

LEGAL CHALLENGES OF INSURGENCY AND TERRORISM IN PAKISTAN

Presented By Ahmer Bilal Soofi*

in

International Conference On

“Combating Terrorism Through Law”

September 28 – 30, 2012

Karachi, Pakistan

* The writer is an Advocate Supreme Court of Pakistan, President Research Society of International Law Pakistan and Member Advisory Committee of United Nations Human Rights Council. He can be reached at ahmersoofi@hotmail.com

Introduction

This conference provides an opportunity to the members of the bar and the bench to take stock of legal aspects of terrorism related issues.

In this regard, I am pleased to present the following thoughts as my contribution to this timely and much needed conference.

I. International Law & Terrorism

The bar and the bench need to be clear that counterterrorism legal efforts in Pakistan are actually linked to its obligations under international law and thus should be tailored within the broader context

of Pakistan's international law commitments. Pakistan has ratified hundreds of treaties and its sovereignty is subject to its treaty obligations. Under the UN Charter, the United Nations Security Council ("UNSC") has issued several binding laws on terrorism primarily laid down in UNSC Resolutions 1373, 1267 and 1540.[1] This UN law creates obligations on all states including Pakistan to enforce counterterrorism measures, implement effective legislation, criminalize specific conduct, and take administrative measures to bring perpetrators of terrorism to justice.[2] Pakistan is under an obligation to file annual compliance reports to the UNSC.[3] Therefore, judgments of the courts, rate of acquittal, amendments in the Anti-Terrorism Act ("ATA"),[4] law of internment, de-radicalization programme etc. all constitute material that needs to be submitted to the UNSC as evidence of Pakistan's compliance. Similar reports are also required to be filed by all other member states of the UN.

This international context is fraught with implications. A decade ago, international community faithfully adhered to the principle of non- intervention but recent developments in international law of state responsibility have created exceptions to this once inviolable principle. One such exception is that if a state is "unable or unwilling" to handle or eliminate the threat of terrorism or fails to suppress human rights violation or is unable to secure weapons of mass destruction including nuclear weapons, then the international community may resort to intervention as a countermeasure.[5] An instance of one such intervention was the flash raid by the United States ("US") on Pakistan's territory to eliminate Osama bin Laden ("OBL"). The justification advanced by the US hinged on Pakistan's inability or unwillingness to capture OBL.[6] Likewise, the US justifies its drone strikes in Pakistan as an anticipatory form of self-defense necessitated by Pakistan's inability or unwillingness to eliminate certain non-state actors on its territory. In the words of John Brennan, the White House Counterterrorism Advisor:

*"There is nothing in international law that bans the use of remotely piloted aircraft or that prohibits us from using lethal force against our enemies outside of an active battlefield, at least when country involved consents or is unable or unwilling to take action against the threat."***[7]**

In terrorism's context, it is routinely posited that as a state, Pakistan hosts the largest concentration of terrorists found anywhere in the world; its rule of law or legal apparatus to successfully bring terrorists to justice is extremely weak; its investigation systems are faulty and primitive; its prosecution is disinterested; its courts acquit the suspects. Furthermore, the state cannot protect itself against those who attack it and lacks the necessary legal framework to effectively combat terrorism through necessary and proper laws. Despite being aware of these issues, the state of Pakistan is neither taking any interest in upgrading its laws nor showing any commitment to making its criminal justice system more efficient and robust. Hence, it is advanced that Pakistan is 'unable' or 'unwilling' to counter the threat of terrorism within its boundaries and this shortcoming has serious ramifications for global peace and security.

II. An Urgent Need to Upgrade Pakistan's Criminal Justice System

In order to resist future foreign intervention inside its territory, Pakistan must upgrade its existing terrorism related legislation, develop new legal tools, and make its criminal justice system as efficient as possible. Pakistan faces unique and exceptional circumstances which justify developing creative legal solutions. The Government of Pakistan ("GOP") has only recently introduced the draft law for surveillance and interception. Under the proposed law, a judicial authority shall issue the warrants to authorize the intelligence and law enforcement agencies to collect evidence which will not only be admissible in courts but also prevent the occurrence of an act of crime. This law ought to have been introduced several years ago as presently, the Police have to wait for the occurrence of crime before registering an FIR and triggering its investigating mechanism. Deficient lawmaking in this area is inexcusable considering that far more advanced jurisdictions much more sensitive to privacy concerns have developed laws strengthening their investigating agencies such as Regulation of Investigatory Powers Act 2000[8] ("RIPA") in the United Kingdom and Foreign Intelligence Surveillance Act of 1978[9] ("FISA") in the United States.

Likewise, the President of Pakistan issued the FATA/PATA Action (in Aid of Civil Power) Internment Regulations, 2011 ("AACP Regulations") which allow insurgents to be retained in custody during a conflict. Article 245 of the Constitution which bars the High Courts from enforcing fundamental rights during operation in aid of civil power provides the legal space necessary to issue AACP Regulations.[10] In this context, the basis of entertaining the writ petitions by the Khyber Pakhtunkhwa ("KPK") High Court is not sufficiently clear. If the notification under Article 245 of the Constitution exists in which the Armed Forces have been called in aid of civil power in KPK, then Article 245 categorically prohibits the enforcement of fundamental rights.[11]

Assuming that may be the case and the KPK High Court is barred from entertaining writ petitions for missing persons and for enforcement of fundamental rights, then the more pertinent question is whether the Court should give a free hand to the Armed Forces and the intelligence agencies to act with impunity and violate human rights at will. The answer, of course, is negative.

III. Law of Peace and Law of Conflict in Pakistan

When action in aid of civil power commences, it signals the breakdown of the constitutional machinery to a degree that it is no longer functioning. Although it goes without saying that calling the Armed

Forces implies the paralysis of civilian administration, the problem is compounded when the insurgents are attacking the state itself with brute force and thus need to be confronted with a powerful and effective state apparatus. Such conflict or war-like situations have particularized rules of conduct, which are globally recognized and accepted. For example, there are Guidelines issued by the UN on the nature of force to be used by the Army or Police personnel in such circumstances.[12] The courts can direct the GOP to incorporate and implement these rules of international conflict either in provincial legislation or in federal law.

AACP regulations contain law only applicable during conflict and whenever the Armed Forces are called in aid of civil power. AACP regulations provide internment regulations allowing internees to meet families, receive medical treatment, and file an appeal. Since such detention is not a 'constitutional detention,' the internees cannot be interrogated formally in a legal manner. In certain cases, KPK's judiciary is correctly implementing the provisions of AACP Regulations as it represents the law of conflict and while fundamental rights may not be enforceable during conflict due to Article 245 (4) of the Constitution,[13] an existing law specific to the conflict is enforceable.

The courts can even direct the issuance of rules for the use of force proportionality etc. under the Pakistan Army Act 1952.[14] There may well be several standard operating procedures ("SOPs") issued by the General Headquarters, the Corps Headquarters, Rangers and other forces like the Frontier Constabulary ("FC") on how to conduct themselves during conflict. The courts will have jurisdiction to call for any such SOPs and assess if they are in conformity with Pakistan's international commitments under International Covenant on Civil and Political Rights ("ICCPR"),[15] Convention Against Torture ("CAT"),[16] and customary law of International Humanitarian Law ("IHL") and also determine if the conduct of the military personnel conforms to such SOPs, which represent the laws of conflict. For both the judiciary and the legal community, it is extremely important to always bear in mind and retain the distinction between the law of conflict and law applicable during peace.

Pakistan does not have a statute to regulate use of force during armed actions. For international armed conflicts, Pakistan relies on the obsolete 1936 Geneva Convention Implementing Act,[17] and for internal conflicts, the only relevant law is AACP Regulations, which have limited application. International scholars have noted that absence of conflict regulating laws creates incentives for extra-judicial acts including killings. This is reflected in the mindset noticeable in the condemnable practice of 'police muqabalas' (encounter killings) where frustrated law enforcement officials eliminate suspects out of their sheer frustrations with the existing legal system.

For an ordinary law and order situation, provisions related to unlawful assembly and occasional riots exist in the Code of Criminal Procedure ("Cr.P.C."),[18] and the ATA[19]. However, significantly, there

are no corresponding applicable or relevant provisions when the Armed Forces are called in aid of civil power during a conflict.

IV. Legal Differences in KPK's, Balochistan's and Karachi's Conflict-Related Issues

Aggrieved victims in KPK, Balochistan and even Karachi are bringing conflict-related legal issues to judicial doorsteps. The judiciary needs to readjust its paradigm in all three cases as they are not like cases and therefore must be treated differently and in this regard the members of the Bar need to render necessary assistance to the Courts.

Despite the fact that in Balochistan case the Supreme Court Bar is present and assisting the court, it has not rendered specific assistance to the Supreme Court on the several aspects of applicable conflict law.

In Balochistan, the Armed Forces have not been called in aid of civil power. Therefore, as Article 245 of the Constitution is not triggered, the Supreme Court and the High Courts are not constitutionally barred from entertaining cases of victims under Article 184[20] or Article 199[21] of the Constitution. Although conflict in Balochistan may not be an all out conflict similar to Swat, it has semblance of insurgency manifested via individual terrorist acts. In Balochistan, the conduct of the deployed FC and Police is under scrutiny. In this context, the Court needs to evaluate the existing circumstances to ascertain whether the threshold of insurgency has been achieved or if it is still a political issue masquerading as self-determination.

Although Baloch nationalists make a legal argument for self-determination, such argument only holds merit where the conflict over title of the territory coexists with the global recognition of a certain ethnic or political group possessing the right of self-determination. Balochistan is an integral part of Pakistan. The principle of equal rights and self-determination of people cannot be construed or interpreted in a manner that would result in a violation of the territorial integrity of Pakistan. The principle of state sovereignty is a peremptory norm; territorial boundaries cannot be changed through use of force. The right of self-determination is not available to people living in a state not classified as a colony. Hence, proclaimed support from third party states to Baloch nationalists would be classified as intervention violating international law. In Balochistan, both the above stated requirements are absent. The title of the territories of Balochistan is not in dispute. Accession instruments of territories of Balochistan and its subsequent integration in the Federation have never been successfully challenged. An initiative taken by the Khan of Kalat to take up the issue at the International Court of Justice ("ICJ") never materialized. Moreover, the "struggle of the Baloch nationalists" has failed to

receive universal recognition as movement for self-determination. Although there have been isolated instances of individual initiatives like hearings on “Balochistan issue” in US Congress or grant of asylum to Baloch nationalist by some Governments, such postures and gestures do not reflect the official stance of any state in the international community.

Thus, in Balochistan’s case, the Court would be correct to enforce fundamental rights and if the law enforcement agencies want to retain people for prolonged custody, they must do so under various statutes including Maintenance of Public Order Ordinance, 1960[22] or Security of Pakistan Act, 1952.[23] In such cases, the detention can be for longer durations as Article 10 of the Constitution[24] allows even unlimited detention of miscreants who are taking instructions from the enemy. This is precisely the argument of the GOP. However, what the GOP needs to do further is to present the material demonstrating that instructions are being taken from enemy before the Review Board comprising of Judges of the Supreme Court, and obtain legitimate orders for detentions of longer duration. This would possibly provide a solution to the missing persons’ issue and the security agencies would be able to satisfy their security concerns within the parameters of law.

What is legally common in KPK and Balochistan is that those who are attacking the state have ended up withdrawing their loyalty from the state even if for different reasons – Baloch nationalists out of retaliation for Federation’s indifference and KPK’s insurgents for setting up their own state by asserting unlawful control over Pakistan’s sovereign territory. Whereas the Supreme Court emphasized adherence to Article 5 of the Constitution in some of its recent judgments, directives which are being violated in both cases[25] although for different reasons. Insurgents in KPK want to assert unlawful control over the sovereign territory of Pakistan, fly their own flags and impose their own way of life. On the other hand, Baloch nationalists do not allow the hoisting of Pakistan’s flag, have largely abandoned the national anthem of Pakistan and openly challenge the Constitution of Pakistan. In several media statements, Akhtar Mengal has termed the unrest in Balochistan as war-like situation where elections cannot be held. Balochistan’s and KPK’s cases are similar to the extent of withdrawal of loyalties under Article 5 of the Constitution[26] and distinct insofar as invocation of Article 245[27] is concerned, which is applicable only in KPK and not in Balochistan where only the FC is active.

In Karachi, terrorism is closer to conventional terrorism that can be treated under existing legal regime because terrorists are targeting a party or a person and not rebelling against the state. The issue relates to counterterrorism for which the appropriate legal vehicle is Section 5 of the ATA[28] or the law regulating Rangers. However, such laws are only enabling in nature and not sufficiently regulatory of the conduct. The courts can direct the Federal Government to make rules on the conduct of armed personnel while performing watch and ward and other duties in densely populated areas in order to avoid tragic incidents like the Rangers’ shootings of an unarmed civilian.

Another important legal commonality between the situation in KPK and Balochistan is that in both the territories, private armed groups have been raised in violation of Article 256 of the Constitution[29] that expressly prohibits raising and maintaining private armies.

Thus, in this context, the Federal Government must plead before the people of Pakistan that its Armed Forces and intelligence agencies are fighting its own war against those violating Article 5 or Article 256 of its Constitution, which must be enforced using all appropriate and necessary means including political options. This should also effectively blunt the highly charged and self-destructive political argument centered on Pakistan essentially fighting the US' proxy war. Plainly, it is a matter of enforcing the Constitution akin to enforcing rule of law through political means first, and if necessary, through proper military measures. In his address to this conference, the Honorable Chief Justice stated that the judiciary shall not budge an inch from the Constitution of Pakistan, which clearly prohibits private armies and demands loyalty to the state. Therefore, let us enforce these provisions and uphold the Constitution as highlighted by the Honorable Chief Justice.

V. International Implications of Domestic Judgments

Judiciary is absolutely independent only within the state but not from the state. For the international community, judiciary is only a subset of the state and its pronouncement and findings are viewed as acts of state under international law. In this context, I advise my fellow colleagues and the Honourable members of subordinate and superior judiciary to exercise caution when seized of a proposition with an international dimension to it.

For instance, although Balochistan's missing persons' case remains commendable from the standpoint of individual victims, if its final judgment ends up documenting instability of any region of Pakistan, it will have grave repercussions for national security. I had brought this to the notice of the Supreme Court during one of its hearings,[30] and I am grateful to the Honorable Chief Justice for appreciating my intervention in this regard.

In the past too, judgments of the Superior Courts have had international repercussions and effectively considered official positions of state since judiciary is a subordinate organ of the state of Pakistan. The case reported as PLD 1995 SC AJ&K 1[31] is usually brought up in the context of the legal status of Northern Areas of Pakistan. Similarly, the Supreme Court's authentication of Durand Line as an international border in Zewar Khan Case 1969[32] represents the official position of the state in

this matter. Likewise, any interpretation vis-à-vis territorial waters, exclusive economic zone or jurisdiction over continental shelves by Sindh's higher judiciary would be treated as state of Pakistan's de facto position in relation to Law of the Sea Convention.[33] Moreover, judgments of acquittal by the High Courts or the Supreme Court are internationally perceived as evidence of weakness of Pakistan's criminal justice system, and further reinforce Pakistan's inability to bring terrorists to justice.

With regard to issues and cases with international dimensions and repercussions, the independence of judiciary is not absolute and judicial authorities must be mindful of Pakistan's international obligations under hundreds of treaties. Decisions contrary to Pakistan's treaty commitments must not and cannot be passed and orders inconsistent with Pakistan's international law obligations must not and cannot be issued. This limitation is sometimes ignored by the judiciary on the basis of over simplified and that until the treaty is incorporated, there is no obligation to recognize it.

Conclusion

The bar and the bench need to consciously readjust their legal paradigms. What Pakistan faces today is not terrorism as it is conventionally understood but war waged against the state by anti-state insurgents. Unfortunately, as the conflict may well be prolonged, it ought to be managed operationally and well regulated legally. Currently, Pakistan lacks an effective and robust legal framework regulating the conduct of its military personnel during such conflict. Members of the bar have a duty and responsibility to think creatively about these challenges. In the context of Pakistan's international law obligations, judicial independence is not absolute and the bench ought to interpret laws in a manner that balances Pakistan's national security and foreign policy imperatives against civil liberties and fundamental rights of its citizens.

[1] S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001); S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999); S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

[2] *See Id.*

[3] S.C. Res. 1624, U.N. Doc. S/RES/1624 (Sept. 14, 2005).

[4] Anti Terrorism Act (ATA), 1997 (XXVII of 1997).

[5] *See Ashley S. Deeks, Pakistan's Sovereignty and the Killing of Osama bin Laden*, 15 Am. Soc'y of Int'l L. (May 5, 2011).

[6] See David Gritten, *Osama bin Laden: The long hunt for the al-Qaeda leader*, BBC News (May 2, 2011).

[7] Ari Shapiro, *U.S. Drone Strikes are Justified, Legal Advisor Says*, NPR, (Mar. 26, 2012) *available at*: <http://www.npr.org/templates/story/story.php?storyId=125206000>.

[8] Regulation of Investigatory Powers Act, 2000, 48 Eliz. 2.

[9] Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-1811 (2006)).

[10] “.... A High Court shall not exercise any jurisdiction under Article 199 in relation to any area in which the Armed Forces of Pakistan are, for the time being, acting in aid of civil power in pursuance of Article 245....” Pak. Const. art. 245 (3).

[11] *See id.*

[12] G.A. Res. 34/169, U.N. Doc. A/RES/34/169 (Dec. 17, 1979).

[13] “....Any proceeding in relation to an area referred to in clause (3) instituted on or after the day the Armed Forces start acting in aid of civil power and pending in any High Court shall remain suspended for the period during which the Armed Forces are so acting.” Pak. Const., *supra* note 10, art. 245 (4).

[14] Pakistan Army Act 1952 [Pakistan], XXXIX of 1952 (May 13, 1952).

[15] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

[16] Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

[17] The Geneva Convention Implementing Act, 1936, A Collection of the acts of the Indian Legislature for the year 1936 *available at*: <http://lawmin.nic.in/legislative/textofcentralacts/1936.pdf>.

[18] Code of Criminal Procedure, 1898 (V of 1898).

[19] ATA, *supra* note 4.

[20] Pak. Const., *supra* note 10, art. 184

[21] *Id.* art. 199.

[22] Maintenance of Public Order Ordinance, 1960 (XXXI of 1960)

[23] The Security of Pakistan Act, 1952 (XXXV of 1952).

[24] Pak. Const., *supra* note 10, art. 10.

[25] “(1) Loyalty to the state is the basic duty of every citizen. (2) Obedience to the Constitution and the law is the [inviolable] obligation of every citizen wherever he may be and of every other person for the time being within Pakistan.” Pak. Const., *supra* note 10, art. 5.

[26] *Id.*

[27] *Id.* art. 245.

[28] ATA, *supra* note 4, §5.

[29] “No private organization capable of functioning as a military organization shall be formed, and any such organization shall be illegal.” Pak. Const., *supra* note 10, art. 256.

[30] Ahmer Bilal Soofi, Remarks at a Hearing of the Supreme Court of Pakistan Case, CP 77/2010 (April 12, 2011).

[31] PLD 1995 SC AJ&K 1, Federation of Pakistan vs. Malik Muhammad Miskeen & Others

[32] PLD 1969 SC 485, The Superintendent Land , Land Customs, Torkham (Khyber Agency) vs. Zewar Khan & others

[33] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, 397.