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  Shayan Ahmed Khan
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Editor’s Note

It gives me great pleasure to present the 1st Issue of the RSIL Law Review. The issue contains eight articles and one student note. All nine pieces are exemplary in their originality and sophistication of thought.

The current issue presents a diverse selection of stimulating articles from practitioners and students. The first article is authored by President RSIL, Mr. Ahmer Bilal Soofi with assistance from Mr. Jamal Aziz, Executive Director, and highlights Pakistan’s primary concerns vis-à-vis the Indus Water Treaty (IWT). The article examines the legal capacity of the IWT to cater to Pakistan’s security concerns of Indian dams and hydroelectric projects upstream on the Western rivers. Mr. Soofi argues that the best course of action for addressing Pakistan’s strategic concerns is through bilateral dialogue with India that goes beyond the traditional framework of the IWT.

Imaan Zainab Mazari-Hazir, an Islamabad based advocate and former research associate RSIL, discusses in her article the challenges Pakistan faces while trying to fulfill its domestic and international commitments of providing and promoting education throughout the country.

Daanika Kamal, Program Manager at the Jinnah Institute, writes in great detail about the incompatibility of Pakistan’s blasphemy laws with international human rights obligations.

Rana Adan Abid, a lawyer and activist, attempts to reconcile tenets of Sharia with the modern conception of human rights by comparing the rights of six groups of individuals- non-Muslim minorities; the inter-trans community; prisoners of war; civilians during wartime; the economically disadvantaged; and the dependents- under both Sharia and international law.

Momna Taufeeq, junior associate at Hassan & Hassan (Advocates), explores the relationship between multinational corporations and their human rights obligations. Her article sheds light on why human rights obligations ought to be imposed and if they are imposed then why are the regulatory structures not enough to create an environment where multinational corporations safeguard human rights.

Zainab Mustafa, research associate at the Conflict Law Centre RSIL, writes about the legal lacunae present in international humanitarian law’s protection regime for civilians and the challenges in its implementation.
Neshmiya Adnan Khan, a practicing lawyer, focuses on the implications that the “North-South” divide has had on the evolution of environmental law and why is there a need to re-conceptualize this archaic distinction in view of contemporary reality.

Usama Malik, another practicing lawyer, explores both the positive and detrimental impact that the implementation of the WTO agreements has had on global economies and trade.

Finally, the note by Shayan Ahmed Khan discusses the issues pertaining to the admissibility of circumstantial, contested, classified, and illicitly obtained evidence in the International Court of Justice (ICJ). He examines relevant case law in order to understand the liberal stance that the ICJ generally takes towards the admissibly of evidence.

I would like to thank Moghees Uddin Khan and Maira Sheikh, whose dedicated efforts brought together this first issue. Both Maira and Moghees have since left RSIL to pursue their careers abroad. I hope to carry forward their good work and will strive to continuously improve the academic standard of this Law Review.

I am grateful to the entire Board of Editors for their hard work in reviewing and editing articles. I am also immensely grateful to Mr. Ahmer Bilal Soofi and Mr. Jamal Aziz, for their constant support and guidance throughout the process.

Hafsa Durrani
Managing Editor
June 2017
Filling the Missing Gaps in the Indus Water Treaty

Ahmer Bilal Soofi* and Jamal Aziz**

INTRODUCTION

The Islamic Republic of Pakistan and the Republic of India share a complex historical relationship. Apart from a common border, centuries of history, culture, languages and ethnicities, and traditions, Pakistan and India share the waters of the Indus River System.

The partition of the Indian subcontinent in 1947 resulted in the headwork of the extensive network of canals - built during the British Raj - being placed in India. This led to India becoming the upper riparian and Pakistan, the lower riparian, in the Indus basin. The boundaries drawn were in disregard of hydrology since 80 percent of the areas irrigated by the canals were in Pakistan.\(^1\)

The waters of the Indus River basin were therefore a major source of contention between India and Pakistan from independence. This is evident in the number of water disputes that broke out between the two states as early as April 1948 and even led, at one point, to the unilateral termination of water supplies by East Punjab to the canals crossing into Pakistan. Water would serve as a likely catalyst for future wars between the two states (given their competitive use of a shared natural resource and enmities rising from a wider conflict).

After four wars, water is the one area where the two countries have historically afforded each other the most accommodation in bilateral relations.\(^2\) The basis for this cooperation is solely attributable to the negotiations that led to the Indus Water Treaty of 1960 ("IWT" or "Treaty") which has been hailed as a successful instance of conflict resolution between two countries otherwise locked in conflict.\(^3\)

The Indus Waters Treaty (IWT) was signed between the two parties on 19 September 1960. It is in essence, a technical treaty which attempts to provide a holistic framework

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** Jamal Aziz holds an LL.M with Distinction from the University College London (UCL). He is the Executive Director of the Research Society of International Law (RSIL).

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3 Supra at 1
for engineering solutions and mutual water management between India and Pakistan. However, unlike most international agreements of this nature, the IWT is not based on the equitable distribution of the waters of the Indus. Instead, it is based on the division of the Indus and its five major tributaries between India and Pakistan. This is the IWT’s most unique aspect. Under the framework of the treaty, the three western rivers of the Indus Basin were allotted to Pakistan. These include the Jhelum, Chenab and the Indus.\(^4\) All the waters of the eastern rivers – the Ravi, Sutlej and Beas – are available to India.\(^5\)

The IWT has endured over five decades of hostilities between the rival states, including, again four major war. During this time, neither Pakistan nor India has targeted the other’s canals and hydroelectric facilities nor sought to terminate the Treaty. This is demonstrative of the fact that both states recognize the need for cooperation in order to safeguard their long-term access to the waters of the Indus Basin.

In recent years, however, water has once again become a divisive issue between India and Pakistan. The IWT is under strain, raising doubts about its efficacy in safeguarding the national interest across both sides of the border. These fears, most of which are legitimate, have the potential to escalate into hysteria by being misconstrued and misrepresented by hawkish elements on both sides. There is therefore a need for both countries to engage constructively in order to understand each other’s concerns and fears and resolve them through bilateral dialogue.

This paper highlights Pakistan’s primary concerns vis-à-vis the IWT. The first section discusses the water security threat felt by Pakistan as a result of Indian hydropower development on the western rivers. It will examine, from a legal perspective, the capacity of the IWT to cater to such concerns.

It will be argued that the best course of action for addressing Pakistan’s strategic concerns is through bilateral dialogue with India rather than abortively through the IWT’s dispute settlement framework. However, abrogation of the treaty is out of the question. This approach does not advocate breaching the Treaty in any way. Rather it seeks to interpret the IWT in its proper legal context.

The second section of this paper relates to India’s usage of the eastern rivers and highlights Pakistan’s concerns over the adverse consequences of this usage to the environment and ecosystems of Pakistan’s river communities. This section will address whether India has an obligation, under international law, to allow minimum flow in the eastern rivers for the purposes of conservation and river ecology.

This section will take into consideration customary international law and examine similar precedents in water jurisprudence. It will be argued that under contemporary conceptions of environmental science, it is untenable for India to claim that it has

\(^4\) Indus Waters Treaty 1960 (signed in Karachi on September 19, 1960), Article III

\(^5\) Ibid Article II
unrestricted use of the eastern rivers. Instead, India should exercise restraint and caution in its use in order to prevent harm being caused to the ecology of the entire river system.

1. **Pakistan’s Water Security Concerns vis-à-vis the Western Rivers**

1.1. Geography of the Western Rivers

The Indus River originates in the Tibetan highlands of western China (part of the Tibet Autonomous Region). At 3,200 kilometres long, it is one of the longest rivers in Asia and encompasses a total area of 1.12 million square kilometres. 47 percent of this total area falls within Pakistan. The river flows through Jammu and Kashmir entering Pakistan through Gilgit-Baltistan and runs through the provinces of Khyber Pakhtunkhwa, Punjab and Sindh.

The Chenab River stems from the State of Himachal Pradesh in Northern India, flowing through Jammu and Kashmir into Punjab. The Jhelum River begins in Western Jammu and Kashmir and is joined by the Neelum River (known as the Kishenganga River in India) at Muzaffarabad in Azad Jammu and Kashmir. The Jhelum then flows south into Punjab.

The Jhelum and Chenab Rivers meet at Head Timu in the District of Jhang in Punjab. Continuing as the Chenab, the river first meets the Ravi and then the Sutlej near the city of Bahawalpur. The River, now called Panjnad, joins the Indus near the town of Mithankot in Southern Punjab.

The Indus continues through the remainder of Punjab into Sindh, finally merging with the Arabian Sea through the Indus River Delta near the city of Karachi.

1.2. The Water Security Threat

Article 3 of the IWT allocates the unrestricted use of the western rivers to Pakistan. India is under an obligation to let flow the waters of these rivers and is not permitted any interference with these waters except for certain limited uses. These uses are domestic, non-consumptive, agricultural and hydro-electric. They are regulated and restricted in considerable detail by Annexures C, D and E of the Treaty.

In the past decade, India has initiated an ambitious programme of hydropower development across its Himalayan region involving the construction of over 60 hydropower projects of various sizes on the headwaters of the western rivers, particularly the Jhelum and Chenab. The Indian government has consistently emphasized that these projects flow from India’s development needs and were undertaken strictly in accordance with the provisions of the IWT.

Pakistan’s major concern in this regard however, goes beyond the technical confines of the IWT. Rather, Pakistan’s fears stem from the potential of the Indian projects to
interfere with the natural timing of flows from these rivers. The timing of the flows is of critical concern because Pakistan’s plains are dependent on adequate water flow during the planting season.\(^6\) It was for this reason that India’s capacity to manipulate the timing of flows was ‘hardwired into the treaty…by limiting the amount of live storage in each and every dam that India would construct on the two rivers.’\(^7\) The limiting of live storage by India under the IWT thus provided some measure of protection to Pakistan against upstream manipulation flows.

The decision by the Neutral Expert in *Baglihar* neutralized this protection through a reinterpretation of the IWT and allowed India to draw water out of the dam at levels lower than those specified in the treaty. Some measure of relief for Pakistan was subsequently provided by the Permanent Court of Arbitration in *Kishanganga*, which did not view the Neutral Expert’s decision in *Baglihar* as constituting a ‘binding precedent’, particularly because Professor Lafitte did not take into consideration the unique political and strategic factors in his deliberations.

Although Pakistan’s worst security fears were raised with Baglihar Dam, the problem is much bigger. These are well illustrated by the writings of John Briscoe, a water engineer renowned globally for his expertise in this field:

> If Baglihar was the only dam being built by India on the Chenab and Jhelum, this would be a limited problem. But following Baglihar is a veritable caravan of Indian projects - Kishanganga, Sawalkot, Pakuldul, Bursar, Dal Huste, Gyspa. The cumulative live storage will be large, giving India an unquestioned capacity to have major impact on the timing of flows into Pakistan. Using Baglihar as a reference, simple back-of-the-envelope calculations, suggest that once it has constructed all of the planned hydropower plants on the Chenab, India will have an ability to effect major damage on Pakistan.

> First, there is the one-time effect of filling the new dams. If done during the wet season this would have little effect on Pakistan. But if done during the critical low-flow period, there would be a large one-time effect (as was the case when India filled Baglihar). Second, there is the permanent threat which would be a consequence of substantial cumulative live storage which could store about one month’s worth of low-season flow on the Chenab. If, God forbid, India so chose, it could use this cumulative live storage to impose major reductions on water availability in Pakistan during the critical planting season. [Emphasis Added]

The substantial cumulative live storage which will occur from the large-scale construction of Indian projects upstream therefore possesses the potential to choke water flow to Pakistan. However, security concerns are also issues of perception. Intentions are not a factor, but rather India’s potential capability to choke Pakistan’s water flow.

An argument could be made that the negotiators of the treaty could have foreseen the water security threat to Pakistan which could arise from India’s permitted usage of the western rivers for domestic use, non-consumptive use, agricultural use and generation

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\(^7\) Ibid
of hydro-electric power. However, it is submitted that a variety of factors over time have contributed towards exacerbating the threat to the point where the entire IWT framework lies at risk of being undermined.

1.3. Factors aggravating the Water Security Threat

a. Water Scarcity & Climate Change

Hydrologists typically assess scarcity by looking at the population-water equation. According to the United Nations, an area qualifies as being ‘water stressed’ when annual water supplies drop below 1,700 m3 per person. When annual water supplies drop below 1,000 m3 per person, the population faces water scarcity, and below 500 cubic meters "absolute scarcity".8

Based on this criterion, Pakistan is already close to being categorized as a ‘water scarce’ country, fast approaching the ‘absolute scarcity’ level. Its water per capita availability has dropped to 1,017 cubic meters per capita, a drastic reduction from 5,000 cubic meters in 1950.

According to the International Monetary Fund (IMF), Pakistan is already the third most water-stressed country in the world. It has the world’s fourth highest rate of water of use and its economy is the most water-intensive in the world, utilizing the highest amount of water per unit of GDP.9

Compounding the problem is the phenomenon of climate change; a concept not adequately understood nor addressed by the IWT.10 Today, the Himalayan glaciers supply the Indus with between 50-70% of its water11. The rapid recession of these glaciers due to global warming has altered river flows and caused uncertainty in the availability of irrigation water, resulting in an overall reduction of water and the drying of riverbeds12. Although glacial melt in the short-term can act as a buffer against arid drought like conditions, in the long-term the size of the glaciers will shrink and thus limit their ability to provide water to the Indus.13

Climate change is also disrupting the pattern of the monsoons, which together with the Himalayan Glaciers feed and replenish river flows, essential in the largely agrarian

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10 Supra at 1
Pakistan. An increase in the number, duration, and severity of extreme events such as floods or droughts as well as higher temperatures will have profound effects on Pakistan’s water resources. This is besides the already accelerated pollution of fresh water.
However, climate change alone cannot be blamed as the reason for Pakistan’s water scarcity problem, which is also attributable to bad water management, population growth and development needs.14

These reasons notwithstanding, the severe water crisis faced by Pakistan puts into perspective its acute sensitivity to any real or perceived threat to the western rivers guaranteed to it by the IWT.

b. Development Needs and Internal Dynamics

Pakistan and India have grown exponentially in terms of their population and economy since the 1950’s. However, the economies of both countries remain heavily dependent on agriculture. Both countries are determined to achieve high economic growth in the coming decades and India in particular has set ambitious targets in this regard. The waters of the Indus Basin are the key factor in achieving this economic growth, both for the purposes of irrigation (the backbone of both economies) and electricity generation.

There is also an internal dynamic at play here, as both India and Pakistan are keen to address the grievances of the people of Kashmir and Gilgit-Baltistan. The people of Jammu and Kashmir in particular regard the IWT as an economic liability as it prevents them from exploiting its water resources without the prior approval of the Indus Commission. Meanwhile, Azad Jammu & Kashmir and Gilgit-Baltistan continue to be plagued by chronic energy shortages negatively affecting industrial production, investment and tourism.

In this context, it is not surprising that India has taken the political decision to undertake major hydropower development across its Himalayan region, particularly on the headwaters of the Chenab and Jhelum.

According to John Briscoe, a big reason for why the IWT as an institutional mechanism ‘worked’ for so long was because for ‘decades India did very little to develop the hydro power resources on the Jhelum and the Chenab in Indian-held Kashmir.’15 This situation however has changed ‘dramatically’ over the past decade as India attempts to harness, within the parameters of the IWT, the waters of the western rivers to meet its development needs and address the grievances of the Kashmiri people.

14 Supra at 9
c. The Defence Security Dimension

Defense security considerations also play an important role in Pakistan’s concerns over Indian water projects in Kashmir. The Chenab canal network in Pakistan constitutes the first line of defense against a conventional Indian attack. Over the years, the potential defensive use of this network of canals, drains and artificial distributaries was studied in meticulous detail by military planners and is considered to be of vital strategic importance. If these canals are dried up, they would afford easier passage for an infantry-armored assault by Indian forces.

Further, the construction of dams upstream on the western rivers by India also pose a threat of flash floods in Pakistan should these dams collapse or malfunction. It is therefore understandable that excessive Indian activity on the western rivers through upstream projects is viewed as a considerable defense security threat by the military establishment in Pakistan.

d. The Baglihar Incident

As discussed above, the Neutral Expert’s decision in the Baglihar case exposed Pakistan to upstream manipulation flows by rejecting its security concerns in favor of contemporary global best practices. These concerns were almost immediately realized when India chose to fill the Baglihar at the time when it would impose maximum harm on farmers downstream without providing accurate data on the initial filing of the dam in violation of the Treaty. This action brought the inflow of the Chenab River to a historic low of 20,000 cusecs and reportedly resulted in an approximate loss of Rs. 5 billion in paddy crop production.

Although the incident constituted a violation of the IWT, Pakistan chose to resolve the issue through Permanent Indus Water Commission in the spirit of cooperation and goodwill. Nevertheless, a negative precedent was set, confirming the fears of many in Pakistan of New Delhi’s ‘mala fide intention’. The incident also served as fodder for hawkish elements to whip up public sentiment against proposed Indian construction on the western rivers.

1.4. IWT’s Inadequacy to Address Pakistan’s Security Concerns

In view of the foregoing, what are Pakistan’s options for addressing its strategic concerns vis-à-vis Indian projects upstream on the western rivers? According to the Indian side, the Permanent Indus Commission, constituted under the treaty, is the best forum for resolving all such matters. However, it is the considered legal opinion of this paper that the number of dams or projects that India could or should construct on the western rivers is an issue that falls outside the scope of the IWT.

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16 Supra at 6
The inadequacy of the IWT as a mechanism to pacify Pakistan’s security concerns is best illustrated by a hypothetical example.

Suppose the Government of Pakistan chooses to adopt the IWT framework in addressing its concerns over the proposed thirty storages under construction upstream of the western rivers. Although these storages may store water within the permissible quota of the upper riparian, Pakistan wishes to challenge them not on engineering grounds but rather on a security perception basis.

Assume that, as per the Indian version, the aforementioned concerns fall within the mandate of the Indus Water Commissioners. Pakistan would thus write a formal letter to the Indian Commissioner, conveying its concerns over the expansive Indian hydropower development on the head-works of the western rivers as being disproportionate to the electricity and agriculture requirements of the upper riparian in that region. Pakistan would also highlight its fears of possible misuse of the said storages, providing India with excessive ability to accelerate, decelerate or block flow of the rivers, thus providing a strategic leverage in times of political tension or war.

The Indian Commissioner’s most likely response would be to simply state that the storages were being constructed strictly in accordance with the IWT and that they will store the quantity that is permitted thereunder. The Indian response would also dismiss the issue of security and misuse as being extraneous to the treaty and therefore outside the jurisdiction of the Commissioner.

This is the kind of issue that cannot be handled under the framework of the IWT. The IWT is primarily concerned with engineering solutions and water management. It neither takes into consideration security threats nor does it establish a mechanism dealing with the possible misuse of engineering solutions, whereby an unfair advantage is provided to the upper riparian by allowing it to gradually build storages over a period of time.

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See also:
'Dams and Reservoirs in India', Project Gutenberg Self-Publishing Press. at: http://www.gutenberg.us/article/WHEBN0004674937/Dams%20and%20reservoirs%20in%20India;

a. Technical Nature of the Treaty: Historical Basis

That the IWT is a technical treaty neither equipped nor intended to resolve political disputes of a strategic nature is firmly borne out by examining its historical basis.

In the original discussions on the treaty, the intended mechanism involved communications between the heads of state on any decision to construct storages via authorized representatives. The heads of state were then to initiate a political process before giving each other formal permission. However, it was subsequently decided that such a process might result in frequent deadlocks, undermining progress under the treaty, given the political sensitivities involved.

The proposal was therefore abandoned in favour of a Permanent Indus Commission (“PIC”) comprising a specialized Commissioner from each country. The political process was therefore avoided as a deliberate choice by the negotiators and the sponsors of the treaty.

There were additional reasons for deliberately restricting the remit of the PIC to technical issues. Pakistan as the lower riparian, was understandably suspicious of the intentions of the upper riparian while entering into any binding arrangement with it. The unilateral termination of water supplies in April 1948, despite assurances of non-interference, had caused acute distress in West Punjab. ‘The sense of insecurity and vulnerability that this interruption caused in Pakistan…became a permanent part of the Pakistani psyche, and continues to influence thinking even today.’

It is in this context that the officials of the World Bank, negotiating the treaty, admitted that retaining ambiguity in the political aspect of the treaty was part of the negotiating strategy. This is well reflected in the World Bank archives on the IWT negotiations:

People like Eugene Black felt, as I do, that if you want to have a difficult negotiation avoid writing too much down. You may write down some basic facts like the flow of water of the rivers and things like that. But don’t write down, he wants this and he wants that and he’s willing to concede. I think you have to do it…without being too clear about everything.

The negotiations were therefore held in a tense atmosphere as illustrated from the following extract from the World Bank’s archives:

…despite the Bank’s efforts to communicate relevant material to both sides, the disputants remained sensitive to the merest rumour of being excluded. These suspicions led one Pakistani delegate to state that ‘he wanted to know if there were any secrets that he hadn’t heard about’…

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20 Supra at 1
22 Ibid 135
These suspicions and doubts were not unfounded. The IWT negotiations were after all, overlapping with negotiations and debates in the United Nations and the Security Council on Kashmir. The Indians at this point were gradually withdrawing from their obligation to hold a plebiscite as per UNSC resolutions.23

The Pakistani delegation was therefore nervous. If India could deflect a binding UNSC resolution and avoid fulfilling its obligation with regard to a plebiscite, then as an upper riparian, it was much more powerful and strategically positioned to create a water security nightmare for Pakistan.

Further, the legal impact of the IWT on the Kashmir issue loomed large on the minds of negotiators from both states. Since the Indus Water Basin partially overlaps with the disputed terrain of the State of Jammu and Kashmir, Pakistan was unsure whether India could, on the pretext of a disputed territory, exercise control over the water flows till such time as the dispute was resolved.

It was in this context that the Indian Prime Minister Nehru extended assurance to the Pakistani side that India had no intention of restricting water flow on the western rivers, specifically mentioning Kashmir:

I might make one point clear. The Canal Waters dispute between India and Pakistan has nothing to do with the Kashmir issue; it started with and has been confined to the irrigation systems of East and West Punjab. So far as the rivers flowing into Pakistan from Kashmir are concerned, there is no question of reducing the quantity of water which they carry into Pakistan by diversion or any other device.24

Sensitivities over the legal impact on the Kashmir issue are perhaps the reason why the IWT does not contain a clear enabling provision identifying sites and venues of future storages by the upper riparian. The treaty could have contained a flexible annexure mechanism, under which the upper riparian could formally intimate a construction decision.

However, the pending Kashmir issue likely precluded the inclusion of such an annexure within the treaty. If Pakistan were to sign on to all future storage facilities, identified and listed down in any additional annexure, the Indian claim over the disputed territory of Jammu and Kashmir may have been supported and endorsed. Pakistan could therefore not endorse, through a sovereign act, any construction of a storage site by India which would have strengthened its claim over the disputed Kashmir territory.

One can therefore speculate that the Kashmir factor resulted in the World Bank adopting a water-flow/cumulative water storage approach as opposed to an enlistment-of-sites approach. The first letter of the World Bank President addressed to Prime Minister Liaquat Ali Khan talked about keeping the political issues separate from water

24 Supra at 21, 178 – 179
development. Pakistan’s approval on the storage sites that were in disputed Kashmir would undoubtedly have made this issue political.

According to water specialist Dr. Undala Alam:

At the start of the mediations, when the World Bank was offering its good offices, the Prime Ministers of both India and Pakistan were categorical in pointing out the limitations of the proposed talks. Discussions pertaining to the Indus Basin would have no bearing on the Kashmir dispute, nor would they discuss possible solutions to that tenacious dispute. Naturally, this conferred upon the subsequent Indus Basin discussions a very narrow remit.25

It is this narrow remit that limited the jurisdiction of the Indus Water Commission to only technical issues and providing engineering solutions.

Therefore, the Bank and its drafting team formulated a different approach which involved limits on water flow/cumulative water storage as opposed to focusing on the identification of future sites.

This is well illustrated by the letter to both states by Eugene Black, the World Bank President, which made it clear that any potential treaty would only focus on the technical aspects of water management as opposed to political issues:

… I shall base my suggestions on the essential principles of Mr. Lilienthal’s proposal which are, as I understand them, the following: … (c) The problem of development and use of the Indus basin water resources should be solved on a functional and not a political plane, without relation to past negotiations and past claims and independently of political issues.26

By focusing on the technical aspects of water management, it is clear that the IWT restricts the mandate and jurisdiction of the PIC to technical issues and providing engineering solutions. However, in abandoning this political approach, one should not assume that a political licence was granted to India to build endless storages disproportionate to its needs, even if such storages fall within the limits of the cumulative storage of water granted to it.

What is apparent however is that the PIC may not be appropriate forum for raising Pakistan strategic water security concerns over Indian projects upstream. Not only is the Commission not equipped to deal with questions of a political nature, it also does not have the mandate to resolve such issues since these fall outside the very scope of the treaty that is the legal source of the PIC.

25 Supra at 21, 199
26 Supra at 21, 203
b. Technical Nature of the Treaty: Indian Projects can only be challenged on an Engineering Basis

In order to comprehend the essentially technical nature of the IWT, it is imperative to realize that the Indian government’s decision to construct a dam or a hydroelectric project upstream on any of the Western rivers is taken outside the IWT regime and is based wholly on India’s assessment of its energy needs and strategic interests.27

This decision consists of two stages. The first stage is internal, whereby the upper riparian takes the political decision to construct a site. Following a green signal from the government, detailed decisions are made relating to location of the project, its design, engineering etc. eventually leading to the finalization of the drawings. During this entire process, no interaction takes place with the lower riparian nor is any input received from it. The Pakistani side therefore remains completely out of the loop.

The lower riparian is only informed about the proposed project in stage two. Thus, having already taken the decision about the site and its feasibility following an intensive internal process, India at this point merely intimates its decision to Pakistan vis-à-vis the Indus Water Commission. The process is illustrated in the table below.

India does not submit to Pakistan the reasons behind any such decision through its Indus Waters commissioner. It merely submits a blueprint of the dam or project as stipulated by the IWT and technical details as mentioned in the annexure to the IWT. Crucially, within the treaty’s framework, Pakistan may only object to the technical specifications of the submitted blueprint, not question the political decision. Thus, as long as India’s blueprints conform to the IWT’s technical specifications, it can potentially undertake any number of projects.

27 Supra at 19
This viewpoint was effectively endorsed in paragraph 409 of the PCA’s partial award in *Kishanganga* which states: “It would make little sense, and cannot have been the parties’ intention, to read the treaty as permitting new run-of-the-river plants to be designed and built in a certain manner, but then prohibiting the operation of such a plant in the very manner for which it was designed.\(^{28}\)

Simply put, the PCA concedes that as long as India’s blueprint conforms to the IWT, it cannot disallow the construction of a dam or a project. This is so because of the lack of any provision in the IWT authorizing India specifically to build a certain number of dams or undertake a certain number of projects. As discussed above, the IWT adopts a water-flow/cumulative water storage approach as opposed to an enlistment-of-sites approach vis-à-vis the western rivers.

In Annexure D for instance there is a list of plants that India will construct or complete but no provision regarding the number of future projects undertaken by India. In the absence of any IWT provision authorizing or limiting the number of dams, the PCA had no choice but to permit India to go ahead with the Kishanganga project subject to the treaty’s technical requirements.

1.5. Beyond the IWT\(^{29}\)

a. Strategic Concerns may be raised outside the IWT Framework

Since the IWT does not bind Pakistan to presenting its objections about the precise number of dams or projects that India might construct in any prescribed manner and as this issue clearly lies outside the IWT’s ambit, it must be addressed bilaterally rather than abortively through the treaty framework.

The futility of addressing these strategic concerns within the framework of the IWT was seen in *Kishanganga*. Although Pakistan engaged the services of lawyers of international repute such as James Crawford QC who along with other members of the legal team tried hard to couch the request for relief in the context of legality of the project itself, they ultimately failed to persuade the PCA.

Although Pakistan was able to obtain certain technical advantages from the award, in the public’s perception the essential relief — banning the project — could not materialize.

Pakistan must realize that the IWT does not provide any framework that caters to its strategic concerns that proliferation in the construction of dams or projects upstream on Western rivers might be used against it by India as strategic assets in times of conflict.

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\(^{28}\) *Indus Waters Kishenganga Arbitration, Partial Award (Pakistan v India)* (2013), Permanent Court of Arbitration

\(^{29}\) Supra at 19
Of course, Pakistan should persist with the IWT. This paper does not subscribe to the idea of scrapping the treaty as it has been an enduring confidence-building measure and has even withstood wars. However, Pakistan’s policymakers must place and interpret the IWT within its proper legal context. As said earlier, the treaty was never intended to scrutinize the Indian government’s political decision of undertaking projects on the Western rivers. This aspect was outside the scope of the IWT.

Hence, the treaty does not list the precise number of upstream dams or projects that the two countries might have agreed upon in any of its otherwise detailed annexes. It neither identifies any possible sites for upstream dams or projects nor provides any timeline for undertaking their construction.

Clearly therefore, the issue of the exact number of upstream dams or projects that India could or should construct falls outside the scope of the IWT and ought to be addressed outside its framework.

Thus, if Pakistan wants to effectively challenge India over the sheer number of upstream dams or projects being constructed as opposed to their technical design, it must not invoke the treaty’s dispute settlement mechanism but rather bilaterally take up the matter with India or with any other international forum. The PCA’s award in Kishanganga affirms this legal position.

b. Addressing Climate-based Water Scarcity Concerns

There is persistent tension between the two neighbors over India’s alleged curtailment of the waters flowing from Indian-administered Kashmir. Some analysts have termed this as a clear violation of the IWT. The media in Pakistan and the general public, too, appear convinced that India is withholding the waters in violation of its treaty obligations.

On the other hand, the Indian perception is that Pakistan’s allegations are unfair since the water levels are reducing over time mostly due to climate-based water scarcity. From a legal point of view, this argument is interesting as it actually raises the issue of jurisdiction and the scope of the IWT itself. The treaty does not deal directly with the issue of water scarcity. In fact, when the treaty was being negotiated, a future possibility of water scarcity was not a priority or a leading concern for the negotiators.

Hence, we find that there is no provision per se that provides a mechanism to both the countries if climate-based water scarcity occurs. The critical provisions of the IWT simply say that India and Pakistan were obliged to “let flow” the river waters without interfering.

Despite speculations by the Pakistani side there is no specific evidence brought forth so far that India is actually obstructing the flow or is diverting the waters. If the Indian version is correct then the issue cannot be addressed within the framework of the IWT and, in that case, Pakistan is pursuing a remedy in the wrong direction.

The question remains as to who determines whether the reduced amount of water flowing into the rivers of Pakistan from the Indian side is because of obstructions or on account of climatic water scarcity. For that both countries would need to agree to an independent and a separate study by a neutral body such as the World Bank. The determination by such a study would make matters clearer for Pakistani and Indian policymakers who could then follow a bilateral remedial course of action.

The argument is also advanced that even if the water flowing into Pakistani rivers is less due to genuine climatic water scarcity, India cannot escape responsibility as a state to maintain and manage the water resources that it exercises control over. India's responsibility comes under the general framework of international law that calls on the upper riparian state to take the necessary measures to minimize water scarcity.

In Europe and elsewhere, water scarcity has promoted trans-boundary water cooperation instead of inciting war over this issue. The UN Convention on Uses of International Water Courses 1997 obliges states to conserve, manage and protect international water courses. Pakistan and India are not party to the said convention but the latter nevertheless offers a comprehensive framework for trans-boundary water cooperation.

Likewise, the 1992 Convention on Trans-Boundary Water Courses primarily meant for European countries offers another legislative model for India and Pakistan for bilateral cooperation on the issue of handling water scarcity. The 1997 convention is widely viewed as a codification of customary international law with regard to obligations for equitable and legal utilisation, the prevention of significant harm and prior notification of planned measures.

At the moment, India and Pakistan lack a legal medium or forum through which the Indian version of 'genuine water scarcity' could be scrutinized and if found to be correct, handled and responded to properly through bilateral action.

If this issue is not handled technically without a legal mechanism, then it has the potential to further aggravate tensions between India and Pakistan as it will be clubbed with the Kashmir dispute. Further, a reduced water flow could be perceived as India's ploy to put additional pressure on Pakistan and, in that event, the response would be equally unmeasured and misdirected.

Therefore, whether India is actually blocking the water or the decrease in water flow is due to scarcity and climatic change, needs objective and transparent determination by experts. This determination of the real reason should be agreed to beforehand through a bilateral agreement confined to fact-finding. If the finding is that the reduced flow of
water is due to obstructions, then Pakistan could take action under the provisions of the IWT immediately.

On the other hand, if it is determined that there is genuine water scarcity then the issue is outside the jurisdiction of the treaty and needs to be sorted out by both states on a bilateral basis. India, in that case, should undertake its obligations under international law for proper water conservation and management and share the details with Pakistan through a mutually agreed mechanism. This point may be considered in upcoming Comprehensive Bilateral Dialogue as an urgent item.

2. REAPPRAISAL OF THE EASTERN RIVERS IN LIGHT OF CONTEMPORARY INTERNATIONAL LAW

The eastern rivers under the IWT comprise the Ravi, Sutlej and Beas rivers. Under the framework of the IWT, the waters of these rivers are available for the ‘unrestricted use of India’ with certain limited rights also granted to Pakistan.

The orthodox understanding therefore is that the IWT grants India complete and unrestricted usage of the eastern rivers which does not require safeguarding Pakistan’s rights vis-à-vis these rivers. However, it must be borne in mind that the IWT was formulated at a time when international environmental law was in its initial stages of development. The question to consider today is whether international environmental law today has evolved to the point where a reappraisal is required of what India can or cannot do vis-à-vis the eastern rivers.

2.1. Major Developments in International Environmental Law since the IWT

Much of contemporary international law relating to trans-boundary waters has developed after the formulation of the IWT. The Helsinki Rules on the Uses of the Waters of International Rivers were adopted in 1966 by the International Law Association and provided an international guideline regulating how rivers and their connected ground waters that cross national boundaries may be used. These Rules were considered groundbreaking at the time, and lead to the adoption of the UN Convention on the Law of Non-Navigational Uses of International Watercourses in 1997 (the 1997 UN Convention).

This was followed by the Ramsar Convention (formally known as the Convention on Wetlands of International Importance, especially as Waterfowl Habitat) in 1971. The Convention on the Protection and Use of Transboundary Watercourses and International Lakes (known simply as the Water Convention) was adopted in 1992 and came into force in 1997. Originally membership to the Water Convention was limited to members of the United Nations Economic Commission for Europe (UNECE).

31 Supra at 4, Article II (1)
However, a 2003 amendment, which came into force in 2013, allows for nations outside the UNECE Countries to join the legal framework of the Convention.

Recently, the International Law Association adopted the Berlin Rules on Water Resources, 2004 which supersedes the Helsinki Rules of 1966 and summarizes customary international law applicable today to freshwater resources.

Multilateral and bilateral treaties made in the decades following the Indus Waters Treaty have demonstrated that the issues of sharing of transboundary waters are dynamic and are constantly shifting and being upgraded. They also reflect an understanding of the importance of preservation of the environment and the ecosystem surrounding the watercourses.

2.2. Contemporary International Law and its Application to the Indus Waters

Many of the responsibilities that states owe each other vis-à-vis international watercourses were earlier set out by the Helsinki Rules 1966 and subsequently codified by the 1997 UN Convention. Article 2 of the Convention states:

(1) The Parties shall take all appropriate measures to prevent, control and reduce any transboundary impact.

(2) The Parties shall, in particular, take all appropriate measures:
   a. To prevent control and reduce pollution of waters causing or likely to cause transboundary impact;
   b. To ensure that transboundary waters are used with the aim of ecologically sound and rational water management, conservation of water resources and environmental protection;
   c. To ensure that transboundary waters are used in a reasonable and equitable way…;
   d. To ensure conservation and, where necessary, restoration of ecosystems.\textsuperscript{32}

The Ramsar Convention discusses the need to ensure conservation and restoration, if need be, of the ecosystems formed by the transboundary watercourses. Evolving beyond the Convention’s initial focus on wetlands, the Eighth Conference of the Parties to the Ramsar Convention, held in 2002, resulted in a set of guidelines which, while non-binding in nature, encouraged Parties to introduce measures to manage environmental flows.

Under international law the 1997 UN Convention is regarded as the cornerstone for transboundary water usage. While neither India nor Pakistan has ratified the UN Convention, allowing for its direct application to the Indus river system, it nonetheless represents the contemporary understanding of transnational water sharing under international law. Thus, while – as non-signatories – the two countries have no legal

\textsuperscript{32} Article 2, \textit{UN Convention on the Protection and Use of Transboundary Watercourses and International Lakes, as amended}, 1997 [emphasis added]
obligations thereunder, the UN Convention exemplifies the international legal consensus on transnational water-sharing arrangements.

Under the UN Convention, states are required to protect and preserve the ecosystems of international watercourses, and to cooperate in the regulation of shared watercourses. These obligations require riparian states to work together on hydraulic initiatives – such as dams or hydroelectric power generation – in order to minimize the impact these projects would have on the ecology of the entire river system.

In addition to these seminal legal instruments there exists a wealth of international agreements which further flesh out the substance of international riparian law. While most of these instruments are regional in their application, they nonetheless represent a growing consensus in international law that states – though sovereign within their own territories – have environmental obligations vis-à-vis their neighbors. Much of the substance of these obligations also finds its way into the corpus of customary international law, a body of laws which is binding upon all states.

The *Trail Smelter* arbitration between Canada and the U.S. set a new benchmark with regards to neighbouring states, such that any usage of a resource in one state must not lead to any harm in the neighbouring state. This was later codified in the Declaration of the United Nations Conference on the Human Environment (also known as the Stockholm Declaration), 1972, Principle 21 of which reads:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

The evolving rules of international law may be utilized in interpreting the IWT. This is supported by the Vienna Convention on the Law of Treaties, specifically Article 31, which states:

1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose …

3) There shall be taken into account, together with the context: …

(c) Any relevant rules of international law applicable in the relations between the parties.

If this rule were to be applied to the waters of the Indus, an argument could be made that India is not allowed, under international law, to use the waters of the eastern rivers in such a manner that harm may be caused within the jurisdiction of Pakistan.

The IWT itself contains provisions for additional resources that may be used when interpreting the Treaty and customary international law, which is a stated source.

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34 Supra at 4, Annexure G, Para. 29
Following the *Trail* arbitration, customary international law was built around the issues of the Danube River, in terms of the *Gabcikovo-Nagymaros* arbitration between Hungary and Slovakia. The judgment states:

> Owing to new scientific insights and to a growing awareness of the risks for mankind—for present and future generations—of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades … This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development … For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabcikovo power plant. In particular [], they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.\(^\text{36}\)

This arbitration has been cited in the *Kishanganga* partial award, but only with reference to the western rivers; the reasoning, however, is still equally valid *vis-à-vis* the eastern rivers. The eastern rivers can no longer be said to be under India’s unconditional control – instead, the international legal consensus is that India may not do anything the consequences of which would cause harm to the ecosystem and environment of Pakistan.

While there is no concept of a minimal water flow as under the Indus Waters Treaty, according to the *Gabcikovo* arbitration, it would nonetheless seem that requiring a minimal flow to be sustained at all times is a reasonable assertion that needs to be complied with. Furthermore, the release of excess water which could cause grave damage to property and livelihoods in Pakistan is a direct violation of the *Trail* judgment and the Stockholm Declaration, an important tenet of international law, and is, therefore, untenable.

Further, while the PCA noted that it would not be appropriate to assume the role of policymaker in determining the balance between ‘acceptable environmental change’ and other priorities, the Court nonetheless was unequivocal in recognizing the significance of an ‘environmental flow’ in the application of the Treaty\(^\text{37}\). The amount of this flow was not codified in the award as, according to the Court, “[i]t is not necessarily a fixed minimum, affecting only the dry season, but is rather the flow regime anticipated to maintain environmental change resulting from infrastructure and development within the range considered acceptable under the circumstances of the river in question…”\(^\text{38}\) Thus, while the environmental flow rate of rivers under the Treaty may change over the course of a year due to seasonal variances in the overall river flow, the overall environmental flow of the rivers under the Treaty was conceived

\(^{35}\) *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, ICJ Rep 7

\(^{36}\) Ibid, p. 78, 7375

\(^{37}\) *Indus Waters Kishenganga Arbitration, Final Award (Pakistan v India)* (2013), Permanent Court of Arbitration

\(^{38}\) Ibid, footnote 151
as being the minimum amount of flow necessary to maintain the ecology of the river systems.

It is particularly significant to note that the Court, in its award, did not specify which river system its discussion of environmental flows touched upon. While a more limited reading of the award would suggest that the Court was focusing on the western rivers, under contemporary international law and modern-day understandings of environmental sciences a far stronger argument can be made in favor of the Court’s conception of an environmental flow being applicable to the eastern rivers as well.

While a more detailed discussion of the relevant international law is outside the scope of this paper, it is pertinent to note that – under contemporary conceptions of environmental science, it is untenable for India to claim that it has unfettered and unqualified use of the eastern rivers. Instead, India must exercise restraint and caution in its use of the rivers – both eastern as well as western – in order to prevent harm being caused to the ecology of the entire river system. Given that, in riparian relationships, no one state can realistically monopolize control over a given river system, a reading of the award – and its emphasis on environmental flows – is far more defensible.

RECOMMENDATIONS

i. Pakistan and India

It is imperative that Pakistan and India include updates in international law, with an emphasis on contemporary customary international law, into their understanding and interpretation of the IWT as well as in their dealings with each other. Modern understandings of the environment and ecological sciences did not exist at the time of the Treaty’s inception, and for either of the two states to hold on to a dim and outdated understanding of the law and of science as it existed fifty years ago is untenable.

According to the PCA, “the Court sees no reason to remain wedded to past practices…” and there is no reason – nor benefit – for either state to do the same. If the IWT is to remain the primary text on trans-boundary waters between Pakistan and India, there is a pressing need to ensure that it does not become obsolete in keeping up with both recent developments in the law and technology, and recent developments on the ground in terms of diplomatic relations between the two states.

Under the Treaty, both states are obliged to share data on river flows to aid each other in preventing floods and to be better prepared for them. There is a need to make the lines of communication stronger and devoid of political influence, and consequently to build infrastructure to handle information sharing more efficiently. Indeed, vis-à-vis its determination on environmental flows the Court noted that were “the difficulties of cooperation... not present, the appropriate environmental flow could well involve a regime of variable releases...”

39 Ibid, para 101
40 Ibid, footnote 154
Furthermore, as the office of the Permanent Indus Commission is equipped to only handle the technical and engineering aspect of the Treaty, there is a need for bilateral communication on a political and legal scale to ensure that there is understanding between the parties that water issues will soon become dire. Thus there is a need for cooperation both as neighbors and as states acting as riparian to each other.

Environmental elements need to be accounted for as well as the ecological impact of the river flows. India must act with a spirit of camaraderie and have no mala fide intentions to harm or disrupt the life along the southern banks of the rivers that originate in its territory. It is now understood that absolute sovereignty in terms of trans-boundary watercourses only acts as a barrier to development and good relations, and India must be cognizant of that fact.

Both countries also need to be cognizant of their obligations under the Sustainable Development Goals (SDGs), adopted at the historic UN Summit in 2015, which officially came into force in January 2016. The SDGs build upon the success of the Millennium Development Goals (MDGs) and call for all countries to act and take ownership in establishing national frameworks for the achievement of the 17 Goals set out in the 2030 Agenda for Sustainable Development.

As the SDGs form a key component of national policy for all UN member states, Pakistan and India, under Goal No. 15, have an obligation to conserve and restore the use of terrestrial ecosystems by 2020. Considering the unprecedented rate at which land degradation is occurring, there is an urgent need for Pakistan and India to ensure protection of biodiversity through their distinct national policies, particularly water-related policies.

While India has historically acted with impunity vis-à-vis the eastern rivers, it is now becoming apparent – within the context of contemporary international law and environmental science – that this modus operandi is unsustainable. Though India has, under the Treaty, the right to use of the eastern rivers, this right is not an unqualified one but instead must be exercised in a manner sensitive to Pakistan’s ecological and geopolitical contexts. As the upper riparian state there exists on India the obligation to act in a responsible fashion vis-à-vis not only the western rivers but the eastern rivers as well.

It is vital to understand, however, that repealing the Treaty or revisiting its drafting process will do no good to either side. Not only has the Treaty served as an able mechanism of building trust between the two states and has lasted for more than half a century to prove it, it also provides a solid basis and framework which needs to only be revised or, more aptly, updated to meet the updated requirements and needs of the two states. Involving neutral experts or taking the matter to arbitration is both lengthy and extremely costly. The same amount of time, effort and money can be spent in a manner far more efficacious if both parties were to consent to discussions bilaterally on the matter with an aim of mutual benefit.
ii. Pakistan

Pakistan must better prepare itself for the floods, which are now seasonal in nature. It needs to equip its infrastructural capability to handle these disasters by increasing its catchment areas, creating storages that can adequately deal with the increased influx of water and to build better bunds and barriers to prevent flooding. It is no longer justifiable on the part of the Government of Pakistan to show surprise and blame “unforeseen circumstances”. Flood preparedness must not be avoided, but instead should become a regular part of the Government’s yearly business.

Pakistan must also look into riverside habitations and facilitate those who cannot afford any other mode or location of housing by providing them with safe shelters that are immune to changes or disturbances in the environment. While there should not be a need to do this, Pakistan needs to play its part as a responsible state to aid its people from what has been an annual disaster waiting to happen. Partnerships with states such as the Netherlands and Denmark, who have survived below sea level for centuries, should be fostered to obtain technical expertise on the various techniques adopted by these countries to avoid flooding.

After the 18th Amendment, the aspect of flood control has been devolved to the provinces. However, the provincial governments as yet do not have the capacity – in terms of resources, technology and personnel - to deal with issues that were previously dealt with by the Federation. The provinces must take responsibility for flood preparedness, or as provided for in the Constitution, entrust this responsibility to the Federation.

Further, Pakistan must ensure that its own actions vis-à-vis the Indus river system is consistent with international law and ecological sciences. As per the Court, when issuing its final award: “[m]eaningful development in this area need not be at odds with careful consideration of environmental effects.”

An obligation also lies on Pakistan to conduct the necessary studies in order to determine not only the effects of India’s usage of the Indus river system [both on the eastern and western rivers] but also the effects of its own hydraulic projects.

In making a determination based on the ‘environmental flow’ of the river, the PCA in Kishanganga provided Pakistan with a potent legal tool to wield in its dealings vis-à-vis India. Following the determination of the NE in Baglihar, India capitalized on the use of the term “state of the art” in order to reinterpret the Treaty in a manner more consistent with its own domestic needs. Similarly, Pakistan can place reliance upon the PCA’s use of the term “environmental flow” in order to reexamine – and reinterpret – the Treaty in a manner which not only safeguards Pakistan’s own interests but the ecology of the Indus river system as a whole.

41 Article 147, Constitution of the Islamic Republic of Pakistan, 1973
42 Supra at 37, Para 101
Addressing the Education Emergency: Obligations, Challenges and Solutions

Imaan Zainab Mazari-Hazir*

INTRODUCTION

The fundamental starting point for any discussion on human rights, at the national level, is the Constitution of a nation-State. In April 2010, the Parliament promulgated the Constitution (Eighteenth Amendment) Act 2010 (herein ‘18th Amendment’). Among other alterations to the Constitution, the insertion of Article 25-A clearly delineated the responsibility of the State to provide “free and compulsory education to all children of the age of 5 to 16 years.”

1. IMPACT OF THE 18TH AMENDMENT

The 18th Amendment set in motion devolution of powers from the center to the provinces. Thus, education shifted from the federation’s mandate to that of each provincial government, which entailed, thereafter, that provincial assemblies would legislate on the issue.

At present, there exists the Right to Free and Compulsory Education Act 2012, enacted for the Federal Capital. Similarly, Sindh promulgated its Right of Children to Free and Compulsory Education Act 2013, while the Compulsory Education Ordinance 2013 exists in Balochistan. Further, the Punjab Assembly enacted the Free and Compulsory Education Ordinance 2014. Khyber Pakhtunkhwa has yet to formulate and enact legislation to secure this right of free and compulsory education.

The fact remains that education has seldom, if ever, been prioritized in Pakistan. To give a brief contextual setting, for the purpose of clarity: 47 per cent of Pakistani children are out of school. In other words, 25 million out of 53 million children, between the ages of five and sixteen, are out of school in Pakistan.¹ To further highlight the extent of the problem, the majority of children in Pakistan are part of the public education system. Out of the estimated 267,955 schools in Pakistan, only 87,659 are

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private institutions. ² In simpler terms, 69 per cent of schools in Pakistan are government schools and 63 per cent of children attend these government schools.³ Therefore, a mere 37 per cent of children in Pakistan, enrolled in the private education system, are given opportunities that the other 63 per cent will never have access to within the public education system.⁴

It is worth mentioning that the Constitution of Pakistan, under Article 38(d), clearly creates an obligation on the State to “provide basic necessities of life, such as food, clothing, housing, education and medical relief…” From this, it is evident that the right to an education is rightfully classified as a basic necessity of life. Despite this classification, as well as Pakistan’s international legal commitments on education, the State has been unable to make significant headway in safeguarding and promoting this fundamental right. The cost can be seen and felt in the increased wave of so-called ‘honor’ crimes, and terrorist and sectarian attacks: without opportunity, there is anger and frustration which is easy to harness into intolerance and bigotry.

2. INTERNATIONAL LEGAL OBLIGATIONS

At the international level, Pakistan has undertaken a series of international legal obligations with regard to safeguarding the right to an education. The two key conventions Pakistan has ratified, in this regard, include the International Covenant on Economic, Social and Cultural Rights (herein ‘ICESCR’)⁵ and the Convention on the Rights of the Child (herein ‘CRC’).⁶ Pakistan ratified the ICESCR in April 2008, while the CRC had been ratified much earlier in November 1990. The right to an education is enshrined extensively in both these international instruments.

Article 13(1) of the ICESCR stipulates that all States Parties to the Covenant “recognize the right of everyone to education”. Further, Article 13(2) provides that States Parties will ensure “primary education shall be compulsory and available free to all”; that “secondary education…shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education”; that “higher education shall be made equally accessible to all”; that “fundamental education shall be encouraged or intensified”; and that “development of a system of schools at all levels shall be actively pursued.”

In addition, Article 14 of the ICESCR states: “Each State Party to the Covenant which… has not been able to secure… compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the

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² Supra at 1
³ Ibid.
⁴ Ibid.
Available at: http://www.refworld.org/docid/3ae6b36c0.html
Available at: http://www.refworld.org/docid/3ae6b38f0.html
progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.” As per this provision, Pakistan should have had a detailed action plan in place by the year 2010. It is now 2016 and that action plan is non-existent and no signs of enforcement of the right to education can be seen.

Now, that the European Union’s Generalized Scheme of Preferences (GSP) Plus status has been granted to Pakistan, the obligation of the State to follow-through on its commitments, particularly with regard to education and other basic human rights, has become even more crucial as the same has been linked to economic progress. Pakistan, however, continues to hide behind the excuse of “financial constraints” when it comes to implementation of the right to education.

Under the ICESCR’s provisions on education, the terms “progressive implementation,” “progressive realization” and “progressive introduction” are used to take into account limitations on a State’s resources. Upon ratification of the ICESCR, Pakistan’s reservation to the Covenant stated: “Pakistan, with a view to achieving progressively the full realization of the rights recognized in the present Covenant, shall use all appropriate means to the maximum of its available resources.”

The Committee on Economic, Social and Cultural Rights (the monitoring body for the ICESCR) produces general comments of a non-binding but authoritative nature, which seek to guide States Parties in implementing the obligations enlisted within the Covenant. To understand the extent to which Pakistan can utilize the “available resources” argument to deflect responsibility under the Convention, General Comment No. 3 of the Committee on the nature of States Parties’ obligations must be discussed.7 The Committee highlights that “Article 2 is of particular importance to a full understanding of the Covenant and must be seen as having a dynamic relationship with all of the other provisions of the Covenant.”8 Further, the Committee explains that the term “progressive realization” entails “recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time.”9 However, the Committee clarifies that “realization over time, or in other words progressively… should not be misinterpreted as depriving the obligation of all meaningful content.”10 In other words, States Parties must move “expeditiously and effectively” towards the realization of the goals enlisted within the Covenant.11

Similarly, the right to an education is safeguarded in the CRC, which also creates binding legal obligations for Pakistan owing to the latter’s ratification of the same. While education is mentioned throughout the Convention, Article 28 extensively safeguards the right whilst also highlighting what it entails. The right of children to

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8 Ibid.
9 Ibid.
10 Ibid.
11 Ibid.
education entails making primary education “compulsory and available free to all”. Further, it requires the encouragement and development of “different forms of secondary education, including general and vocational education.” Financial assistance on the basis of need is also provided for. Article 28(1)(c) requires that States Parties make higher education “accessible to all on the basis of capacity by every appropriate means,” while Article 28(1)(d) provides for educational and vocational information and guidance to be made accessible and available to all children. Article 28(1) (e) requires States Parties to take measures to “encourage regular attendance at schools and the reduction of drop-out rates.”

3. Lacking Progress

In 1990, the same year it ratified the CRC, Pakistan signed the World Declaration on Education for All, thereby committing to secure universal primary education by 2000. The Education for All Global Monitoring Report 2015 identifies Pakistan as one of the worst in terms of progress, or lack thereof, with regard to education. The Report identifies that females are more likely to be enrolled in public schools in Pakistan, while males are more likely to be sent to private schools. There is greater scope for gender inequality to entrench itself within society as a result of these decisions.

While India has been able to significantly improve its net enrolment ratio, Pakistan joins Nigeria in having made little to no progress in this regard. In fact, the Report clearly states: “In Pakistan, despite some reduction in the percentage of out-of-school children, household survey data suggests entrenched inequalities.” Similarly, the Report highlights that between 2006-2012 “little progress was made in reducing the proportion of the poorest children who had never attended and in reducing the gender gap of 18 percentage points between the poorest girls and boys.”

The picture is clear and rather alarming: Pakistan is severely lagging behind in implementing its primary and secondary education targets. Goal number four of the Sustainable Development Goals (herein ‘SDGs’) is the right to quality education. Despite the fact that Pakistan has an entire Parliamentary SDGs Task Force, tasked with expediting implementation of the Goals, little progress has been achieved in this regard. Essentially, as a result of unwillingness, inability and general apathy on the part of the State, Pakistan finds itself in the midst of an education emergency.

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14 Ibid.
15 Ibid.
16 Ibid.
17 Ibid.
4. **IDENTIFYING CHALLENGES AND DEVELOPING SOLUTIONS**

It is clear that there are several factors that have contributed to the present day education emergency this nation’s children are engulfed in. Public-private disparity is a good starting point for understanding how lack of initiative on the part of the State has created an environment where high fees and low quality can not only be expected but are accepted.

Since most children in Pakistan are part of the public education system, the State has set an alarmingly low baseline in terms of curriculum, quality of teachers and facilities, monitoring attendance of teachers and students, etc. As a result, the majority of children in this country are never even given a chance to compete with their counterparts in the private sector. When this competitive edge is given to the elite and upper middle class of this country, upward mobility is a distant dream and parents would much prefer their children get involved in some sort of work rather than spending on a rather futile education.

This disparity is further worsened by the attitude of private schools in Pakistan. In September 2015, the Prime Minister of Pakistan had to intervene to direct private schools to maintain fees rather than raising them. Regardless, private sector schools continue to raise fees, draining parents’ bank accounts and ensuring that quality education is only secured for those who have enough wealth to share with the owners of these schools.

While one can understand that the private sector operates as per demand and supply in the market, one wonders how callous and insensitive this society has become that it believes in charging exorbitant rates for education when they are fully aware that the country is in the midst of an education crisis. Admittedly, development of the public education system is the responsibility of the government. However, to ensure that disparity isn’t worsened, there is a key recommendation that may be adopted. This entails the need for legislative or administrative direction binding private schools to offer scholarships and financial aid to a certain number of students from public schools, each academic year. While this is neither a long-term solution nor a substitute for improvement of the public sector education system, it will definitely serve as a mitigating factor in this state of emergency.

Another challenge that requires our immediate attention is the formulation of a national action plan on education. This must address attitudes towards enrolment of male and female children, as well as general attitudes towards education. Alif Ailaan reported that gender disparity is manifest in school enrolment rates.\(^\text{18}\) Thus, it becomes clear that if the State wishes to correct this disparity, it must begin large-scale awareness programs across the country engaging households and parents on the importance of educating their children, particularly their female children.

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At present, enrolment remains one of the greatest challenges faced by Pakistan, with Balochistan at the forefront of areas with the highest proportion of out-of-school children.\(^{19}\) It is estimated that around 70 per cent of children in Balochistan are out of school, while 60 per cent of children in FATA are out of school.\(^{20}\) While the government has made half-hearted attempts towards developing school facilities, there is much more to be done. There are around 9 per cent of schools that operate without a building, 38 per cent without an adequate building, 44 per cent of schools without electricity, 28 per cent of schools without toilets and 34 per cent of schools without drinking water.\(^{21}\)

With regard to the aforementioned conditions, it is recommended that the legal community step forward and take responsibility for the future of this nation’s children, particularly considering the inability and incompetence of the State in doing so. Leading lawyers in Pakistan must be encouraged to take a case before the Supreme Court of Pakistan, requiring that resources be allocated towards improving public school curriculum, facilities and attendance.

Simultaneously, it is recommended that the government strictly monitor attendance, enforcing penalties against parents who refuse to send their children to school. Unless there is sanction attached, it is highly unlikely that parents, particularly in rural areas, will send their children to school when the latter can be used to generate income for the family in the short-term.

**CONCLUSION**

There is no doubt that the task ahead is a difficult one, with many financial and other constraints. However, to understand the cost is to solve half the problem. The cost is Pakistan’s future. With over 20 million children out of school, Pakistan is crippling its future generation, which essentially represents the next tier of leadership to emerge and deal with the country’s upcoming challenges. It is on this note that Confucius’ words resonate more than ever: “If your plan is for one year, plant rice. If your plan is for ten years, plant trees. If your plan is for one hundred years, educate children.”\(^{22}\) Unless we prioritize education, attributing a larger budgetary allocation to it among other necessary measures which must be taken immediately, there is no hope that Pakistan will ever come out of this period of intolerance, bigotry and hatred, which in turn fuels sectarian, ethno-linguistic, religious, and other kinds of violence.

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\(^{19}\) Ibid.  
\(^{20}\) Ibid.  
\(^{21}\) Ibid.  
\(^{22}\) Goodreads.com, “Confucius Quotes.” Available at: https://www.goodreads.com/quotes/79127-if-your-plan-is-for-one-year-plant-rice-if
The strongest legal case for the right to an education can only be made in direct linkage with the State's own commitments in the field of education, be them through Constitutional affirmations of the same or through the undertaking of international legal obligations in the area. Moreover, where provincial legislation has been enacted, the role of civil society organizations and citizens in general must be enhanced to ensure that they act as pressure groups providing the impetus for enforcement of said legislation.
Inherent Incompatibility with International Human Rights Obligations

Daanika Kamal*

INTRODUCTION

Previously, blasphemy laws existed in many countries, including Denmark, France, Germany, Ireland, Switzerland and India.¹ For the most part, offences related to blasphemy have been completely abolished. In jurisdictions where it still remains a crime on paper, violations have been heavily curtailed via judicial amendments requiring high evidentiary standards under due process, resulting in prosecutions being few and far between, ‘rendering the law redundant.’² Although blasphemy laws are not specific to Pakistan, it is argued that the State’s application of the laws is more likely to violate fundamental rights.³ The procedures used to determine guilt under blasphemy laws are very problematic in this jurisdiction, and these laws are used for the prosecution of more individuals than in any other nation.⁴

1. HISTORY OF BLASPHEMY LAWS IN A PAKISTANI FRAMEWORK

Blasphemy laws in Pakistan find their roots in the Indian Penal Code, 1860, introduced by the British in Colonial India as a means of safeguarding the interests of individuals to maintain stability in a multi-religious society.⁵ After Partition, Pakistan Penal Code, 1860 (PPC) inherited a number of criminal laws contained in its predecessor, including Chapter 15 on Offences Related to Religion. In its original form, “the injuring and defiling of a place of worship, with intent to insult the religion of any class”⁶ was criminalized under Section 295-A of the PPC, in accordance with similar blasphemy laws introduced in western democracies at the time.⁷

While Pakistan was formed on the premise of religious identity, that is, as an independent state for Muslims, it is important to note that Pakistan was intended to be a secular state with equal rights provided to all religious minorities within its

¹ Select Committee on Religious Offences in England and Wales, “First Report” (HL 2002-03, 95-I) Appendix 5
⁵ Bilal Hayee, ‘Blasphemy Laws and Pakistan’s Human Rights Obligations’ (2012) 14University of Notre Dame Australia Law Review 29
⁶ Penal Code, Act No 45 of 1860 (India), s 295-A
As famously stated by Mohammad Ali Jinnah during his Presidential address to the first Constituent Assembly in 1947:

You are free; you are free to go to your temples, you are free to go to your mosques or to any other place of worship in this State of Pakistan. You may belong to any religion or caste or creed - that has nothing to do with the business of the State.9

Accordingly, the Constitutions of 1956 and 1962, adopted in their original form, asserted the fundamental rights of individuals in an Islamic State, based on non-discrimination and therefore equality on the basis of sex, race and religion.10 Under the leadership of Zulfiqar Ali Bhutto, a new Constitution was adopted in 1973 where Islam was reaffirmed as the state religion,11 and which allowed only Muslims to run for the offices of President and Prime Minister. Further, the Parliament passed a bill in 1974, which declared Ahmadis, a religious sect, as a non-Muslim minority, accordingly amending the Constitution.12 A bill surfaced soon after, asking for an amendment to the PPC which made it illegal to question the finality of the Prophet Mohammad, as stated in Islamic scripture, or to acknowledge any comparable beliefs.13

Between 1977 and 1988, during the military regime of Zia-ul-Haq, popularly referred to as a political campaign of Islamisation,14 Zia assumed the power of amending the Constitution and aimed to substitute the progressive, pluralistic vision of Pakistan’s founding fathers to a State based on theocratic ethos,15 rationalizing the introduction of an Islamic system as being an “essential pre-requisite for the country.”16 In an attempt to strengthen the ‘repugnancy clause’ which states that no law should be inconsistent with the requirements of Islam as per the Holy Quran and Sunnah,17 Zia created a Federal Shariat Court (FSC) and established a Separate Electorates System.18 The Constitution was amended to include Article 203-D,19 establishing the FSC and giving the Court authority to examine and identify any existing laws repugnant to Islam and amend them to conform to Islamic jurisprudence.20 As it currently stands, Pakistan’s judicial system comprises of the lower courts and higher courts, with the latter

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8 Theodore Gabriel, “Christian Citizens in an Islamic State: The Pakistan Experience” (Ashgate 2007) 26
11 Constitution of the Islamic Republic of Pakistan (1973), art II
13 Ibid.
14 Hayee, Blasphemy (n.5) 26
15 Siddique and Hayat, ‘Unholy Speech’ (n.2) 316
17 Constitution (1973), supra note 11, at 227
18 Hayee, Blasphemy (n.5) art 27
20 Zamin Hussain Talpur, “Legal System of Pakistan” (Karachi, Pakistan Law House 2010) 85-87
including the Supreme Court, the Federal Shariat Court, and the five High Courts; one for each province and another for the State’s Capital Territory. Under Zia’s reforms, decisions of the FSC are binding on all High Courts and lower courts.21

Zia made a number of amendments to Pakistan’s blasphemy laws under Chapter 15 of the PPC by introducing five additional clauses, namely Sections 295-B, 295-C, and Sections 298(A-C): a law punishing the defilement of the Quran, a law criminalizing any ill-speaking against the Prophet, and laws specifically prohibiting members of the Ahmadi sect from practicing their faith respectively.22 For the scope of this paper, Section 295-B and 295-C are of particular significance, as they constitute blasphemy laws in their current form:

Section 295-B “Defiling etc. of Holy Quran”. Whoever willfully defiles, damages or desecrates a copy of the Holy Quran or of an extract therefrom or uses it in any derogatory manner or for any unlawful purpose shall be punishable with imprisonment for life.23

Section 295-C “Use of derogatory remarks, etc., in respect of the Holy Prophet”. Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine.24

Contrary to the laws Pakistan inherited from the Indian Penal Code at independence, the amendments made by Zia moved the onus of protecting all religions under these laws, to the protection of one. The Indian Penal Code emphasized the need for “deliberate or malicious”25 intent for one to be charged with blasphemy. While the term ‘willfully’ remains under Section 295-B, this requirement was waived from Section 295-C of the PPC, with no mandatory need to prove intent. The latter therefore has a lower burden of proof, and is (incidentally) the provision under which a majority of blasphemy cases are reported. With amendments to the PPC by Zia in 1980, 1982 and 1986,26 not only were blasphemy laws expanded in scope, but harsher penalties were imposed, with no practical basis to evaluate evidentiary standards and an absence of mechanisms to safeguard the due process of law. These laws were thus rendered incompatible with what would soon be Pakistan’s (binding) international human rights obligations.

21 Constitution (1973), supra note 11 art 203A-203J
24 Ibid. S 295-C incorporated by s 2 Criminal Law (Amendment) Act (111 of 1986)
25 Penal Code (India), (n. 6) S 295
26 Hoffman, Modern Blasphemy (n. 19) at 378
2. INTERNATIONAL HUMAN RIGHTS OBLIGATIONS UNDER DUE PROCESS OF LAW

Having voted in favor of the Universal Declaration of Human Rights (UDHR), Pakistan’s human rights obligations are further emphasized by the ratification of numerous international human rights treaties. The UN Charter, for example, guarantees fundamental rights to life, liberty and equality before the law, and prohibits discrimination on the bases of race, sex, language and religion. In 2010, Pakistan ratified the International Covenant on Civil and Political Rights (ICCPR), as well as the United Nations Convention against Torture, and Other Cruel Inhuman and Degrading Treatment or Punishment (UNCAT), with a number of reservations. Under Article 19 of the Vienna Convention on the Law of the Treaties (VCLT), states are allowed to express reservations at the time of signing, ratifying or acceding to a treaty, unless that reservation is specifically incompatible with the overarching purpose of the treaty. Accordingly, Pakistan voiced reservations on Articles pertaining to freedom from torture, freedom of thought, conscience and religion, and freedom of opinion and expression; subsequently withdrawing almost all reservations in 2011. In its current form, Pakistan has ratified all but Articles 3 and 25 of ICCPR, and Articles 8, 28(1) and 30(1) of UNCAT. Article 3 of ICCPR relates to extending civil and political rights without discrimination on the basis of gender (which does not directly concern the case at hand), whereas Article 25 calls for equal rights to all within a jurisdiction to take part in public affairs of the state. Subject to Articles 41(2) and 91(3) of Pakistan’s Constitution, the Government maintains that a non-Muslim cannot become the President or Prime Minister of the country, hence implicating Article 25 of ICCPR.

Presently, under ICCPR, Pakistan is obligated to ensure that all individuals have the right to freedom of thought, conscience and religion, including the freedom to adopt and practice one’s religion. Further, ICCPR binds member States to guarantee

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27 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)
28 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) arts 1(3) and 13
29 International Covenant on Civil and Political Rights (adopted 16 December 1996, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)
30 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT)
32 The Nation, ‘Pakistan decides to withdraw most of reservations on ICCPR, UNCAT’ The Nation (23 June 2011)
33 Ibid.
34 Constitution (1973), (n.11) art 41(2) “A person shall not be qualified for election as President unless he is a Muslim”; art 91(3) “After the election of the Speaker and the Deputy Speaker, the National Assembly shall, to the exclusion of any other business, proceed to elect without debate one of its Muslim members to be the Prime Minister”
35 ICCPR, (n.29) art 18
freedom of expression, except when these provisions compromise national security or public order. The State must also ensure that all individuals under its jurisdiction are equal before law with a right to due process. A ‘fair trial’ reflects the need for all to be entitled to an independent and impartial tribunal established by law, with public hearings and judgments. Anyone charged with a criminal offence is entitled to a minimum number of guarantees, including but not limited to; being informed promptly of the nature and cause of the charge against him, to have a trial without undue delay, to be tried in his presence through legal assistance of his choosing, to have witnesses examined on his behalf, and to not be compelled to testify against himself.

By ratifying UNCAT Pakistan is obligated to ensure that the necessary legislative, judicial and administrative measures are taken to prevent torturous acts under its jurisdiction, including those committed by State officials. While the State has maintained certain reservations to Articles 28(1) and 30(1), they pertain to committee-based mechanism for accountability and do not counter Pakistan’s wider human rights obligations. UNCAT ensures the right of all individuals to life and security of person, creating obligations on member States to take measures against the arbitrary deprivation of life. With respect to capital punishment, while international law has not explicitly prohibited it, it is required that this sentence is reserved for only the most heinous crimes, as an exceptional measure “pursuant to a final judgment rendered by a competent court.”

It is important to note here that Pakistan has also abstained from ICCPR’s Optional Protocol, an international treaty which, if implemented, would enable an individual complaint mechanism for provisions under ICCPR that the State in question has failed to abide by. Therefore, regardless of Pakistan’s (binding) international human rights obligations, the government has not been held accountable for its actions on a case-by-case basis, specifically in instances related to blasphemy.

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36 Ibid. art 19
37 Ibid., art 19(3)(b)
38 Ibid., arts 9 and 14
39 Ibid., art 14(1)
40 Ibid., art 14(3)
41 UNCAT, (n.30) art 2
42 Ibid., art 20(1) “If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practiced in the territory of a State Party, the Committee shall invite the State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned”
43 ICCPR, (n.29) art 6(1)-(2)
44 Optional Protocol to the International Covenant on Civil and Political Rights (status as at 23 August 2015), United Nations Treaties Collection
Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en
3. EVIDENTIARY STANDARDS USED IN BLASPHEMY CASES UNDER PAKISTAN’S CRIMINAL LAWS

In essence, the applicability of customary international law to municipal legislation depends on whether the rules of international law are covered by domestic law, and whether the rights granted therein are in conflict with existing domestic laws. Thus, the application of international law in domestic courts is subject to two limitations; the possibility of conflict with an Act of Parliament, and the possibility of conflict with Sharia. Those international laws which are discordant with Islam would be considered void in their applicability to Pakistan.\(^45\) The State has argued that Islamic Law supersedes international human rights.\(^46\) As in an extensive hearing on the topic by the Sindh High Court in *Najib Zarab Ltd v the Government of Pakistan:*\(^47\)

... The sovereignty and the integrity of the Republic and the supremacy of the constituted legislature in making laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislature themselves.\(^48\)

In cases where municipal legislation coincides with the international legal norms, international law may be applied by executive order or administrative directives. Such rules then form a broader notion of norms, which are used to regulate activities within domestic law. In 2010 for example, after ratifying ICCPR and UNCAT, Pakistan took measures on an executive level to seem consistent with provisions of international law by amending Article 10 of its Constitution to mirror Article 14 of ICCPR concerning due process.\(^49\) Pakistan is obligated to adhere to certain levels of lawfulness under domestic constitutional law, in addition to the State’s international obligations. These aspects of domestic law directly coincide with rights granted by international law with respect to freedom of religious expression, freedom from arbitrary arrest and detention, the right to a fair and timely trial, the right to life and freedom from torture, and ultimately, the right to due process in the determination of guilt.

3.1. Free Speech and Freedom of Religious Expression

Article 18 of the ICCPR requires the right to freedom of thought, conscience and religion,\(^50\) with the two main provisions being the right to have or adopt a religion, and to manifest and practice that religion.\(^51\) The Human Rights Committee has clarified that Article 18 does not permit any limitation on the freedom to *have* a religion. However it is possible for the right to *manifest* one’s religion to be subject to limitations derived

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\(^45\) Constitution (1973), (n. 11) art 227
\(^46\) Ebrahim Moosa, ‘The Dilemma of Islamic Rights Schemes’ (2000-01) 15 Journal of Law and Religion 185, 196 quotes Zafrullah Khan, former foreign minister of Pakistan
\(^47\) *Najib Zarb Ltd. V Government of Pakistan* 1993PLD Karachi 93
\(^48\) Ibid.
\(^49\) Constitution (1973), (n. 11) arts 10-10A
\(^50\) ICCPR, (n. 29) art 18
\(^51\) Ibid.
from justifications of public safety, order, or the fundamental freedom of others.\textsuperscript{52} However, these limitations must not be applied in a manner that allows them to supersede fundamental freedoms granted within Article 18.\textsuperscript{53} Further, Article 20 of the ICCPR prohibits any advocacy of national, racial or religious hatred that may entice any discrimination, hostility or violence.\textsuperscript{54} When coupled, these provisions indicate the need for Pakistan to protect against the infringement of rights of religious minorities as guaranteed by Article 18, in addition to extending safeguards to ensure that acts of persecution are not directed at them, in compliance with Article 20.

Following the freedoms entitled to individuals by international law, Article 19 of Pakistan’s Constitution discusses the right to freedom of speech and expression, and thereby freedom of the press.\textsuperscript{55} Even though the provision prima facie provides such freedoms, the rights are derogable,\textsuperscript{56} as the restrictions and exceptions embedded within the text of the Article render it useless. The right of free speech and expression are bound by “restrictions” imposed by law in interest of the “glory of Islam,”\textsuperscript{57} leaving room for Courts to determine the “reasonableness” of limitations imposed on legislature on a case-by-case basis.\textsuperscript{58} With respect to blasphemy laws, research has shown that speech was implicated in a number of ways, including casual conversations, slogans at processions, photocopying, speeches at religious congregations, translating, as well as placing a sticker with certain inscriptions on vehicles.\textsuperscript{59} Despite the implications of free speech, Article 19 of the Constitution is never referred to in cases brought to court, indicating that constitutional protections for speech were not considered to be relevant (directly or indirectly) to cases of blasphemy. It seems redundant for a right to be fundamental under the Constitution, yet possible to be divested by laws enacting it.\textsuperscript{60}

On that account, there are many gaps within Pakistan’s legislative system beyond phrasing of provisions in legal documents. These loopholes are directly connected to a lack of due process in the judicial system which when combined with ambiguity regarding what constitutes a legal violation, leads to a number of violations of the rights laid out by the international treaties that Pakistan is party to. In blasphemy cases,

\textsuperscript{52} UN Human Rights Committee (HRC), ‘CCPR General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)’ (30 July 1993) UN Doc CCPR/C/21/Rev.1/Add.4 para 3
\textsuperscript{53} Alex Conte and Richard Burchill, “Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee” (2nd ed, Ashgate 2009) 80
\textsuperscript{54} ICCPR, (n. 29) art 20
\textsuperscript{55} Constitution (1973) supra n 11 art 19 “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”
\textsuperscript{57} Ibid.
\textsuperscript{58} Siddique and Hayat, Unholy Speech (n.2) at 371
\textsuperscript{59} Ibid. at 374
specifically, due process, as per Pakistan’s Criminal Procedural Code, 1898 (CrPC),
can be discussed with regards to these offences being cognizable, non-bailable, and
non-compoundable, which are attributed to the human rights they respectively abridge.

3.2. Freedom from Arbitrary Arrest and Detention: Blasphemy as a Cognizable
Offence

ICCPR guidelines state that no one should be subjected to arbitrary arrest or
detention, and anyone who is arrested must be immediately informed of the reasons of
arrest and any charges against him or her. Blasphemy offences in Pakistan however,
are considered to be cognizable: the police have the authority to arrest without warrant
for alleged violations, and further to investigate such allegations without the
authorization of a court. At times, police is under the ‘grave misconception’ that they
can determine the guilt or innocence of the accused.

Under the CrPC, even cognizable offences must adhere to a minimum legal evidentiary
standard. While the police can arrest anyone on measures based on “reasonable
complaint” and “reasonable suspicion” as seen in Sufi Muhammad Ishaq v the State,
they must draft the offence in a written document known as the First Information
Report (FIR). Even after the FIR is registered however, the police are not permitted to
investigate a case unless they consider the alleged offense to have “sufficient ground”
for examination. While Article 54 of CrPC originally specified that any person for
whose arrest a requisition has been received from another officer may be lawfully
arrested without warrant, a 2004 amendment removed the possibility for any officer
below a certain rank to arrest or investigate cases related to blasphemy, specifically in
cases implicating Section 295-C of the PPC.

In practice, the drafting of offences and powers of arrest granted in such cases lack a
check-mechanism, as decisions of local police can be based purely on their preference
to avoid potential law and order situations in the district. In some instances, police
tends to arrest the accused immediately, without conducting preliminary investigation
and often without the accused having any knowledge of why the arrest is being made,
contravening his Freedom from Arbitrary Arrest and Detention.\textsuperscript{71} In addition, vague guidelines lead to situations, as noted in \textit{Sufi Muhammad Ishaq}, where there is an apparent inconsistency in the roles of various law instruments. During trial, the court found that a Senior Superintendent of local Police had “pre-empted the power of the criminal court” by collecting and discussing evidence, and subsequently passing a verdict even though such authority is “exclusively vested in the court of law.”\textsuperscript{72}

In \textit{Hazrat Ali Shah v the State},\textsuperscript{73} the accused was found guilty and sentenced to death by a trial court. However, during the appeal, the proceedings before the High Court were deemed as \textit{coram non judice}, that is, illegal and without jurisdiction under Section 196 of the CrPC which posits that no court shall take cognizance of any offence unless it has been granted the authority to do so from the federal government, or from the respective provincial government.\textsuperscript{74} Thus, in the aforementioned case, the complainant had not obtained necessary permissions and the trial court had therefore disregarded this (mandatory) provision by convicting the accused without valid jurisdiction.\textsuperscript{75} Failure to abide by relevant domestic legislation violates human rights with respect to arrest and detention extended to individuals by virtue of international law.

\textbf{3.3. Right to Life, Security, and Freedom from Torture: Blasphemy as a Non-Compoundable Offence}

Blasphemy cases are popularly deemed to be compoundable,\textsuperscript{76} but in Pakistan they are not. Compoundable offences are those where the complainant may enter into a compromise with the accused, agreeing to drop the charges against him. Applications for compounding offence are generally made before the court. Once compounded, the effect is similar to that of the accused being acquitted of all charges. In Pakistan however, blasphemy cases cannot be settled outside of court. Once a charge has been filed, the complainant cannot drop charges and it is difficult for the case to be quashed.\textsuperscript{77} With all blasphemy cases being classified as non-compoundable, there is an influx of alleged accused that are detained and labeled as blasphemers even before they are tried. As they are often presumed to be guilty, it is likely for those accused to be subject to (unwarranted) acts implicating their right to life, security and freedom from torture as specified under Articles 1 and 2 of UNCAT.\textsuperscript{78}

Article 1 of UNCAT defines torture as “any act by which severe pain or suffering,
whether physical or mental, is intentionally inflicted on a person.” Ratifying UNCAT means that the respective State Party must take “effective legislative, administrative, judicial or other measures.” However, in Pakistan, those detained under blasphemy are more often than not subject to torture and inhuman treatment at the hands of the public, as well as jail authorities whose personal religious beliefs differ from those of the accused. For example, Fanish Masih, a Christian arrested for blasphemy for allegedly throwing pages of the Quran into a drain was imprisoned and subsequently found dead in a special security zone of the Sialkot Central Jail. The superintendent of the jail stated that Masih had hanged himself. The post-mortem however, indicated that he had been tortured to death.

In another case, Anees Mallah, charged with blasphemy, was found murdered in his jail cell in Hyderabad. According to reports, over 200 prisoners took part in torturing him to death. Jail wardens chose to withdraw from the scene, irrespective of their civic duties to protect. While a case was registered against ‘unknown persons,’ no criminal cases were brought forward against the wardens on duty, effectively disregarding Pakistan’s obligations to protect their citizens from torture and limiting their inherent right to life.

3.4. Right to a Fair and Timely Trial: Blasphemy as a Non-Bailable Offence

Blasphemy laws in Pakistan are non-bailable offences. This means that the granting of bail is not considered to be a right and is only allowed at the courts discretion. When coupled with the lack of due process of a timely and fair trial, this clause can cause a number of complications for those allegedly accused under blasphemy.

ICCPR specifies that individuals are entitled to a trial within a reasonable time, and without undue delay. Under Pakistan’s domestic laws, the right to a timely trial is specified in Article 10 of the Constitution but rarely adhered to. In a 2014 blasphemy case, Murad ur Rehman v the State, bail was sought on grounds of statutory delay in the conclusion of the trial. The defense counsel pleaded that the accused was entitled to be released on bail as he had been imprisoned for over four years, with over two years having passed since the initial charge against him and no subsequent trial to judge his alleged guilt. Despite the circumstances, the accused was refused bail by the court.

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79 Ibid., art 1
81 Ibid.
82 Dawn, ‘Murder in jail: case lodged against unknown people’ Dawn (5 April 2009)
83 Ibid.
84 Cr P C (n. 63) s 497
85 ICCPR, (note 29) art 9 “… entitled to trial within a reasonable time or release”
86 Ibid. art 14(c) “to be tried without undue delay”
87 Murad ur Rehman v the State (2014) P Cr L J Karachi 61, 5
In 2010, it was found that Zaibun Nisa, a 60-year-old woman charged with blasphemy for allegedly throwing pages of the Quran down a drainage pipe in 1996 was found to have spent 14 years in a prison mental ward without ever being tried in a court of law.\textsuperscript{88} A petition was brought to the High Court in Lahore, and the court subsequently instructed the initial complainant and investigation officers to provide evidence against the accused, which they were unable to produce.\textsuperscript{89} In such a case, Zaibun Nisa was entitled to compensation under international law for the many years that she was wrongfully detained without a trial.\textsuperscript{90} However, no compensation was provided. A trial must be compatible with due process in order to be considered ‘fair’ under international law. Accordingly, the legal process must be free from discrimination, and consistent with the laws surrounding burden of proof and evidentiary standards in the determination of guilt.

3.5. Right to Due Process in the Determination of Guilt

With respect to the legal mechanisms in place to determine guilt, ICCPR requires State Parties to ensure that all individuals within its territory are given rights without distinction made on the grounds of race, color, sex or religion.\textsuperscript{91} In Pakistan, many of the sections related to blasphemy in the PPC are specific to Islam, and thereby not applicable to granting protections to the scriptures or personalities belonging to religious minorities, rendering them discriminatory in nature. As found in \textit{Hazrat Ali Shah}, protections within the law indicate that no Muslim can be convicted on a charge under Section 295-C if he clearly denies the charge, and claims that he is a “true Muslim and could not even think of such an act.”\textsuperscript{92} In comparison, as in the case of \textit{Asia Bibi v the State}, religious minorities are convicted and sentenced to death regardless of pleading innocence and claiming “great respect and honor to the Holy Prophet (PBUH) as well as the Holy Quran.”\textsuperscript{93}

In determination of guilt, Pakistani Courts turn to domestic law found in the Qanoon-e-Shahadat, 1984 (the Law of Evidence). For cases concerning blasphemy, three chapters are significant relating to: oral evidence, burden of proof, and the examination of witnesses. If evidence is oral, it must be reproduced before the Court by a witness who

\textsuperscript{90} ICCPR, note 29 art 9(5)
\textsuperscript{91} Ibid. art 2
\textsuperscript{92} \textit{Hazrat Ali Shah}, note 73 at 14
claims to have heard it directly,\textsuperscript{94} and the burden of proof lies on whoever is required to prove the existence of any fact.\textsuperscript{95} However the threshold of this requirement is not mentioned in the text of the law. Further, the Law of Evidence stipulates that the examination of witnesses is to be regulated by the law, following criminal procedures, with the Judge having discretion regarding the admissibility of evidence.\textsuperscript{96}

International laws under ICCPR stipulate that all persons should be equal before the courts under due process, with the right to examine witnesses against the accused and the right to “obtain the attendance and examination of witnesses”\textsuperscript{97} on behalf of the accused under the same conditions. In practice, Pakistan has been unable to uphold such standards in its legal discourse. In \textit{Haji Bashir Ahmad v the State},\textsuperscript{98} the court ruled that a number of witnesses were not required, and that it was “not necessary that (such) abusive language against the Holy Prophet (should) be made loudly in public,”\textsuperscript{99} concluding that even the statement of a single witness who claims that “somebody had made utterance for the contempt of the Holy Prophet”\textsuperscript{100} was sufficient to award capital punishment.

With respect to the reproduction of oral evidence in court, the lack of clarity in domestic laws makes it difficult to determine who bears the burden of proof, as witnesses against the accused can refuse to repeat the alleged blasphemous statements in court. In a 2014 case at the Sindh High Court, \textit{Haji Nasarullah v the State},\textsuperscript{101} a witness indicated that:

\begin{quote}
… The words uttered and filthy language used by the accused is highly insulting [sic] and intolerable, one cannot dare to reproduce the same in this order, as the honour of Hazrat Muhammad (PBUH), being so much sacred, rents my breast even to go through the statements (of witnesses) before police.\textsuperscript{102}
\end{quote}

From the aforementioned, it seems the burden of proof lies on the accused to substantiate his innocence, rather than on the complainant for proving the fault of the accused, implicating the right of the latter to be presumed innocent until proven guilty.\textsuperscript{103} Further, the Courts have been unable to meet procedural requirements under domestic laws, let alone their international obligations of customary law. During the appeal of \textit{Hazrat Ali Shah}, the accused had taken a plea of fits, mental disorder and unsound mind, denying the allegations that he had blasphemed.\textsuperscript{104} Not only do international standards of due process account for such instances, but domestic law as under Section 465 of the CrPC and Article 59 of the Law of Evidence maintain that if an accused pleads as such, he must be referred to a relevant medical practitioner before

\textsuperscript{94} Law of Evidence (Qanun-e-Shahadat) Order, 1984, Pres Order No. 10 of 1984
\textsuperscript{95} Ibid. art 117(2)
\textsuperscript{96} Ibid. art 131
\textsuperscript{97} ICCPR, note 29 art 14(3)(e)
\textsuperscript{98} \textit{Haji Bashir Ahmad v the State} (2005) YLR Lahore 985
\textsuperscript{99} Ibid. at 19 (parenthesis added)
\textsuperscript{100} Ibid., at 19
\textsuperscript{101} \textit{Haji Nasarullah v the State} (2014) MLD Sindh 617 (HC)
\textsuperscript{102} Ibid., at 8
\textsuperscript{103} ICCPR, note 29 art 14(2)
\textsuperscript{104} \textit{Hazrat Ali Shah}, note 73 at 13
the Court can proceed with trial. However, Shah was not referred to a practitioner, and had been previously convicted of the charge by a lower court, demonstrating discrepancies within domestic law.

4. THE EXCUSE OF BLASPHEMY

Key aspects that play into the discrepancies in blasphemy laws are the alleged offences that fall under what can be aptly called the ‘excuse of blasphemy.’ Ranging from the lack of clarity of definitions and interpretations, to the filing of false complaints, lack of mechanisms to monitor and prevent abuses, extra-judicial killings and vigilantism; the inconsistencies of understanding the powers of arrest and drafting of offences enable unwarranted acts to be justified under these laws, while contravening due process and evidentiary standards in cases of blasphemy.

4.1. Definitions and Interpretations

The wording used in the relevant sections of PPC does not provide a clear understanding of what acts are considered to be blasphemous and constitute a violation. Due to its ambiguity, it is often stated that a violation is in essence anything which offends the accuser. It is significant to note that there is a difference between ‘hate speech’ and indirect incitement, where ‘advocating’ racial hatred is not the same as ‘arousing’ it. The element of intent is of paramount importance in differentiating the two. Without exhibiting mens rea, or criminal intent, the laws are unable to distinguish between deliberate and unintended acts of blasphemy. The absence of an explicit intent requirement in Section 295-C, or even ‘willful’ as stated in Section 295-B, along with no requirement for an individual to be offended or hurt by the accused’s act makes the former a strict liability offence. Directly corresponding to the lack of mens rea is the lack of specificity in definitions, with interpretations being boundless. For example, the phrase “defiles the sacred name of the Holy Prophet” in Section 295-C offers no specific understanding regarding the types of acts which can constitute a violation.

It is important to note the original provisions in Chapter 15 of the PPC on blasphemy laws, such as it has been maintained in Section 298 on ‘uttering words etc., with deliberate intent to wound religious feelings’, specifies:

Whoever, with the deliberate intention of wounding the religious feelings of any

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106 Hazrat Ali Shah, note 73
108 Hurst Hannum, ‘Speech, Religious Discrimination, and Blasphemy’ (1989) 83 ASIL Proc 427, 428 on the question of whether there should be “a distinction between the prohibition of propaganda that might arouse religious hatred and that which might advocate racial hatred”
109 PPC, note 25
110 Ibid.
person, utters any word or makes any sound in the hearing of that person or makes any
gesture in the sight of that person shall be punished with imprisonment of either
description for a term which may extend to one year, or with fine, or both.\textsuperscript{111}

In Section 298, the laws have clearly stated the need for criminal intent, while defining
the circumstances under which the law can be applied, that is “in the hearing or sight of
the complainant.”\textsuperscript{112} This diverges from Section 295-C, where “indirect imputations,
nunuendoes or insinuations,”\textsuperscript{113} not necessarily in the sight or hearing of the
complainant, will suffice for conviction.\textsuperscript{114} Despite disparities within offences relating
to religion in the PPC, the Judiciary has refrained from taking action to amend the
wording of the laws for Section 295. This when coupled with a lack of definitional
specificity, has led to the misuse and abuse of the laws.

4.2. Abuse of Laws

Motivations for blasphemy allegations often arise from false pretenses, arising from
personal disputes, with allegations being the “by-products of disputes between
neighbors, business associates, political opponents or religious leaders.”\textsuperscript{115} Numerous
media sources report on instances in which blasphemous allegations were made against
individuals as a result of blackmail. In 2012, non-Muslims were accused of blasphemy
for refusing to convert to Islam.\textsuperscript{116} In another case in 2011 a young Christian, Khuram
Sunny, was arrested for burning papers of the Quran and allegedly using them to make
tea.\textsuperscript{117} His partner, Ms. Bano, had been blackmailed by Muslim neighbors into bringing
false accusations of blasphemy against him, otherwise they would complain to
authorities that she had been living with her partner out of wedlock, which could lead to
charges of fornication, adultery and rape; hinting the possibility of her facing death by
stoning.\textsuperscript{118} With respect to false accusations Section 203 of PPC states that:

\begin{quote}
Whoever, knowing or having reason to believe that an offence has been committed,
gives any information respecting that offence which he knows or believes to be false
shall be punished with imprisonment of either description for a term which may extend
to two years, or with fine, or with both.\textsuperscript{119}
\end{quote}

\begin{itemize}
\item \textsuperscript{111} Ibid., s 298
\item \textsuperscript{112} Ibid.
\item \textsuperscript{113} Ibid. s 295-C
\item \textsuperscript{114} Siddique and Hayat, Unholy Speech (n. 2) at 352
\item \textsuperscript{115} Human Rights First, supra note 88 para 25
\item \textsuperscript{116} Rabia Mehmood, ‘Twice cursed: Trials of being labeled an Ahmadi and a blasphemer’ \textit{Tribune} (9 October 2012)
\item \textsuperscript{117} Asia Human Rights Commission, ‘Pakistan: A Christian laborer arrested on blasphemy charges in an
\item \textsuperscript{118} Ibid.
\item \textsuperscript{119} PPC, note 25 s 203
\end{http://tribune.com.pk/story/448710/twice-cursed-trials-of-being-labelled-an-ahmedi-and-a blasphemer/>}
Despite constitutional safeguards to prevent the abuse of criminal laws, the lack of enforcement mechanisms enable the laws to be used for revenge, settling personal disputes or matters completely unrelated to blasphemy. In *Haji Nasarullah v the State*, the defense pleaded that the alleged case had been fabricated as a means to settle a personal dispute between the complainants and the accused. It was discussed that the accused had lodged an FIR against the complainants prior to being accused of blasphemy, as they had damaged property and proceeded to shoot the brother of the accused with ‘intent to murder.’ The defense therefore argued that given an FIR had been issued preceding the blasphemy accusation; it was evident that the latter case was fabricated by the complainants to protect them from a previously registered case against them. The Court however did not find relevance in the arguments made in the appeal and dismissed it.

Further, there is an absence of precautionary measures taken to prevent the abuse of laws, such as the responsibilities of police authorities and law enforcing agents. In 2013, a case was registered with respect to reported violence in a Christian colony, allegedly resulting from blasphemy. During trial, it was found that police officers on the scene had retreated from the mob at the onset of violence, taking refuge in warehouses while the mob proceeded to set fire to houses in the colony. It was appropriately noted that the police had failed “to protect the life and property of inhabitants”. This failure indicates the lack of safeguards and shows that the “fundamental rights of citizens of the colony were not protected as under Article 9 and 14 of the Constitution.”

### 4.3. Disproportionate Penalties

The United Nations has repeatedly stressed for countries that still practice it, capital punishment should be reserved only for the “most serious crimes,” and that it should be read restrictively, so as to allow death penalty only as an exceptional measure. Blasphemy laws maintain that those convicted of offences are punishable by imprisonment or death. In 1991, a petition was moved before the FSC demanding that the alternative punishment option of imprisonment be declared void on accounts of repugnance to the Quran. The petition was subsequently accepted and its demands were met on the basis of the court’s interpretation of Quranic verses. The Court further forwarded the order to the Supreme Court and the alternative penalty has failed to be

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120 *Haji Nasarullah, supra* note 101 at 4
121 Ibid., at 12
122 Against the Violence in Christian Colony in Badami Bagh Area Over Alleged Blasphemy (Constitutional Petition No 10 of 2013) (2013) SCMR 918 (Pakistan)
123 Ibid., at 4
124 Ibid.
125 ICCPR, note 29 art 6(2)
126 UN Human Rights Committee (HRC), ‘CCPR General Comment No 6: Article 6 (Right to Life)’ (30 April 1982) UN Doc HRI/GEN/1/REV.1 para 7
127 Siddique and Hayat, note 2 at 379
implemented since, given that “all injunctions of the FSC are binding.” In 2014, the FSC referred to the earlier decision of 1991 and directed the Ministry of Law, Justice and Human Rights to take the necessary steps for concrete implementation, so that the alternative penalty of imprisonment was completely removed from the PPC and all relevant law books, leaving death as the only (and therefore mandatory) punishment for blasphemy offences under Section 295-C.

The assumption upon which the death penalty was deemed mandatory is inaccurate. If blasphemy falls within ‘Hadd’ (Islamic punishments that carry mandatory death penalty) as ruled by the FSC, the higher evidentiary standard for convictions under ‘hadd’ should also be a requirement. Instead, Pakistan’s use of disproportionate penalties is further implicated as the procedures of due process and fair trial are (more often than not) lacking. The ICCPR has duly noted, for countries who maintain the death penalty that “capital punishment may only be carried out pursuant to a final judgment rendered by a competent court,” while further elaborating that legal processes must include safeguards to ensure a fair trial, as listed under Article 14 of the Covenant. In the case at hand, blasphemy laws have been rendered such that anyone blaspheming is punishable by “death and nothing else.” A number of cases brought to trial have quoted accordingly, where it is apparently “a unanimous verdict that the punishment of someone who abuses Holy Prophet or degrades him is death.” At times, this argument is also used as a defense for extra-judicial killings that are allegedly premised on blasphemy.

4.4 Extra-Judicial Killings and Vigilantism

Over recent years, the laws have created a ‘climate of vigilantism’ enabling individuals to murder those who have allegedly committed blasphemy, seeing it as their duty, and most are acquitted for their actions. For example, in Malik Zafar Awan v the State, the petitioner reckoned that the “accused had not committed any offence because he killed a man who had made contempt to the honor of the Holy Prophet.” The petition was filed subsequent to the lodging of an FIR against the accused, Mumtaz Qadri, with respect to the assassination of former Governor Salman Taseer. The Governor had previously spoken out against the verdict of a court sentencing Asia Bibi

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128 Ibid., at 380
129 Ilyas Masih Monem v Federation of Pakistan (2014) PLD 18 (Federal Shariat Court)
129 Ibid.
130 ICCPR, note 29 art 6
131 ECOSOC ‘Safeguards guaranteeing protection of the rights of those facing the death penalty’ Res 1984/50 (25 May 1984)
132 ICCPR, note 29 art 14
134 Malik Zafar Awan v SHO (2011) YLR Islamabad 717
135 Ibid.
136 Malik Zafar Awan, supra note 135
137 Ibid., at 2
to death for blasphemy. Mumtaz Qadri had infamously stated that “Salman Taseer is a blasphemer and this (death) is the punishment for a blasphemer.” During trial, the petitioner argued that the murder of ‘such a person’ was legal, as said person has been agitating the emotions of Muslims, and the arrest of the accused for homicide was therefore considered to be “illegal and without any justification.”

The public seem to consider it their “religious duty to kill blasphemers and supporters”, as declared by a mob outside the courtroom during the trial of Qamar David, accused of blasphemy in 2010. Given the culture, it is unlikely for someone characterized as a blasphemer to return to the public realm. Even if acquitted of the charge, it is likely that mobs take matters into their own hands, arranging extra-judicial killings under the premise that the legal system failed to provide justice. In 2015, Aabid Mehmood, convicted of blasphemy in 2011 was released from prison due to his deteriorating mental and physical condition. Soon after his release, he was kidnapped and shot. When his body was brought to the village, an enraged mob refused to allow the deceased’s family to bury him in their local graveyard.

5. PROPOSED FRAMEWORK FOR CRIMINALIZING BLASPHEMY

Pakistan’s recent history has indicated that blasphemy laws are here to stay. The governments of Benazir Bhutto (1988-1990 and 1993-1996), President Musharraf (1999-2008) and Prime Minister Gilani (2008-2012) all called for repealing of the laws, but withdrew their assertions as a result of threats made by religious parties. The assassinations of Governor Salman Taseer and Minister Shahbaz Bhatti in 2011 for speaking out against blasphemy laws with respect to Asia Bibi’s death sentence are further examples of the situation. As evidenced by the repeated failed attempts to repeal these laws, instead of calling for their annulment, it may be more plausible to make amendments within the current legal system under which the laws operate, allowing them to exist while limiting the human rights violations that they currently entail.

5.1. In-text Amendments to Section 295-B and 2295-C of the PPC

The first step in limiting these violations is to extend protections to minorities. While

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140 Mst Asia Bibi, supra note 93
141 BBC, supra note 139 (parenthesis added)
142 Malik Zafar Awan, supra note 135
143 Ibid., at 2
144 Human Rights First, supra note 88
146 Ibid.
147 Hayee, supra note 5 at 27
the beliefs of religious minorities are protected under Section 295-A\textsuperscript{149} and Section 298\textsuperscript{150} of the PPC, by virtue of criminalizing acts intended to insult any class; minorities are not protected from being victimized under Section 295-B and 295-C. By amending the current context of the laws, violations can be limited by clarifying the definition of what constitutes as blasphemy. For example, a mens rea requirement can be established by including the words “maliciously, deliberately and intentionally” to the relevant sections. Further, the laws must be amended to remove the mandatory death penalty in order for the State to be consistent with international obligations under ICCPR and UNCAT.\textsuperscript{151} Critics of the death penalty have noted its correlation with high probability of legal and procedural inconsistencies, aggravated by discrimination and inadequate legal representation. They have found that the death penalty has no greater deterrent effect compared to lesser penalties.\textsuperscript{152} Correspondingly, punishments may be amended to range up to ten years of imprisonment,\textsuperscript{153} depending on the severity of the crime established as per the Court’s discretion.

There are two reasons for proposing a sentence ranging up to ten years. While Section 298 and 295-A of the PPC deal with offences related to religion of any class and have maximum sentences of one and two-year imprisonment respectively, it is likely for one to assume that punishments for 295-B and 295-C should mirror these in order to remain consistent within the laws and exercise a non-discriminatory sentiment. However, if punishments were the same, there would be no use for 295-B and 295-C as the laws in their definition would be redundant to 295-A and 298, which by and large cover the same offences by virtue of being applicable to all religions, including Islam. Such an amendment would be equivalent to the repealing of the laws completely, which as previously discussed, has not proved to be a viable option. Second, sentences are usually determined in line with the deterrence or reduction in offences that will ensue, protection of the public and making of reparation by offenders to persons affected by their offences.\textsuperscript{154} In line with such purposes, a sentence of up to ten years may be justifiable on retributive grounds. Going beyond this to impose a death sentence is unlikely to be necessary for the requirements of retribution, deterrence or the protection of the public; therefore being an arbitrary punishment. Given the nature and plight of the situation in a public setting, the expression of the public’s moral outrage to the accused’s actions should be proportionate. Given that Pakistan’s domestic laws must be consistent with Sharia’, it could be argued that punishments for offences related to Islam should be greater than that of another religion, as the power to interpret Sharia’

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\textsuperscript{149} PPC, supra note 25 s 295 “Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowing ledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, shall be punishable with imprisonment of either description for a term which may extend to two years, or with fine, or with both”

\textsuperscript{150} Ibid., s 298 ‘Uttering words, etc., with deliberate intent to wound religious feelings’

\textsuperscript{151} ICCPR, supra note 29 art 6(2)

\textsuperscript{152} Michael L RADELET and Traci L LACOCK, ‘Recent Developments: do executions lower homicide rates?: the views of leading criminologists’ (2009) 99(2) Journal of Criminal Law & Criminology 489

\textsuperscript{153} PPC, supra note 25 s 295-A

\textsuperscript{154} Martin WASIK, ‘Principles of Sentencing’ in David Feldman (ed), English Public Law (2nd edn, OUP 2009)
law rests with the government and laws are therefore interpreted according to what appeals to the majority of the population to gain approval.\textsuperscript{155} While not advocating for a discriminatory regime, but rather determining the most plausible amendments to the laws within their current political and legal context that could alleviate some human rights violations, the respective amendments to the PPC would then read:

Section 295-B. Whoever maliciously, deliberately and intentionally defiles, damages or desecrates a copy of the Holy Quran or of an extract therefrom or uses it in any derogatory manner or for any unlawful purpose shall be punishable with imprisonment of either description from a term which may extend to ten years, or with fine, or both.\textsuperscript{156}

Section 295-C. Whoever by words, either spoken or written, or by visible representation maliciously, deliberately and intentionally defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punishable with imprisonment of either description for a term which may extend to ten years, or with fine, or both.\textsuperscript{157}

While the PPC defines offences, and provides a list of their respective penalties, CrPC provides the mechanism, the evidentiary standards and due process for the trial and sentencing of the accused. Due to the overlap between the PPC and the CrPC, it is important for both statutes to be read together, so as to ensure that any amendments made to one, is effective by virtue of the other. A proposed framework for criminalizing blasphemy must then adhere to international standards of due process, which would assist in eliminating (some) human rights violations.

5.2. Amendments to Safeguard Due Process of Law

In order to be compatible with international standards, it is necessary for blasphemy to no longer be a cognizable offence, that is, a warrant must be required for arrests made under Sections 295-B and 295-C of the PPC, as it would enable a higher level of scrutiny in making arrests, limiting false convictions and arbitrary detention. Additionally, the drafting of offences and consequential arrests must be made in accordance with the authorization already granted under CrPC,\textsuperscript{158} with all courts needing approval from the Provincial and Federal Governments before conviction. For first-responders such as police officials, a penalty should be in order if it is found that they have failed to comply by domestic procedural laws, in order to safeguard the individual’s freedom from arbitrary arrest and detention.

Secondly, blasphemy offences under the CrPC should entitle the accused to bail, especially if his or her detention is endangering the right to life and security, and

\begin{itemize}
\item \textsuperscript{155} Ann Elizabeth MAYER, ‘Law and Religion in the Muslim Middle East’ (1987) 35 Am J Comp L 127,
\item \textsuperscript{156} Example of a judicial amendment which could be made to Section 295-B of the Penal Code in order to accommodate for a mens rea requirement in its application, and a lesser penalty.
\item \textsuperscript{157} Example of a judicial amendment which could be made to Section 295-C of the Penal Code in order to accommodate for a mens rea requirement in its application, and a lesser penalty.
\item \textsuperscript{158} Cr P C, supra note 63 s 196 “No Court shall take cognizance of any offence punishable under Chapter VI or IXA of the Pakistan Penal Code”
\end{itemize}
increasing the possibility of torture. As seen in numerous cases, those who are detained can be subject to threats within the confinement of where they are incarcerated. Allowing bail would lessen the number of individuals forced to remain in prison by virtue of waiting for trial, which could take years. Further, as specified by ICCPR, those detained in an untimely (and at times unlawful) manner are entitled to compensation from the State. Section 382-B of the CrPC aims to compensate the accused if he has remained incarcerated for a long period while waiting for trial in cases where bail has not been granted, i.e., the accused will be granted concession by treating the time spent as an under-trial prisoner in lieu of his subsequent sentence, if any. Using this provision as an example, a clause specifying compensation (monetary or otherwise) for any undue delay in blasphemy trials could not only act as a deterrent for officials delaying proceedings but could also discourage the refusal of bail on statutory grounds.

Further, adapting the laws to allow them to be compoundable (so that they can be settled outside of court) could significantly reduce the number of false cases that are brought forward on the pretense of personal disputes. When all cases are taken to court, the accused are labelled as blasphemers even before they are tried, igniting a culture that subjects them to unwarranted acts by those who have differing religious views and impacting the accused’s right to security within and beyond the confinements of prison. With compoundable offences, it is possible for complaints to be settled before the accused is characterized as a blasphemer in public realms. If coupled with safeguards that penalize false accusations, those who hide under the veil of the ‘excuse of blasphemy’ could be limited. Adding a clause to the PPC which does so could discourage such acts. Even though Section 203 of the PPC in its current form states that anyone giving false information with respect to a criminal offence is to be punished with imprisonment, the clause in practice has never been applied to provisions related to blasphemy, as evidenced by precedents discussed above. Adding a provision within Section 203 which specifically refers to a punishment for anyone deliberately making a false or frivolous accusation under Sections 295-A, 295-B or 295-C may be deemed as worthy in reducing the number of cases brought forward.

These amendments, however, will only work if they are implemented under a fair legal system, where ‘fair’ is determined by standards declared so in international law. This entails being tried by an impartial and regularly constituted court, which must be able to perform its functions independent of any other branch of government, while offering guarantees to exclude any legitimate doubts about its impartiality. Specifically with

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159 Human Rights First, supra note 88
160 ICCPR, supra note 29 art 9(5)
161 PPC, supra note 25 s 203
162 For example, Section 203-A could be introduced, specifying that ‘Anyone making false or frivolous accusations under Sections 295-A, 295-B and 295-C shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or both.’
163 ICCPR, supra note 29 art 14(1)
164 See ICCPR, supra note 29 art 14; UDHR, supra note 27 art 10; American Declaration on the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the International American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992) art XXV1; ECOSOC ‘Strengthening basic principles of
respect to determination of guilt, a minimum evidentiary standard must be adhered to. In blasphemy cases, more often than not, the only ‘evidence’ used is verbal. Thus, for cases where documents cease to exist, there must be a mandatory requirement for the reproduction of oral evidence in court as indicated in Pakistan’s Law of Evidence.165 While past cases have shown that witnesses can refuse to do so on a rationale based on their personal religious beliefs, this requirement should not be waived under any circumstances. It must be clarified that anyone repeating the alleged blasphemous statement will not be charged with blasphemy, and their words will be secure under witness protection programs in the court of law. Accordingly, the burden of proof should lie on the complainant and not on the accused, in order to complement the notion of being ‘presumed innocent until proven guilty.’166

Further, it must be a requirement of all Courts to take any previously registered FIRs by the individuals involved into account. In some cases, it may be found that the accused had previously reported a complaint against his accusers founded on property disputes or vandalism, and so previous FIRs can be rendered as relevant to the current blasphemy case,167 and be admissible as evidence for the possibility of a false accusation under blasphemy law to settle personal quarrels. Further, Section 195 of the PPC on ‘false evidence’ discuss the giving of fabricated evidence with intent to procure convictions, stating that punishments for such acts mirror those that the accused would have been liable to.168 As a preventive measure, such provisions should be implemented, and anyone providing false evidence (oral or otherwise) as a witness in blasphemy cases should be punished according to domestic law as it currently stands.

Additionally, it is an inherent human right under due process to have a public hearing.169 While parts of the hearing may be kept away from the public and the press for reasons in the interest of morals, public order or where the interest of justice so requires, using such reservations as a justification for having all hearings behind closed doors poses a higher risk of unlawful proceedings. Given that the case of blasphemy is sensitive, instead of having all hearings in the public realm, it may be more effective to include a clause in CrPC which requires all offences falling under Sections 295-B and 295-C of the PPC to be exclusively tried by the High Courts, which are under a higher degree of public scrutiny, and have previously acquitted individuals who were convicted of the offence in lower courts.170 Niaz Ahmad v the State,171 Muhammad Sharif v the State172 and Ranjah Masih v the State173 are a few cases where the

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165 Law of Evidence, supra note 94 art 70
166 ICCPR, supra note 29 art 14(2)
167 Haji Nasarullah, supra note 101
168 PPC, supra note 25 s 195 “giving or fabricating false evidence with intent to procure conviction of offence punishable with imprisonment for life or for a term of seven years of upwards… shall be punished as a person convicted of that offence would be liable to be punished”
169 ICCPR, supra note 29 art 14(1)
170 Hassan, supra note 10 at 297
171 Niaz Ahmad v the State (2009) MLD Lahore 616 (HC)
172 Muhammad Sharif v the State (2008) YLR Lahore 1386 (HC)
173 Ranjah Masih v the State (2007) YLR Lahore 336 (HC)
conviction and sentence awarded by Trial Courts were set aside by the respective High Court after appeal due to lack of supporting evidence. Ensuring cases are exclusively tried by the superior courts would therefore limit the miscarriage of justice in the lower and Sessional courts used to prosecute minorities in Pakistan, and will consequently enable defendants to enjoy a higher standing of the rights extended to them by international covenants.

On release from prison or after the accused is acquitted, it is essential for necessary precautions to be taken to ensure that his or her life is not threatened by extra-judicial killings or vigilantism. International agencies have recently taken steps to encourage States to take a stand against extra-judicial executions. The Third Committee of the UN General Assembly passed a draft condemning such acts, reiterating the international obligation on States to conduct thorough, timely and impartial investigations into all suspected cases of such killings, with respect to religious identity, sexual orientation and gender identity.174 Pakistan should punish those who take matters into their own hands just as severely as those who make false and frivolous complaints (as proposed above), or as severely as those implicated in cases of homicide under the State’s criminal law. Crimes falling under the banner of extra-judicial killings are still effectively murder, and should not be treated differently if it is allegedly predicated on religious beliefs. If treated contrarily, the law may be incidentally legitimizing acts of vigilantism.

CONCLUSION

Pakistan’s vulnerable groups continue to be victims of these laws, as they evidently lack the coherence and equitability in a legal setting, which when applied in practice have resulted in the persecution, undue detention, exile and death of many. The State must take necessary steps to identify legal shortfalls in the law and reform them accordingly. If blasphemy laws are here to stay, it is vital for the State to meet its human rights obligations in a manner which allows the laws to exist, but under a stringent rule of law by virtue of due process, which prevents abuses and consequently guarantees the enjoyment of human rights granted to Pakistan’s citizens by virtue of international law.

Exploring the Precedent for Human Rights in Sharia: 
A Reconciliation?

Rana Adan Abid*

INTRODUCTION

Is Islam antithetical to the modern conception of human rights? Does Sharia lack an alternative framework to protect the rights of the vulnerable, underprivileged and marginalized sections of society? And most importantly, when it comes to the hard questions concerning the legal principles, norms and philosophies that lie at the foundation of the human rights discourse: to what degree can Sharia and International Law ever be reconciled?

These are the salient questions addressed in this paper within a framework based on six groups of individuals: non-Muslim minorities; the Intersex/Trans community; prisoners of war; civilians during wartime; the economically disadvantaged; and the dependents. Conceptually speaking, the paper shall limit its scope to the first two generations of civil, political, social, economic and cultural human rights enshrined in the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), respectively. In terms of the methodology used to substantiate claims, this piece of research has employed a vast range of materials to find sound legal precedent, including but not limited to international treaties and covenants (most notably, ICCPR, ICESCR and the four Geneva Conventions), U.N. State practice, Western and Islamic scholarship, Quranic verses, sayings of Prophet Muhammad recorded in the six authentic books of Sahih Bukhari and well-documented events from early Islamic history.¹ The use of such an integrated and interdisciplinary pool of knowledge has ensured this work’s commitment to the bigger picture.

It is pertinent to appreciate at the beginning that the thematic focus of this paper lies at the dynamic interface of law, morality and religion - a dynamic troika that together stands at the base of society. However, to contain our exercise in comparisons within a legalistic structure, it is important to define beforehand the parameters of our understanding of Law. These parameters must be applicable in contexts across civilizations. What universal quality makes Law what it is? And how does Law change over time? We proceed with an understanding of Law as that which can bind and direct behavior through firstly, a subjective element of belief and, secondly, the fear of punishment. Theoretically, we remain close to John Austin’s positivistic understanding of Law with its twin elements of Duty and Sanction. Now, to apply this understanding to the theory and practice of International Law, let’s have a look at the way opinio juris

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¹ Al-Tabari, Ab Jaffar, “The History of the Kings and Prophets”
is best understood as the *subjective* belief of a given State as to whether it believes a certain course of action (or inaction) is legally binding upon itself. This element of belief is subjective and psychological and may be identifiable in foreign office statements, UN General Assembly resolutions and diplomatic correspondence and various other sources. As for the *fear* of punishment it comes with the variety of reprisals that exist on the international level, such as reputational damage, monetary loss, loss of moral standing, international trade embargos or diplomatic isolation; a *fear* that altogether accounts for the overwhelming compliance of UN Member States with International Law.

The same definition is also applicable to Sharia – a body of laws that is for the great number of Muslims around the world, the foremost source of all worldly obligations. Here, we have the *subjective* belief manifest in the deep conviction of Muslims that God is the ultimate source of Law. The element of *fear* is evident upon a cursory look through the text of the Quran where divine retribution and the punishment of Hell are one of the most recurring themes. Both these bodies of Law contain the *subjective* element of belief and the sense of *fear* that give us the parameters for our understanding of Law as a command capable of enforcing itself through the force of sanction.

In the interest of intellectual honesty, we now seek to identify the origins of International Law within the broader historical context within which it developed through the ages. Copious amounts of interdisciplinary research during the 20th century pointed to the idea that the norms and principles found at the basis of contemporary human rights and humanitarian law are deeply rooted in Biblical traditions. Max Stackhouse, author and theologian, has identified serious concerns about an understanding of the human rights agenda without an understanding of its ‘*ultimate roots and legitimations*’. For him and the present writer, the key task is to ‘identify where, in the depths of all these traditions, that residual capacity to recognize and further refine the truth and justice of human rights insights lies, for this is necessary in order to overcome what, otherwise, is likely to be a “clash of civilizations.”’

By way of an example, the linear evolution of the ‘Just War Theory’ is one case in point in order to show the influence of Christian doctrine on Western legal philosophy—the historical predecessor of the two Latin maxims: *Jus In Bello* and *Jus Ad Bellum*. Beginning with the fourth century writings of Saint Augustine, a prominent Catholic priest and scholar of his time, who was the first to coin the term ‘Just War’ – a concept that has, ever since, informed and redefined international legality on the use of force.

Centuries later this inspired Saint Thomas Aquinas to build upon the authority of Augustine's arguments to define the conditions under which a war could be just. For his

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2 Dr. Max Stackhouse is director of the Kuyper Center for Public Theology and Stephen Colwell Professor of Christian Ethics at Princeton Theological Seminary. He is the author and editor of numerous books on a wide variety of topics including most recently (with Peter Paris) a three-volume series entitled God and Globalization. His work has indeed taken him global; he has taught and lectured in places as wide-ranging as India, Germany, the Philippines, Indonesia, and Hong Kong.

philosophical contribution, he was later given the title of the Doctor of the Church by the Roman Catholics during the thirteenth century. The framework Aquinas proposed then culminated into one of the foundational treatises of modern International Law ‘The Law of Peace and War’ by Hugo Grotius who relied heavily on citations from the Old and New Testament to demonstrate a universal law on the quintessential questions of armed conflict. Within his work, Grotius employs a multilayer mode of argumentation resorting to religious edicts among arguments from utility. Widely seen as the first systematic study of the subject from a legalistic angle, the work earned Grotius his status as the ‘father of modern international law’.

These theo-philosophical works handed down through history by the pioneers of international law are now developed into elaborate legal frameworks: international law of armed conflict. Therefore, as a matter of historical fact, it can be stated that an understanding of human rights movement, or for that matter international law, without addressing the religious context belies the trajectory of events through which international law itself came into being.

On the other hand, Sharia - representative of the Islamic discourse - is a body of divine commandments that find their starting point in the Holy Book of Islam. The Quran is believed by Muslims to be the largely unchanged word of God carrying the force of law. The second source of law under Sharia comprises of all the collections of Hadith and Sunnah detailing the everyday conduct of Prophet Muhammad (although, unlike Quran the content of Hadith and Sunnah is more likely to be challenged for its lack of authenticity).

Nevertheless, due to the rise of new, complex and ever-changing circumstances of human life, a need for law making was identified in Muslim societies. These declarations of law (i.e, Fatwas) seek to fill the gaps left so by resorting to the ancillary sources of Ijma (consensus of opinion) and Aql (reason) for legal interpretation. Even within the two major sects of Islam (Shiite and Sunni) there is a lack of consensus as to the circumstances under which these sources of Islamic Law are applicable. Sentient to this deadlock the present work shall deliberately circumvent any discussion of Fiqh (Islamic legal science); instead choosing to browse through good and valid precedent established by Quran, Hadith/Sunnah and early Islamic state practice.

1. THE RIGHTS OF RELIGIOUS MINORITIES

The rights of religious minorities were first codified in Islamic state practice with the signing of the Charter of Medina that laid down the code of conduct to govern various religious denominations of the Arab World at the time. Like the unwritten Constitution of the United Kingdom, the Charter was a series of legal documents; only consolidated into one text after the death of Prophet Muhammad.

Read in tandem with the two primary sources of Islamic jurisprudence (Quran and Hadith/Sunnah) various clauses of the Charter make provisions to uphold the equal and fair status of non-Muslim citizens. They do so through a comprehensive framework of civil, political, cultural, social and economic human rights. In a modern sense the rights
under the Charter of Medina are comparable to the guarantee under Article 18 of the ICCPR: “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.”

The following clauses from the Charter of Medina particularly serve to establish precedent of non-discrimination against non-Muslims by curtailing their most fundamental human right to equal protection of law:

- No Jew will be wronged for being a Jew (right to equal treatment before law).
- The security of God is equal for all groups (right to Security of life, person and property).
- The Jews must bear their own expenses and the Muslims bear their expenses. (right to self-determination)
- The Jews are of a community along with the Believers. To the Jews their religion and to the Muslims their religion. (right to freedom of religion)

Moreover, under the political authority of Prophet Muhammad, Muslims signed a covenant with the Christians of Najran. The covenant laid down practical guidelines for Muslim armed forces based on the teachings of Sharia in order to protect the civil rights of non-Muslims to life, property, places of worship and the freedom to practice their own religion:

To the Christians of Najran and neighboring territories, the security of God and the pledge of his Prophet (s) are extended for their lives, their religion and their property… to the present as well as the absent and others besides (a) there shall be no interference with the practice of their faith or their observances, nor any changes in their rights and privileges; (2) no bishop shall be removed from his bishopric nor any monk form his monastery, nor any priest from his priesthood and (3) they shall continue to enjoy everything great and small as heretofore, no image or cross shall be destroyed; they shall not oppress or be oppressed.4

As a matter of general principle, at various points in the Quran it has been reiterated that there must always be justice in one’s dealings with others regardless of religious beliefs. In clear words, the Quran impresses upon Muslims that when it comes to matters of faith, the use of violence or coercive force is not the answer. For Muslims, this prohibition is codified by the Quranic verse: ‘Let there be no compulsion in religion’ (2:256)5. The same principle that finds its sentiment echoed in Article 18(2), ICCPR, ‘No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.’

Another relevant Quranic reference establishes the right of non-Muslims to a fair trial, ‘When you judge between them, judge with justice’ (5:42)6. The rights of non-Muslims

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5 Chapter 2: Verse 256
6 Chapter 5: Verse 42
to special protection for their places of worship is also enshrined in Quran in the following words, ‘And were it not that Allah checks the people, some by means of others, there would have been demolished monasteries, churches, synagogues, and mosques in which the name of Allah is much mentioned’ (22:40)\(^7\).

Individual sayings attributed to Prophet Muhammad also point to the great importance attached to the just and humane treatment of non-Muslims. On one occasion, he is reported to have said:

> Whoever committed any act of injustice towards a person who has a treaty with the Muslim, took away part of his rights, charged him with something he could not do (labor or other things) or took from him anything without his consent then I will be his complainant on The Day of Judgment.

Principles that underlie Article 18 of the ICCPR, Article 18 of the UDHR and Article 9 of the ECHR, find themselves echoed in the comprehensive Islamic precedent for protection of religious minorities in Muslim majority areas. At the time the Charter of Medina, signed over a millennium ago, might even have been one of the first written declarations in history to enshrine religious freedom as a fundamental constitutional right\(^8\). However, the only challenge for contemporary Muslim legal systems is to adapt that precedent by making it more responsive to the needs of society. The gross violations of the rights of religious minorities across Muslim countries have led to discriminatory treatment by States, widespread misuse of local blasphemy laws and the death penalty for apostasy. These practices challenge Sharia as a framework containing adequate safeguards for non-Muslims. If so, perhaps there might be an opportunity to introspect and reform Sharia as well as Islamic State practice to a different and changed world.

### 2. The Rights of Civilians During Armed Conflict

During armed conflict an extensive body of international law classically known as *jus in bello* (international humanitarian law) seeks to define the lawful conduct including treatment of civilians during wartime. Where both international law and Sharia acknowledge this inevitable possibility of war, they also prescribe limitations to minimize human rights violations against civilians.

The similarities between international law and Sharia law include the distinction between a civilian and non-civilian. It seems that across these two bodies of law the wartime rules apply to precisely the same category of people. Common Article 3 of the Geneva Conventions states that each Party to the conflict shall be bound to apply, as a minimum, the following provisions to “persons taking no active part in the hostilities.”\(^9\)

Despite the use of the term non-combatant to include military personnel (doctors/nurses) within international law, the term ‘non-combatants’ is used

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\(^7\) Chapter 22: Verse 40


\(^9\) Common Article 3 Geneva Convention 1949…
interchangeably with civilians for present purposes. Sharia endorses the same distinction among people during times of armed conflict. This distinction between civilians and non-civilians was, per Islamic jurists, a product of the Sunnah of the Prophet Muhammad. In the Hadith, Muslims are repeatedly forbidden from harming women and children during times of armed conflict.

Moreover, one of the most prominent chapters of the Quran lies down in vivid terms: ‘Fight against those who fight you but do not transgress limits’ (2:191). The principles embodied in this verse not only identify and enforce the distinction between civilian and non-civilian, it also confirms self-defense as an exception to the prohibition on the use of force by a state in much the same way as Article 51 of the United Nations Charter preserves ‘the inherent right to individual or collective self-defense’.

A look at the Islamic state practice during the early Caliphs reveals astonishing similarities in content with the modern day international humanitarian law.

You shall not engage in treachery; you shall not act unfaithfully; you shall not engage in deception; (1) you shall not indulge in mutilation; (2) you shall kill neither a young child nor an old man nor a woman; (3) you shall not fell palm trees or burn them; (4) you shall not cut down [any] fruit-bearing tree; (5) you shall not slaughter a sheep or a cow or a camel except for food. (6) You will pass people who occupy themselves in monks’ cells; leave them alone, and leave alone what they busy themselves.

3. THE RIGHTS OF TRANSGENDER PERSONS

Instances of members of the LGBTQ community continue to face persecution, discrimination and hate crimes across the Muslim world, the position of Sharia only goes so far as to confer recognition to intersex (or khunta) and transgender individuals (or mukhannath). As we shall come to learn, in the case of all other groups that are part of the LGBTQ community, the position of Sharia is either unfavorable or at least ambiguous.

Firstly, in terms of an overarching principle the Quran brings all human beings within the fold of Allah’s creation; this dispels any justification for treating members of the LGBTQ community in a manner that is cruel, inhumane or degrading, such as murder or torture. The single verse in the Qur’ân that speaks of an alternative to the binary of biological male and female reads as follows: ‘He creates whatever He wishes; He gives females to whomever He wishes, and gives males to whomever He wishes, or He combines them males and females, and makes sterile whomever He wishes. Indeed, He

10 While the author acknowledges this nuanced distinction between ‘non-combatant’ and ‘civilian’, the decisive criterion used under International Law to determine whether certain rights of protection be granted to an individual is only contingent upon whether he/she has taken an active part in the hostilities.
11 Sahih Bukhari V. 4, Book 52, 257 & 258
13 Tabari 1996: X, 16
is All-Knowing, All-Powerful.” (42:49). It is worth reiterating this acknowledgement within Sharia of a situation where a new-born baby has characteristics of both male and female anatomy (khunta as referred to in the Quran) – a biological human reality. Within western LGBTQ discourse this translates into the recognition to the subgroup of people known as intersex or transgender.

Secondly, Hadith offers support for the fundamental right to life and security of person of mukhannath (or effeminate men). Abu Hurayrah has narrated it as: “A mukhannath who had dyed his hands and feet with henna like women was brought to Prophet Muhammad. He asked: what is the matter with this man? He was told: Apostle of Allah! He affects women's get-up. So he ordered regarding him and he was banished to an-Naqi'. The people said: Apostle of Allah! should we not kill him? He said: I have been prohibited from killing people who pray.” Within the modern LGBTQ spectrum ‘mukhannath’ may be seen as a comparable reference to transvestite, transgender, or transsexual categories.

In fact, there is evidence within modern Islamic state practice that recognizes and, to a certain extent, facilitates the process of gender reassignment into transwomen and transmen – another group within the larger LGBTQ community. One of the leading Iranian Shiite scholars, Ayatollah al-Khaminai, has justified the permission for sex change operations for khunthas as well as mukhannath. In fact, recent statistics reveal that in the year 2015, Iran performed more sex change operations than any other country (except Thailand) as it continues to provide this service, making it possible for hundreds of transsexual citizens to survive.

In a similar vein in Muslim countries like Pakistan, domestic courts have afforded special protection to members of the local transgender community by recognizing some of their basic civil and political human rights, unfortunately not without exceptions. These include inter alia the right to inheritance and marriage, a separate column in census forms as well as participation in electoral politics. These examples from Iran and Pakistan point to the adaptive ease with which Muslim legal systems have, in their own way, affected practical changes at the policy or juridical level towards acting to protect the rights of some, if not all, members of the LGBTQ community.

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14 Chapter 42: Verse 49
15 Ibid.
16 Abu-Dawood, Book 41, No. 4910
17 Al Khaminai: 1999, v. 2, 73
However, the criminalization of the act of sodomy in nearly all Muslim jurisdictions remains as one of the fault-lines between Western liberals and Islamic traditionalists on human rights. It is pertinent to mention that the position of Sharia on sodomy is one that applies equally to man, woman or animal alike and in that sense, does not represent a criminal offence that exclusively operates to the disadvantage of the LGBTQ community. This is so because contrary to what is manifested in Islamic practice, there is no reference in the Quran of any particular punishment for same-sex activities let alone the death sentence. This remarkable legal lacuna coupled with the claim of literature and arts that speak to a high level of social acceptance of LGBTQ individuals in Muslim cultures offer an alternate window of history. Moreover, the Quranic/Biblical narrative of Sodom and Gomorrah has also been reinterpreted and revised by legal and theological scholars from all denominations of People of the Book, who contend the prophetic narrative is in fact more concerned with the criminalization of forceful sexual assault, lack of consent in sexual relations and maltreatment of guests/aliens. Nevertheless, unless certain prominent sayings from Hadith are also disregarded for their lack of authenticity, the prospects of reconciliation for all members of the LGBTQ community are limited.

4. **The Rights of Prisoners of War**

Across civilizations, prisoners of war were afforded special protection despite their status as former enemy combatants. Once the duration of active hostilities has elapsed and war has officially ceased, the applicable sections of IHL set guidelines for the lawful and humane treatment of prisoners of war. A general position endorsed by the Quran is one that repeatedly ordains Muslims to provide for the basic material needs of those held in captivity in much the same way as the following rules under the Third Geneva Convention (1949):

A) **Humane Treatment of Prisoners** - Article 13: “Prisoners of war must always be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest”

B) **Food** - Article 26: “The basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies. Account shall also be taken of the habitual diet of the prisoners… Sufficient drinking water shall be supplied to prisoners of war…”

C) **Clothing** – Article 27: “Clothing, underwear and footwear shall be supplied to prisoners of war in sufficient quantities by the Detaining Power…”

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21 On the Sins of Sodom and on Sodom as a symbol of Judgment. See D.M Howard, Jr. “Sodom” in The International Standard Bible Encyclopedia
The Quran recognizes and encourages the act of freeing a captive as an act of charity. The basis for this is found in a verse from the Quran which states: *Zakat expenditures are only for the poor and for the needy and for those employed to collect [Zakat] and for bringing hearts together [for Islam] and for freeing captives [or slaves] and for those in debt and for the cause of Allah and for the [stranded] traveler - an obligation [imposed] by Allah. And Allah is Knowing and Wise*22. From the eight categories of persons named eligible for the mandatory Zakat, prisoners of war fall under the category known as *Riqab* (Arabic word used to refer to those captives who make an agreement with their master to pay a certain ransom for their freedom). Another Quranic reference repeats this commandment to ensure there is humane treatment of prisoners of war, “And they feed from what they love for themselves the indigent, the orphan, and the prisoner of war.” (8:9)23

As a matter of fact, the Quran not only strongly adheres to the distinction between combatants and non-combatants, as recognized in international law, for the protection of civilian life and population, it also encourages a framework for the emancipation of war prisoners. It does so by stipulating practical conditions under which it may be possible to grant them freedom, “When you meet the unbelievers in the battlefield strike off their heads and, when you have laid them low, bind your captives firmly. Then grant them their freedom or take a ransom from them, until War shall lay down her burdens.” (47:4)24 The Quran further delineates a formal procedure through the formulation of a contract of emancipation for those held in captivity, “And those who seek a contract for eventual emancipation by purchasing their freedom from their owners for a price agreed upon] from among whom your right hands possess — then make a contract with them if you know there is within them goodness.” (24:33)

During the early years of Islamic history, a well-known practice allowed prisoners of war to regain their freedom by teaching ten Muslim children how to read and write. This general prohibition of inhumane treatment25 of prisoners of war was put to practice by the early Caliphs. Caliph Ali gave the following orders to Muslim armies, “If you fight them and defeat them, do not kill the fugitives, do not finish off the wounded, do not uncover their nakedness, and do not mutilate the slain.”

Based strictly on the above verse, to execute a prisoner of war would be an un-Islamic practice. However, within the overall context provided by Sunnah as well as early Islamic history it becomes clear that such a prohibition has not in fact been followed on the ground. While there is wide disagreement among the Islamic schools of thought on the legality of executing an adult male prisoner, there is also general precedent under Sharia for protection of vulnerably placed prisoners of war – one that must learn to cater to the exigencies of international relations and the modern rules of warfare.

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22 (Chapter 9: Verse 60)
23 (Chapter 8: Verse 9)
24 (Chapter 47: Verse 4)
5. **The Rights of the Economically Disadvantaged**

Within the human rights discourse, the rights of the economically disadvantaged fall under the scope of one of the core human rights conventions, the ICESCR. It bears mentioning that one of the foremost criticisms against human rights conventions, and international law at large, is the lack of enforcement mechanisms. To this end, what has been identified as a matter of individual right under the ICESCR was given more binding value under Sharia through the mandatory practice of Zakat and other voluntary donations derived from Hadith and Sunnah, such as Sadaqat, Kaffara, Sadaqa-e-Jariah, Awkaf.

Upon a closer understanding of the legal philosophy of rights versus duties, it can be demonstrated that the discourse on social and economic human rights is in fact more binding and enforceable under Sharia. Coppens describes rights and duties as “correlative and inseparable.” As the corresponding obligation to a right, it is duties that allow moral values and social norms declared in the language of rights to be practically implemented. In this way, Sharia can be seen attaching the weighty force of divine rule towards implementing the human right to social and economic well-being. It does so by providing specific mechanisms on an individual, State and community level that obliges the redistribution of wealth as a matter of practice.

Zakat is one of the five fundamental duties of individual Muslims in possession of a certain amount of money for a period of one year (Nisab). Various Quranic verses serve to reiterate the status of Zakat as the individual’s primary obligation to the economically disadvantaged sections of his/her community. According to the Quran, “[prescribed] charitable offerings are only [to be given] to the poor and the indigent, and to those who work on [administering] it, and to those whose hearts are to be reconciled, and to [free] those in bondage, and to the debt-ridden, and for the cause of God, and to the wayfarer. [This is] an obligation from God. And God is all-knowing, all-wise.” (9: 60). On other occasions, it is made clear that the failure to perform one’s individual duty of Zakat is worthy of punishment according to Sharia. In this way Sharia practically works to promote the same egalitarian values and ideas of social justice that lie at the philosophical basis of the modern welfare state. National constitutions around the Islamic world testify to the fact that the tenets and laws of Islam are sensitive to the social and economic rights of the poor.

6. **The Rights of Dependents**

Another class of people who is afforded special protection under Sharia is comprised of those who may depend on others for sustenance, employment and patronage. Some examples may include members of house staff, non-earning family members, employees in offices, laborers at work and others. This category of persons for whom

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27 Ibid.
28 (Chapter 9: Verse 60).
one may carry individual liability in different legal capacities is well established in Sharia literature.

Beyond the scope of the legal framework under ICESCR, the Cairo Declaration of Human Rights adds ‘dependents’ as a social group entitled to protection. Strong precedent for rights of dependents can be found in Prophet Muhammad’s last sermon wherein there is clear indication of this responsibility/duty upon all Muslims: “Oh people! Be mindful of those under you. Feed and clothe them as you feed and clothe yourselves.”

Moreover, in the Quran, there are repeated references to act in a just and friendly manner towards those who fall under one’s realm of authority in one way or the other: “Allah has favored some of you over their provisions to those whom their right-hand controls so that they become equal partners in it. Would they thus disclaim Allah’s favor?” (16:71)

In this way, the commandments of Sharia extend to both an individual’s position in life as a guardian of minors, dependent relatives and disabled persons within family as well as the collective responsibility of the State or community towards vulnerable groups such as senior citizens, homeless and orphans.

CONCLUSION

While there is certainly room for this comparative analysis to further develop, it does manage to lay down significant precedent for human rights within Islam. It contributes to existing literature for the following reasons. Firstly, through its highlighting of legal precedent under Sharia that may be similar or comparable to the standards of international law, this research critically questions the popular perception of Islam as a religion with no respect for the fundamental and inalienable dignity of human beings. Secondly, this paper revisits the understanding of Sharia by driving attention back to fundamentals while advocating for an open mind to incorporating international best practices. Lastly, by contributing to arguments for similarity as opposed to conflict, the author offers an alternative to the presumably inevitable ‘Huntingonian’ clash of our times. In doing so, this research contributes to a discourse of reconciliation by highlighting shared precedent, and in doing so, build common ground for the understanding of key questions that polarize our world.

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29 The Last Sermon. (Hadith of the Day) Available at <http://hadithoftheday.com/the-last-sermon/>
30 (Chapter 16: Verse 71)
Multinational Corporations and Their Accountability under Human Right Frameworks

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INTRODUCTION

This article explores the relationship between multinational corporations and their human rights obligations. The matter that forms the crux of the discourse is not only of human rights obligations that such transnational corporate entities may have but, more importantly, that of accountability under a regulatory framework that caters to such duties. During the course of this article it will become clear why human rights obligations ought to be imposed and if they are imposed then why the current regulatory structures are not enough to create an environment where multinational corporations safeguard human rights. Finally, the suitability of treaty frameworks as accountability mechanisms for multinational entities will be discussed.

To even begin to understand the failings of the structures in place currently the issue of why multinationals corporations (M.N.C.s) need such frameworks to begin with must be addressed. In the context of globalisation and the growing clout of the M.N.C.s in the domestic and international arena, there is an on-going debate regarding the accountability of such corporations for infringements of human rights. Arguments for and against the imposition of such liabilities on corporations have been forwarded with some arguing for a more elaborate framework of corporate social responsibility to be created while others argue for a more limited approach with regard to the issue of the extent and scope of human rights obligations on M.N.C.s.

The question of whether or not M.N.C.s can be held accountable for human rights infringements and whether a framework created solely to deal with such violations by corporate actors is not easily answered. The argument that these corporations have a powerful position and possess an ability to have a far-reaching impact and therefore they ought to be held liable for human rights infringements, might seem compelling at first, but it is not the only consideration. This question needs to be approached in a way that recognizes the multifaceted nature of arguments put forth for a holistic and complete understanding of this area of law. It also needs to be seen why the current voluntary initiatives and soft law approaches will not suffice; should M.N.C.s be brought under a framework of human right treaties, or whether domestic legislations are enough, are some of the questions which need to be considered. Of equal importance are trajectories of globalisation: whether human rights obligations can be imposed in situations where the infringement is carried out by a foreign subsidiary of a parent company or whether M.N.C.s should be liable for human rights violations if their

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1 Globalisation, for the purpose for this article, means the breakdown of national barriers economically, socially, politically and culturally resulting in integration and convergence that cuts across geographical boundaries; see A. O. Osibanjo, A.E. Oyewunmi & O.P. Salau, Globalisation and Multinational Corporations: The Nigerian Business Environment in Perspective” (2014) 16 (11) (IOSR-JBM)
activities and operations are supportive of countries with poor human rights records. The extent and scope of such duties are some of the key factors that need to be resolved before a viable regulatory framework can be put forth.

Some of the key incidents, which highlight the need for some sort of accountability of M.N.C.s for infringing human rights, are: the Union Carbide incident in Bhopal, India and the Shell incident in Nigeria among other instances. These episodes showed that not only are M.N.C.s amongst the key players in the international arena but could also be possible violators of human rights.

However, to even attempt to understand the complexities and the issues raised for the imposition of a human rights’ framework the expression ‘multinational corporations’ needs to be understood. Multinational corporations are business entities that are carrying out business activities and have assets and facilities in places other than their home country\(^2\). Essentially, they are corporate entities that operate transnationally.

1. **THE NEED FOR AN IMPOSITION OF HUMAN RIGHT OBLIGATIONS**

Organizations such as Amnesty International have repeatedly emphasised why M.N.C.s ought to comply with human rights obligations. A report by Anderson and Cavanagh,\(^3\) (while comparing corporations’ revenue and states’ gross domestic product (GDP)), found that out of the hundred largest economic entities in the world, almost fifty-one were corporations whereas forty-nine were countries.\(^4\) A report by the Transnational Institute in 2014 showed that out of the top one hundred economic entities thirty-seven were corporations.\(^5\) These statistics show the growing influence of corporations in the world today. These corporations not only operate in a manner that is not restricted by geographical boundaries, but also seem to have an impact on communities under their sphere of influence. This method of operation, the influence these organizations wield and the impact they have on various stakeholders puts them in a position of power which must entail responsibility. The problem is further exacerbated by the fact that states that are bound under the current framework of treaties and even by their own domestic legislations fail to carry out proper legal proceedings against corporations violating rights. Not only do some states fail to provide effective relief, but also in many cases are involved in violations themselves. In a world where some corporations have greater revenues than the GDP of some states, weaker states are left with little option but to submit to the demands of M.N.C.s, often at the expense of the rights of their own citizens.

The need for multinational corporations to comply with human rights under a more extensive framework is made clear in the case of the Union Carbide gas leak, which caused the death and injury of thousands of people in Bhopal, India. This was an

\(^3\)Sarah Anderson and John Cavanagh, “The Rise of Corporate Global Power,” (The Institute for Policy Studies 2000)
Available at: <https://www.amnesty.org/en/what-we-do/corporate-accountability/>
instance of an M.N.C. being negligent with regards to health and safety standards. The litigation for the Bhopal case was long drawn and came to a conclusion after thirty years. If corporations could have been held directly responsible for failure to comply, such lengthy legal proceedings could have been avoided and quicker relief could have been provided to the victims. Bhopal is not the only case where M.N.C.s carried out violations of human rights. Additional examples of M.N.C.s being linked to violations include the case of the Bodo oil spill in Nigeria where the Shell Corporation was accused of asking for operations by Nigerian Police; and the Union Oil Company of California (UNOCAL) in Burma was allegedly involved in cases of rape, murder and torture. In both cases, the collaboration of the respective state was an infringement of human rights, and with the state being complicit in such acts, those affected were left with limited judicial remedies. Thus, it can be argued that there is a need for such corporations to be held responsible under a human rights framework. In the landmark Shell litigation, the plaintiffs, under the United States Alien Tort Claims Act (ATCA) and Torture Victim Protection Act, carried out legal proceedings against the Shell corporation in United States and were awarded $55 million in damages. However, more direct liability under a human rights framework would not only result in a more expeditious and effective litigation but would also send a strong message to corporations that such blatant disregard for human rights will not be tolerated.

The basis for multinationals being bound by human rights can also be found in the Universal Declaration of Human Rights (UDHR), which includes political, social and economic rights. There are voluntary initiatives like the United Nations Global Compact and Organisation for Economic Co-operation and Development (OECD) guidelines for multinational corporations that require M.N.C.s to respect human rights and set standards for working corporations and guidelines regarding labour and their treatment. An argument may be made that the creation of such guidelines will set more effective standards for M.N.C.s to comply with through which their actions can be measured. However, given that soft law is not binding and compliance with these benchmarks is not a legal duty, this may not be an ideal solution.

Human right frameworks that cut across national borders become even more important when we look at state backed violations. Such infringements occurred in the UNOCAL incident in Burma and the Bodo Oil Spill in Nigeria. Both states were involved in gross human rights violations including enforced disappearances, torture, etc. This demonstrates that domestic legislation alone may not be enough in many instances especially where the state mechanisms do not entirely protect its citizens. Not only do

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states at times fail to safeguard citizen rights, but also violate them either by failing to act or falling short when it comes to enacting appropriate legislation.

At times, even powerful governments fail to take necessary legal action against corporations. This is not only an example of weak domestic structures of a country where the human rights infringements take place but it also demonstrates the corporation’s home country’s unwillingness to intervene. This was highlighted in the Abu Ghrail cases which were instances of governments of strong states failing to take action against multinational corporations where human rights violations took place.

In the case of Saleh et al. vs. Titan, Saleh was imprisoned and tortured by U.S based private contractors and government actors at Abu Ghrail prison in Iraq. Saleh was allegedly subjected to sleep deprivation, isolated detention, threats of rape, beating, forced nudity, hoisting and rape. Saleh also claimed he saw other prisoners executed and young men raped. The plaintiff filed a suit under the ATCA. However, the case was dismissed by a Federal Appeals Court in Washington and the Supreme Court refused to take up the case or to comment on the refusal. The Federal Appeals Court ruled that a suit could not be brought under the ATCA because the contractors could not be categorized as ‘state actors’ for the purposes of the ATCA. It was also held that the claims against the contractors had no standing under the doctrine of battlefield preemption.

In the Kiobel case concerning the human rights violations in Ogoniland, Nigeria, the U.S. Supreme Court decided that there can be no extraterritorial application of municipal law of the United States. Esther Kiobel claimed that the Nigerian government committed human rights infringements and the Shell Petroleum Development Company of Nigeria acted in collaboration with the government. The Supreme Court, again, ruled that the ATCA could not be applied. The Court also held that for there to be application of U.S. law extraterritorially, the issue at hand ought to ‘touch and concern’ the United States. These cases are a testament to the fact that despite existing laws in powerful states, municipal legislation will, at times, fail to provide relief to the victims of gross human rights abuses abroad.

As a result, M.N.C.s are now putting greater emphasis on public image, opting for fair trade and projecting their entities as compliant with human rights. Companies now choose to create niches for themselves by showing their compliance with human rights standards. A more human rights friendly environment is also conducive for business:

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13 Ibid.
14 For the purpose of this article, ‘Battlefield preemption’ has been defined as a doctrine that states a tort claim arising against private military contractors participating in activities under the military during wartime, will be preempted, see, Sonia Tabriz, “The Battlefield Preemption Doctrine: Preempting Tort Claims Against Contractors on the Battlefield to Preserve Federal Interests in Wartime Matters” (2013) 42 (3) Public Contract Law Journal 629.
where the safety and health of the labour is guaranteed, business operations are likely to operate smoothly and effectively.18

2. **The Case Against Human Rights Duties**

States are the primary subjects of human rights obligations in international law. Multinational corporations operate in the private sphere where seemingly the only responsibility of the company is to safeguard the rights of the shareholders. Under international law, a company has no responsibility or duty towards the human rights of the general public. However, companies are subject to the laws of the states in which they operate.

However, the private and the public realms are not so distinct anymore and corporations have now begun to delve into the public sphere, no longer remaining solely private commercial entities. The private and public spheres are not separate anymore "authority, repression and alienation extends beyond the apparatus of the state". The distinction between public and private entities having no social obligations is now being questioned. Also, supranational bodies like the European Union allow M.N.C.s to circumvent state mechanisms and to have an influence on individuals through such bodies.19

M.N.C.s will only observe human rights standards if the state enacted law that required compliance from them. Otherwise, corporations would feel no need to protect the sanctity of human rights of their own accord.20

3. **Current Regulatory Frameworks**

Apart from such theoretical concerns, there is also a more practical question: how will this duty to comply with human rights actually extend to corporations? MNCs are not direct parties to any international human rights law instruments. Soft law initiatives like the International Labour Organization (ILO) Tripartite Declaration are popular amongst corporations simply because they are not binding and compliance, although attractive, is not a legal duty. These initiatives merely provide guidelines and thus their substantive impact on the activities of M.N.C.s is not significant.

This was seen in the case of *Motto & Ors v. Trafigura*,21 22 in which the corporation, in an attempt to redefine and reconfigure its public image, became party to the Extractive Industries Transparency Initiative but failed to demonstrate any transparency with regards to the toxic waste it had dumped in Abidjan.23 This demonstrates that merely

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18 Ibid 38.
19 Ibid 40.
20 Ibid 35.
being party to a soft law instrument does not suffice. Such structures do not seem substantial enough to create an environment in which M.N.C.s would uphold human rights. There is indeed a need for stronger frameworks that demand greater compliance, regulate corporate activities and instate an accountability mechanism in case of violations. A transnational framework avoids the problems associated with the limited jurisdictional scope of domestic laws. Some argue that a move to further extend human rights duties to such corporations will weaken the resolve of states to protect the rights of citizens as the obligation will be shifted to private legal entities. To avoid this problem, a transnational framework needs to bind states that will then hold M.N.C.s accountable.

Municipal law may cater to situations where multinationals have committed human rights infringements. This raises the question that why are such provisions not sufficient to protect human rights. Why are domestic frameworks not enough to impose obligations on multinational corporations? There are cases of infringements by the corporate sector that were tried domestically. After *Bano v. Union Carbide*, the Bhopal Act, for example, was passed to deal with the aftermath of the incident.

Another important issue is of whether parent companies should be held liable for human rights violations carried out by their subsidiaries. Some also argue that corporations that trade with states that violate human rights must also be culpable even if they are not directly complicit in any such infringement. In certain cases parent companies were held liable for infringements carried out by subsidiaries as in the case of *Chandler v. Cape*. The parent company, in this case, was held liable for a breach of health and safety standards by its foreign subsidiary. An employee of the subsidiary company sustained an injury during the course of employment. Despite the fact that the subsidiary functioned independently of the parent company, the latter was held liable on the basis of assumption of responsibility under the law of United Kingdom. This imposition on parent companies is further highlighted in the case of *Lubbe v. Cape Industries*, where it was deemed by the UK courts that in order to avoid a denial of justice, the case should be allowed to proceed against the parent company in London rather than in South Africa where there was a lack of legal representation. In doing so, the Court set aside the veil of incorporation and recognized the foreign subsidiary’s link with its parent in the UK. These cases show that parent companies were held liable for failure to comply with health and safety standards by their subsidiaries.

4. **NEW ACCOUNTABILITY MECHANISMS**

Despite overseas jurisdictions catering to victims of human rights abuses, the failure of home countries to provide protection through domestic law prevails. There are

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28 Assumption of responsibility, for the purpose of this article, is taking on the responsibility for the actions of another.
29 *Lubbe and Others and Cape Plc and Related Appeals* [2000] UKHL 41.
numerous cases where judicial relief was not forthcoming. This is not always because legal structures do not exist or municipal law is lacking but because states, even developed ones, do not always have the resources or the power to pursue legal action against powerful multinationals. Where weaker states suffer due to lack of domestic legislation, developed nations too face obstacles when it comes to the provision of effective relief. New mechanisms also need to tackle the problems of inability to provide relief where provisions exist, while also catering to victims in jurisdictions that lack legal structures altogether. A binding treaty framework is needed. Such a treaty would uphold provisions seeking compliance by M.N.C.s with human rights obligations and would provide judicial relief regardless of whether a suit is filed in a host state or the home state of a M.N.C.

The Human Rights Council passed Resolution 26/9\(^{30}\) to establish an ‘open ended intergovernmental working group’ that would work on human rights and transnational corporations and other businesses. This was a move towards the initiation of a discussion to create a binding treaty framework for the accountability of corporations. The report on the first session of this Working Group brought forth concerns of all the stakeholders. The multi-stakeholder approach of the Working Group allows for an effective framework to be created that will address the gaps within the current structures in place and, at the same time, make sure that all parties involved are on board. Accountability and uniform remedies are the most pressing concerns that need to be addressed.

The Guiding Principles on Business and Human Rights\(^ {31}\) are not binding in nature and they act in a complementary fashion with the adoption of a binding framework, as was pointed out by certain delegations in the first session of the Working Group. This will help the implementation of the framework so that during the time period the treaty is being drafted the mechanisms of accountability and relief are still active.

One of the problems facing the stakeholders is that many of the countries who voted ‘yes’ on the resolution have failed to take any steps towards enforcing the Guiding Principles.\(^ {32}\) Another issue is the wide-ranging scope of the treaty. As with many of the problems of international community and taking into consideration the nature of problem solving on the international plane, a sudden radical change would not result in consensus and is unlikely to be conducive for sustainable development and implementation of a new legal framework. The imperatives of time and eccentricities of international law-making call for a slow and gradual adoption of the binding instrument- one which contributes, in a sustainable manner, to the wider human rights agenda.


CONCLUSION

Even though there is a need for reform, a sudden overhaul of the current structure of accountability is not pragmatic. Undoubtedly, multinational corporations need to be held accountable for human rights violations. Domestic legislation and courts have in some cases held these organizations accountable, but this is not sufficient.

There are glaring gaps within the current framework that need to be addressed especially in states where the domestic legislation is weak or the state and the corporation are joint offenders. States may enact more stringent and stronger legislation to cater to the issues brought forth as the Bhopal Act did after the Union Carbide incident.

However, as in some of the cases that have been highlighted, at times either it is unlikely that municipal law will be enacted to deal with such infringements or even if there is law in place, effective judicial relief will not be provided due to lack of resources. Therefore, remedies cannot be confined to the domestic realm. There is a dire need for more binding structures. Structures need to be created that deal specifically with multinational corporations’ human rights violations. This will ensure better and more holistic human rights regimes within the country and deter states from collaborating with corporations that are violating human rights.
Protecting Civilians during Violent Conflict: Challenges faced by International Humanitarian Law

Zainab Mustafa*

INTRODUCTION

War spares no one, be it combatants, civilians, men, women or children. Today, despite legal safeguards, the majority of victims of armed conflict are civilians.\(^1\) The shift in the balance of wartime casualties from primarily soldiers to now an increased number of civilians took place during World War II.\(^2\) Civilians engulfed by an armed conflict suffer in a great number of ways. They are exposed to injuries, physical suffering, destruction of their properties and livelihoods and a serious impairment of access to basic, life-sustaining services.\(^3\) Over the past years, an increase in the military operations carried out in urban, densely populated areas has been witnessed, which in turn results in greater civilian casualties.\(^4\) It is thereby evident that the civilian population normally finds itself at the heart of the conflict.

International Humanitarian Law (IHL), as a body of law, caters to the protection of civilians during armed conflict. It is particularly difficult to apply the rules of IHL during internal armed conflicts (now the more common form of armed conflict) as they often involve a range of non-state actors that do not often possess the will or capacity to comply with IHL.

This brief aims to address the legal lacunas present in IHL’s protection regime for civilians and the challenges in its implementation. Furthermore it aims to suggest ways to overcome them in order to strengthen compliance. The brief is divided into three parts: Part I depicts the realities faced by civilians on the ground; Part II highlights the obligations of states and non-state actors under IHL, in addition to illustrating what is

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meant by ‘protection’ under the tenets of IHL; Part III identifies lacunas in the protection regime and challenges faced by IHL, along with proposing solutions on how to fill these gaps within the law and ensure implementation.

1. **REALITIES FACED BY CIVILIANS ON THE GROUND**

The reality of today presents a dismal picture of how civilian populations in armed conflicts are often the ones who suffer the most from the consequences of such violence.⁵ Civilians are often at the heart of the conflict and control over the civilian population is one of the prime goals during an armed conflict.⁶ However, the deliberate or indiscriminate targeting of civilians, the use of them as shields or hindering access to humanitarian assistance are violations of IHL and may amount to war crimes or crimes against humanity.⁷ The laws contained within IHL offer protection to civilians during armed conflict. However, there are certain inadequacies in the laws that need to be addressed. Implementation of the law and compliance with its provisions must be strengthened in order to provide the requisite protection to civilians.⁸

2. **IHL’S OBLIGATIONS ON STATE AND NON-STATE ARMED ACTORS**

The primary responsibility for providing protection to civilians during an armed conflict falls on the state and when they are not able, the international community has a subsidiary responsibility to provide protection. IHL specifically requires compliance from all parties involved in an armed conflict.⁹

A basic element of IHL is the protection of the civilian population. All those not taking part in the hostilities and civilians must not be attacked and must be safeguarded.¹⁰

Under international law, it is a requirement for both the state and armed groups to respect the principles of *distinction*¹¹ and *proportionality* when carrying out armed operations.¹² The principle of distinction dictates that the armed forces should

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⁶ Ibid.
⁷ Ibid.
⁸ Ibid.
¹⁰ ICRC “Enhancing Protection For Civilians In Armed Conflict And Other Situations Of Violence” (1st edn, International Committee of The Red Cross 2012).
¹² UNAMI “Protection Of Civilians In The Non-International Armed Conflict In Iraq” (Office of The High Commissioner for Human Rights 2014).
distinguish between civilians and combatants, whereas the principle of proportionality states that launch of an attack which is expected to kill civilians, injure them or cause damage to their objects, or a combination thereof, which is excessive in relation to the concrete and direct military advantage anticipated is prohibited.

Parties to an armed conflict must take all reasonable precautions to avoid, or minimize, the impact of violence on civilians, in addition to taking steps to ensure the safety of civilians by enabling them to leave areas of violence and providing them access to humanitarian assistance.

Protection of the civilian population generally entails that state and non-state actors remain respectful of their obligations and do not infringe the rights of individuals in order to preserve the lives, physical and moral integrity, security and dignity of those affected by armed conflicts. Efforts that aim to prevent/stop actual or potential violations of IHL and other bodies of relevant law, all fall within the ambit of ‘protection.’

Protection also aims to eliminate the causes of such violations by directly addressing the parties responsible for the violations and those with influence over such persons. Additionally, it also seeks to limit the risks faced by civilians during armed conflict and their exposure to such risks by increasing their security.

IHL, as a body of law, also offers protection to particularly vulnerable civilian groups including women, children and the displaced. Although civilians were always targeted, there have almost always been certain limits on warfare. These are norms that established the types of actions that are acceptable or unacceptable in war. Although these norms varied greatly, they often included, the “innocent,” “vulnerable” or “weak,” such as children, women and the elderly.

However, it was only after the brutal impact on civilian life of World War II, which included indiscriminate attacks, mass extermination, hostage taking, deportations, pillage and internment, that a specific legal framework for the protection of civilians was established. The Fourth Geneva Convention was therefore adopted in 1949. Under the Fourth Geneva Convention, parties to armed conflicts have obligations to

13 ICRC, “Customary IHL - Rule 1. The Principle Of Distinction Between Civilians And Combatants”
15 UNAMI “Protection Of Civilians In The Non-International Armed Conflict In Iraq” (Office of The High Commissioner for Human Rights 2014) 3
16 ICRC “Enhancing Protection For Civilians In Armed Conflict And Other Situations Of Violence” (1st edn, International Committee of The Red Cross 2012) 9
17 Ibid.
19 Waszink, Challenges (n. 4), 3
take a wide array of measures in order to protect civilians during military operations.\textsuperscript{21} The international rules pertaining to protection of civilians during armed conflict are contained within the 1949 Geneva Conventions and their 1977 Additional Protocols.\textsuperscript{22} The Geneva Convention pertaining to civilians\textsuperscript{23} recognized that the nature of warfare has changed and therefore, there is a dire need to establish legal protection for any person not directly engaged in hostilities.\textsuperscript{24}

IHL dictates that civilians who are caught by enemy forces must be treated humanely in every circumstance, without any adverse distinction. Additionally, they must be protected from being subjected to degrading treatment and violence, including torture and murder. In cases of prosecution civilians are also entitled to the right to fair trial.\textsuperscript{25} Even parties who are trying to help civilians are covered by the protection under the Fourth Geneva Convention, in particular medical units and humanitarian or relief bodies. The hostile parties are required to give passage to such organizations. The Fourth Geneva Convention and Additional Protocol I specifically dictate that belligerents are also required to facilitate the work of the International Committee of the Red Cross (ICRC).\textsuperscript{26}

Common Article 3\textsuperscript{27} to the Geneva Conventions and Additional Protocol II\textsuperscript{28} contain rules governing armed conflicts of a non-international nature (internal armed conflicts). Although, these rules are less detailed as compared to those applicable to international armed conflicts, they nonetheless impose necessary obligations on State and non-state actors.\textsuperscript{29}

Further, most of the fundamental rules relating to the protection of civilians, covering both international and non-international armed conflicts, constitute customary humanitarian law. Customary law is binding on all states, even if they are not parties to the relevant treaty, including non-state actors.\textsuperscript{30}

\footnotesize{\begin{itemize}
  \item \textsuperscript{21} Waszink, Challenges (n. 4) 3
  \item \textsuperscript{22} ICRC “Enhancing Protection For Civilians In Armed Conflict And Other Situations Of Violence” (1st edn, International Committee of The Red Cross 2012) 7
  \item \textsuperscript{24} ICRC, “Civilians Protected Under International Humanitarian Law” (2010)
  \item \textsuperscript{25} Ibid.
  \item \textsuperscript{26} Ibid.
  \item \textsuperscript{27} Common Article 3 To The Geneva Conventions Available at <http://www.defense.gov/pubs/pdfs/App1.pdf> accessed 7 April 2015
  \item \textsuperscript{28} Additional Protocol II To The Geneva Convention Available at <http://www.ohchr.org/Documents/ProfessionalInterest/protocol2.pdf> accessed 8 April 2015
  \item \textsuperscript{29} Waszink, Challenges (n.4), 3
  \item \textsuperscript{30} Ibid.
\end{itemize}}
3. **LACUNAS IN THE LAW AND CHALLENGES IN IMPLEMENTATION**

The protection afforded by the Geneva Conventions and the Additional Protocols is extensive. However, there is a lack of compliance of these rules in contemporary warfare which some would argue, renders the law useless. State or non-state actors do not comply with the obligations elucidated under IHL and civilians continue to suffer as a result.\(^{31}\) However, there might be a need to develop new responses in respect of certain areas, in addition to strengthening compliance.

In order to provide sufficient protection to the civilian population, states should ensure that the civilian population has adequate supplies in accordance with the relevant provisions of IHL. Furthermore, in accordance with IHL, states should facilitate unimpeded passage of impartial humanitarian relief for civilian populations, in addition to respecting and protecting humanitarian personnel and objects.\(^{32}\)

In order to further this commitment, states should consider facilitating the issuance of valid documents to provide access of humanitarian personnel across the international borders of the State and within the State. States should expedite procedures for monitoring and distribution of the humanitarian goods and these should be exempted from taxes, duties and fees.\(^{33}\)

Furthermore, it is crucial to establish and maintain a constructive dialogue with all the parties to the conflict in order to acquire access to civilians and the requisite security for the humanitarian personnel. States should also instruct their armed forces to respect the unimpeded passage of humanitarian personnel and objects in accordance with IHL, and to respect their physical integrity. In this respect, it may be prudent for states to adopt national legislation, which outlaws arbitrary obstruction of humanitarian assistance and prevents attacks on humanitarian personnel, along with providing sanctions for such acts.\(^{34}\)

As previously stated, certain categories of persons are more vulnerable during armed conflict due to their gender, age or disabilities. In respect to children, states should take effective measures to register children immediately after birth so that they can be identified and registered. This is an imperative requirement for particularly vulnerable children like internally displaced children and refugees so that they may be protected from unlawful recruitment.\(^{35}\) There are also various additional international instruments that states should considering ratifying and implementing, in order to increase the protection offered to children during armed conflict. These include the 2000 Optional Protocol to the Convention on the Rights of the Child on involvement of children in

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\(^{33}\) Ibid. at 27

\(^{34}\) Ibid.

\(^{35}\) Ibid. at 27-28
armed conflict\textsuperscript{36} and the 2007 Paris Principles and Commitments to protect children from unlawful recruitment or use by armed forces or armed groups.\textsuperscript{37}\textsuperscript{38} State must proscribe such acts in their domestic legislation and hold the perpetrators accountable through referral to courts especially when it constitutes a war crime under international law.\textsuperscript{39}

Additionally, in order to further the protection being provided to women and girls during armed conflict, states should take the requisite legislative, judicial and administrative measures to implement their obligations.\textsuperscript{40} Impunity for serious violations of IHL involving sexual and other forms of violence against women and girls should be eliminated and states should prosecute such crimes in order to deter such acts from recurring. Furthermore, states should enhance their capacity to prevent, monitor and document such violations of IHL and their compliance with international obligations, both at an inter-state level and with international criminal tribunals and courts.\textsuperscript{41}

Measures that states may undertake in order to increase the protection afforded to women and girls during armed conflict, in compliance with their obligations under IHL, include, but are not limited to, pre-deployment gender training of armed forces to sensitize them on issues of gender, and to make them aware of their responsibilities.\textsuperscript{42} Furthermore, the training should accentuate upon reporting incidents of sexual violence and military procedures should have the requirement, that female detainees and internees should always be supervised by women and separated from male detainees and internees. Additionally, it should always be ensured that female personnel are present when female detainees are interrogated.\textsuperscript{43}

In respect to persons with disabilities, states should, in cooperation with humanitarian personnel, facilitate steps to search for and evacuate such persons and ensure access to disability-specific medical care and attention, in accordance with IHL.\textsuperscript{44}

It is crucial to discuss the protection of persons deprived of liberty during armed conflict, especially of a non-international nature. In most situations, due to a lack of resources and adequate infrastructure the establishment of a proper detention regime is

\textsuperscript{38}“Report Of The 31st International Conference Of The Red Cross And Red Crescent” (1st edn, International Committee of the Red Cross 2011) 28
\textsuperscript{39} Ibid.
\textsuperscript{40} Ibid at 29
\textsuperscript{41} Ibid.
\textsuperscript{42} Ibid.
\textsuperscript{43} Ibid.
\textsuperscript{44} Ibid.
hampered. However, there is also a lack of legal norms applicable in non-international armed conflicts, a major obstacle in offering adequate protection to civilians in such a situation.\textsuperscript{45}

Special categories of persons, such as women and children, may be at greater risk than others due to their specific protection needs. Therefore, the protection regime must also specifically cater to such situations where women and children face harsh conditions while detained during non-international armed conflicts. International armed conflicts, however, are governed by more detailed binding rules on the conditions of detention that better protect women and children.\textsuperscript{46}

It is also evident that there is insufficient protection provided for internees. Internment is used to deprive persons of their liberty without bringing criminal charges.\textsuperscript{47} Again, the law pertaining to internees during NIACs proves deficient in providing internees with procedural safeguards and internees may be subjected to long periods of internment. There are also few procedures for detainees to challenge the legality of their internment or to secure their release when their internment is not justified.\textsuperscript{48}

Possible solutions to the inadequate protection of internees could include declaring the process of interment illegal under IHL, unless the internees are immediately informed of the grounds for detention. It could also be declared unlawful to detain anyone beyond a period of forty-eight hours without providing grounds for detention or producing them before a judicial body within that time.

Detainees also face grave risks when they are being transferred from one authority to another. These risks can include persecution, forced disappearance, murder, or torture. Legal guidance provided to detaining authorities in such situations is not sufficient and in order to address this issue, there is an immediate need to establish substantive and procedural rules for the protection of detainees.\textsuperscript{49} IHL therefore does not offer the requisite protection to such individuals and needs to be developed in this respect.

It is also crucial that independent and neutral bodies, like the ICRC, are allowed access to these detainees in order to investigate their conditions, including whether or not they have access to legal counsel. Such rights are provided during international armed conflicts, not non-international armed conflicts.\textsuperscript{50} Therefore, IHL needs to be revised in order to include such a right to make conditions for detainees more humane, so as not to infringe their rights as human beings.

\textsuperscript{46} Ibid.
\textsuperscript{47} Ibid.
\textsuperscript{48} Ibid.
\textsuperscript{49} Ibid.
\textsuperscript{50} Ibid.
Another area of IHL that is deficient in providing protection to civilians is the protection regime pertaining to internally displaced persons (IDPs). The adoption in 1998 of the Guiding Principles on Internal Displacement\textsuperscript{51} was a significant step to greatly strengthen the international legal framework for protecting internally displaced persons. However, in order to increase the impact of this instrument, it may be necessary to codify and develop the elements in it, in order to provide the requisite protection to IDPs.

Internally displaced persons often have no means to earn livelihoods and may be exposed to further risks such as forced recruitment into fighting forces, murder or rape. They also may not have documents to declare their status, which can act as a major hurdle to free movement within the country or gaining access to social services.\textsuperscript{52} Therefore, it is necessary that legal development in this area takes place in order to provide IDPs with protection and access to healthcare, and the necessary documents to do so.

Another challenge faced by civilians during armed conflicts, is the damage being done to the natural environment, which increases the vulnerabilities of the affected people. It not only affects them but has a deep impact on their future generations. The law pertaining to protection of the environment during armed conflict lacks clarity, as it is not sufficiently developed.\textsuperscript{53} Treaty law does not contain specific requirements that serve to protect and preserve the environment during NIACs. Customary international law dictates the obligation not to attack the environment unless it is a military objective and prohibits attacks that may cause disproportionate incidental damage to the environment.\textsuperscript{54} However, it can be argued that these provisions are generic and in order to effectively protect the environment during armed conflicts, the precise scope and application of these rules needs to be defined.\textsuperscript{55}

Therefore, laws under IHL, which cater to, the protection of environment during armed conflict needs to be laid out, addressing NIACs as well. These laws should provide for measures to establish protection mechanisms for immediate and long-term consequences of damage to the environment. International cooperation will also play a key role in fixing environmental contamination, as areas that are affected may need to be isolated and effectively cleaned. Hence, international cooperation mechanisms also need to be developed.\textsuperscript{56}

Additionally, it is crucial to note that procedures laid down for the supervision of belligerents in international armed conflicts have almost never been used in practice. This is due to a lack of consent from the parties to the hostility. In respect to NIACs,

\textsuperscript{52} ICRC “Strengthening Legal Protection For Victims Of Armed Conflicts”
\textsuperscript{53} Ibid
\textsuperscript{54} ICRC, “Customary IHL database Rule 43,” Available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule43>
\textsuperscript{55} Strengthening Legal Protection For Victims Of Armed Conflicts. (n. 52)
\textsuperscript{56} Ibid.
such procedures do not even exist.\textsuperscript{57} It can be argued that the law is anachronistic if it does not cater to the most common nature of warfare today, (i.e. NIACs) and that such supervisory procedures should be implemented.

In order to incorporate a more effective supervisory mechanism, it may be prudent to gain inspiration from mechanisms developed by the UN Security Council, the UN Human Rights Council or regional human rights systems. The strength of these mechanisms lies in the fact that the consent of the parties to the conflict is not required and they apply to all forms of conflict, including NIACs. \textsuperscript{58}

However, these mechanisms also have limitations, which need to be addressed if a model like theirs is to be incorporated within IHL. They only focus on the conduct of states and not on non-state actors.\textsuperscript{59} It is essential that any laws developed to cater to such situations under IHL extend to all parties to a conflict. Furthermore, the entities implementing such mechanisms are not always successful in ensuring the cooperation of parties to the conflict.\textsuperscript{60} It is thus necessary that monitoring procedures be strengthened under the law governing NIACs.

Recently, emphasis has been laid on developing criminal law procedures to prosecute and penalize serious violators of IHL.\textsuperscript{61} However, there is a serious lack of means of putting a stop to and redressing violations while they are occurring. This is a major lacuna in the law, which needs to be filled. Civilians should be offered protection while they are caught in the midst of a conflict. The efficacy of a protection regime is questionable if it can only offer prosecution of the perpetrator and not any semblance of safeguards for civilians during conflict.

Another issue that needs to be dealt with is the reparation for victims who have been subjected to violations of IHL. Reparation is not always tantamount to financial compensation and can include other forms such as rehabilitation, restitution, and the guarantee that the violations will not be repeated.\textsuperscript{62} It is a necessary step to start the healing process of civilians that have been targeted during conflict, as often their own Governments usually do not have the means to address such issues. Therefore, IHL should provide a mechanism to initiate their healing process.

Compliance with the law may be strengthened if states seek the development of national international humanitarian law commissions to identify the scope of their international obligations pertaining to the repression of violations of IHL and to ensure their incorporation into the domestic legal agenda.\textsuperscript{63} Additionally, states should

\textsuperscript{57} Ibid.
\textsuperscript{58} Ibid.
\textsuperscript{59} Ibid.
\textsuperscript{60} Ibid.
\textsuperscript{61} Ibid.
\textsuperscript{62} Ibid.
\textsuperscript{63} “Report Of The 31st International Conference Of The Red Cross And Red Crescent” (1st edn, International Committee of the Red Cross 2011) 30
recognize the importance of redressing gross violations of IHL and should consider providing requisite means to help the victims of such violations.\textsuperscript{64}

It is also crucial for states to disseminate information on IHL to legal professionals, including prosecutors and judges present in the country where the conflict is present. This will help to ensure that states fulfill their existing obligations under IHL, including the Geneva Conventions.\textsuperscript{65} Civilians should be provided with information on their rights and the protection that is offered to victims of violations of IHL and witnesses.\textsuperscript{66} Additionally, the parties to armed conflicts should be made aware of their obligations so that they can comply with them efficiently.\textsuperscript{67} Thus, if these measures are adopted it is hoped that the protection regime for the protection of civilians under IHL will be strengthened.

CONCLUSION

The protection regime of civilians under IHL faces many challenges and lacks compliance. However, if the comity of nations unites to strengthen this regime, the law can evolve to fill in the gaps and address the inadequacies of the law pertaining to NIACs. All the options available for the evolution of IHL need to be considered in depth, including the elaboration of soft law instruments, the identification and implementation of best practices and the facilitation of expert process that aim to clarify any ambiguity within the existing law under IHL.\textsuperscript{68}

Greater compliance with IHL is an indispensable prerequisite for improving the situation of victims of armed conflict. This will necessarily entail a strengthened commitment by all states and all parties to armed conflict to respect and ensure compliance of IHL.\textsuperscript{69} In order to show this commitment, states may consider ratifying or acceding to IHL treaties to which they are not yet party. Furthermore, states should also offer financial and technical support to humanitarian organizations involved in the protection of civilians.\textsuperscript{70}

The issue of protection of civilians during armed conflicts is an increasingly prominent area for international debates. Between 1999 and 2012, the UN Secretary-General

\textsuperscript{64} Ibid.
\textsuperscript{65} Ibid. 31.
\textsuperscript{66} Ibid
\textsuperscript{69} “Report Of The 31st International Conference Of The Red Cross And Red Crescent” (1st edn, International Committee of the Red Cross 2011) 24
\textsuperscript{70} Strategy On The Protection Of Civilians In Armed Conflicts. (n. 67) 17
published nine reports on the subject and the Security Council (SC) adopted numerous resolutions to strengthen protection.\textsuperscript{71} The SC has also mandated United Nations peacekeeping and other relevant missions authorized by the SC to impartially contribute to the protection of the civilian population, including those under the threat of imminent violence.\textsuperscript{72} Additionally, the UN Secretariat and regional bodies such as the African Union have developed operational directives, and multinational military operations are paying more regard to civilian protection.\textsuperscript{73}

Significant progress has no doubt been made and it is hoped that further innovative measures to alleviate the suffering of civilians will be proposed at the 32\textsuperscript{nd} International Conference of the ICRC, scheduled to be held in 2015.\textsuperscript{74}\textsuperscript{75} However, as mentioned above, gaps still exist in IHL, which need to be addressed, and compliance with the law needs to be strengthened, in order to win this battle against the victimization of civilians during armed conflict.

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\textsuperscript{71} Ibid at 14
\textsuperscript{73} Igor Primoratz, Conflict (n.2) CH 1[3]
\textsuperscript{74} Strategy On The Protection Of Civilians In Armed Conflicts (n.67) 15
\textsuperscript{75} It was held in Geneva from 8-10 December 2015, the resolutions passed are available at <https://www.icrc.org/en/document/outcomes-32nd-international-conference-red-cross-and-red-crescent>
\end{flushright}
The North-South Divide and the Ineffectiveness of International Environmental Law and Sustainable Development

Neshmiya Adnan Khan*

INTRODUCTION

The poor are not asking for charity. When the rich chopped down their own forests, built their poison-belching factories and scoured the world for cheap resources, the poor said nothing. Indeed they paid for the development of the rich. Now the rich claim a right to regulate the development of the poor countries. And yet any suggestion that the rich compensate the poor adequately is regarded as outrageous. As colonies we were exploited. Now as independent nations we are to be equally exploited.1

Former Malaysian Prime Minister, Mahathir Mohamed

The above statement encapsulates the quite palpable tension between the developed and developing states during the Rio Conference held in 19922, where the imposition of environmental conditions and standards upon development and development policies was perceived as acting to restrain the newfound capacity of the newly independent post-colonial Southern states to finally grow and develop. Some even viewed this as a form of indirect colonization.3

The focus of this paper is to understand the origins of the North-South Divide, the implications this divide has had on the evolution of environmental law and the need to re-conceptualize this archaic distinction in view of contemporary reality. Moreover, we shall also seek to analyze the causes of its ineffective implementation and how a redefinition of the concept of the sustainable development could aid it in becoming a relevant part of the development discourse. For the purpose of this paper, I will begin by discussing the origins of the North-South Divide and the affect it has had on the development of environmental law. I will then briefly discuss the concept of Common but Differentiated Responsibilities (CBDR) and then move on to discuss the need to re-conceptualize this archaic distinction that is the North-South divide and the need to redefine the concept of “sustainable development” itself. I will then briefly discuss the concept of environmental justice and then end by giving my conclusion.

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1. **THE ORIGINS OF THE NORTH-SOUTH DIVIDE**

It can be asserted without any doubt that the North-South divide originates in colonization. The function of positivist international law at the time was to legitimize and provide legality to the claim that the Southern states and its people were “uncivilized” and hence unfit to control and effectively use and develop the resources they possessed. Further, by creating concepts such as a “standard of civilization” and “sovereignty,” judged and defined entirely by subjective European standards of development and society, the colonial states were able to dispossess, appropriate and exploit southern lands, labor, and natural resources. Colonialism converted self-reliant subsistence economies into virtual single commodity plantations and activities such as mining, logging, and cash crop production, resulting in the destruction of forests, dispossessed local communities and dramatically altered ecosystems of the territories.

The effect these colonial policies had not only upon the native peoples but also upon the environment can be summed up by Sir Charles Trevelyan’s declaration before a Parliamentary enquiry in 1840 when describing the state of what is now present day Dhaka:

> “The population of Dacca has fallen from 150,000 to 30,000 or 40,000 and the jungle and malaria are fast encroaching upon the town... Dacca which used to be the Manchester of India has fallen off from a flourishing town to a very poor and small one.”

The period of decolonization in the 1940’s finally allowed Southern states-upon gaining independence and freeing themselves from the exploitation and subjugation of the North-the opportunity to develop and grow not to fulfill the needs of the North, but for themselves as sovereign states. However, this division between the industrialized North and the newly independent South was first made evident in the 1972 UN Conference on the Human Environment held in Stockholm, Sweden (or the 1972 Stockholm Conference) where the North’s new found environmental morality was seen as being an attempt to impose restrictions on the South’s new found capacity and ability to grow.

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8 Ibid
11 Dacca, now Dhaka, is the capital of present day Bangladesh.
and develop itself. The differing objectives and needs of the two finds poignant encapsulation in the statement made by Indira Gandhi, the then Indian Prime Minister:

“...We do not want to impoverish (the) environment any further, (but) we cannot forget the grim poverty of large numbers of peoples. When they themselves feel deprived how can we urge the preservation of animals? How can we speak to those who live in villages and in slums about keeping the oceans, rivers, and air clean when their own lives are contaminated at the source?”

2. THE EFFECT OF THE NORTH-SOUTH DIVIDE ON THE CREATION AND EVOLUTION OF ENVIRONMENTAL LAW

One of the main issues at the Stockholm Conference was with reference to the sharing of responsibilities. The South consistently stressed that pollution was primarily the result of industrialization, the initiators and beneficiaries of which were the North and hence should be made responsible for its remedy. This narrative became the focal point of the conference, and this conflict has profoundly shaped the development and evolution of International Environmental Law. Furthermore, the attempt to impose restrictive environmental measures inflamed North-South tensions as the South viewed these restrictions as enabling the North to dictate how the South would use its natural resources, without providing neither technical nor financial assistance to resource the poor southern producers and without taking responsibility for the far greater environmental harm. The appeal, as Anand sarcastically observes, appeared to be along the lines that:

“For the survival of mankind the poor developing countries should remain in a state of underdevelopment because if the evils of industrialization were to reach them, life in the planet would be in jeopardy.”

Therefore, in order to resist the imposition of new standards and conditions upon their ability to develop, the post-colonial southern states grouped together to form the Group of 77 (G77). The G77’s first victory (pyrrhic as it may be due to its ineffective implementation) came in the form of the United Nations General Assembly’s adoption of the Establishment of New International Economic Order (NIEO), as well as the Charter of Economic Rights and Duties of States. These non-binding instruments were meant to act as a basis for overcoming economic disparities between the two blocs by the supply of development aid and technology transfer to aid the South to meet the

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17 Gonzalez, Anthropocene, (n.4).
20 UN General Assembly’s Resolution 3281 (XXIX) of 12 December 1974; ILM (1975), 251.
environmental demands of the North. It however lacked in its recognition that one of the major root causes of the contemporary ecological crises was and is in an international economic order premised on unlimited economic growth that resultantly impoverishes the global South and facilitates the overconsumption of the planet’s resources by its more affluent inhabitants.\textsuperscript{21} The South’s aim, at that time was simply to enable itself to match the development standards of the North, without recognizing that such developmental standards would cause further ecological problems.

However, it would be too harsh and unfair to chastise the South for wanting to do so: the seed of subjective European modernity and development having been once sowed by its Colonizers, who constantly used such subjective standards to belittle their culture and society, was seen as being the only way to challenge them. As Antony Anghie explains, the South, by first accepting its status as underdeveloped and backward, and then by asserting that only it could develop itself so to enable it to reach the same standard as the Europeans, was one of the ways by which the South could seek to legitimize its claim for independence.\textsuperscript{22} However, by doing so, it also unfortunately accepted an economic order which sought to reinforce the colonial notion that all societies must evolve through particular stages until they achieve the apex of civilization represented by the Global North, and which thus cast development as “the ubiquitous goal of all states and people.”\textsuperscript{23} One can thus argue that this economic order equates development with rising material consumption, and not development for the welfare of its people.

However, when it came to compliance, the North’s unwillingness to comply with the demands of the South for more distributive justice were met with an equal reaction by the South where the demand to take better care of their natural resources was brushed aside, and justified on the basis of poverty alleviation.\textsuperscript{24}

The ineffective implementation, one needs to understand, was the result of the completely different objectives each bloc hoped to achieve: the North’s emphasis on environmental problems of global concern (such as ozone depletion) whereas the South has generally prioritized poverty alleviation and environmental problems with more direct impacts on vulnerable local populations (such as desertification, food security, access to safe drinking water, sanitation and energy).\textsuperscript{25} It would, however, be unfair to term it as an eco-centric vs. anthropocentric battle, as the function of these laws and polices is primarily and inherently anthropocentric.

\begin{footnotesize}
\begin{enumerate}
\item Gonzalez, Anthropocene, (n.4), 417.
\item Anghie, Imperialism, (n.7), 196.
\item Anand, Sustainable Development, (n.18), 261; Also see, M. Ul Haq, “The Poverty Curtain: Choices for the Third World,” (New York 1976), 82.
\item Gonzalez, Anthropocene, (n.4).
\end{enumerate}
\end{footnotesize}
“Environmentalists sometimes use the expression ‘saving the planet.’ This is not the problem, the planet will survive. The problem is the human species.”

3. **The Principle of CBDR and The Concept of Sustainable Development**

What emerged from these conflicting objectives and competing aims was the principle of ‘Common but Differentiated Responsibilities’ (CBDR) and recognition of the concept of sustainable development in international environmental law.

The principle of CBDR seeks to recognize not only the difference in the historical contributions made by both the developed and the developing countries to the degradation of the environment, but also the differences in their respective economic and technical capacity to tackle the environmental problem. Principle 7 of the Rio Declaration sums this up as follows:

“In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.”

The acceptance of this principle has not been easy though. Southern states have demanded that the North assume responsibility for its immense contribution to major environmental problems, but the North has only grudgingly accepted this on the basis of its superior technical and financial resources while disowning responsibility on the basis of its historic contributions to the ecological crisis.

The concept of CBDR essentially allows for the imposition of different environmental standards on the basis of one’s contribution to the environmental problem and capacity for remedy. The standards are obviously higher for the developed North than for the developing South, for example, the Kyoto Protocol to the United Nations Framework Convention on Climate Change exempts Southern States from binding emission reduction obligation. However, this is no longer reflective of contemporary reality and hence where the flaw lies. The archaic conceptualization of the South as a bloc made up of States with equal capacities to develop is no longer reflective of current times. Excluding the global South from mandatory emissions caps, as Rajamani explains, is fundamentally unjust as it equates countries such as India and China (with their substantial and growing emissions) with Sudan and Tuvalu (with their minimal

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28 Gonzalez, Anthropocene, (n.4)
emissions, limited capacity, and significant vulnerability), and allows abuse of such lenient standards meant to aid underdeveloped nations. The G77 and China are at times able to project a stubborn togetherness, but the cracks within, due to the inherent economic differences, are beginning to show. The overall unity of the group, as Rajmani further observes, has been abandoned in order to enable progress in the negotiations on multiple occasions in the past. Recently, more vulnerable developing countries, which have little in common with large developing countries, have begun to find their own voice. Bangladesh, in its final plenary statement at the Bali Climate Conference of 2007, and in subsequent written submissions, emphasized upon the “vast differences” between developing countries, in particular between large developing countries and least developed countries. The emergence of the Cartagena Dialogue for Progressive Action, an informal alliance of countries some developed and many underdeveloped developing countries, working towards an ambitious, legally binding regime, is also evidence of this trend. Furthermore, in paragraph 247 of The Future We Want the concept of CBDR was also criticized for its failure to integrate the “dynamic differentiation” of “national realities, capacities and levels of development.”

The concept of sustainable development first received an agreed definition in the Brundtland Report, where it was defined as:

“Development that meets the needs of the present without compromising the ability of the future generation to meet their own needs.”

However, what is lacking in this definition is the articulation of an implementable policy statement. All development is often always projected to be beneficial in the long run, and the attachment of the word “sustainable” just now appears to provide it with a moral flourish. Its basic idea, which is the need to reconcile economic development with the protection of the environment, that ecological sustainability should be a precondition to development, has received consistent affirmation in the judgments of the International Court of Justice. However, the environment is always treated as a

33 Rajmani, Changing Fortunes, (n.31), 619.
36 International Court of Justice: Judgement in Case Concerning the Gobacikovo-Nagymaros Project (1998) 37 ILM 162, para 140.
necessary sacrifice at the altar of development, and has led to what the standard of what is “sustainable” for the purposes of development to remain vague.\(^{37}\)

4. **THE NORTH-SOUTH DIVIDE, SUSTAINABLE DEVELOPMENT AND THE NEED TO RECONCEPTUALISE AND REDEFINE RESPECTIVELY**

How does one then approach this divide emerging within the South, and ensure just and equitable sharing of responsibilities regardless of one’s status as a Northern or Southern country? One solution, as put forward by Gonzalez is a “reinvigorated conception\(^{38}\)” of CBDR that imposes differential mitigation obligations on all states, regardless of status as Northern or Southern, based on historic responsibility, vulnerability, and capacity to reduce GHG emissions\(^{39}\). Popularly known as “contraction and convergence,” this approach would cap and reduce greenhouse gas emissions by allocating emissions entitlements to each state based on the above criteria with the ultimate goal of having Northern and Southern per capita emissions converge.\(^{40}\)

Furthermore, the concept of the North-South divide, which has been deemed outdated and archaic by some authors, requires a re-evaluation to suit contemporary legal and economic realities. This conceptual dimension is problematic, as it frequently presents a fictional picture where global environmental negotiations are established between two homogenous blocks. Such a generalization “sheds shadow rather than light” when assessing the diverging positions within both blocks.\(^{41}\) For example, the contrasting environmental stances between the United States and the European Union; or within the South, with the very different agendas of oil-producing countries against those of small island states or the least developed countries.\(^{42}\)

When it comes to the concept of sustainable development it gives ecology general preponderance over development and hence pays respect to the future-oriented dimension of development as embodied by the concept of intergenerational equity. This hardly reflects the current state of thinking when it comes to development policies in domestic jurisdictions. It merely points to an ambitious long-term goal, an ambiguous one at best. Referring to something as environmentally friendly is not necessarily an accurate description of the actual environmental friendliness of the project. Take for example, the current Orange Line Metro project in Lahore, Pakistan. The Orange Line Metro project was described as “environmentally friendly” in the Environmental


\(^{39}\) Ibid.

\(^{40}\) Ibid.


\(^{42}\) Rajamani, Changing Fortunes, (n.31)
Assessment report published by the Punjab Metro Bus Authority, and albeit it does discuss the environmental impacts the construction of this project will have, it fails to discuss its long-term consequences. Two recent studies, documenting the effect of rapid urbanization being carried out in the city of Lahore, reveal increases in temperatures and a decrease in precipitation at an average rate of 0.09mm/year. But this appears to be of no concern where the environmental cost is often treated as being remediable by the planting of a few thousand saplings. Development of this kind, which is through the injection of foreign investment, is meant to aid in the growth of the country, and more often than not, the protection of the environment is seen as a hindrance to the greater goal of growth and development. This line of thinking is not limited to the South. The European Union has been known to overturn domestic policies and laws related to the protection of the environment as they are viewed as being an obstacle to the integration required for the effective functioning of the internal market. How does one then change this perception? One way is to redefine what is meant by “sustainable.” A project should only be considered sustainable if its long-term benefits outweigh its long-term costs. In other words, the focus will be to show what impact such development projects will have, not only on the environment, but also the impact it will have on future development projects. Future costs/externalities should therefore be accounted for in the feasibility of such reports. For example rising temperatures could lead to a rise in demand for energy meant to power cooling units, and hence will require the diversion of funds to projects aimed at remedying such externalities created by the projects implementation in the long run. This could allow environmental policies and laws to be viewed as not only having an aesthetic function, but rather whose non-implementation can be seen as leading to quantifiable externalities and costs, and the obstacles it shall place on the initiation of future development projects. The “needs of the future” is an ambiguous long term goal, but the quantifiable costs of disregarding environmental law could aid in strengthening the position of environmental laws in the development discourse. Moreover, since the North now outsources its pollution to Southern states, that welcome any form of foreign investment, quantifying future externalities as part of the investment could stop the implementation of an environmental destructive project, ensuring the costs of remedying such externalities forms part of the investment.

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45 Ghaus, Temporal Analysis, (n.44), 1283.
46 See section 6 of the EIA report (n.43) where one of the mitigation measures includes the planting of 4 trees for every 1 that was chopped down, and the “Plantation plan for tall species of trees on available spaces along rail track to minimize the effect of air and noise pollution.”
5. THE CONCEPT OF ENVIRONMENTAL JUSTICE

While the aforementioned deals more with domestic jurisdictions, how does one transpose a similar narrative in international law? The answer is through the concept of environmental justice.

International environmental law scholars and practitioners have often used the power of human rights law to advocate for the individuals and communities that were harmed by environmental degradation. However, the North-South economic and political disparities, pose significant challenges to the achievement of environmental justice within and between nations. North-South environmental inequities manifest themselves in the form of distributive, procedural, corrective, and social injustice. Although the North has contributed disproportionately to global environmental degradation and has reaped the associated economic benefits, the South experiences distributive injustice in the form of disparate exposure to environmental hazards. This disparity is due to the vulnerable geographic locations and limited regulatory capabilities of many Southern nations, the ongoing unsustainable extraction of the South’s natural resources to satisfy Northern consumers, and the transfer of polluting industry and hazardous wastes from the North to the South.

North-South relations are also plagued by procedural injustice because the North dominates decision-making in the World Bank, the International Monetary Fund (IMF), the World Trade Organization (WTO), and in multilateral environmental and human rights treaty negotiations due to its greater economic and political influence. Corrective injustice is perhaps most evident in the inability of small island nations to obtain redress for the imminent annihilation of their lands due to climate-change-induced sea level rise. Finally, North-South environmental conflicts are inextricably intertwined with colonialism and with post-colonial trade, aid, finance, and investment policies that impoverished southern states and enabled the North to exploit the South’s resources while externalizing the social and environmental costs.

The environmental justice framework provides a compelling moral narrative with justice as its core. It is meant as an antidote to the technocratic, ahistorical approach that dominates much of mainstream environmental discourse. The objective is to reconceptualise environmental problems as manifestations of social, economic, and environmental justice between and within states and to place these problems in historical context rather than treating them as technical problems to be overcome by

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48 Gonzalez, Environmental Justice, (n.30), 190.
49 Ibid, at 57.
scientific innovation or more effective planning.\textsuperscript{54} This concept is more grounded in reality, and should be referred to when reconceptualising the concepts of CBDR and the North-South divide to ensure the effective and substantive implementation of environmental legislation and sustainable development policies.

CONCLUSION

The current climate problems and the state of ecological decline warrants urgent attention in the form of effective environmental and ecological laws and policies grounded in substantive reality. However, the current state of environmental law and sustainable development policies appear disconnected from reality due to them being grounded in archaic formulations of economics, law, and politics, and thereby resulting in their ineffectiveness. An injection of political, economic and legal reality, with the aid of the concept of environmental justice could potentially aid in the effective reformulation of CBDR and the concept of sustainable development, and in a way to ensure that the environment gets the proper attention and the just protection it deserves.

\textsuperscript{54} Atapattu and Gonzalez, North-South Divide, (n.10), 13.
World Trade Organization: Strengths and Weaknesses from the Perspective of Developing States

Usama Malik*

INTRODUCTION

After eight years of negotiations, the Uruguay Round of discussions finally wrapped up, resulting in the creation of the World Trade Organization (WTO) on 1 January 1995. This complex agreement brought numerous changes in the multilateral trading system, covering institutional and rule changes. The eight years of intensive negotiations, followed by another seven years of implementation of these WTO agreements have had significant impacts on world trade, both negative and positive. The following discussion examines both sides of the picture, as experienced by developing member states. This paper analyzes the effects on trade in the developing states, of Special & Differential Treatment, tariffs, The Uruguay Round, laws regarding textile trading and agriculture, anti-dumping laws and countervailing, standards and technical barriers and The Doha Round, concluding with a note on challenges that the WTO needs to address in the future, in order to improve the effectiveness of its operations.

1. WTO & THE DEVELOPING STATES

“...the biggest supporters of trade today are not to be found in developed countries, as one might have expected, nor even in emerging countries — but in developing countries.

On every front — on trade as a force for good, as a source of jobs, as a force to lower prices and increase wages — the greatest proportion of supporters were found in developing countries.”

Director-General WTO, Roberto Azevêdo¹

About two thirds of the WTO’s 150 members are developing states. These states are not only important players for the world markets, but are also dependent on trade as a vital tool in their own development. The WTO has laid down several provisions in its agreements that are aimed at facilitating these states.

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¹ The Director General was speaking at the first of 68 sessions in a three-day 2014 WTO Public Forum
1.1. Special & Differential Treatment (SDT)\textsuperscript{2}

In its agreements, the WTO shows extra leniency towards the least developed and developing states, granting them special rights, which are more commonly known as \textit{special and differential treatments}. The General Agreement on Tariffs and Trade (GATT) has a separate section dedicated to the concept of preferential treatment.\textsuperscript{3}\textsuperscript{4}

1.2. Extra time

Developing states are given extra time to fulfill their commitments, keeping in mind their capabilities and nature of the commitment.

1.3. Greater Market Access

This is given to facilitate greater growth in trading opportunities for developing states. Several policies are adopted to provide these states with such access. Examples of it can be seen in the fields of trading of textiles, agricultural and manufactured products. These are discussed later on in greater detail.

1.4. Special Provisions

These are in place to ensure that the interests of developing states are sufficiently safeguarded, especially in cases where new domestic or international measures are being adopted.\textsuperscript{5}

1.5. Provision of Legal Assistance

The WTO Secretariat has separate legal advisors to help developing states in dealing with any technical legality that might arise while dealing with WTO disputes of different natures and severities. It is Training and Technical Cooperation Institute is responsible for overseeing this function.

1.6. Training, Seminars and Workshops

Regular training sessions are held on trade policy in Geneva by the WTO. Over 500 technical cooperation activities annually take place in Geneva and are for the most part focused on developing states.

\textsuperscript{2} World Trade Organization, “Understanding the World Trade Organization: Developing Countries,” (5th, World Trade Organization Information and External Relations Division, Geneva, Switzerland 2011) 93

\textsuperscript{3} For instance, the principle of non-reciprocity in trade negotiations between developed and developing countries which stipulates that when developed countries grant trade concessions to developing countries, they should not expect matching offers in return. Ibid 93

\textsuperscript{4} Thomas Fritz, “Special and Differential Treatment for Developing Countries,” (Heinrich Boll Foundation 2005)

\textsuperscript{5} For instance, anti-dumping, technical barriers to trade etc. WTO: Developing Countries, 93
1.7. Creation of Better Export Opportunities

These are created to provide less developed states with better trade options in the global markets. Fundamental reforms in agriculture were brought about. Quotas on developing states’ exports of textiles and clothing were phased out. A decrease in custom duties on industrial products has also been introduced. Furthermore, the number of products whose custom duty rates are bound under the WTO has been increased. These are just a few examples of WTO laws opening up avenues for developing states.

1.8. Special Focus on Least Developed Countries (LDCs)\(^7\)\(^8\)

Least developed countries stand to benefit the most from WTO agreements. The wealthier member states under the WTO umbrella make efforts to ensure the greatest possible flexibility for these states and lower import barriers substantially to facilitate trade with them. In 1996, WTO Ministers, meeting in Singapore came up with a “Plan of Action for Least Developed Countries” granting them technical assistance in matters relating to the multilateral system. In 1997, six international organizations\(^9\) inaugurated the “Integrated Framework”; a combined technical assistance program aimed at helping the least developed states. The year 2002 saw WTO adopt a work program for these least developed states covering several major aspects of support in the world markets.\(^10\)

Numerous member governments have contributed to helping these developing states by unilaterally scrapping import duties and import quotas on all exports from them. Thus, clearly, over the years WTO has made efforts to facilitate the developing states in world trade. But the question is, have these countless efforts yielded the desired outcomes?

2. **Positive Outcomes of WTO’s Efforts for Developing States**

If we look at matters in terms of how far the integration of developing states into the multilateral trading system has come, we can measure the success of these efforts. Indicators that speak of the success of WTO initiatives include the share of developing states in the world merchandise exports, the constituents of their exports and tariffs.

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6 Tariff concessions that countries give on joining the WTO or as a part of negotiations held by the organization are referred to as “bound” tariffs in their tariff schedules

7 A group composed of the poorest states defined by the United Nations, based on specific criteria. There are currently 48 LDCs under the UN


9International Monetary Fund, International Trade Center, United Nations Development program, United Nations Conference for Trade and Development, World Bank and the WTO.

2.1 World Merchandise Exports & the Constituents of Exports

The 1990’s saw a growth in world trade with an average per annum increase of 6.3% in the volume of global merchandise trade (1990-99). This figure surpassed the global gross domestic product (GDP) by an average of 4.2% per year in the same period. Exports grew faster than output in every major region.\textsuperscript{11}

While these are the figures for the overall success of WTO efforts, it must be noted that the developing states played a significant part in this progress. The share of the developing states in the world export markets grew by nearly 7% going up to about 25% of the world’s non-energy merchandise trade. This growth can be primarily attributed to a superior performance in the manufacturing sector, with developing states accounting for 27% of global exports of manufactures in 2000, a noteworthy rise from their previous 17% share in 1990.\textsuperscript{12}

Developing states, as a whole showed improved presence in the world markets. However, it was not good news for all developing states. The export share of 49 LDCs went down from 3% in the 1950’s to a low 0.5% in the early 1980’s and remained steady at this number for the next two decades.\textsuperscript{13}

In the year 2000, the overall merchandise exports from the least developed states were at a record level of $34 billion. LDCs showed a continued dependence on agriculture and labor-intensive manufactured items, which amounted up to about 70% of their exports. However, a detailed analysis of these exports for individual LDCs shows that the picture is grimmer than it may seem at first. Take Africa’s example, 33 out of the 49 LDCs are located in this continent, but the share of manufactures in the total exports of Africa amounts up to a meager 24.6%, a number significantly lower than the world’s share of 74.9%. As is evident from these numbers, the expansion of trade in these sectors has not kept pace with the world trade growth, undermining the growth prospects for these least developed states.\textsuperscript{14}

2.2 Tariffs

Before the Uruguay Agreement, developed states had 78% of their tariff lines of industrial products bound. On the other hand, the figure for developing states was an

\textsuperscript{11} World Bank, “Global Economic Prospects & The Developing Countries” (World Bank, Washington DC 2002) 38
\textsuperscript{14} The North-South Institute, 9
inadequate 22%. Following the effects of the Uruguay Agreement, the percentage for developing states has gone up to a high 72%.\textsuperscript{15}

The Uruguay Round saw huge cuts in the field of tariffs, including a 40% cut on industrial products. Efforts to bring trade liberalization to the agricultural sector finally also showed positive trends and ended up becoming a comprehensive program of reforms under these negotiations.\textsuperscript{16}

2.3. Other Concerns Addressed in the Uruguay Round

Issues such as tariffs, domestic supports and export subsidies were all dealt with in the Uruguay Round. For textiles trade, an agreement was reached, known as the Agreement on Textiles & Clothing (ATC), which phased out discriminatory restrictions maintained by most developed states against developing state exports.

The Uruguay Round of trade negotiations certainly contributed significantly towards lowering trade barriers to merchandise trade in two aspects: improving entry into the markets, owing mainly to the reduction of tariffs; and advancing multilateral trading capabilities to sectors that were previously left out, including textiles, clothing and agriculture.

While the positive outcomes are evident, they have nearly always come with attached weaknesses, which have hampered their overall effect on the growth prospects of developing states.

3. WEAKNESSES IN THE WTO SYSTEM

According to Ruth Bergan, WTO has simply failed the poorest, owing majorly to the reluctance of developed states to genuinely offer assistance to the developing states.

\textit{The World Trade Organization (WTO) has had difficulty setting a development agenda and delivering aid packages to poor countries at recent Doha trade talks. Rich countries do not want to give way to emerging economies and often circumvent WTO rules by engaging in bilateral talks to create deals, severely hampering the progress of developing nations. Bergan believes that developed countries have a steadfast adherence to free trade policies and find it beneficial to ignore social issues such as climate change and food security.}

\textit{Global Policy Forum}\textsuperscript{17}

\textsuperscript{15} Arvind Panagariya, “Core WTO Agreements: Trade in Goods and Services and Intellectual Property,” (Columbia Edu 2005) 9
Available at <http://www.columbia.edu/~ap2231/Courses/wto-overview.pdf>
\textsuperscript{16} Ibid 10
\textsuperscript{17}Ruth Bergan, “WTO Fails the Poorest-Again,” (Global Policy Forum 2011)
Bergan’s concerns are just a small part of what is wrong with the WTO’s system of operations. But before we move on to discussing the negative effects of the policies designed by the WTO, it is essential to first understand the inherent problems with the criteria for these policies. The main framework of the WTO’s policies towards developing states revolves around the concept of preferential treatment. A detailed analysis of this framework reveals several flaws ingrained in it that have been discussed and critiqued by several authors.

3.1. Flaws in Preferential Treatment

One factor that has always caused issues with this policy is the criteria for eligibility. Which states should classify for preferential treatment? Competition within the developing states might end up limiting the overall benefits to them and to the developed states that act as donor states. It is argued that preference margins should decrease as the income levels of the beneficiary states increase. Also, in sectors where preferences would make a difference, they might end up making these developing states specialized in products they did not have an inherent competitive advantage in, resulting in significant socially inefficient investment. Other drawbacks of preferential treatment are frictions between beneficiary and excluded states, and even among states that are at different stages of development. Uniform policies across the board for all developing states cause dissent among them, since individual needs of these states vary greatly.

Other scholars identified a number of problems with the preferential treatment concept, laying down two broad problem areas. Due to preferential treatments (i) political disputes might arise between developed and developing states, and (ii) the administrative cost of implementing, operating and monitoring preferences is quite high.

With such arguments present, the question at the end of the day becomes whether preferences are good for development in global trade? The majority of the views result in the conclusion that at best, these preferences are a marginal benefit. There is a general agreement among scholars that these are certainly not enough as they are. While on one hand, they help increase the national income of the recipient; they come at a cost to other developing counties through trade diversion and inherent discrimination. In addition to that, concern is also expressed regarding the effectiveness

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20 Ibid 1735-1739: At the 2001 ministerial meeting in Doha, ACP members asked for an extension of the GATT waiver for their preferences. The subsequent debate that followed created a rift between non-ACP developing country exporters against ACP preference beneficiaries. Even though the dispute was eventually resolved, it serves as a classic example of how preferences can give birth to conflicts among developing countries.
in terms of costs to taxpayers and consumers in the donor states and the costs associated with different conditions and uncertainty.

3.2. Elimination of Quotas on Textiles and Clothing

In addition to the inherent flaws in the WTO’s basis for policy making, there are numerous weaknesses in the implementation strategies for these policies. The Uruguay Round Agreement on Textiles and Clothing (ATC) was a significant move towards providing developing states with better access to high-income markets. It did so by establishing policies that made it very difficult for importers to introduce new quotas.

On the surface of it, the agreement seems to have done enough. But on a closer look into the actual effectiveness of ATC, we come across some facts that present a relatively different picture. ATC has not been as effective as it ought to have been in freeing up markets. The North-South institute talks about the reason for this being the “scheduled quota integration,” which is “back-loaded,” with quota free market access for nearly half of all imports due only at the end of the transition (i.e. 2005).

The second drawback that the same document refers to revolves around how the removal of quotas is based on overall import shares in textiles and clothing, instead of being in terms of the number of existing quotas. The problem with this is that it places the power to select products to be freed of quota in the hands of importing states, subsequently slowing the speed of liberalizing the trade process. In terms of numbers, up to the year 2000, over 33% of trade was integrated, which seemed fine since it amounted up to the minimum ATC requirements. However, the products that were freed of quotas by the EU and the US at that time translated into very small shares of their total textiles and clothing imports, reducing the overall positive impact of ATC’s efforts.

3.3. Agriculture Trade

The WTO made efforts for improvement in this sector as well. Its Agreement on Agriculture (AoA) was a significant step in granting better access to developing states to sheltered agricultural markets in developed states. A large number of non-tariff barriers were removed and changed to ordinary barriers. Present and new tariffs were bound and reductions in these bindings were considered highly likely. WTO’s policies towards agriculture in developing states ended up giving these states more flexibility through longer periods for their execution and lower reduction committees.

While the above efforts seem commendable, problems still arose. Seven years after these policies were brought about in the Uruguay Round; the agriculture market was still highly protected. High-income states continued to follow their own set of policies

21 About 6% of US imports for 1995-97 and lower than 5% for the EU in the same period
that protected their farm sectors reducing the effectiveness of the efforts made by the AoA.

Let us take the example of cotton trade. In 2010, the Fair-trade Foundation revealed that $47 billion were paid in terms of subsidies to rich state producers in the last ten years. This created serious problems for 15 million West African cotton farmers using the agricultural front as their way out of poverty. In addition, over 5 million of the world’s poorest farming families were forced out of business and deeper into poverty due to these subsidies.22

3.4 Anti-Dumping and Countervailing

Firms competing for imports often resort to anti-dumping laws23, which are allowed by the WTO. Over the years, the number of times anti-dumping laws have been used has increased dramatically. The failure to pen down a precise and proper anti-dumping law for quite a few years effectively turned these half-baked rules into little more than just discretionary measures to raise tariffs. Unfortunately, by the time GATT members stipulated a formal anti-dumping legal document; individual players in the market24 had already formed their own interpretations of the rules, making it impossible for WTO members to design a policy beneficial to all states.

The problem with anti-dumping laws becomes evident when we look at the number of states using them. Initially, the main users of this law were developed states but in subsequent years this trend shifted. In 1980, the top anti-dumping users were only four in number. In 2002, the list of top anti-dumping users changed dramatically25. The number of anti-dumping actions filed also saw a significant increase.26 The rise in the usage of these laws is testament to the fact that most member states had started misusing these laws, working their way around it and adjusting their tariff schedules as they wished.

The use of countervailing duties27 has also seen an increase over the years. Even though the increase is not as significant as the number of anti-dumping initiations, there is still a strong upward trend developing here as well. Mid-2000 saw an estimated 95

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22 The North-South Institute 10
23 “Dumping” refers to a company exporting a product at a price lower than the one it typically charges in its own market. There are varying opinions regarding the use of Anti-Dumping Laws in the global markets.
24 Most notably the EU and the United States
25 Thomas J. Parusa, 2005:
   India (80 cases), United States (35), Thailand (21), EU (20), Australia (16), Argentina (14), Peru (13) and PR China (11)
26 WTO members noted 360 cases of anti-dumping investigations initiated in 1999, an increase of 42% from the 1998 number (WTO, 2011)
27 Also known as anti-subsidy duties, these are trade import duties implemented by the WTO to neutralize the negative effects of subsidies. They are imposed if investigation reveals a foreign country is subsidizing its exports, causing harm to domestic producers in the importing country.
countervailing measures in place, the breakdown of which showed the United States at the top with 46 cases, followed by the EU with 13 cases and Mexico with 10.

3.5 Standards and Technical Barriers

On one hand, traditional trade barriers are being abolished gradually, sending out positive effects in the developing markets. On the other hand, what has recently become a concern for poor states’ exports are the laws relating to the Sanitary and Phytosanitary (SPS) measures and Technical Barriers to Trade (TBT).

All governments under the WTO umbrella are unanimous on the fact that some trade restrictions are mandatory and appropriate in order to ensure food safety and animal and plant health protection. However, developed states have been using these laws to prescribe stricter and stricter standards.

Developing states are put in a weak position with such strict regulatory changes. They do not typically have the public resources to finance compliance with newer, more stringent laws. Such issues arise when the standards of trade are set in a way that favors domestic producers and makes it costly for foreign producers to comply. As a reaction to this, middle-income states have started working their way around these laws. Some states have begun exporting processed food instead of fresh produce, to avoid having to comply with SPS standards. However, states in the lowest income bracket (such as states in Africa) are still heavily dependent on raw food exports. For them, securing sales in major markets for their products is becoming more of a challenge over time. Lack of technological advancement also contributes to these LDCs not being able to comply with new rules. Developed states have access to far superior technologies.

28 The Agreement on the Application of Sanitary and Phytosanitary Measures sets out the basic rules for food safety and animal and plant health standards. It allows countries to come up with their own standards in keeping with the laws of science.

World Trade Organization, “Understanding the WTO Agreement on Sanitary and Phytosanitary Measures,” (Wto.org, 1998)

Available at <http://www.wto.org/english/tratop_e/sps_e/spsund_e.htm>

29 North-South Institute, 12:

Standards relating to cleanliness, microbial loads, pesticide residues and aflatoxin have been prescribed. An example is Japan’s insistence on DDT residues level of 0.4 PPM on unmanufactured tobacco, even though the international standard is a high 6 PPM.

30 Arvind Panagariya, 8:

As an example, Swiss car manufacturers frequently equip their cars with wipers on headlights. The adoption of this feature as a requirement for car sales in Switzerland may push up the production costs excessively for foreign suppliers who are not in the habit of typically equipping their cars with this feature. Even though the regulation seems to be in compliance with the national treatment provision, it can have a negative effect for the exporting nation.

31 The North-South Institute, 12:

The famous beef-hormone case is an apt example of a controversial SPS restriction. In 1988, the European Union (EU) banned the use of hormonal substances to fatten animals meant for human consumption. This restriction had a negative impact on the U.S exports of beef from such animals. The U.S. ended up challenging this EU’s step at the WTO as being protectionist rather than a legitimate SPS concern. It eventually won the case.
which allow them to implement advance inspection capacities; leading to more restrictive SPS and TBT standards that the developing states are unable to bring themselves up to.

3.6. Decision Making Procedures

The WTO makes the majority of its decisions via consensus. This creates a problem since getting 153 states to agree on something is nearly impossible. This brings to light another inherent weakness in the WTO’s frame of operations: the failure to abolish the link between market size and political weight. As a result, poor states rarely ever have a voice in the major decisions made by the organization.

3.7. Failures with the Doha Development Round

The Doha Round was the latest set of discussions among the members of the WTO. It aimed to build upon the existing laws on international trade reforms and trade barriers. The fundamental objective for this round of talks was the growth prospects for developing states.32

The outcomes of these talks were negatively affected by several factors. For instance, in agriculture, the U.S. and Japan were hesitant in making any formal commitments, even though the EU had begun showing a positive attitude towards reforming its subsidy program. At Cancun, the developed and developing states were unable to reach an agreement over the issue of subsidies and domestic assistance. The Cancun Talks eventually ended with no positive results as such because of demands by the US and EU regarding the initiation of discussions on matters such as investment, competition, government procurement and transparency. Developing states argued that they already have a lot of concerns to address and by bringing in these four major issues, their resources would be overwhelmed.33

3.8. Failure of WTO’s Dispute Settlement Mechanism

WTO’s dispute settlement mechanism evolved from the earlier GATT procedures for settling disagreements between states. The Uruguay Round introduced the concept of appeal in dispute settlement under the WTO to assist in the operations of an effective decision making authority called the Appellate Body. Dispute Settlement Understanding (DSU) was the name given to the framework that was adopted for the purpose of handling difference of opinions between the WTO member states. Between 1995 and 2014, WTO members have filed over 486 complaints under the DSU.34

32 World Trade Organization, “The Doha Round,” (Wto.org) Available at <http://www.wto.org/english/tratop_e/dda_e/dda_e.htm>
33 Center for International Development at Harvard University, 2004
34 World Trade Organization, “Chronological List of Dispute Cases,” (Wto.org) Available at <http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm>
The dispute settlement mechanism of WTO has been widely criticized, particularly because of the diminutive power given to the developing states. Even though developing states make up the majority of WTO, over 80% of the disputes are initiated by developed states.\textsuperscript{35} Other than the participation of some developing states, a huge majority of developing states seem to have only a ‘systemic interest’ in dispute settlement.\textsuperscript{36} What was further troubling was the fact that disputes files by USA and EU appear to have nearly always resulted in favorable policy changes for them.\textsuperscript{37} The lack of legal and political capacity of the LDCs in international trade, along with the fear or political and trade reprisal, has kept the balance of this mechanism in favor of the developed states.

**CONCLUSION**

Since its inception, the WTO was repeatedly criticized as an organization that acts as a beneficiary for wealthier states. The agenda of the organization, its agreements and their implementation and its frequently commended dispute settlement system are said to merely serve the purpose of advancing the interests of developed states, sidelining those of developing states.\textsuperscript{38} Inherent weaknesses in the system combined with ill-thought laws and poor implementation in the fields of agriculture, textiles and manufacturing have hampered the growth prospects for developing states. Problems such as anti-dumping, countervailing, technical barriers, strict standards, flawed decision-making procedures and the failure of repeated talks have overshadowed the positive effects of the WTO’s efforts for these states.

Even though constructive results have also been witnessed as a result of the WTO’s involvement in world trade, there is a long way to go before this organization can be considered a true beneficiary of developing states. It faces considerable challenges in terms of its decision-making process, dispute settling, implementation strategy and facilitation of global trade liberalization. Working on these challenges might help WTO achieve the purpose it was initially built to accomplish.

\textsuperscript{35} Kristin Bohl, “Problems of Developing Country Access to WTO Dispute Settlement,” (9 Chi.-Kent J. Int'l &Comp. 2009) 132-133
\textsuperscript{36} Ibid 133: Systemic interest refers to the diminutive power of the developing countries in the litigation process due to their comparatively smaller trade volumes.
\textsuperscript{37} Marc L. Busch and Eric Reinhardt, “Transatlantic Trade Conflicts and GATT/WTO Dispute Settlement,” (RSCAS 2002) 6
\textsuperscript{38} Aileen Kwa, “WTO and Developing Countries,” (Foreign Policy in Focus 1998) Available at <http://fpif.org/wto_and_developing_countries/> accessed 31 December 14
The Issues of Admissibility Pertaining to Circumstantial, Contested, Classified, and Illicitly Obtained Evidence in the International Court of Justice

Shayan Ahmed Khan*

INTRODUCTION

The International Court of Justice (ICJ or ‘the Court’) has generally had a liberal stance towards the admissibility of evidence and indeed in most of the instances the Court accepts evidence submitted by parties. However, when it comes to evidence, which is circumstantial, classified, or illicitly obtained, the Court has deviated from the general rule.

This note focuses on exactly these issues and tackles some specifics within these issues (e.g. the Court’s treatment of press reports, public knowledge, maps, and the weight accorded to them etc.). This note also discusses the significance of Wikileaks and the likely outcome if a party was to ever present evidence from Wikileaks before the Court.

In his dissenting opinion in the Corfu Channel case, Justice Krylov observed that:

\[
\text{[o]ne cannot condemn a State on the basis of probabilities. To establish international responsibility, one must have clear and indisputable facts.}^1
\]

In the Oil Platforms case, the ICJ rejected evidence because it was “highly suggestive, but not conclusive.”^2

As a matter of general rule, states impleading against each other in the ICJ need to and are required to present evidence to the Court to supplement their arguments and contentions. In particular it can also help the parties in satisfying the high threshold of state responsibility set by the World Court. However, at times presenting evidence to the Court can become complex due to certain factors or due to the nature of the evidence in question. As we will see below, complications with regards to evidence have arisen over the years for various reasons. It is these very reasons which the article would be touching upon whilst remaining in the confines of the sources of law enshrined within Article 38 of the ICJ Statute.

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1 Corfu Channel (United Kingdom v. Albania.), Judgment, [1949] I.C.J. Rep 4 at 72 (9th April) (dissenting opinion of Judge Krylov)


3 United Nations, Statute of the International Court of Justice, (18 April 1946) 33 UNTS 993
1. THE ICJ STATUTE AND THE RULES OF THE COURT

There is a lack of express rules regarding the admissibility of evidence in the ICJ Statute:

"the International Court of Justice has construed the absence of restrictive rules in its Statute to mean that a party may generally produce any evidence as a matter of right, so long as it is produced within the time limits fixed by the Court."\(^4\)

This corresponds with the stance of Switzerland in the *Interhandel* case.\(^5\) Some argue that the ICJ tends to accept contested documents and accords weight to the evidence itself.\(^6\) As a matter of general practice, the Court approaches the question of admissibility with unilateral discretion and admits relevant evidence. The reason behind this may be that the Judges in the ICJ possess the ability "to ascertain the weight and relevance of particular evidence due to their qualifications and experience."\(^7\)

This does not however mean that there are virtually no provisions that could govern the question of admissibility of evidence. For instance, Article 49 of the ICJ Statute empowers the Court to demand evidence and a refusing party may be subjected to a formal notice.\(^8\) Even though there is no guidance as to what the words ‘formal notice’ entail, some interpretations maintain that in such instances the ICJ draws liberal recourse to inferences.\(^9\) Precedent suggests that the Court was reluctant to subject a non-complying party to a formal notice. For instance in the *Corfu Channel* case,\(^10\) the Court requested evidence from the United Kingdom (UK), which resulted in a refusal from their end. No formal notice was taken even though the ICJ was empowered to do so.\(^11\) Apart from Article 49, the reluctance of the Court to demand evidence is also apparent in the *Bosnian Genocide* case, where Bosnia and Herzegovina requested the Court to order Serbia and Montenegro to produce classified military documents but the Court refused to act upon this request.\(^12\) However, in the case Bosnia already had

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\(^5\) "[T]he parties are . . . largely able to present any evidence they deem necessary and appropriate." (Translated from French) *Interhandel Case (Switzerland v. United States of America).*, [1959] ICJ REP. 6; REISMAN, W. Michael and FREEDMAN, Eric E., "The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication" (1982). Faculty Scholarship Series. Paper 730 at 740


\(^8\) Article 49, Statute of the International Court of Justice


\(^10\) Corfu Channel Case, *supra* note 1


access to evidence, primarily the reason the Court did not proceed with the request.\(^\text{13}\) Furthermore, Article 62 of the Rules of the Court\(^\text{14}\) gives ICJ the power to demand evidence from the parties, as it deems necessary. Collectively the two provisions put together, point to the conclusion that by virtue of the ICJ Statute and the Rules of the Court the Court does indeed have wide discretion, at least in theory, to demand any and all evidence from the parties. In practice, however, it is reluctant in following through.

2. **FORMS OF EVIDENCE**

Some attention should also be directed towards the form of evidence, its relevance to admissibility and whether it has the potential to pose difficulties to the parties. The *Max Planck Encyclopedia of Public International Law* maintains that admissible evidence includes all types of evidence excluding expert and witness testimony.\(^\text{15}\) A preference is given to written evidence over oral evidence.\(^\text{16}\) The word ‘form’ is broadly construed to encompass:

... published and unpublished diplomatic correspondence, and communiqués and other miscellaneous materials, including books, maps, plans, charts, accounts, archival material, [...] affidavits and declarations.\(^\text{17}\)

Lastly, with the growth of technology, digital evidence is also now relevant and in this regard the United Nations Office on Drugs and Crime synthesizes the practice of states: “over 60 percent of responding countries do not make a legal distinction between electronic evidence and physical evidence.”\(^\text{18}\)

3. **TREATMENT OF CIRCUMSTANTIAL EVIDENCE BY THE ICJ**

This section primarily discusses two types of circumstantial evidence: firstly public knowledge and secondly maps along with the weight that is accorded to maps in territorial disputes.

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\(^{16}\) Anna Riddell and Brendan Plant, “Evidence Before The International Court of Justice” (2009) British Institute of International and Comparative Law, 232


3.1. Public Knowledge

The Court seems unanimous in its approach where it relies on public knowledge to confirm the facts in question. Public knowledge was used by the Court in the case Concerning United States Diplomatic and Consular Staff in Tehran. This was also later used and accepted in the case of Military and Paramilitary Activities in and against Nicaragua with a qualification that it must be done so with caution as in such instances public knowledge may have been derived from just one source. Finally, in the Bosnian Genocide case, the Court relied on public knowledge and terming it as international concern, established Serbia’s responsibility for a failure to prevent genocide. In particular, Justice Hersch Lauterpacht supported this approach and was of the view that collectively, public knowledge as secondary evidence coupled with the direct evidence available was conclusive evidence of Serbia and Montenegro’s responsibility. Upholding the dictum laid down in the Nicaragua case, the Court expressed its concern about public sources in the Oil Platforms case when the Court chose not to rely on public sources because the Court was wary of the fact that the reports were only derived from one source.

3.2. Maps

Parties that have brought territorial disputes to the ICJ have relied heavily on maps while trying to establish territorial boundaries.

In the Frontier Dispute case, the Court gave the general position about the treatment of maps as evidence:

Maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title are only extrinsic evidence of varying reliability.

In the Kasikili/Sedudu Island case the Court referred to the above passage and acknowledged the exception laid down for when maps may be used as direct evidence- when the maps possess legal force. In this case, due to the contentious nature of the maps the Court was not able to conclude whether they could be used as

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21 Crime of Genocide case, supra note 13, 225
22 Scharf supra note 9 138
23 Oil Platforms Case, supra note 2 at 190
24 Frontier Dispute (Burkina Faso/Republic of Mali), Judgment [1986] ICJ Rep 554, 582
25 For a further discussion see also Temple of Preah Vihear (Cambodia v. Thailand), Judgment [1962] ICJ Rep 6, 33-5
evidence.\textsuperscript{26} The same position was reiterated by the Court in the \textit{Sovereignty over Pulau Ligitan and Pulau Sipadan} case.\textsuperscript{27}

From the above cases, it is clear that the court did not deviate from its initial position through the passage of time. Maps are generally secondary evidence with the exception of when they possess a legal standing (e.g. by means of being annexed to a treaty).

3.3. Press Reports\textsuperscript{28}

The \textit{Nicaragua} case summarizes the position of the ICJ where it is held that press reports are to be treated “with great caution.”\textsuperscript{29} In the \textit{Armed Activities on the Territory of the Congo} case the Court took the opinion that press reports that originate from one source carry no probative value\textsuperscript{30} and therefore the Court decided not to rely on various items due to their circumstantial nature.\textsuperscript{31} In the \textit{Bosnian Genocide} case, an article in \textit{Le Monde} could only qualify as a secondary source of evidence.\textsuperscript{32} This case resonates with the \textit{Nicaragua} case, which held that press reports alone cannot be categorized as primary evidence, but can nevertheless corroborate or aid in the corroboration of existing facts.\textsuperscript{33} The \textit{Armed Activities on the Territory of the Congo} case held that such evidence must be “wholly consistent and concordant as to the main facts and circumstances of the case.”\textsuperscript{34}

The above cases show that although press reports may never amount to a primary source of evidence, they may still be used by parties as corroborating evidence.

3.4. Wikileaks

Even though the position on press reports of the ICJ is clear, by way of example, Wikileaks poses a more complex challenge. The matter has not yet come before the Court. A case from the Special Court of Sierra Leone admitted marked portions of U.S. Government’s cables, disclosed by Wikileaks.\textsuperscript{35} In \textit{Bancoult v. Secretary of State}, the UK Court of Appeal accepted channels from Wikileaks as admissible evidence, raising no doubts about the authenticity of these documents. The Court of Appeal further opined that since a third party had already leaked them, no diplomatic immunities could

\textsuperscript{26} Kasikili/Sedudu Island (Botswana/ Namibia), Judgment [1999] ICJ Rep at 1045, 1100
\textsuperscript{27} Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment [2002] ICJ Rep 625, 667
\textsuperscript{28} Roscini, supra note 12, 260 and onwards
\textsuperscript{29} Military and Paramilitary case, supra note 20, 40
\textsuperscript{31} Ibid, 225-6
\textsuperscript{32} Crime of Genocide case, supra note 12, 191
\textsuperscript{33} Military and Paramilitary case, supra note 20
\textsuperscript{34} Armed Activities case, supra note 31 (citing Tehran Hostages case, supra note 19, 10)
\textsuperscript{35} Prosecutor v. Charles Ghankay Taylor in the Special Court of the Sierra Leone Trial Chamber II. Decision on the urgent and public with annexes A-C defense motion to re-open its case in order to seek admission of documents relating to the relationship between the United States Government and the Prosecution of Charles Taylor, 27 January (2011) 6.
be invoked. These cases have two points in common: (i) the admission of Wikileaks documents as evidence; and (ii) trusting their authenticity. However, in contrast, a case from the Extraordinary Chambers in the Courts of Cambodia did not admit Wikileaks documents, holding that this evidence could not be categorized as valuable because the court was not satisfied by its authenticity. Similar reasoning has been employed in the judgment from the Special Tribunal of Lebanon, where the Court held that the prosecution has the onus of doing more than merely presenting Wikileaks documents. It was further held that since these documents, supposedly belonging to the United States, were not acknowledged domestically they can therefore not be held admissible.

Some courts have differentiated Wikileaks from press reports, assuming their authenticity. In Bancoult for example, the question was whether the admissibility of Wikileaks would infringe upon diplomatic immunities, not authenticity. If Wikileaks’ documents are to be presented to the Court as evidence, the Court will obviously have the authority to hold it admissible. However, it is likely that the treatment similar to press reports will be preferred by the ICJ because matters of state responsibility are very sensitive and therefore the Court would likely be reluctant to automatically assume their authenticity.

3.5. Leaked Information

*Ex Turpi Causa Non Oriitur Actio* literally translates to “from a dishonorable cause an action does not arise”. The maxim operates to prevent leaked information from being held as admissible. Some argue that this maxim does not encompass leaked information and that for it to apply the information must be acquired by the wrongdoer directly. If, however, it is brought forward by a third party the evidence in question is admissible as dictated in the *Factory at Chorzów* case from the Permanent Court of International Justice (PCIJ). The same may be observed as reflected in the Bancoult decision, where the court found no infringement of diplomatic immunity in admitting Wikileaks evidence.

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36 Bancoult v Secretary of State for Foreign and Commonwealth Affairs [2014] EWCA Civ 708 at paras 58 and 65
37 Case 002, Decision on the Co-Prosecutors’ and Khieu Samphan’s Internal Rule 87 (4) Requests concerning US Diplomatic Cables (E282 and E282/l; E290 and E290/l), Extraordinary Chambers in the Courts of Cambodia [2013] (13th June) at 2 and 3
40 Factory at Chorzów (Germany v. Poland.) Claim for Indemnity [1927] P.C.I.J. (ser. A) No. 9 at 31
41 The predecessor of the International Court of Justice
42 Bancoult Case, supra note 36
3.6. Contested, Classified and Illicitly Obtained Documents

Issues over the admissibility of documents as evidence go as far back as 1927 to the Advisory Opinion of the *Danube Commission* case. During the proceedings, the PCIJ refused to admit certain articles of the Versailles Treaty as they were confidential and lacked consent of the respective authority. In stark contrast, in the *Corfu Channel* case, the ICJ relied on evidence that was illegally obtained by the UK, thus entailing the adoption of a more liberal approach towards accepting such evidence.

4. Liberal Recourse to Inferences and the Use of Circumstantial Evidence in the *Corfu Channel* Case and the *Bosnian Genocide* Case

What recourse is available to the parties if there is a lack of direct evidence in the matter at hand, taking into account the *Corfu Channel* case and the *Bosnian Genocide* cases? In such circumstances the Court may allow the use of inferences, thus according more weight to circumstantial evidence.

The *Corfu Channel* case acknowledged the difficulty regarding the availability of evidence in inter-state disputes. The Court held that if a party lacks direct evidence to substantiate its claims “a more liberal recourse to inferences of fact and circumstantial evidence” is allowed, provided that “the evidence is based on a series of facts linked together and leading logically to a single conclusion.”

In the *Bosnian Genocide* case, the same approach was questioned. There were two issues at hand, the duty to prevent genocide and the specific intent to commit genocide. The Court, though not explicitly referring to it, only relied upon circumstantial evidence in addressing the duty to prevent genocide. One of the reasons for doing so may be that it was a matter of international concern. Thus using public knowledge, coupled with indirect evidence, the Court accepted circumstantial evidence. Regarding the specific intent to commit genocide, there was a lack of direct evidence, yet the Court did not accept the *Corfu Channel* case approach because the intent to commit genocide requires a high threshold of *dolus specialis*, which the Court could not have found with a lack of direct evidence.

At the outset, it may appear as though the Court departed from the reasoning of the *Corfu Channel* case but this is not the case. In fact, the two judgments are relatively similar because the Court allowed both the UK and Bosnia to present circumstantial evidence and assessed the reliability of this evidence by comparing it with direct evidence. The primary difference was that in the *Corfu Channel* case, Albania was unable to present direct evidence to cast shadow upon the authenticity of the UK's

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44 Ibid
45 *Corfu Channel* Case, *supra* note 1 at 14–5
46 *Corfu Channel* Case, *supra* note 1, 18
48 *Crime of Genocide*, *supra* note 13, 196
circumstantial evidence. In the *Bosnian Genocide* case Serbia managed to do what Albania could not by casting doubt upon the indirect evidence through direct evidence.

**Conclusion**

Considering the totality of the cases discussed above in matters of admissibility of evidence, the ICJ favors a liberal stance. As a general rule, it will admit any and all evidence which is relevant and helps the Court in finding a just solution to the case. However, even if the evidence is held admissible, it is the Court that will accord weight to it and it will thus be at the discretion of the Court to treat it as primary or secondary evidence.
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