

**EXPERT MEETING**

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# **THE LEGAL IMPLICATIONS OF ADOPTING A CONFLICT PARADIGM IN PAKISTAN**



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OF ADOPTING A CONFLICT  
PARADIGM IN PAKISTAN**

Report prepared and edited by the  
Research Society of International Law, Pakistan



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## **Acknowledgments**

The present report is a publication of the Research Society of International Law, Pakistan (RSIL). It is the outcome of an expert meeting which took place on 6 May, 2015 at the RSIL offices in Islamabad on the applicability of international humanitarian law to domestic counter-terrorism operations in Pakistan. The session focused on discussing, from a strictly academic perspective, if a state of armed conflict exists in Pakistan according to objective legal criteria, and the political advantages and disadvantages of the State of Pakistan adopting a conflict paradigm in catering to contemporary threats.

Our gratitude goes to the experts who participated in their personal capacity and made this report possible with their contributions. Their valuable insight has provided much needed academic clarity and perspective on a complicated and relatively unexplored area which is of increasing relevance to the contemporary challenges facing the State of Pakistan.

We would also like to extend our deepest appreciation to the International Committee of the Red Cross (ICRC) for providing us with insight and materials relating to the law of armed conflict. The input received from the ICRC's Legal Division provided the foundation upon which the expert meeting was based and honed our understanding of the applicable legal principles.

## INTRODUCTION

Traditionally, the State of Pakistan's response to counter-terrorism could be regarded as falling exclusively within the domain of a 'law enforcement' paradigm with regular law enforcement agencies responsible for maintaining law and order and the civilian anti-terrorism courts serving as the forum for trial of terrorist offences.

Recently however, the nature and scope of the threat has changed dramatically, representing a truly existential threat to the security and well-being of the State as a whole. Metastasizing from a spate of isolated incidents to a nation-wide menace, contemporary terrorism in Pakistan is a much-changed beast from the phenomenon which first gave rise to the anti-terrorism courts under the Anti-Terrorism Act, 1997. In responding to this accelerated threat, the state has arguably shifted into a de facto 'conduct of hostilities' or war paradigm. Two primary reasons indicate this paradigm shift. First is the formal initiation of military operations against militants residing in North Waziristan Agency in the Federally Administered Tribal Areas ("FATA"), following a deadly attack by militants on Jinnah International Airport, Karachi in June 2014. Code-named Zarb-e-Azb (meaning sharp strike/fatal blow), the operation was launched with the objective of comprehensively flushing out all local and foreign militants in North Waziristan. Since its inception, the operation has witnessed the involvement of up to 30,000 troops and the use of aerial bombardment by fighter jets, gunship helicopters, artillery shelling, and even armed drones.

The operation has yielded considerable success for the Pakistani Armed Forces over the past year. In North Waziristan alone, the operation has reportedly resulted in the death of 2763 militants, the destruction of 837 militant hideouts and the recovery of 18087 weapons and 253 tons of explosives. Simultaneously, intelligence based operations across the country have resulted in the apprehension of 9000 'terrorists and abettors' and the killing of 218 'hard-core terrorists' in the urban cities. 347 soldiers have also lost their lives during this time period.<sup>1</sup> The operation has also resulted in militant attacks dropping by nearly 50 percent (which represents a six year low) and has split the unity of the Tehreek-Taliban Pakistan ("TTP") into three factions.<sup>2</sup>

1 These statistics were released by the Inter-Services Public Relations ("ISPR"), the official public relations agency of the Pakistan Armed Forces on 13 June, 2015 which marked the one year anniversary of operation Zarb-e-Azb. Inter Services Public Relations, (2015). One Year Update of Zarb-e-Azab. [online] Available at: [https://www.ispr.gov.pk/front/main.asp?o=t-press\\_release&id=2913](https://www.ispr.gov.pk/front/main.asp?o=t-press_release&id=2913)

2 The Nation, (2015). Militant attacks declined after Zarb-e-Azb operation: report. [online] Available at: <http://nation.com.pk/national/17-Jun-2015/militant-attacks-declined-after-zarb-e-azb-operation-report>



Second is the recent establishment of military courts following the Peshawar school massacre which left 145 people dead, including 132 school children. This ghastly incident rallied the nation against these violent non-state actors like never before, with citizens demanding a swift and decisive response from the state. This led to the government devising a National Action Plan.

The key element of this plan included the establishment of military courts to try certain 'hard-core' terror suspects. Frustrated with the inordinate delays in trials of terror suspects and their abysmally low conviction rates by the civilian courts including the special anti-terrorism courts, the government felt that military courts were a necessity in the prevailing circumstances.

The establishment of military courts to try civilian suspects of terror has been granted legal cover for a period of two years via the 21st Constitutional Amendment and the Pakistan Army Act 1952 has also been amended to enable them to function. However, bar councils representing lawyers from across the country have challenged these amendments before the Supreme Court of Pakistan. The case is currently being heard by a full bench of the Supreme Court comprising 17 judges. In response, the Federal Government has taken the position that the 21st amendment is an appropriate response to the 'war-like' situation in the country. The Federation has argued, amongst other things, that persons apprehended during combat with the armed forces deserve to be treated differently from ordinary citizens since they do not accept the State of Pakistan and have violated its Constitution. For now the case remains in the media spotlight and it is difficult to predict the exact direction the Supreme Court may take in this matter.

The Research Society of International Law, Pakistan ("RSIL") has been conducting research in the field of counter-terrorism for over a decade and houses a dedicated team of researchers whose mandate is to find solutions to combating terrorism within the constitutional framework. However, we have been convinced by these recent developments that this is the right time to make a compelling case before the stakeholders about the distinction between the law of peace and the law of war. This is especially so because the 21st Amendment as well as the publicly stated positions of the Prime Minister,

the Interior Minister and the Army Chief expressing a state of war in Pakistan can be legally reconciled with only under a conflict paradigm.

In our opinion, the State may consider adopting a conflict paradigm that relies on domestic law of conflict to comprehensively justify its actions legally. The scope of our domestic anti-terrorism framework is too limited to cater to large-scale military operations, detentions and the prosecution of enemy fighters. However, Pakistan's domestic law of war, rooted in the Constitution as well as several military laws, affords the necessary flexibility to comprehensively cater to contemporary threats.

It is against this backdrop that RSIL, with support from the ICRC, decided to convene a round table meeting of Pakistani experts to receive their input on the proposition of the State of Pakistan adopting a conflict paradigm. Two separate questions were laid before the experts at the round table. The first question considered whether a state of conflict could be said to exist in parts of Pakistan as a matter of law. The second issue considered the various advantages and disadvantages of adopting such a paradigm. In keeping with RSIL's mandate, the discussion sought to analyze these issues from a strictly academic and legal viewpoint.

In promoting a greater awareness of the legal implications of adopting a conflict paradigm in Pakistan, it is hoped that this report will benefit a broad range of participants in the domestic public sector. The research and diverse views presented in this report is intended to add value to domestic and international discourse of contemporary issues in Pakistan. It is hoped that this will enable policymakers to better craft internal policies and legal responses to these issues in a way which conforms to Pakistan international legal obligations, thus solidifying its reputation as a responsible and proactive participant in the international community. Similarly, it is hoped that through this report, members of the international community will be able to better understand the milieu within which Pakistan frames its domestic responses.

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**THE CONDUCT OF HOSTILITIES AND  
LAW ENFORCEMENT PARADIGMS**

## Background

The participants of the experts' group meeting were given an overview by the RSIL team on of the main distinguishing features between the conduct of hostilities and law enforcement paradigms. The materials used by RSIL in this regard were based on the report of an ICRC Expert Meeting on the interplay between these two paradigms in armed conflicts.<sup>3</sup>

### 1.1 Overview of Conduct of Hostilities Paradigm

The conduct of hostilities paradigm finds its legal basis in IHL. Since the basic rules of IHL were reflected to cover the reality of armed conflict, this paradigm is based on the assumption that the use of force is inherent to waging war because the ultimate aim of military operations is to prevail over the enemy's armed forces.

The conduct of hostilities paradigm is predicated upon three basic rules/principles of IHL – distinction, proportionality and precaution. The principle of distinction serves as the lynchpin of this paradigm, which requires the parties to the armed conflict to distinguish at all times between combatants and civilians as well as military objects from civilian ones. Technically therefore, at the most basic level, IHL does not legally bar the parties to the conflict from attacking each other's military objectives.<sup>4</sup> The basic rule of distinction is supplemented by the prohibition against non-discriminatory and disproportionate attacks and the requirement for the parties to the conflict to take constant care to spare civilian populations and objects.

### 1.2 Overview of Law Enforcement Paradigm

The law enforcement paradigm finds its legal basis in international human rights law ("IHRL"). The rationale for IHRL is based on different assumptions; as it was initially conceived to protect individuals from the State, hence its rules on the use of force in law enforcement essentially provide guidance on how force can be used by the State. State uses of force are considered legitimate under the IHRL framework when such is absolutely necessary in self-defence, in order to prevent crime or in order to effect the lawful arrest of offenders. This paradigm regulates the resort to force by State authorities in order to

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3 ICRC, (2013). The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms. Expert Meeting. [online] Available at: <https://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf>

4 Ibid at p.6

maintain or restore public security, law and order, and is therefore premised on the principle of 'capture rather than kill' unless capture is not possible through non-lethal means. Under the IHRL paradigm therefore, the use of force – particularly lethal force – is only a measure of last resort.<sup>5</sup>

### Conduct of Hostilities Paradigm vs. Law Enforcement Paradigm

Conduct of Hostilities Paradigm	Law Enforcement Paradigm
<p>Military necessity to use force against legitimate targets is <b>presumed</b>.</p> <p><b>Legitimate targets</b> in this regard may be regarded as persons performing a continuous combat function, as defined by the ICRC interpretative guidance on the notion of Direct Participation in Hostilities under IHL,<sup>6</sup> as well as objects or infrastructure which constitute 'legitimate military objectives' as described by Rule 8 of customary IHL<sup>7</sup></p>	<p>Principle of 'absolute necessity' implies that the use of force is a measure of last resort undertaken in pursuance of a legitimate aim, such as self-defence, arrest, preventing escape etc.</p>
<p>Proportionality: attack on a <b>legitimate target</b> would be disproportionate if the collateral damage would be <b>excessive</b> in relation to the concrete and direct <b>military advantage</b> anticipated.</p>	<p>Proportionality based on a balancing act between the <b>risk posed by the individual</b> versus the <b>potential harm to the individual himself</b>. Thus, there is no concept of legitimate target. The individual must be posing an imminent threat otherwise the force would be disproportionate, even if necessary.</p> <p>Even if the use of force would be proportionate, the <b>smallest amount of force must be used</b> based on an escalation of force procedure.</p>
<p>Precaution: Parties to the conflict must take constant care to spare civilian populations and objects.</p>	<p>Precaution: All precautions must be taken to avoid, as far as possible, the use of force itself. Minimize injury and preserve human life must be the constant objective.</p>

<sup>5</sup> Ibid at p.7

<sup>6</sup> Melzer, N. (2009). Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law. Geneva: International Committee of the Red Cross.

<sup>7</sup> ICRC.org., 'Customary IHL - Practice Relating To Rule 8. Definition of Military Objectives'. Available at: [https://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule8](https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule8)

In the law enforcement paradigm there has to be a concrete and imminent risk to life or limb by the specific individuals in question for the use of force against those individuals to be necessary and proportionate.

Under the armed conflict paradigm however, the legality of the attack does not depend on the existence of a concrete and imminent risk but rather on the qualification of a person/object as a military objective. Such persons can be legitimately targeted and killed at any time even if the danger they pose to military operations is remote, unless they are captured or otherwise rendered hors de combat.

It is interesting to note that the ICRC report on the 2012 Expert Meeting refers to the concept of a 'conflict zone' as potentially defining the geographical scope of application for the conduct of hostilities paradigm.<sup>8</sup> This terminology has not been used nor defined in the IHL treaties but is frequently used in IHL academia to describe an area where active fighting is taking place. On the basis of this, the ICRC report raised the possibility of both paradigms operating simultaneously in a NIAC, where the conduct of hostilities/IHL paradigm would apply within the conflict zone and the law enforcement/IHRL paradigm would apply outside this zone.

Also pertinent to this analysis is the fact that, following the commencement of operation Zarb-e-Azb, the entire North Waziristan Agency in Pakistan has officially been declared as a conflict zone by the FATA Secretariat as per government notification FS/L&O/05-IDPs/NWA/2000-07 dated 18 June 2014.<sup>9</sup> Based on the foregoing, military operations in FATA, should be framed within the conduct of hostilities paradigm to provide legal cover to these operations. The scope of Pakistan's domestic anti-terrorism framework, predicated upon a law enforcement paradigm, is too limited to justify large-scale military operations, detentions and the prosecution of enemy fighters through military courts. However, the law of conflict may afford the necessary flexibility to the State to comprehensively cater to contemporary threats while ensuring that the necessary due process safeguards are instituted.

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8 Supra at 4, p.17

9 Cf, Annexure IV of this Report

**LAW APPLICABLE TO  
NON-INTERNATIONAL ARMED CONFLICTS**

Non-International Armed Conflicts (“NIAC”) in international humanitarian law are primarily regulated by two main conventional sources – common Article 3 of the Geneva Conventions, 1949 and Protocol II Additional to the Geneva Conventions, 1977 which develops and supplements Article 3. In addition to these conventional sources, the conduct of hostilities in a NIAC is further regulated by the jurisprudence of international courts and tribunals which has attained the status of customary international law.<sup>10</sup>

## 2.1 Common Article 3, Geneva Conventions 1949

### Background

According to the ICRC, common Article 3 operates as a 'mini-Convention' within the Geneva Conventions, containing the essential rules of all four Conventions in condensed form and making them applicable to conflicts not of an international character.<sup>11</sup> The provisions of this Article require each party to the conflict to apply basic and fundamental rules of humanity from which no derogation is permitted. According to the official ICRC Commentary on the Geneva Conventions, the provisions of Article 3 are applicable automatically without any condition of reciprocity. Their observance does not depend upon preliminary discussions as to the nature of the conflict.<sup>12</sup>

### Text of Common Article 3

*In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:*

*(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.*

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10 Customary international law constitutes one of the primary sources of international law. Article 38(1) (b) of the Statute of the International Court of Justice describes customary international law as “a general practice accepted as law.” The existence of a rule of customary international law requires the presence of two elements, namely state practice and *opinio juris*. The first element requires state practice in respect of the rule in question to be virtually uniform, extensive and representative. The requirement of *opinio juris* in establishing the existence of a rule of customary international law on the other hand denotes a subjective obligation; the belief by a state that a particular practice must be carried out as a matter of legal obligation. Customary international law therefore refers to international obligations arising from established state practice and exists independent of treaty law.

11 Pictet, J. and Siordet, F. (1952). Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva: International Committee of the Red Cross, p.48.

12 Ibid at p.48



*To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:*

*(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*

*(b) taking of hostages;*

*(c) outrages upon personal dignity, in particular humiliating and degrading treatment;*

*(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.*

*(2) The wounded and sick shall be collected and cared for.*

*An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.*

### Material Scope of Application of common Article 3:

Common Article 3 is applicable to armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties.

The amorphous nature of common Article 3 is readily apparent from its broad and vague definition, which does not even define the meaning of an armed conflict. This however, is a deliberate omission; with the negotiating states hesitant to adopt a resolution which would have effectively extended exterior legal regulation into their internal affairs.

Common Article 3 has attained the status of customary international law. Accordingly, its provisions are legally binding on all states. As stated by the International Court of Justice in the Nicaragua case, common Article 3 establishes elementary considerations of humanity that apply as a minimum even in international armed conflicts.<sup>13</sup>

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13 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14.

## 2.2 Protocol II Additional to the Geneva Conventions, 1977

### Background

Prior to the adoption of Additional Protocol II (“AP II”), the only provision applicable to a NIAC was common Article 3 of the Geneva Conventions. However, it became gradually apparent that the basic protections offered by Article 3 were no longer tenable as NIAC’s replaced international conflicts as the predominant form of armed conflict in the late 20th century. The intention behind AP II therefore was to extend the essential rules of the law of armed conflicts to internal wars.<sup>14</sup>

Material Field of Application of AP II

#### Article 1

1. *This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.*
2. *This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.*

Article 1 of AP II is considerably more sophisticated than common Article 3 and attempts to set out a number of material concrete elements which when present, would establish the existence of a conflict. However, all of these conditions must be satisfied cumulatively, so that the absence of one renders the Protocol inapplicable.<sup>15</sup>

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14 Pilloud, C., Sandoz, Y., Swinarski, C. and Zimmermann, B. (1987). Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. Geneva: International Committee of the Red Cross, p.1344.

15 Barquero, R. The [New] Thresholds of Non-International Armed Conflict — A product of Jurisprudential Provenance? [online] Available at: [http://www.academia.edu/4663155/The\\_New\\_Thresholds\\_of\\_Non-International\\_Armed\\_Conflict-\\_A\\_Product\\_of\\_Jurisprudential\\_Provenance](http://www.academia.edu/4663155/The_New_Thresholds_of_Non-International_Armed_Conflict-_A_Product_of_Jurisprudential_Provenance).

In this regard, the Article requires:

- i) That the conflict in question must not be one that could potentially be covered by Additional Protocol I to the Geneva Convention of 1949 (i.e. it must not constitute an international armed conflict);
- ii) It must take place in the territory of a State party to Additional Protocol II;
- iii) At least one of the parties engaged in the conflict must be the armed force of that State;
- iv) At least one of the parties against whom the States armed forces engage must constitute either a dissident armed force or an armed group, either of which must demonstrate some level of organization;
- v) If dealing with an organized armed group, that group must operate under a responsible command and exercise a sufficient degree of control over at least part of the States territory so as to enable that group to implement sustained and concerted military operations.

Similar to common Article 3, Article 1 of AP II does not directly define what is meant by an armed conflict. However, Article 1 is nevertheless instructive in that it establishes upper and lower thresholds of non-international conflicts.<sup>16</sup> The upper threshold is defined by reference to international armed conflicts within the meaning of common Article 2 of the Geneva Conventions. The exclusion of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence determines the lower threshold.<sup>17</sup>

### **2.3 Interplay between common Article 3 and AP II**

Article 1 of AP II makes it clear that the Protocol merely develops and supplements the provisions of common Article 3. It is additional to Article 3 and is not meant to replace its provisions, nor modify Article 3's existing scope of application. There is therefore a dual threshold for NIAC's in international humanitarian law

- i) Common Article 3 – a minimum standard which applies in all NIAC's.

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<sup>16</sup> Supra at 11, p.1349.

<sup>17</sup> Ibid.

- ii) Additional Protocol II – only apply to conflicts which attain a certain level of intensity.

Therefore, in circumstances where the conditions of Article 1 have been met, the Protocol and common Article 3 will apply *simultaneously*. On the other hand, where the characteristic features required by Article 1 of AP II have not been met, only common Article 3 will apply.<sup>18</sup>

#### Applicability of AP II to the Conflict in FATA

In the Pakistani context, the provisions of AP II are not – legally speaking – applicable to the situation in FATA as Pakistan has yet to ratify the Protocol. Further, following the advent of Operation *Zarb-e-Azb* in June 2014 by the Pakistan Army, there is no organized non-State armed group exercising a sufficient degree of control over any part of Pakistani territory which would enable that group to implement sustained and concerted military operations against the Pakistani State.

Additionally, the provisions of AP II have not yet achieved the status of customary law, which would have made the Protocol legally binding on Pakistan despite its non-ratification of the same. While in *Tadic* the ICTY Appeals Chamber stated that many provisions of AP II can now be regarded as declaratory of existing rules or as having crystallized in emerging rules of customary law, not all of the norms of AP II were considered to be customary. The Tribunal therefore concurred with the non-customary status of AP II.<sup>19</sup>

In light of the foregoing, it is the considered opinion of the Research Society of International Law that, should the State of Pakistan choose to officially declare a NIAC in FATA, it is likely to rely solely on the provisions of common Article 31.<sup>20</sup>

### **2.4 Supplementing Treaty Law: Jurisprudence of International Tribunals in defining NIAC**

In the absence of a treaty based, objective definition of what constitutes an armed conflict, the criteria for one today are best extrapolated from state

18 *Supra* at 11, p.1350.

19 *Prosecutor v. Dusko Tadic* (Appeal Judgement), IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999, paras. 116 and 134 available at: <http://www.refworld.org/docid/40277f504.html>

20 However, all rules of IHL which have attained the status of customary law will also be applicable in such a situation. This is discussed further in Section 2.5 of this Report below.

practice and the jurisprudence of international tribunals. The leading jurisprudential authority on the matter is the ICTY Appeals Chamber decision in *The Prosecutor vs. Dusko Tadic*, wherein the existence of an armed conflict is determined with reference to two primary factors:

- 1) The intensity of the hostilities between the State and armed groups;
- 2) The level of organization of the armed group.

It is now both politically and legally correct to only refer to these criteria when deciding whether there is an armed conflict,<sup>21</sup> and the Tadic test has since consistently been used as the authority for when an armed conflict is deemed to exist, as evinced by a series of decisions of the International Criminal Tribunal for the former Yugoslavia ("ICTY"),<sup>22</sup> the International Criminal Tribunal for Rwanda ("ICTR"),<sup>23</sup> the International Court of Justice ("ICJ"),<sup>24</sup> the International Criminal Court ("ICC")<sup>25</sup> and the Special Court for Sierra Leone ("SCSL").<sup>26</sup>

Further judgments of the ICTY and ICC have clarified what is meant by these criteria, especially the Boskoski,<sup>27</sup> Limaj<sup>28</sup> and Haradinaj<sup>29</sup> judgments. According to the jurisprudence of these international tribunals, the intensity

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- 21 Lozano, G. and Machado, S. (2012). *The Objective Qualification of Non-International Armed Conflicts: A Colombian Case Study*. Amsterdam Law Forum, 4:1, p.63.
  - 22 *Prosecutor v. Blagojevic and Jokic* (Trial Judgment), IT-02-60-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 17 January 2005, available at: <http://www.refworld.org/docid/47fdaf51a.html>, para. 536; *Prosecutor v. Zlatko Aleksovski* (Trial Judgment), IT-95-14/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 25 June 1999, available at: <http://www.refworld.org/docid/4146e8ba2.html>, paras 43-44; *Prosecutor v. Tihomir Blaskic* (Trial Judgment), IT-95-14-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 3 March 2000, available at: <http://www.refworld.org/docid/4146f1b24.html>, paras. 63-64
  - 23 *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgment), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, available at: <http://www.refworld.org/docid/40278fbb4.html>, p.13, para. 619; *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda* (Judgement and Sentence), ICTR-96-3-T, International Criminal Tribunal for Rwanda (ICTR), 6 December 1999, available at: <http://www.refworld.org/docid/48abd5880.html>, p.14, para. 92.
  - 24 *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ Reports, Separate Opinion of Judge Simma, 19 December 2005, para. 23. Available at <http://www.icj-cij.org/doctrines/files/116/10467.pdf>
  - 25 *Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo* [2007] ICC-01/04-01/06 (International Criminal Court), p.57 para. 233
  - 26 *Prosecutor v. Fofana et al*, Decision on Appeal against 'Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence', 16 May 2005, Appeals Chamber Decision of the Special Court for Sierra Leone. Separate Opinion of Justice Robertson, para. 32
  - 27 *Prosecutor v. Boskoski and Tarculovski* (Appeal Judgment), IT-04-82-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 19 May 2010, available at: <http://www.refworld.org/docid/4bfff84f2.html>
  - 28 *Prosecutor v. Limaj et al*. (Appeal Judgment), IT-03-66-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 27 September 2007, available at: <http://www.refworld.org/docid/48ac19112.html>
  - 29 *Prosecutor v. Haradinaj et al*. (Appeal Judgment), IT-04-84-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 19 July 2010, available at: <http://www.refworld.org/docid/4c5965522.html>

of the hostilities and the level of organization of the armed group can be indicated by the following, non-exhaustive and non-cumulative factors:

#### 2.4.1 Factors determining the Intensity of Hostilities

- a. the seriousness of the attacks and whether there has been an increase in armed clashes;
- b. the spread of clashes over the territory and over a period of time;
- c. an increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict;
- d. whether the conflict has attracted the attention of the Security Council;
- e. the number of civilians forced to flee from combat zones;
- f. the type of weapons used;
- g. the besieging of towns and the heavy shelling of these towns;
- h. the extent of destruction and the number of casualties caused by shelling or fighting;
- i. the quantity of troops and units deployed;
- j. the existence and change of front lines between the parties;
- k. the occupation of territory, towns and villages;
- l. the deployment of government forces to the crisis area;
- m. the closure of roads;
- n. the existence of cease fire orders and agreements; and
- o. other attempts of representatives from international organisations to broker and enforce cease fire agreements;
- p. The continuous character of a terrorist campaign may also be considered in order to assess the gravity of the conflict.

#### 2.4.2 Factors determining the Level of Organization of Armed Groups

- a. the existence of a command structure;
- b. the ability to undertake organized military operations;
- c. a certain level of logistics, such as the ability to recruit or the issuance of uniforms;
- d. a certain level of disciplinary enforcement; and
- e. the ability to speak with one voice.

It must be stressed that the foregoing list is neither exhaustive nor cumulative; instead, these criteria are indicative of a particular armed group's organization as understood in IHL.

As per the decision of the ICC in the *Lubanga Case*, the criterion of organization requires the need for the armed groups to have the ability to carry out military operations for a prolonged period of time.<sup>30</sup> Similarly, the ICC decided in the *Katanga Case* that the existence of responsible command structures, an internal disciplinary system and the capacity to plan and carry out concerted military operations were also factors to be considered in determining whether a particular armed group was 'organized'.<sup>31</sup>

## 2.5 Conclusions Presented by RSIL to the Experts for Review

Contemporary international humanitarian law does not require formal recognition for a situation to qualify as an armed conflict. This is because the jurisprudence of international tribunals has led to the development of objective criteria for the existence of an armed conflict which does not depend on the subjective views of the parties to the conflict.

Legally speaking therefore, the provisions of IHL will apply to operation Zarb-e-Azb in FATA if the *Tadic* criteria are satisfied. As a minimum, this means that the provisions of Common Article 3 will apply to the operation. Although an argument could be made that the four Geneva Conventions and AP II will not apply to the conflict, the correct legal position is that all those provisions of the Geneva Conventions which have attained customary status would apply and would be applicable regardless of whether the armed conflict is a NIAC/IAC. In this regard, the ICRC's study of customary IHL should be referred to which contains this list of binding obligations.<sup>32</sup>

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30 Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, International Criminal Court (ICC), 14 March 2012, available at: <http://www.refworld.org/docid/4f69a2db2.html>

31 The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07 OA 8, International Criminal Court (ICC), 25 September 2009, available at: <http://www.refworld.org/docid/4ac9dd592.html>

32 Henckaerts, J., Doswald-Beck, L. and Alvermann, C. (2005). Customary International Humanitarian Law. Cambridge: Cambridge University Press.





**DETERMINATION OF A STATE OF  
CONFLICT IN PAKISTAN:  
EXPERTS' COMMENTS & DISCUSSION**

The first part of the roundtable discussion dealt with determining, from a strictly legal perspective, whether or not a state of armed conflict could be deemed to exist in Pakistan. This determination was based on the unified contemporary criteria for a NIAC as set out by the ICTY in the Tadic judgment and subsequently elaborated upon by international jurisprudence.<sup>33</sup>

### **3.1 Geographical Scope of Application**

At the outset, the experts considered the question of whether the application of a conflict paradigm in Pakistan should be narrowed down to the operations against the non-state actors in the tribal belt of the country. In other words, the experts considered the question of whether the scope of the discussion should be limited to a 'conflict zone' limited to a particular part or area of Pakistan and not be extended to operations by state forces in Karachi, Balochistan or elsewhere.

In this regard, the overall view of the experts favoured the limitation of the conflict paradigm to the conflict zone in FATA where it was easier to objectively qualify the situation as a conflict because of the scale of the operations and the intensity of the fighting between the state forces and non-state actors. However, RSIL researchers pointed out that a territory specific application of the conflict paradigm was not without its complications; the primary difficulty being that non-state actors were also attacking targets indiscriminately in urban areas such as Islamabad, Lahore, Karachi and elsewhere. Could these attacks be viewed as an expansion of the conflict zone to the entire country?

In response, the majority of the experts were of the view that occasional attacks by non-state actors in urban centres would not expand the zone of conflict since under IHL law, there is a certain threshold in terms of intensity which is a high standard, requiring a systematic and regular pattern. Anything below this threshold would constitute an internal disturbance not attracting the application of IHL principles.

In the case of Pakistan, the armed forces have been very systematic in their operations in FATA and there is a clear distinction between the use of force

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33 Cf, Section 2.4 of this Report at p.15.

that is adopted in the tribal belt vis-à-vis the rest of the country. Expanding the zone of conflict beyond FATA would likely lead to violations of human rights law since the context and nature of the operations is very different in the urban areas. All experts were of the view that IHL should not be used as a justification for adopting draconian measures in urban areas in derogation of human rights principles where no conflict existed.

Some experts were also of the view that the use of force on the scale of a conflict paradigm in the urban centres would result in severe political backlash and is something which Pakistan as a nation is not ready for.

One of the experts further emphasized that the IHRL and IHL regimes should not be considered as competing regimes nor were they mutually exclusive in their operation. As such, it was necessary to adopt a complementary approach, with a focus on protection. This approach would begin on the assumption that the domestic criminal law of the land supplemented by international human rights law is de facto always applicable. The conflict paradigm on the other hand could only be applied once a determination was made of the existence of an armed conflict. This determination is based on objective criteria. In the case of Pakistan, many, if not all of these criterion are only satisfied with respect to the tribal belt. For operations in FATA, Pakistan must follow the detailed procedure of derogation from the ICCPR.

Article 4 of the ICCPR provides for the mechanism by which a State may derogate from its obligations under the Covenant:

1. *In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.*
2. *No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18<sup>34</sup> may be made under this provision.*

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34 These articles relate to protections against the arbitrary deprivation of life; torture or inhumane treatment; slavery; imprisonment for debts; retrospective punishment; non-recognition of legal personhood; and restrictions on thought, conscience, or freedom respectively

3. *Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.*

It is clear from the text of Article 4 of the ICCPR that the provision does not grant State parties the unchecked ability to derogate from their legal obligations under the Covenant. Instead, the State must be facing what amounts to an existential threat before derogating and these derogations must be limited only to those which are “strictly required by the exigencies of the situation” and which are not inconsistent with other applicable international legal obligations.

The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights<sup>35</sup> are a collection of non-binding interpretative principles for use when analyzing and applying the provisions of the ICCPR. As such, while they may lack the mandatory nature of the Covenant itself, they nonetheless serve as a useful tool in extrapolating from the abstract language of the ICCPR tangible legal rules to apply to a given national situation.

In the context of derogations from the ICCPR, the Siracusa Principles describe 'a threat to the life of the nation' as a situation which “affects the whole of the population and either the whole or part of the territory of the State”, and which “threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant”.

According to the Covenant itself, should a State choose to derogate from its obligations under the ICCPR it must immediately inform the other States party to the Covenant – through the UN Secretary General – of the specifics of

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35 UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4, available at: <http://www.refworld.org/docid/4672bc122.html>.

the derogation, the reasons compelling the derogation, and the date on which the derogation will cease. The Siracusa Principles further elaborate upon the procedure for derogations, requiring the derogating State to make a proclamation of a state of emergency and, when notifying the other State parties to the Covenant, provide sufficient information to “permit the States parties to exercise their rights and discharge their obligations under the Covenant”.

Derogations from the ICCPR, as described in the Siracusa Principles, must be limited to those measures which are “strictly required by the exigencies of the situation”, and again the Principles go further than the abstract language of the ICCPR in rigidly limiting the scope of what constitutes ‘the exigencies of the situation’.

The ICCPR, therefore, envisions situations where States party to the instrument may be obliged to derogate therefrom, even as it seeks to restrict the space in which States may deviate from their obligations under the Covenant. Nonetheless, in times of existential crisis, a State may take steps in direct contravention of their obligations under the ICCPR. Such times of crisis, however, do not completely inure a derogating State from the application of international law, as principles of IHRL – particularly those which have attained customary status – as well as provisions of domestic law would still be applicable.

Another expert was of the view that limiting the conflict to a particular zone or a particular enemy were legal questions which could only be done once a decision was taken by the State to adopt a conflict paradigm. This choice, in his view, was essentially a political and diplomatic decision which needed to be made by the public leadership of the country. The question of limiting the zone or tailoring the operations to target only a specific set of opponents could, no doubt, inform this decision but these were essentially legal determinations which could only inform the operations once a formal characterization of a state of armed conflict was made by the State.

In summary, the experts were of the unanimous opinion that the conflict paradigm be only applied in the context of operations in FATA and not uniformly across the country, since it would defeat the very purpose of IHL if its provisions were utilized to derogate from IHRL where no conflict existed. The scope of the remaining discussion therefore, should be viewed in this limited context.

### 3.2 Intensity of Hostilities in FATA

With respect to the first limb of the Tadic test, the experts took the unequivocal position that the fighting in the tribal areas of the country had reached the required level of intensity to constitute an armed conflict.

One expert however was of the opinion that the involvement of the armed forces should be the primary indicator of the applicability of a conduct of hostilities paradigm. In the case of FATA especially, the involvement of the armed forces under the Actions (in Aid of Civil Power) Regulations, 2011 in controlling the situation was sufficient to legally view the situation as being one of conflict.

While it was accepted that the scheme and structure of the Actions (in Aid of Civil Power) Regulations, 2011 for FATA was clearly reflective of an IHL/conflict paradigm, several experts did not agree to the contention that the mere involvement of the armed forces was itself a decisive criterion for determining the existence of a conflict paradigm. This was because all over the world, the military is allowed to act in aid of civil power and this is also part of the constitutional scheme in Pakistan.<sup>36</sup> It was pointed out that the Civil Armed Forces were also acting in aid of civil power under the Anti-Terrorism Act in

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36 Constitution of the Islamic Republic of Pakistan, 1973; Article 245, Functions of Armed Forces.  
(1) The Armed Forces shall under the directions of the Federal Government, defend Pakistan against external aggression or threat of war, and, subject to law, act in aid of civil power when called upon to do so.  
(2) The validity of any directions issues by the Federal Government under clause (1) shall not be called in question in any court.  
(3) A High Court shall not exercise any jurisdiction under Article 199 in relations to any area in which the Armed Forces of Pakistan are, for the time being, acting in aid of civil power in pursuance of Article 245: Provided that this clause shall not be deemed to affect the jurisdiction of the High Court in respect of any proceeding pending immediately before the day on which the Armed Forces start acting in aid of civil power.  
(4) Any proceeding in relation to an area referred to in clause (3) instituted on or after the day the Armed Forces start acting in aid of civil power and pending in any High Court shall remain suspended for the period during which the Armed Forces are so acting.

Karachi and Balochistan in what were clearly law enforcement operations.<sup>37</sup>

However, all the experts were of the view that the nature of the fighting in FATA had certainly met the intensity threshold of the Tadic test as further developed by jurisprudence of international tribunals. With respect to the indicative, non-exhaustive criteria presented earlier,<sup>38</sup> the experts were of the opinion that 14 of the 16 indicative factors were met either partially or fully by the situation on the ground.

### 3.3 Level of Organisation of the Non-State Actors in FATA

The majority of the experts were of the view that the organisational test was met for non-state actors fighting in FATA. However, in contrast to the intensity test, the consensus was not unanimous for the second limb of the Tadic criteria. Some of the experts were of the view that the government should clearly identify the Tehreek-e-Taliban Pakistan (“TTP”) as the armed adversary in the conflict. Other experts believed this would be difficult since more than 30 organisations were reportedly fighting under the TTP umbrella and there were clear signs of internal rifts within the organisation. It was difficult therefore to regard these organisations as speaking with one voice or uniformly enforcing discipline.

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37 The Anti-Terrorism Act, 1997; Section 4. Calling in of armed forces and civil armed forces in aid of civil powers.

(1) It shall be lawful for the Federal Government to order, and subject to sub-section (2), for the Provincial Government to secure, the presence of armed forces and civil armed forces in any area for the prevention and punishment of terrorist acts and scheduled offences in accordance with the provisions of this Act.

(2) If, in the opinion of the Provincial Government, the presence of armed forces, or civil armed forces, is necessary in order to prevent the commission of terrorist acts or scheduled offences in any area, it may request the Federal Government to direct the presence or posting of units or personnel of the armed forces, or civil armed forces, in such numbers as may be deemed necessary for the prevention or control of terrorist acts or scheduled offences.

(3) The Federal Government may decide whether the requirements of the situation call for the deployment of:

(i) the civil armed forces; or  
(ii) the armed forces,

and on so deciding shall, by means of a notification in the official Gazette issued under clauses (i) or (ii) or both, authorize and direct the posting thereof.

38 Cf. Section 2.4 of this Report at p.18.

These concerns notwithstanding, the majority of the experts were of the view that the organisation test can still be met in this case since the organisation of outfits in Yugoslavia was much less than the TTP. The ICTY nevertheless still regarded the organisational test as being met in Yugoslavia. This was because the standard of organisational control in IHL is quite low. The test, in the view of the experts, related more specifically to the intrinsic nature of the command structure of an outfit itself, as a determinative criterion in gauging that particular group's 'organisation'.

According to this view presented by the experts, the non-state actors active in Pakistan were more organized than those under discussion in the Tadic case. The TTP was described as an umbrella organisation with loose forms of connectivity to a coalition of smaller organisations. On their own these smaller organisations may not pass the organisational test but, given their loose level of cooperation, they could collectively be seen as having sufficient organisation under the umbrella of TTP to constitute an armed group as per Tadic.

#### Internationalisation of the Conflict

One of the experts present raised the possibility of the internationalisation of the conflict based on the alleged involvement of foreign intelligence agencies, in particular the Indian Research & Analysis Wing ("RAW"). Although this was acknowledged by the participants as being relevant to the discussion, it was deemed premature to comment conclusively on this issue at this particular stage through this forum.

### **3.4 Conclusions**

The first session of the roundtable concluded with the experts unanimously agreeing to a state of conflict existing in parts of Pakistan from a legal perspective. However, notwithstanding the specific legal implications (discussed below) of such a categorization, three important points were emphasized by individual experts and agreed to by all participants:

- i) In adopting a conflict paradigm, the humanitarian nature of the law of armed conflict must always remain a priority. This means that certain



basic protections must always be accorded to people in conflict, especially those set out in common Article 3, regardless of whether they are combatants, civilians, enemy fighters etc. These basic protections and safeguards are non-derogable and a conflict paradigm cannot be used as a fig leaf for abuses such as torture, degrading treatment or the passing of sentences by irregularly constituted courts.

- ii) Regardless of the application of a conflict paradigm, the domestic criminal justice framework – which criminalizes extremist activity – will nonetheless remain in force. While, under the conflict framework, the provisions of IHL would also necessarily apply, the domestic legal system would continue to operate regardless of a state of armed conflict.<sup>39</sup> Thus, the adoption of a conflict paradigm would therefore extend no rights to the TTP or any other non-state actor to take up arms and engage in hostilities against the armed forces of Pakistan; rather, such actors would remain subject to the domestic law of Pakistan and could, ipso facto, be prosecuted thereunder.
- iii) The engagement with IHL concepts however, should be done through the prism of our domestic law of conflict, since Pakistan will have a very strong hand in interpreting its own law and explaining and defending – in legal terms – the way in which it is applied in any given context. Therefore, Pakistan's legal narrative to military operations and the military courts should be presented in the language of 'domestic humanitarian law' ("DHL").

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39 ICRC.org, (2011). The Relevance of IHL in the Context of Terrorism. [online] Available at: <https://www.icrc.org/eng/resources/documents/misc/terrorism-ihl-210705.htm>.



**ADVANTAGES AND DISADVANTAGES OF  
ADOPTING A CONFLICT PARADIGM IN PAKISTAN:  
ANALYSIS AND EXPERTS'  
COMMENTS & DISCUSSION**

The first part of the roundtable discussion concluded with the experts unanimously agreeing that a state of conflict could be said to exist in FATA from a legal perspective. Notwithstanding the legal value of such a classification, the decision to classify a situation as a conflict ultimately remains a political one. The second part of the roundtable therefore sought to examine in detail, the potential advantages and disadvantages of adopting a conflict paradigm in Pakistan.

In this regard, the following arguments were presented by RSIL to the experts for their comments and discussion.

#### **4.1 Potential Advantages in adopting a Conflict Paradigm**

##### **4.1.1 Legal Cover for Pakistan to use lethal force against the TTP and its affiliates**

As discussed above, the conduct of hostilities paradigm is based on the assumption that the use of force is inherent to waging war. In fact, a determination that a situation does not reach the threshold of a conflict today significantly reduces a state's freedom of action in terms of the use of force, rather than increasing it. This is because any situation below the threshold of a conflict would be regulated by a human rights framework under the law enforcement paradigm.

The use of force by the Pakistani armed forces in operation Zarb-e-Azb over the past year has witnessed a large deployment of troops especially in FATA and the use of aerial bombardment by fighter jets, gunship helicopters, artillery shelling, and even armed drones.

The scope of our domestic anti-terrorism framework, based on a law enforcement paradigm, is too limited to justify such large-scale military operations, detentions and the prosecution of enemy fighters through military courts. However, Pakistan's domestic law of conflict, rooted in the Constitution as well as several military laws, affords the necessary flexibility to the State to comprehensively cater to contemporary threats.

#### 4.1.2 Adoption of a Conflict Paradigm will not alter the Legal Status of the TTP and its affiliates

The adoption of the conflict paradigm in terms of common Article 3 will not increase in the slightest the authority of the TTP and its affiliates. This is clearly set out in the fourth clause of common Article 3, whereby the application of the Article does not affect the legal status of the parties to the conflict.<sup>40</sup> Such a paradigm will not confer legitimacy of these non-state actors and will not limit Pakistan's right to ensure its national security. Therefore, the TTP and its affiliates will remain legally subject to the domestic criminal law of Pakistan and will remain prosecutable for any offences they may have committed. The conflict paradigm will not change the actions of the non-state actors from criminality to combatant immunity, nor would they benefit from belligerent or Prisoner of War status. In fact, the only change to the TTP and its affiliates' legal status is that they will become legitimate targets for attack by Pakistani forces, as opposed to keeping state forces limited to law enforcement based actions. These consequences can therefore be characterised as positives for the State of Pakistan.

#### 4.1.3 Presentational & Strategic Advantages

The adoption of a conflict paradigm by the state may allow the government to prosecute these non-state actors for war crimes, since acts of terrorism during an armed conflict constitute a grave violation of the Geneva Conventions and are prosecutable as war crimes. States are in fact under a legal obligation to prosecute and punish such violations of IHL. In this regard, the military courts may be presented as being de facto war crimes tribunals. Domestic jurisdiction could also potentially be invoked to try the perpetrators for war crimes under domestic law.

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40 "This clause is essential. Without it neither Article 3, nor any other Article in its place, would ever have been adopted. It meets the fear - always the same one - that the application of the Convention, even to a very limited extent, in cases of civil war may interfere with the de jure Government's lawful suppression of the revolt, or that it may confer belligerent status, and consequently increased authority, upon the adverse Party...It makes it absolutely clear that the object of the Convention is a purely humanitarian one, that it is in no way concerned with the internal affairs of States, and that it merely ensures respect for the few essential rules of humanity which all civilised nations consider as valid everywhere and under all circumstances and as being above and outside war itself. Consequently, the fact of applying Article 3 does not in itself constitute any recognition by the de jure Government that the adverse Party has authority of any kind; it does not limit in any way the Government's right to suppress a rebellion using all the means - including arms - provided for under its own laws; it does not in any way affect its right to prosecute, try and sentence its adversaries for their crimes, according to its own laws. In the same way, the fact of the adverse Party applying the Article does not give it any right to special protection or any immunity, whatever it may be and whatever title it may give itself or claim." Pictet, J. and Siordet, F. (1952). Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva: International Committee of the Red Cross, pp.60-61.

There is also strategic advantage in labelling non-state actors such as Al-Qaeda, TTP and other extremist groups operating in Pakistan as military adversaries in the lens of the law of conflict. This is due to the fact that they are universally detested and 'unloved' and no State can legally support them because of UNSC 1373 and 1267. There is therefore minimal political or strategic risk to balance against the political and strategic gain of characterizing the situation as a conflict against extremist groups such as the Taliban and Al-Qaeda.

## **4.2 Potential Disadvantages in adopting a Conflict Paradigm**

### **4.2.1 International Assessment & Condemnation due to a greater Use of Force**

The greater use of force by Pakistan under this paradigm could result in international assessment and condemnation. A domestic lack of expertise in IHL at the policy level places Pakistan in a weaker position to respond to international critique and may result in the loss of some degree of control over the strategic context.

One possible solution to this problem could be for the state to engage with IHL concepts through the prism of Pakistan's domestic law of conflict, since Pakistan will have a very strong hand in interpreting its own law and explaining and defending – in legal terms – the way in which it is applied in any given context.

### **4.2.2 Use of Force by the Parties to the Conflict**

As discussed above, on a very basic level, IHL does allow the parties to the conflict to use force against each other. The party on the one side would obviously be the Pakistan's Armed Forces and Civil Armed Forces. But the TTP and its affiliates under this paradigm will technically have the right to engage with these state forces. They cannot be tried for war crimes simply because they attack military objects. However, IHL allows Pakistan to prosecute these non-state actors for any offences committed under its domestic criminal law (they will not have combatant immunity). Nevertheless, this might raise concerns with some stakeholders in Pakistan.

#### 4.2.3 Reputational and Economic Consequences

Officially acknowledging a state of conflict may prove damaging to Pakistan diplomatically and may negatively impact its economy.

#### 4.2.4 Weak IHL Infrastructure

If Pakistan adopts a conflict paradigm, it will have to rapidly upgrade the IHL infrastructure in the country. This will require a whole range of new measures, including the development of operational manuals for the Armed Forces with Rules of Engagement that clearly embrace the IHL framework. Laws will have to be revised and upgraded and the Government must set out a clear policy. Security forces would have to be trained in switching between the conflict and law enforcement modes and the judiciary would need to be educated on a very complex area of law. Such measures would be time consuming and require extensive coordination between the state institutions. They will also require considerable political will at the highest levels to become a reality.

#### 4.2.5 Remote Possibility of International Litigation

There also exists the remote possibility that international litigation could be initiated against Pakistan for any war crimes that may be committed by its own Armed Forces. It should be noted that the Columbian government was twice taken to the Inter-American Court of Human Rights for alleged violations.

### **4.3 Experts' Comments and Discussion**

The general consensus amongst the experts was that the advantages presented by RSIL outweighed the disadvantages. The experts also dismissed the possibility of international litigation for war crimes arising out of operations conducted by Pakistan's Armed Forces as being far-fetched; in their opinion, the professional training of the military precluded such conduct. Further, it was pointed that the spectre of international litigation is not contingent upon Pakistan adopting a conflict paradigm, and could arise even if the government did not recognise the situation as a conflict. Additionally, regulating the conduct of hostilities would serve to further reduce the likelihood of such incidents by ensuring that military operations conform to international legal standards, thus preventing isolated instances

of abuse. From this perspective, adopting a conflict paradigm may actually be viewed as an advantage as it would reduce the possibility of international litigation.

#### 4.3.1 Engagement with the International Community on IHL

The experts were unanimously in favour of actively engaging with the international community on this issue, since IHL requires stakeholders to engage with its concepts. Many experts cited the government's traditional policy of distancing itself from IHL concepts, to the extent that even terminology such as 'Internally Displaced Persons' ("IDP's") were viewed askance. In the view of the experts, this was a result of fear of the unknown, caused by a lack of proper understanding of the international law on armed conflict. Consequently, there was a common misconception at the official level that an armed conflict paradigm would grant political legitimacy to 'combatants' and would subsequently dilute the government's strategic control over the situation.

The lack of understanding of IHL at the official levels in Pakistan was accepted as a potential disadvantage by some experts, as the adoption of a conflict paradigm could result in the development and application of policies not in conformity with the applicable international law. The experts noted that such policies might not adequately address the complexities of IHL, resulting in some loss of control of the narrative by the state. Nevertheless, the experts opined that this should not serve as the basis of an 'ostrich approach' by the state, as the law of conflict afforded important privileges to the State of Pakistan, while also extending necessary protections to other actors in the conflict.

Several experts were also of the view that the law of conflict should not be judged by the good it may bring, but the evil it could prevent. A complete disengagement with IHL principles would constitute a failure of Pakistan's obligations under international law; if the State of Pakistan did not consider itself to be in a state of conflict, it would not think the international standards applicable in such situations to be relevant to its counterterrorism operations. This, in turn, would only serve to increase the possibility of inadvertent violations of the applicable international law.



According to one expert, purely from a strategic perspective it is clear that Pakistan will win this war since it is fighting 'at home' and maintains one of the largest and most professional army in the world. There is therefore no possibility that reciprocity will become an issue with the TTP or other non-state actors, requiring the recognition of belligerency and subsequent activation of the jus in bello between the parties. The Ministry of Foreign Affairs must therefore realise that the international perception of Pakistan as teetering on the brink of a failed state is not and will not be the reality. Instead, there is need to engage with the international community and receive support for our situation by using a shared responsibility approach. In this regard, Sri Lanka's engagement with the international community during its conflict is instructive as the engagement enabled the government to receive international support for its operations. In Pakistan's case, such support would be easier to procure since normatively, no state supports the TTP and would want these non-state actors to be comprehensively defeated. If the TTP merges with ISIS/Daesh, the support from the international community would only increase. Therefore, there was a need to look at the practice of other states who engaged with IHL principles during NIAC-like situations. The experiences of the ICRC in this regard would prove beneficial. Further, since conflicts were sui generis, the world could learn from our experiences on how to respond to this type of conflict.

Another expert considered the adoption of a conflict paradigm as advantageous from the perspective of jus ad bellum law, since it could materialise Pakistan's right to self-defence against these non-state actors operating in other states or receiving material support from other states. This position was likely to encourage support from other states because of their political, legal and normative obligations.

#### 4.3.2 Reputational and Economic Consequences

The reputational and economic consequences were accepted by some experts as a disadvantage of adopting a conflict paradigm, since an official declaration of a conflict in the country will lead to a drop in investment and jurisdictional arbitrage. Another expert was of the opposing view that a conscious decision to adopt a conflict paradigm would actually provide clarity

to investors as it would indicate that the government is pursuing a deliberate strategy. If Pakistan were further to engage with the international community through the prism of conflict law and receive support for its actions, it will enable investors to make confident predictions since they will no longer view Pakistan as the solitary outlier in this fight.

#### 4.3.3 IHL and the Fog of War

Considerable discussion was devoted by the experts to the concept of the 'fog of war' and its potential advantages and disadvantages to a state embroiled in internal conflict. In the view of expert, from the perspective of the stakeholders, even the advantages outlined above may be viewed as disadvantages. The biggest fear of acknowledging a NIAC-like situation would be the fear that international watchdogs would descend on the country. Even if these organisations are not provided access to the conflict zone, there would still be reluctance to engage with them simply because transparency, in the experts' view, was alien to the domestic style of governance. In such a situation, would the state be ready to provide answers to the questions that will inevitably be raised on the standards being adopted on the battlefield?

In response, another expert noted that the opacity of the current situation results in a fog of war which often suits the interests of the state. In such a situation, the challenge lies in convincing the state that the advantages outweigh the disadvantages. The advantages should not be seen in absolute terms but rather in relative terms. Legal cover to target the TTP under the armed conflict model may not be viewed as a positive by the state if it results in unmitigated international assessment and too much transparency. However, domestic humanitarian law may prove to be the solution, since it could be used to give legal cover to the operations, provide the necessary protections, while also enable the state to enjoy the opacity that comes therewith.

Other experts posited that the advantage inherent in the IHL framework was that it constituted a way for the State to provide clarity to a situation of conflict; adhering to the principles of IHL could help the State 'diffuse the fog of war'. This would effect clarity and transparency in the operations, allowing

the State – and its military – to attain the higher moral ground, and minimize the potential for abuses. This would also apply to non-State actors as well: for instance, following the attack on the Army Public School, Peshawar in December 2014, public sentiment forced the TTP to justify its actions in order to control the backlash and public outrage. IHL, it was thus posited, provides the State with a way to undermine the legitimacy of enemy actions by subjecting them to the harsh light of critique and condemnation. Thus, adherence to IHL can actually enable the Pakistani military to achieve a moral and psychological victory over the extremists they are operating against, and – given the professional codes of conduct already adopted by the Pakistani military – the adoption of supplementary IHL principles would not prove particularly difficult.

#### 4.3.4 Military Courts in the Armed Conflict Paradigm

The session concluded with the participants briefly discussing the role of the recently established military courts in a conflict paradigm. In this regard, several experts endorsed RSIL's position that military courts could potentially be viewed as *de facto* war crimes tribunals. Since the military courts have been set up in the legally permissible zone of Article 245 of the Constitution, they could be viewed as a measure taken under the law of war. Further, the advantage of such courts would be that they will be able to understand IHL better, especially since an emergency for a normal criminal court is very different from an emergency for a military court. However, all the experts agreed that, notwithstanding the constitutional legality or legislative contours of their jurisdiction and functioning, they will nevertheless be obliged to provide basic protection and fair trial guarantees, both under domestic and international law.

### **Conclusions**

At the conclusion of the session certain specific positions cohered from the dialogue on the discussion points tabled by RSIL: there was consensus amongst the panel of experts on the existence of an extant armed conflict in the Federally Administered Tribal Areas of Pakistan, especially in the North Waziristan Agency, evinced with reference to the factual situation in the region. The experts were also in agreement on the positives associated with

declaring a situation of armed conflict in North Waziristan, and for the State to employ the applicable international humanitarian legal principles. According to the panel of experts, the advantages to the citizenry of the region – as well as to the State itself – far outweighed the real or perceived disadvantages associated with applying IHL to the present conflict, and as such it was in Pakistan's strategic interests to ensure that the necessary IHL provisions were implemented.

The panel also noted that, as academic and intellectual clarity on the substance and application of IHL was still nascent in Pakistan, further debate and discussion on the matter was necessary. This necessity, according to the experts, was felt most keenly in centers of learning and academia – particularly in the context of 'DHL' or domestic humanitarian law. If the concept of a DHL framework was to gain traction, a community of interest needs to be formed, with persons of interest in the public and private sectors contributing to the discourse. This community of interest, according to the experts, would prove vital to developing the narrative for an indigenous humanitarian legal framework, and would serve to better inform the citizenry as well as the State on the application and implications of humanitarian law – both international as well as domestic.

Finally, the panel of experts stressed the need to further the process of engagement with the State once academic clarity on the intersection between humanitarian law and the situation in Pakistan was achieved. Decisions such as a declaration of a state of armed conflict, the conduct of military operations, and the application of a legal framework thereto were all political decisions which needed to be formulated at the State level. According to the panel, once a coherent enough narrative in support of the application of humanitarian law – both domestic as well as international – has developed, the primary stakeholders in the public sector need to be engaged with in order to better inform their decision-making. To this end, the experts recommended that more roundtable sessions such as this one be conducted in the future, with participation from key public stakeholders, to allow them to contribute to the discourse as well.

## Appendix I: Agenda

### ROUNDTABLE SESSION

*Adopting a Conflict Paradigm in Pakistan:  
The Legal Implications*

**Wednesday, 6 May 2015**

#### Part 1

Welcome statement	Mr. Ahmer Bilal Soofi, President RSIL
Round of introductions of experts	See List of Participants (Appendix II)
Introductory speech	Dr. Ali Sultan, Executive Director RSIL
Presentation of the issue; Determination of a State of Conflict in Pakistan	Mr. Jamal Aziz, Research Fellow RSIL
Experts' comments and discussion	

#### Part 2

Presentation of the issue: Pros and Cons of Adopting an Armed Conflict Paradigm in Pakistan	Mr. Jamal Aziz, Research Fellow RSIL
Experts' comments and discussion	
Conclusions reached by Experts	

Vote by a show of hands:

- (a) Does a state of conflict exist in Pakistan from a legal perspective?
- (b) Do the pros outweigh the cons in adopting an armed conflict paradigm in Pakistan?

*(Both questions were answered unanimously in the affirmative by the experts)*

**High tea**

## Appendix II: List of Participants

### EXPERTS

Prof.	M. Mushtaq Ahmed	Assistant Professor Department of Shariah and Law, Islamic University, Islamabad
Prof.	Sikandar Shah	Associate Professor Law and Policy, Shaikh Ahmad Hassan School of Law, Lahore University of Management Sciences
Prof.	Uzair Kayani	Assistant Professor Law and Policy, Shaikh Ahmad Hassan School of Law, Lahore University of Management Sciences
Prof.	Ataullah Khan Mahmood	Assistant Professor, Department of Shariah & Law, Islamic University, Islamabad
Mr.	Reto Stocker	Head of Delegation, ICRC Pakistan
Mr.	Jamal Khan	Political Advisor, ICRC Pakistan
Mr.	Dilawar Khan	President, CODE Pakistan <i>Former Senior Legal Officer, ICRC Pakistan</i> <i>Former Senior Advisor to the Ambassador, US Embassy Islamabad</i>
Mr.	Haroon Khan	Lecturer, Department of Shariah & Law Deputy Registrar (Academics) Islamia College, Peshawar, KP Pakistan
Mr.	Kamran Abdullah	Lecturer, Department of Shariah & Law Islamia College, Peshawar, KP Pakistan
Dr.	Ziaullah Rahmani	Assistant Professor, Department of Shariah & Law, Islamic University
Mr.	Usman Khan	Legal Advisor, ICRC

### RSIL

Mr.	Ahmer Bilal Soofi	President
Dr.	Ali Sultan	Executive Director
Dr.	Maira Sheikh	Senior Research Fellow
Mr.	Jamal Aziz	Research Fellow
Mr.	Oves Anwar	Research Fellow
Mr.	Abid Rizvi	Research Fellow
Mr.	Mogheesuddin Khan	Research Fellow
Mr.	Saad-ur-Rehman Khan	Research Fellow
Mr.	Fahd Qaisrani	Research Associate

**Appendix III: Pakistani Legislation Indicative of  
'Domestic Humanitarian Law'**

1. Constitution of Pakistan, 1973. Provisions relating to the Armed Forces: Articles 8(3), 10 (3)(4)(5)(6)(7)(8)(9), 237, 245 and 256.
2. Provisions of the Pakistan Penal Code, 1860: Secs. 121 – 140.
3. Provisions of the Code of Criminal Procedure, 1898: Secs. 129 – 132.
4. Provisions of the Civil Procedure Code, 1908: Sec. 83.
5. Provisions of the Anti – Terrorism Act, 1997: Secs. 4 & 5.
6. Provisions of the Protection of Pakistan Act, 2014.
7. Action in Aid of Civil Power Regulations, 2011.
8. The Pakistan Army Act, 1952.
9. The Pakistan Army Rules, 1954.
10. The Pakistan Air Force Act, 1953.
11. The Pakistan Navy Ordinance, 1961.
12. The Security of Pakistan Act, 1952.
13. The Prevention of Anti- National Activities Act, 1974.
14. The Private Military Organizations Act, 1973.
15. The War Injuries Ordinance, 1941.
16. The War Injuries (Compensation Insurance) Act, 1943.
17. The War Risks Insurance Continuance Ordinance, 1969.
18. The War Risks Insurance Ordinance, 1971.
19. Rules of Business, 1973
20. The Geneva Conventions Implementing Act, 1936
21. The United Nations (Security Council) Act, 1948
22. The Frontier Corps Ordinance, 1959
23. The Pakistan Rangers' Ordinance, 1959
24. Chemical Weapons Convention Implementation Ordinance, 2000







