	Initiatives for harmonization of legislation, regulations and practices with the international human rights covenants and agreements to which Pakistan is a party and monitoring of implementation(Sect. 15A(3))
Interior	Internal security and matters relating to public security arising out of dealings and agreements with other states and international organizations (Sect. 18(1))
Law and Justice	Dealings and agreements with other countries and international organizations in judicial and legal matters(Sect. 21(4))
Narcotics Control	Policy on all aspects of narcotics and dangerous drugs in conformity with national objectives, laws and international conventions and agreements; bilateral and multilateral cooperation with foreign countries against narcotics trafficking and all other international aspects of narcotics including negotiations for bilateral and multilateral agreements for mutual assistance and cooperation in enforcement(Sect. 21D(1),(3))

National Harmony	International agreements and commitments in respect of all religious communities and subsequent implementation (Sect. 22(2))
Climate Change	Coordination, monitoring and implementation of environmental agreements with other states, international agencies and forums (Sect. 22A(7))
National Heritage and Integration	International agreements and assistance in the field of archaeology, national museums and historical monuments declared to be of national importance (Sect. 22C(3))
Petroleum and Natural Resources	All matters relating to oil, gas and mineral at the national and international levels, including policy, legislation, planning regarding exploration, development and production and matters related to international aspects (Sects. 23(1)(i),(iii))
Ports and Shipping	International shipping and maritime conferences and ratification of their conventions (Sect. 25A(8))
Railways	Negotiations with international organizations and other states and implementation of subsequent agreements (Sect. 26(4))
Scientific and Technological Research	Promotion of scientific and technological contacts and liaisoning nationally and internationally, including through dealings and agreements with other countries and international organizations (Sect. 28(9))

These excerpts from the Federal Rules of Business serve to also demonstrate the lack of exclusive authority the Parliament has over the domestic treatment of international law. The roles are clearly divided and where they are so heavily divided between the executive and the legislature, it makes little sense to exclude the judiciary. It appears inconsistent with the spirit of the separation of powers for the judiciary to so vehemently attempt to restrict itself to considering only legislation enacted by the Parliament as domestic law where the other branches of federal government exercise some authority over international law.

B. International Law versus Domestic Law: The Traditional Legal Interpretation

Pakistan traditionally operates as a dualist state. Dualism approaches national and international law as separate entities that only overlap when international law is incorporated through legislative action into national law.⁷⁹ In a strict dualist system, for international instruments to have the same status as domestic law, implementation through legislation or executive action is required. For the courts, in many instances, executive action is not enough.⁸⁰ The Supreme Court found that where treaty provisions are not incorporated through legislation into the formal law of the state, they do not “have the effect of altering the existing laws,” which means “rights arising therefrom called treaty rights cannot be enforced” and “the Court is not vested with the power to do so.”⁸¹ In support of this statement, the courts reference Article 175(2) of the Constitution of Pakistan, “no Court has any jurisdiction unless conferred by or under any law or the Constitution.”

A litany of domestic judgments, a sample of which is provided below, support this conventional notion that international law is domestically unenforceable, save for legislative incorporation in domestic law:

*It is well settled proposition of law that international treaties and convention, unless incorporated in the municipal laws, the same cannot be enforced domestically.*⁸²

*It is established principle of law that any agreement award not approved by the Parliament does not have the force of law and cannot be executed through process of Court.*⁸³

*An international agreement between the nations, if signed by any country, is always subject to ratification, but it can be enforced as a law only when legislation is made by the country through its legislature. Without framing a law in terms of the international agreement of covenants of such agreement cannot be implemented as a law nor do they bind down any party.*⁸⁴

⁷⁹ SGS Societe Generale v. Pakistan (2002) CLD Lah. 790.

⁸⁰ Id.

⁸¹ Societe General De Surveillance S.A. v. Pakistan, supra note 71, at ¶ 23.

⁸² Govt. of Punjab v. Aamir Zahoor-ul-Haq (2016) PLD SC, 421.

⁸³ Ministry of Inter Provincial Coordination v. Maj. (R) Ahmad Nadeem Sadal (2014) CLC Lsb. 600.

⁸⁴ Shehla Zia v. WAPDA (1994) PLD SC. 693.

*Where there is a conflict between a municipal law and any provisions of an international convention, which has not been legislated or enacted, the provisions of municipal law shall prevail.*⁸⁵

Other similar judgments promote the superiority of municipal law over international law obligations accepted by Pakistan, based on the dubious assumption that both do not in some capacity comprise domestic law.⁸⁶

*We are not to lose sight of the established legal principal prevalent in our legal jurisdiction that when international obligations and bilateral commitments come in conflict with municipal laws, the later are to prevail.*⁸⁷

*A government, which is a party to an international convention, cannot enforce it like a municipal law unless it has been enacted and codified by the legislature in a proper manner. However, if a government is a party to a Convention it is morally bound to observe the provisions of the Conventions. But if it is in conflict with any provision of law, the law shall prevail over such Convention.*⁸⁸

*We are inclined to hold that the absence of any provisions in the relevant [domestic] law, the Pakistani courts are not entitled to take note of the factum of violation of any provisions of international agreement or law, the Pakistani courts are bound to give effect to the municipal law as they are.*⁸⁹

B. International Law versus Domestic Law: A Progressive Legal Approach

The Constitution of Pakistan specifically refers to the power of Parliament to “make” laws.⁹⁰ The word “make” is broad and is repeatedly construed as such when measuring the powers of the Parliament. While it is undoubtedly true that the Constitution protects the exclusive power of Parliament to make legislation with regards to the Federal Legislative List, “make” may refer to the actual process of creation of law. It need not be assumed that to make, or even its synonym to enact, also specifically refer to the process of formal

⁸⁵ Commander Aziz Khan v. Director General, Ports and Shipping (1991) CLC 362.

⁸⁶ Presumably any conflict within international law is addressed through declaration during accession or ratification, negating any conflict within the international instrument to the extend of the discrepancy with municipal law.

⁸⁷ Ahtabar Gul v. State (2014) PLD Pesh. 10.

⁸⁸ Commander Aziz Khan v. Director General, Ports and Shipping, supra note 85.

⁸⁹ Indus Automobile v. Central Board of Revenue (1988) PLD Kar. 99.

⁹⁰ PAKISTAN CONST. arts. 97 & 142(a) (1973).

incorporation of international instruments or provisions the Government of Pakistan has already accepted as binding.

Incorporating international law into domestic law is not necessarily lawmaking per se. It may alternatively be understood as a weaving process, blending accepted international law obligations within the fabric of Parliamentary municipal law [without any actual making involved]. This approach reflects the view that a constitution is something of a living organism that adapts over time to changes in law and society. Justice Oliver Wendell Holmes, a chief proprietor of this theory of living constitutionalism, stated:

[W]e must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago.⁹¹

Justice Holmes adamantly expresses his disdain for heavy reliance on rigid or traditional interpretations of areas of constitutional ambiguity. In the incorporation of international law into domestic law, the same approach may be applied. The Constitution of Pakistan does not explicitly prohibit the judicial branch of government from engaging with international law as a branch of domestic law and thus this is an area of legal ambiguity.

Where the traditional judicial approach [see Section B of this Chapter] very rigidly construes the application of international law by courts, there is little to prohibit a change in interpretation now to reflect changing domestic perceptions of international law. To this end, the superior courts are neither explicitly bound nor do they bind themselves through the principle of stare decisis.⁹² The Supreme Court has confirmed as much in numerous judgments, including the following:

[T]here is no Article in the Constitution which imposes any restriction or bar

⁹¹ Missouri v. Holland, 252 U.S. 416, 433 (1920).

⁹² Article 189 of the Constitution of Pakistan binds all other courts in Pakistan by judgments on any question of law decided by the Supreme Court. Article 188, on the other hand, empowers the Supreme Court to review any previous judgment or order.

on this Court to revisit its earlier decision or even to depart from them, nor the doctrine of stare decisis will come in its way so long as revisiting of the judgment is warranted, in view of the significant impact on the fundamental rights of citizens or in the interest of public good.⁹³

[T]he Courts are not slaves of the doctrine of stare decisis. A Court may change or modify its view with the passage of time. The development of jurisprudence is an on-going process.⁹⁴

It is the policy of the Courts to stand by the ratio decidendi, that is, the rule of law and not to disturb a settled point. This policy of the Courts is conveniently termed as the doctrine or rule of stare decisis. The rationale behind this policy is the need to promote certainty, stability, and predictability of the law. This, however, does not mean that this rule is inflexible.

In spite of a Judge's fondness for the written word and his normal inclination to adhere to prior precedents one cannot fail to recognize that it is equally important to remember that there is a need for flexibility in the application of this rule, for law cannot stand still nor can courts become mere slaves of precedents.

The rule of stare decisis does not apply with the same strictness in criminal, fiscal and constitutional matters where the liberty of the subject is involved or some other grave injustice is likely to occur by strict adherence to the rule.

Courts regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

Too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law.⁹⁵

For resolving a conflict of judicial opinion, the Supreme Court noted several considerations, including obviously that the "Supreme Court is not bound by the principle of stare decisis," though any "departure from the precedent

⁹³ Khalid Iqbal v. Mirza Khan (2015) PLD SC. 50, ¶ 13.

⁹⁴ Hitachi Limited v. Rupali Polyester (1998) SCMR SC. 1618, ¶ 14.

⁹⁵ Pir Bakhsh v. Chairman, Allotment Committee (1987) PLD SC. 145.

should be well reasoned, proper and in accordance with the established principles of law. The Court, like Justice Holmes, also noted that the “law is a living organism which adapts to societal change.” The role of a judge was also enumerated:

A judge's role is to interpret the law and to correct its mistakes. The twin role of a developer in law and an earnest interpreter of legislation, though challenging, is in accord with the role the Supreme Court has in the constitutional scheme as also consistent with society's perceptions of the role of judiciary in a liberal democracy.⁹⁶

This concept of a twin role supports the progressive approach towards the domestic incorporation of international law through the judiciary. The judge, in performing this role, has enough flexibility to recognize that international law is not a monolithic, rigid or uniform construct. International legal obligations arising out of treaties or customary law are an additional tool within the domestic legal framework to enforce the rule of law. It would be shortsighted to enforce a sweeping rejection of all of international law or anything that may be classified as international law in domestic courts for fear that individuals may attempt to secure rights under particular international legal instruments. International law is multi-faceted and dynamic. There are different kinds of instruments that comprise international law with differing levels of obligation that a state may undertake.

It is not necessary that the courts must allow for a cause of action to arise under all international instruments to which Pakistan is a party in order to uphold its duty in considering international law while enforcing the domestic rule of law. Nuanced judicial opinions in line with this type of reasoning are already present in domestic jurisprudence:

International agreements, which are a part of foreign policies of the Government, cannot be called in question in exercise of power of judicial review and commitments made thereunder are necessarily to be honored as per mandate of the Constitution itself, and injunctions of Islam.⁹⁷

We are of the view that nations must march with international community and the municipal law must respect rules of international law, even as nations respect international opinion. The comity of nations requires that rules of

⁹⁶ Pakistan Defence Officers' Housing Authority v. Lt. Col. Syed Jawaid Ahmed (2013) SCMR SC. 1707, ¶ 55.
⁹⁷ M.D. Tahir v. Pakistan (1995) CLC Lah. 1039.

international law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict [with acts of Parliament].⁹⁸

The Fundamental Rights enshrined in our Constitution in fact reflect what has been provided in [the] Universal Declaration of Human Rights. It may be observed that this Court while construing the former may refer to the latter if there is no inconsistency between the two with the object to place liberal construction as to extend maximum benefits to the people and to have uniformity with the comity of nations.⁹⁹

Every statute is to be so interpreted and applied as far as its language admits, as not to be inconsistent with the comity of nations, or with the established rules of international law...¹⁰⁰

National courts should strive for uniformity in the interpretation of treaties/conventions and therefore the case-law developed in other jurisdictions can and ought to be taken into consideration by courts of the states party to such treaties.¹⁰¹

It is by now settled that International Law, unless in direct conflict with the municipal law, ought to be applied and respected by municipal courts in deciding matters arising therefrom.¹⁰²

Courts have also appreciated the responsibility of courts to uphold the international obligations of the state, including recognizing the potential consequences of disregarding such obligations:

Indeed we agree with learned counsel for the respondents to the extent that terrorism is a fast growing phenomena and it is in the wider public interest that all civilized States should make laws and take appropriate measures within their Constitutional system to combat it. We also agree [...] that international obligations to the State ought to be duly honoured.¹⁰³

[T]he domestic courts must take account of the consequences that can flow

98 Najib Zarab Ltd. V. Pakistan (1993) PLD Kar. 93.

99 Al-Jehad Trust v. Federation of Pakistan (1999) SCMR SC. 1379.

100 Hanover Fire Insurance Co. v. Muralidhar Banechand (1958) PLD SC. 138.

101 Abdullah v. Cnan Group Spa (2014) PLD Kar. 349.

102 Haji Lal Muhammad v. Pakistan (2014) PLD Pesh. 199.

103 Suleman v. Manager Domestic Banking, Habib Bank (2003) CLD Kar. 1797.

from the “legal obligation,” namely, that any breach of [the provisional measures recommended by the international (ICSID) tribunal] may be taken into consideration by the tribunal [...] the domestic courts should be cognizant that a breach or disregard of the “legal obligation” could, ultimately, result in severe consequences for their State on the international plane.¹⁰⁴

These judgments are a reflection of the recognition by the judiciary of the relevance of international law as a dynamic element within domestic law. Correspondingly, sweeping exclusion of any international law to which Pakistan is a party results in discord with other nations and international organizations, interference with foreign policy and even violates the spirit of the Constitution of Pakistan and the enforcement of fundamental rights.

The approach of the domestic judiciary towards international law should reflect the development that international law has endured. Even the Parliament now periodically references international law and international organizations within laws. The Public Procurement Rules, 2004, for example, allow international obligations to prevail over municipal law provisions:

Whenever these rules are in conflict with an obligation or commitment of the Federal Government arising out of an international treaty or an agreement with a State or States, or any international financial institution the provisions of such international treaty or agreement shall prevail to the extent of such conflict.¹⁰⁵

Numerous newly enacted or proposed laws now include references to organizations like the Organization of Islamic Cooperation¹⁰⁶ and the World Trade Organization.¹⁰⁷ There are also legislative references to treaties like the General Agreement on Tariffs and Trade¹⁰⁸ and the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.¹⁰⁹ Where Parliament now accepts on some level the influence of international law on domestic law and integration of both frameworks in

¹⁰⁴ Lakhra Power Generation Company v. Karadeniz Powership Kaya Bey (2014) CLD Kar. 337.

¹⁰⁵ Public Procurement Rules, S.R.O. 432(I)/2004, Rule 5.

¹⁰⁶ Pakistan Halal Authority Act, Act No. VIII (2016).

¹⁰⁷ Anti-Dumping Duties Act, Act No. XIV (2015).

¹⁰⁸ Anti-Dumping Duties Act, supra note 107; Countervailing Duties Act, Act XIII (2015).

¹⁰⁹ Torture, Custodial Death and Custodial Rape (Prevention & Punishment) Act, proposed (2014) available at: http://www.na.gov.pk/uploads/documents/1415360249_881.pdf.

domestic law, the judiciary should also be keen to take a progressive approach in marshaling international law to enforce the domestic rule of law.

Reference Annex II for further information on additional approaches to international law within the domestic legal framework of states that include the United Kingdom, the United States and India.

C. Appreciating International Law in Domestic Judgments

The conventional view of international law within a state, motivated by lack of awareness, operates somewhere between dismissal, ignorance and fear. International law is viewed as alien to the domestic system, a representation of foreign or external influence to be dealt with only in a limited and evasive capacity. Many states harbor ill will towards any representation of power that does not organically originate within the state itself. However, international law is a global system of compromise that seeks to collectively imbue a basic set of rights and protections to all persons regardless of their background. Obligations accepted by a state with regards to these rights and protections no longer remain alien to the domestic law of that state when a legitimate arm of government has accepted the agreement. These rights and protections do not displace the laws of a state or challenge them; rather they enhance the state through ensuring basic guarantees for all people.

The importance of international law as an element of domestic law may only be appreciated when it is understood what it means to accept obligations under international law. A basic example of this appreciation is the distinction between signature and ratification of a treaty or convention. Though the definitions of both signature and ratification were previously references within Section B of Chapter II within the explanation of international conventions recognized between states, for emphasis, the same shall be clarified further. Signature upon a treaty is different from ratification. A state only agrees to take on the legal obligations of an international instrument when such instrument is ratified by the state, bearing in mind any written reservations raised at the time. After signature, a state only displays its eventual intent to ratify a treaty and therefore seeks not to violate its provisions, but it is not legally bound. A domestic judge, in considering any point of law relevant to international law must possess a solid awareness of those international agreements that the state has ratified and those that it has signed or has taken no action on and employ the correct language in their

decision if necessary. The appreciation of this distinction allows for further recognition of other nuances within international law. This includes, for example, understanding what is customary international law and where the elements of human rights and humanitarian law overlap and where they differ.

A Case Study on "Torture"

The following case study represents one distinct example of a lack of domestic recognition towards a term that within international law has a legal connotation, but in domestic law is used more diversely and without any particular legal meaning inherited from law. Though Pakistan is a state party to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which defines "torture," the obligation assigned thereunder have by and large failed to trickle down into domestic law. The domestic judiciary has also largely ignored the legal density of the term "torture" as shall be explained in the following.

Those in the legal profession are able to appreciate the distinction between the colloquial use of a term and the legal use of a term. The term "person" is one such example. A generic, non-legal definition of person generally refers to a human being. However, in law, a person may refer to a human being, but also to a "legal person," which would include a business entity or public organization. The term "torture," legally speaking, refers to a specific act that is distinct from its generic definition. The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹¹⁰

Pakistan ratified the Convention in 2010 and is subsequently obligated to adhere to the provisions thereunder. However, there is no municipal law

¹¹⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, art. 1(1).

currently in application that defines torture. Domestic laws that include the Constitution of Pakistan, the Police Order, 2002, the Pakistan Prison Rules, 1978, the Pakistan Penal Code, 1860, the Code of Criminal Procedure, 1898 and the Actions (in Aid of Civil Power) Regulations, 2011 criminalize torture or acts that amount to torture, but never define the parameters of what is considered torture. Without any definition within traditional domestic law, the judiciary is free to exercise its own judgment with regards to what may or may not amount to torture.

The Convention limits its definition of torture to acts committed by or at the instigation of a public official or anyone acting in an official capacity. However, judgments in Pakistan, without appreciating Pakistan's status as a state party under the Convention, have deviated from this limited understanding of torture. The term "mental torture" is commonly used in judgments addressing domestic violence and suits seeking punitive damages for suffering caused by the wrongdoing of others. The use of this term in this haphazard manner dilutes the force of the definition and defeats the purpose of Pakistan's acceptance of obligations under the Convention.

Where the state has agreed to be bound by the Convention and by association its definition of torture, the functionaries of the state, including the judiciary, may also be empowered by what the Convention contains. In those cases where public officials or persons acting in an official capacity are accused of committing acts of torture, judicial officials may reinforce their judgment with a reference to the provisions of the Convention, including the definition of torture. This application of international law also coincides with the restrictive traditional approach to international law, in that the Convention would not give rise to a cause of action independently, because municipal law already generically criminalizes torture. What amounts to torture in the judgment, however, could be influenced in part by the definition of torture provided in the Convention. At the very least, the judiciary may be mindful in their decisions to refrain from any violation of the Convention or any other international law obligation.

The above may only be achieved where international law is appreciated as an entity of domestic law, rather than avoided or dismissed. An appreciation for the nuances of international law does not hinder the enforcement of domestic law. Understanding international law empowers domestic judges in making their decisions.

VI. CONCLUSION

The purpose of the Benchbook was to demonstrate the current nature of engagement of Pakistan's domestic courts with international law and to encourage further incorporation in a manner sanctioned by domestic law. The Book is intended to acquaint all readers with the nature and relationship of international law in Pakistan's courts, but was specifically created for members of the superior judiciary to review the nature of their understanding and engagement with the subject matter.

The Benchbook provided an introduction to basic tenants of international law and discusses the importance of applying international law within the domestic rule of law. It also addresses the role of the domestic judiciary in enforcing international law, including an overview of the actual process of incorporating international law provisions into domestic law. The Benchbook discusses the relative importance of considering international law within domestic judgments and maintaining a flexible approach to its relative applications. It also subsequently furnishes examples from Pakistan's jurisprudence as well as that of other states within the Annexes.

It is hoped that this book may provide some measure of perspective on a dynamic body of law, the consideration of which may only serve to bolster (and not encumber) domestic jurisprudence. The traditional view of international law as entirely alien to domestic law is quickly becoming outdated and as such a more nuanced approach is needed. The domestic judiciary of any state is often at the helm of progressive legal thought and in this matter it must be as well. The international legal obligations of a state, whether derived from custom or an international instrument, are part of the domestic legal framework of a state and should be proactively employed by the domestic judiciary.

VII. ANNEX I: INTERNATIONAL LAW IN PAKISTAN'S COURTS

A. Deferral to the Executive: Durand Line

Superintendent, Land Customs Torkham (Khyber Agency) v. Zewar Khan

Declaration by the Council of Foreign Ministers of the South-East Asia Treaty

Organization:

“The members of the Council severally declared that their Governments recognized that the sovereignty of Pakistan extends up to the Durand Line, the international boundary between Pakistan and Afghanistan...”

Both under the international law as well as the Municipal Law, the tribal territories became part and parcel of Pakistan and were duly recognized as such by the United Kingdom and the member Nations of the South East Asia Treaty Organization. The Dominion of Pakistan through its Constitutional Assembly also formally accepted it as such. In the circumstances it was not for the Municipal Courts to hold otherwise. It is important to remember that in such matters of a political nature, namely accession or cession of territory it is not for the Courts to take a different view. The executive authority of the State has in the exercise of its Sovereign power the right to say as to which territory it has recognized as a part of its State and the Courts are bound to accept this position. Indeed this was the principle that was given statutory effect in section 4 of the Foreign Jurisdiction Act, 1890 and section 6 of the Governor-General's Order No. 5 of 1949. If the Courts felt any doubt with regard to the status of such a territory then it was incumbent upon them to make reference to the Government and to accept its opinion.¹¹¹

The Supreme Court, under the circumstances, declined to exercise a judgment differing from that of the executive in recognition of Pakistan's treaty rights and obligations that secured the Durand line as the international border. The Court, in support of the executive's foreign policy stance, held that it was not appropriate in the specific circumstances of the case to diverge in interpretation of the treaty. The *Zewar Khan* case represents one of the many circumstances in which the superior courts must exercise their judgment in evaluating the soundness of the executive's action vis-à-vis a treaty or treaty obligations as a part of domestic law. However, this case is not to be taken as an example of the courts signaling their lack of domain with regards to international law in deferring to the executive's power. That interpretation would frustrate the spirit of the Constitution of Pakistan, which marshals the independence of the courts as a chief tenant.

111 Superintendent, Land Customs Torkham (Khyber Agency) v. Zewar Khan (1969) PLD SC. 485.

B. Defend the State's Rights through International Law: Drone Attacks

Foundation for Fundamental Rights v. Federation of Pakistan

[N]either the Security Council nor the [United Nations] in general at any point of time has permitted the U.S. Authorities particularly the CIA to carry out drone attacks within the territory of Pakistan, a sovereign State...¹¹²

The huge loss to life and property [...] is thus, strictly prohibited not only by the Charter of the UNO but also by the Geneva Conventions of 1949.¹¹³

[N]either any municipal law nor international law including the [United Nations] Charter and the provisions of the Geneva Conventions [...] permit these drone strikes [...] in the sovereign territory of Pakistan, which is unlawful and illegal.¹¹⁴

Under the international law and conventions of the UNO, no State can choose and hit its enemy, hiding in another State, unless the latter State consents to it in writing and with mutual collaboration the same is carried out but strictly under the sanction of the UN Security Council which is not granted [in this instance]...¹¹⁵

[T]he drone strikes [...] are absolutely illegal and blatant violation of the sovereignty of the State of Pakistan because frequent intrusion is made on its territory/airspace without its consent rather against its wishes despite of the protests lodged by the Government of Pakistan...¹¹⁶

The Peshawar High Court ambitiously employed Article 2(4) of the United Nations Charter, the Geneva Conventions, General Assembly resolutions and the scholarly works of international academics to support its holding regarding the international illegality of the drone strikes in Pakistan. The scope and breadth of the international law referenced within the decision is tenacious and in some ways amounts to an act of lawfare. The Court not only aggressively uses international law to declare the acts unlawful, but it also

¹¹² Foundation for Fundamental Rights v. Federation of Pakistan (2013) PLD SC. 94, ¶7.

¹¹³ Id. at ¶11.

¹¹⁴ Id. at ¶16.

¹¹⁵ Id. at ¶19.

¹¹⁶ Id. at ¶22(ii).

strongly recommends international legal steps to be taken to combat the issue. This case is, at the very least, is symbolic of the potential power of proactively harnessing international law to reach a just decision.

C. Application of International Legal Principles: Enforced Disappearances

Human Rights Case No.29388-K of 2013

It is pertinent to note that Pakistan has also not ratified this [Convention for the Protection of All Persons from Enforced Disappearances]. 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 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. Likewise, there are cases from international tribunals such as the UN Human Rights Committee, the Inter-American Court of Human Rights and the European Court of Human Rights as well as other national courts [...] where the Courts were forced to issue directions to the concerned authorities for effecting recovery of the missing persons and also dealing with those persons who are responsible for their enforced disappearance.¹¹⁷

The Supreme Court embraced the application of international law to interpret a domestic provision of law. The overtly progressive nature of this application must be recognized. The Court used an international legal instrument to which Pakistan is not a party to interpret domestic law and “achieve the ends of justice.”

D. International Law Implications of Recognizing Another State: Bangladesh

Pakistan Services Limited v. Commissioner of Income Tax (Revision) Karachi

Bangladesh was recognized as an independent country by the Government of Pakistan in 1974.¹¹⁸

*The fact of recognition of Bangladesh as an independent State has more than one implication [...] Recognition is a political act, which when accorded by the authorized political department, will be accepted as conclusive by the Courts.*¹¹⁹

The international law on the subject of recognition of a State...

*Among the more important consequences which flow from the recognition of a new Government or State are these: (1) it thereby acquires the capacity to enter into diplomatic relations with other States and to make treaties with them; (2) within limitations which are far from being clear, former treaties (if any) concluded between two states, assuming it to be an old state and not a newly-born one, are automatically revived and come into force; (3) it thereby acquires the right, which, at any rate according to English law, it did not previously possess, of suing in the Courts of law of the recognizing state; (4) it thereby acquires for itself and its property immunity from the jurisdiction of the Courts of law of the State recognizing it and the ancillary rights which are discussed later-an immunity which, according to English law at any rate, it does not enjoy before recognition; (5) it also becomes entitled to demand and receive possession of property situate within the jurisdiction of a recognizing state, which formerly belonged to the preceding Government at the time of its supersession; (6) Recognition being retroactive and dating back to the moment at which the newly-recognized Government established itself in power, its effect is to preclude the courts of law of the recognizing state from questioning the legality or validity of the acts both legislative and executive, past and future, of that Government; it therefore validates, so far as concerns those courts of law, certain transfers of property and other transactions which before recognition they would have treated as invalid.*¹²⁰

The effect of the law so far discussed is that the acquisition of the properties of

¹¹⁸ Pakistan Services Limited v. Commissioner of Income Tax (Revision) Karachi (1993) SCMR SC. 1406, ¶ 10.

¹¹⁹ Id. at ¶ 13.

¹²⁰ Id. at ¶ 15.

the assessee will be taken to be compulsory and by the competent authority, and the cause of action for claiming relief in respect of such properties will arise not retroactively from the date Bangladesh declared independence [...] *but from the date it was recognized by the Government of Pakistan.*¹²¹

International law is also indirectly applicable or ancillary to domestic legal disputes in many instances. What it means to recognize Bangladesh as a state is pertinent to the discussion of how and if the property in the above instance was discarded. Thus, international law, including the scholarly works of international jurists assists in addressing what recognition actually requires or entails. As such, international legal provisions assist the Court in arriving at a conclusion under traditional municipal law, meaning that international law is something to be explored and harnessed rather than ignored or feared.

VIII. ANNEX II: USE OF INTERNATIONAL LAW IN THE COURTS OF OTHER STATES

Judges from around the world cite international legal materials to explain their decisions as international law primarily relies on domestic legal and political structures for implementation. The blend of international law in domestic courts is therefore, becoming a thriving subfield overlapping comparative and international law.¹²²

Article 38¹²³ of the Statute of the International Court of Justice as well as multiple treatises that address sources of international law, emphasize treaties, custom, and general principles as primary sources of international law. The most widely used amongst domestic judges is the application of treaties since they are more concrete and accessible as compared to customs and general practices.¹²⁴

¹²¹ *Id.* at ¶ 18.

¹²² Wayne Sandholtz, *How Domestic Courts Use International Law*, 38 *FORDHAM INT'L L.J.* 595 (2015).

¹²³ Statute of the International Court of Justice, 18 Apr. 1946, Art. 38. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, [i.e. that only the parties bound by the decision in any particular case] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

¹²⁴ Sandholtz, *supra* note 122, at 596.

The application of international law in municipal law is quite widespread as courts from every major legal tradition and from every part of the world draw on international legal norms in deciding domestic disputes. The Oxford Electronic Database, *International Law in Domestic Courts*, for example, includes more than 1,300 decisions from ninety countries, covering all regions of the world.¹²⁵

Human rights litigation comprises the greatest share of citations within international legal materials in domestic courts. Domestic judges find the interpretation of international human rights law to be more fluid as fundamental human rights is already a part of domestic legislation.¹²⁶ Other rights, *jus cogens*, for example, are widely incorporated under domestic law, including the prohibition of torture, slavery, crimes against humanity and genocide.¹²⁷

In states including Canada, the Netherlands and Australia, national courts have invoked treaties and other international law materials as aids in the interpretation of domestic laws because they find it useful and the quality of judgments has improved over time. States like Venezuela, Austria, the Netherlands, Nigeria and Poland have gone as far as applying treaty law as persuasive authority without being a party to the treaty.¹²⁸

In *Slaight Communications v. Davidson*, the Supreme Court of Canada, invoking the International Covenant on Economic, Social, and Cultural Rights (ICESCR), declared that it could refer to international law, both treaty and custom, to determine the substance of constitutional rights.¹²⁹

Similarly, in Bangladesh, treaty law may be used to interpret fundamental rights in the constitution and to develop common law on the matter.

In 2012, the Constitution of Mexico was revised to declare that, all persons shall enjoy the human rights recognized in this Constitution and in international treaties to which Mexico is a party.¹³⁰ Article 1 of the Constitution requires that norms concerning human rights always be interpreted in conformity with the constitution and with international treaties

¹²⁵ *Id.*

¹²⁶ *Id.* at 600.

¹²⁷ *Id.* at 607.

¹²⁸ *Id.* at 599.

¹²⁹ *Slaight Communications Inc. v. Davidson*, (1989) 1 S.C.R. 1038 (Can.).

¹³⁰ Sandholtz, *supra* note 122, at 610.

in the manner that offers the broadest protection.¹³¹ Thus, in Mexico, judges are obligated to interpret rights in light of international law.¹³²

A. United Kingdom

Lord Bingham of the House of Lords observed that international law used to be seen as an “esoteric preserve” that did not feature significantly in the work of “ordinary practitioners and national courts;”¹³³ He also provided the following:

“Times have changed. To an extent almost unimaginable even thirty years ago, national courts in this and other countries are called upon to consider and resolve issues turning on the correct understanding and application of international law, not on an occasional basis, now and then, but routinely, and often in cases of great importance”

Historically, the courts of the United Kingdom have developed the application of international law in various decisions, just as long as its incorporation was not inconsistent with the statutes. Where the provisions of a statute are unambiguously written with those of an earlier treaty, the courts must apply the statute in preference to the treaty. However, if the statute is ambiguous, there is a presumption that the court is required to refer to a treaty to find the true meaning and purpose of the statute.¹³⁴

After the incorporation of the European Convention on Human Rights in 1950, the Parliament enacted the Human Rights Act, 1998 which gave domestic legal effect to the core articles of the European Convention on Human Rights. The judgment in *A v. Secretary of State for the Home Department* held that legislation must be read and given effect in a way that is compatible with rights provided in the Convention.¹³⁵

¹³¹ Article 1 of the Constitution of Mexico, 1917: The provisions relating to human rights shall be interpreted according to this Constitution and the international treaties on the subject, working in favor of the broader protection of people at all times.

¹³² Sandholtz, *supra* note 122, at 610.

¹³³ Anthea Roberts, *Comparative international law? The role of National Courts in Creating and Enforcing International Law*, CAMBRIDGE JOURNALS, [ICLQ vol. 60, January 2011] at 57.

¹³⁴ Dr. Braham A Agarwal, *Enforcement of International Legal Obligations in a National Jurisdiction*, LAW COMMISSION OF INDIA, New Delhi, at 11.

¹³⁵ (2004) UKHL 56.

One of the most celebrated cases involving the use of international law by the House of Lords was the Pinochet Case in which the House of Lords found that a former head of State could not claim immunity for acts of torture.¹³⁶

B. United States of America

At the time of the American Revolution, increased international trade and colonization of the new world made international law and its application an issue of daily importance. The founding fathers recognized this fact by including treaties along with the Constitution and domestically originating federal laws as a part of “the supreme law of the land”.¹³⁷

Where a treaty and a subsequent statute conflict, the “last in time” doctrine applies. This theory derives from the fact that the Supremacy Clause, by its wording, affords equal weight to both treaties and federal statutes.¹³⁸ The Supreme Court stated in *Whitney v. Robertson*:

*Congress may modify such provisions so far as they bind the United States, or supersede them altogether. By the Constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in time will control the other.*¹³⁹

The judiciary is required to determine whether a conflict actually exists when the two provisions are read in their utmost consistent light. Only if the two cannot be reconciled should the court apply the last in time doctrine.

The role of customary international law in the United States courts has likewise evolved through federal court decisions. Custom, from the inception of a body of international law, plays a role in defining the duties and obligations of nations. References of the applicability of customary

¹³⁶ R v. Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte (No.3) [2000] AC 147.

¹³⁷ Margaret Hartka, The Role of International Law in Domestic Courts: Will the legal Procrastination End? MD. J. INT'L. 99, 106 (1990).

¹³⁸ Article VI, Paragraph 2 of the U.S. Constitution is commonly referred to as the Supremacy Clause. It establishes that the federal constitution, and federal law generally, take precedence over state laws, and even state constitutions.

¹³⁹ 124 U.S. 190, 194 (1888).

international law can be traced as far back as 1793 when the Supreme Court stated:

*[T]he United States had, by taking a place among the nations of the earth, become amenable to the law of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed; in their national character and capacity, the United States were responsible to foreign nations for the conduct of each state, relative to the laws of nations and the performance of treaties...*¹⁴⁰

By the end of the nineteenth century, the Courts repeatedly indicated that customary international law was binding upon the federal government. The limits of its applicability were further explained in *The Paquete Habana*¹⁴¹ case:

*International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations...*¹⁴²

C. India

India is also quite familiar with the domestic application of international law. Under Article 51(c), the Constitution of India incorporates international law as an integral part of the domestic legal framework.

*The State shall endeavor to foster respect for international law and treaty obligations in the dealings of organised people with one another*¹⁴³

Indian courts have managed to move from a “transformationalist” approach (requiring international law to be transformed into municipal law through the constitutional processes) to an “incorporationalist” approach (recognizing international law as a part of the municipal law without the intervention of domestic constitutional processes). The Supreme Court and High Courts are

¹⁴⁰ *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419-474 (1793).

¹⁴¹ 175 U.S. 677 (1900).

¹⁴² *Id.* at 700.

¹⁴³ Article 51(c) of the Constitution of India, 1949.

more inclined to take international treaties, custom and general practice especially with regards to Human Rights and environmental law into account.¹⁴⁴

One of the landmark cases decided by the Supreme Court of India, *Gramophone Company of India v. Birendra Pandey*,¹⁴⁵ stated the following:

*The comity of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. National courts cannot say yes if Parliament has said no to a principle of international law. National courts will endorse international law but not if it conflicts with national law.*¹⁴⁶

Many of the superior court judgments in India tilt towards applying international law as long as it is not inconsistent with domestic law.¹⁴⁷ The dissenting judgment of Justice Khanna given in *A.D.M., Jabalpur v. Shivakant Shukla*¹⁴⁸ held the view that if two constructions of municipal law are possible, the courts should lean in favor of adopting such construction as would make the provisions of municipal law to be consistent with international law or treaty obligations.¹⁴⁹ In this case, the construction of municipal law was not in conflict with the Universal Declaration of Human Rights (Articles 8 and 9 – right to 'an effective remedy' and 'no arbitrary arrest').¹⁵⁰ The Declaration itself is not binding per se, but much of its content may be considered to be an integral part of customary international law.¹⁵¹ Justice Khanna's opinion was later followed in *Vellore Citizens Welfare Forum v. Union of India*.¹⁵²

¹⁴⁴ Chintan Chandrachud, International Humanitarian Law in Indian Courts: Application, Misapplication and Non-application, In *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies* 389-413, TMC Asser Press (2014).

¹⁴⁵ 2 SCC 1984 534 (5).

¹⁴⁶ Id.

¹⁴⁷ Agarwal, supra note 134, at 15.

¹⁴⁸ AIR 1976 SC 1207, 1291.

¹⁴⁹ Agarwal, supra note 134, at 15.

¹⁵⁰ Id. at 15.

¹⁵¹ Id.

¹⁵² AIR 1996 SC 2715.

