NATIONAL SECURITY: IMPERATIVES AND CHALLENGES THROUGH A PRISM OF INTERNATIONAL LAW

Case studies and discussion with a sharper focus on Pakistan

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The views and opinions in the subject publication are solely of the author and do not project the stance of any institution.
…..to Love!
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LIST OF ABBREVIATIONS

- **CCI**: Council of Common Interest
- **CEDAW**: Convention on Elimination of Discrimination against Women
- **CNN**:
- **CPEC**: China- Pakistan Economic Corridor
- **CrPC**: Criminal Procedure Code
- **FATA**: Federally Administered Tribal Areas
- **FCR**: Frontier Crimes Regulation
- **GDP**: Gross Domestic Product
- **GHQ**: Grand Headquarter
- **HEC**: Higher Education Commission
- **ICCPR**: International Covenant on Civil and Political Rights
- **ICJ**: International Court of Justice
- **KPK**: Khyber Pakhtunkhwa
- **LG**: Local Government
- **LGO**: Local Government Ordinance
- **MPNR**: Ministry of Petroleum and Natural Resources
- **NAP**: National Action Plan
- **NATO**: North Atlantic Treaty Organization
- **NDU**: National Defence University
- **Ops**: Operation
- **R2P**: Responsibility to protect
- **TTP**: Tehrik-e-Taliban Pakistan
- **UAV’s**: Unmanned Air Vehicles
- **UN**: United Nations
- **UNCLOS**: United Nations Convention on the Law of Sea
- **UNHCR**: United Nations High Commission for Refugees
- **US**: United States
- **USSR**: United Soviet Union Republic
- **NSC**: National Security Council
The idea of viewing national security from the prism of international law is quite underrated. Traditional approaches are sought in order to deal with evolving challenges and deviation is considered aberrant. However, today, the changed nature of threat perceptions and subsequent imperatives of security brings forth newer avenues of impact and discourse of international law. This indeed provides an index of the newer compulsions in the external and internal dimensions of national security and role of international law as a tool to address or highlight them. Where the UN Charter provides a ‘collective security system’ and raises the specter of the Security Council as a protector of international peace and security, bifurcating myths from realities is the need of the hour.

This publication proposes to investigate the national security imperatives of States, particularly in terms of conflict and cooperation, through the operative and normative prism of international law. The study of both the areas are subject to complexity and have narrow yet significant overlapping themes. It is hence imperative for the purpose of such a publication to reflect the understanding of international law as a facilitator of state interaction and not as a body of negative restrain. It is indeed imperative at this point of history, when the World Order is subject to change with the rise of new stakeholders, non-state actors etc. and the diminishing idea of State being the primary subject of international law.

Furthermore, for the notion of promoting the tools and operations of international law as ‘law-fare’, this publication highlights the challenges posed to ancient concepts like Sovereignty, territorial integrity and independence of a State after the boom of Globalization. The idea is to view international law as a liberator of these concepts if appropriate tools are investigated and later materialized by States in their interaction. Consequently, the world which is weary of Wars since time immemorial, had the tool of treaties, customs and common consent or general practices to manage conflict and promote cooperation as salient features of national security.

Within this purview, inquiry of Pakistan’s evolving national security imperatives through the prism of international law is indeed an interesting case study. Its early choices to remain connected to the ‘sole super power’- the US, has brought more challenges than opportunities to the country. Thus, evolving its national security imperatives from external to regional and now to internal. Today, the country is posed with serious threats from within, starting from terrorism, severe energy crisis and sectarian based violence to name a few, while the external threats remain overwhelmed by a dominant India and turbulent Western border with Afghanistan. All combined, stresses on the importance of developing strong narratives both in the political and legal domain. Needless to say that, international law has the potential to act as a key tool of mitigating evolving imperatives of national security of Pakistan.
ACKNOWLEDGEMENT

This book marks the culmination of over six years of my efforts to first understand and then examine and analyze various aspects of the ‘law of nations’ and its relevance in furthering national security objectives of a State. The idea was subject to my background as an advocate with a passion for research both in the legal and security aspects of Pakistan. Hence, the thrust for this publication is in the underlying objective of highlighting the significance of international law in foreign policy and national security operatives, a window which Pakistan has used irregularly; despite the fact, that the world at large has become highly legalized.

It all started with my realization about Pakistan being host to one of the biggest number of refugees in the world; more than 1.3million are registered in Pakistan. It is indeed a grave challenge to host such a big number of refugees in a country which itself is fighting a war from within. The heavy influx of refugees due to wars in Afghanistan was not managed through proper documentation or a proper legal arrangement in the beginning. Once the need was realized, myriad of challenges in this regard had entrapped the country. Comparatively, Iran had strict regulations for managing the influx of refugees from Afghanistan. Hence, my realization of how significant legal procedures are in the interaction of States, particularly in issues of national security, was deepened.

This publication would not have been possible without my inspiration from the magnitude of issues posed to Pakistan and the idea of dealing with them within the legal domain. It was an idea of ‘war of words and legal rationale’ instead of bullets and ammunition. Nonetheless, it is a humble compilation of my reflections from working on issues of national security since the past few years and how international law is relevant in channeling the loopholes. I was very fortunate to have extraordinary mentors, both at my workplace and university, who guided me persistently. Above all, the support of my loving parents and siblings has helped me through every thick and thin; which was also essential in the compilation of this book.
INTRODUCTION

INTERNATIONAL LAW AND NATIONAL SECURITY: RELEVANCE AND OVERVIEW

The idea of viewing National Security from the prism of International law is often taken for granted. This rhetoric is even more prevalent in developing countries like Pakistan. Conceptualization of using international law as a tool in furthering national security objectives and agenda's fall prey to ‘failure’ of hard law\(^1\); while ‘soft’ law's\(^2\) ability to deal with threats emanating from external and internal threats falls prey to politicization. However, the fact remains that the operational mechanism of international law provides an index of opportunity for countries like Pakistan in order to regulate threats posed to its national security both from the internal and external fronts. It can be argued that regulating issues posed to Pakistan, like Pakistan- India relations, terrorism, maritime security and even energy crisis if also viewed from the prism of international law can provide a comprehensive framework for achieving tangible objectives. Furthermore, both ‘hard’ and ‘soft’ law has the capacity to support a framework for achieving policy objectives in every domain including economic, political, social and military.

In this collection, international law is viewed from a perspective of an ‘operative’ tool for furthering national security objectives of Pakistan. It seeks to move forward in the subject by providing an amalgam of national security and international law as two inseparable ingredients of achieving objectives of national interests and dealing with tangible and intangible threats. It is imperative to provide such a discourse for Pakistan because of the lack of literature available on the subject and also because of arbitrary understanding of both the domains. There are several unique features of this effort. Firstly, it perhaps is one of its kind of a publication which views National Security from the prism of international law for Pakistan. Second, it focuses on the current setting of both the subjects for Pakistan and brings forth numerous issues. Third, it starts from the very basic to the advanced level of understanding of both the subjects making it reader friendly at both graduate and post-graduate levels. Fourth, it comes at a time when Pakistan is amidst a transitionary phase of the region and is being regarded as the ‘zipper’; where international law perspectives become equally important. Finally, this book provides an organizational scheme of salient features of both the subjects and relevance for each other at the domestic and international level equally.

The idea of this book was initially geared towards deliberating on the key issues of national security as posed to Pakistan through the prism of domestic law. However, when I started teaching as a visiting lecturer of international law, I realized that this publication needs to be linked with major salient of the law of the States. Essentiality of this step lies in the significance of linking the domestic legislations with international obligations, constructing foreign policy while keeping in view international norms and standards and even connecting economically within the prism of international law. Furthermore, while Pakistan is amidst a major war against extremism and terrorism both through kinetic and non-kinetic means, deliberating on the legal framework both internationally and domestically is highly essential. Needless to say, that both the domestic and international law operate in an aura of reciprocity.

Hence, the emphasis of this book is on how the framework of international law facilitates or rather regulates the major challenges and opportunities posed to the national security of States particularly Pakistan, while streamlining with the domestic law of the country. It aims towards perception building of ideas and concepts in this domain and highlighting the notions of the international legal order for facilitating national security issues and concerns.

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\(^1\) Generally, ‘hard’ law refers to instruments that create legal obligation. It actually strengthens the credibility of State interaction. Sometimes treaty obligations are considered as hard law.

\(^2\) ‘Soft law’, is a term which is used for normative considerations.
Chapter 1 deals with the very basic understanding of national security and international law with key focus on Pakistan. While moving systematically in the discourse it first provides a theoretical framework for understanding national security; key concepts ranging from definitions and salient of the concept including external and internal are highlighted. It stresses on the fact that, issues pertaining to national security transcends borders of a country and are linked primarily with the issues emanating from the regional and global level. Second, as a matter of fact and concern of national security, the chapter delves upon the traditional and internal challenges as posed to the national security of States. In the 21st century, these challenges are indeed overshadowed by extremism and militancy which receive special focus in this part of the chapter. Third, in this purview, the chapter links the role of an independent and objective foreign policy in order to deal with the external challenges. This primarily brings forth the idea that domestic compulsions need to be kept in view in order to intelligently streamline the policy options dealing with external challenges. Lastly, the chapter presents as a case study the national security imperatives of Pakistan by keeping in view the entire theoretical framework as discussed earlier in the chapter.

Chapter 2, aims to provide a basic understanding of international law. It gears up the discourse within the ambit of various definitions and scope of the subject and further sheds light on the subjects and sources of international law. Its main feature is the idea of considering state as the major subject of international law, despite the emergence of non-state actors as a key phenomenon effecting international relations.

Chapter 3, acts as a major bridge between the two phenomenon’s; international law and national security, through an evolutionary approach. It provides an insight into how relevant it is to view both of the subjects from a single prism of evolution. Primarily, it analyses the evolution of national security and its sustained importance for a nation-state, alongside the evolution of international law as ascertained from the period of ‘father of international law’- Hugo Grotius. It also brings forth the understanding of how both the phenomenon’s have evolved almost together and impact each other in both operative and normative sense. This chapter in fact lays a ground for the next chapter which specifically deals with the interplay of international law and national security.

Chapter 4 acknowledges the fact that national security and international law both have a major interplay to perform amongst each other. It is imperative to highlight at this point of history that, while dealing with challenges emanating from the internal and external fronts, the domestic and international laws should be in harmony with each other. Once this is achieved, international law can act as a tool of supplementing actions taken by States. However, due to the inability of hard law to deliver and politicization of soft law by major powers, developing States tend to look away from the importance of formulating a legal framework for their actions. It is the States and not international law itself that fail to achieve acceptable delivery from the international legal order. In order to augment this argument, the chapter is divided over four separate subjects all complying with the current status of the international legal order and framework for streamlining domestic law with the international one. First, it provides a basic insight into the most important source of international law- treaties and their relevance in supporting national security initiatives. This is then supported by two separate subjects of instruments related to suppression of Terrorism and impact on National security and protection of environment: International Agreements, Features, Formation and Effects. While lastly, it delves upon the major aspect of role of armed forces and phenomenon of ‘use of force’ all highlighting how international obligations play a role in supporting national security.

In chapter 5 a major analysis of what the international law should deliver and is not able to deliver is presented by applying the understanding achieved earlier on the case study of Pakistan. The country is posed with numerous challenges from the internal and external fronts and is busy dealing with them through various policy options. However, after 9/11 it was posed with serous compulsions to remain connected with the ‘super power’ and also restrict the brunt of war in its neighbourhood. It ends on the note that, international law like other tools of dealing with threats to national security may provide a framework to justify and harmonize the efforts and goals of a state.
Map 1: Administrative Regions of Pakistan, along with neighbouring countries
Conceptual Understanding Of National Security

Fig 2 Troops on a counter terrorism ops
National Security:
Conceptual and Theoretical Understanding

PRELUDE

So, what is National Security? Generally, there have been irregularities in the understanding of its conceptual underpinnings. The idea has merely rested on an effort to secure the national boundaries, which as an implied meaning overwhelmed countries over centuries. However, an evolutionary phase struck this understanding and with a different connotation, every step taken by a State, which guaranteed the security of its territory, people and things, was eventually deemed as national security. Consequently, it was not until the realization of the devastating consequences the Great War dawned on world peace that the concept of a tangible phenomenon of national security emerged. This remains true because, ever since Wars have been threatening civilizations, protecting the existence of State was the mainstay of politics, amid ensuring security being the imperative tool. The Great World Wars and the resultant instability, later on propelled the World conscious towards protecting territories against aggression and restricting the ‘use of force’. The goal was to shun antagonism and designs of hostility. For this purpose, the United Nations and its Charter in the year 1945, restricted aggression across national boundaries and locked down the existing territories. The focus shifted towards ‘collective measures’ of maintaining international peace and security by dealing with threats posed to global peace.

Meanwhile, it may be rather delusional to view the understanding of national security in isolation of the factual suburbs of the globe. The idealistic paradigm of this understanding fell prey to the harsh realist connotation. Due to a world order overwhelmed by power politics and efforts of major powers to sustain their ‘rule’, security has become a relative term. Thus, the efforts to secure national security concerns by one country sometimes over step the security boundaries of another State. In other words, national security evolved as a ‘contested concept’, with tentacles spread over a wide spectrum and scope. It was sometimes referred to as a rhetorical concept, while in strict military terms considered as a matter of policy. Conceptually, it has evolved while raising complex questions of the role played by a State in guaranteeing its security and protecting its political, economic, social and military interests. Today, in a world which is weary of Wars and inter-State rivalry, the idea is overwhelmed not just by State responsibility but also by how far a State can go in the pursuit of fulfilling its objectives, by keeping in mind the collective security of the international arena.

Theoretically, it can be trickier to acquire a holistic understanding of a complex subject like national security. Today in the second half of the 21st century, amidst major global transformations, national security as a term remains as contentious as in the early years of 1950’s. It was an era marked by the weariness of two great wars, a precursor to the cold war, and rise of communism in China. On the other hand, the developing world was privy to insecurities of foreign interventions and threats against independence. Hence, threat perceptions of states were influenced by external factors driven by strict military apprehensions. For the United States, this era was also a turning point for its policies of ‘containment’ and support for

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4 This refers to the World War One from 1914-1918. It is deemed as one of the major catastrophic events of the world history.
5 Ref to the world scenario after both the World Wars i.e. World War One and Second World War
7 Article 1 of the UN Charter, 1945.
9 Ibid.
10 Ibid.
democratic institutions in developing countries. The chronicles of NSC-68, a report presented to then President Truman, by the newly established National Security Council,\(^{11}\) was a ‘shifting sand’ of threat perceptions for the entire world.

Hence, the era of 1950’s to the mid-1960, in theory, was rise of developed world activism and simultaneous efforts of the developing world to resist the adventurism. Hence, security was equated with a State’s military strength and ability to protect the national goals through tangible means. It is worth mentioning that, this generalization was in theoretical terms only, while in the real world security issues were far more complex than merely being external. Defending borders and adventurism was one aspect of national security, while the other aspect of internal cohesion and strength was ignored altogether. Creating a link between these two aspects was a tedious task for early national security theorists. It is due to this complexity that, the concept was regarded as ‘essentially contested’ under Barry Buzan’s proposition borrowed from W.B. Gallie.\(^ {12}\) Later on famous Yale studies also characterized national security as an ‘ambiguous’ symbol.\(^ {13}\) Hence, the list of scholars and academicians characterizing its abstract nature became quite long and some scholars even argued if such a subject should even be regarded separately than other streams and suggested its merger in others areas of similar dimensions.

Amidst the criticism and negativity, National Security has managed to evolve as a vital pillar in the development and protection of the idea of a nation-state. Keeping in mind views of various scholars and theorists about the very nature and evolution of national security, this chapter stresses on the significance of the subject. It begins by delineating national security as a phenomenon and links up its underpinnings with the threats from the external and internal domains. Numerous theorists and scholars have dwelled into the theoretical understanding of national security however; for the purpose of this publication emphasis is laid upon its evolution. This is imperative for understanding the change in foreign policy options of nation states today while dealing with both external and internal threats posed to their national security. Particularly, the chapter takes Pakistan as a case study to understand the conceptual framework and dynamics of national security as a concept. The notion starts with the very basic understanding of what do we generally mean by national security.

**Can National Security be understood?**

Within a strategic framework, the Encyclopedia of Social Sciences defines national security as the

‘……., Ability of a nation to protect its internal values from external threats’,\(^ {14}\)

For indulging into an extensive debate within this context, it is often opted to split the term in to two i.e. National and security. From these two elements, security is a question of authority and power while national is related to the tangible territory of a State. For students of international relations, the concept of security flows from State responsibility. It is the extent of balance and equilibrium maintained by States in pursuing their objective of guaranteeing its rights and serving its duties. This is true because, the nature of the world order being highly state-centric has always maintained the impression of insecurities and fear. In doing so, the State has evolved to become both a ‘provider’ and ‘protector’ of security.

The salient features of the Treaty of Westphalia, signed in the year 1648, heralded this evolution.\(^ {15}\) It effectively recognized the significant principle of ‘State Sovereignty’, and its ability to control affairs within its territory. Furthermore, this treaty also emphasized on equality of States

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\(^{15}\) Peace of Westphalia European History, the Editors of Encyclopedia Britannica
as a general principle irrespective of size and strength. State security as a matter of theory is a concept of protecting ‘sovereignty’ and ‘independence’, which overwhelmed the international arena particularly after de-colonization in the 20th century. Hence, a state in its boundaries, both geographical and in terms of personality, is a sovereign entity. The treaty of Westphalia, rested in a state, supreme authority of regulating domestic affairs and extending external security. It is the protection of this virtue that has defined and evolved the concept of security.

It is worth mentioning that, the role of a State in guaranteeing security for its territory was a limited concept. The idea was very much tangible and physical, recognized only after the State evolved to be the sole legitimate actor of international relations. De-colonization which resulted in the formation of new States, rested in a State the responsibility to protect itself from elements of instability in physical terms. However, after the Second World War, this conception expanded. States started looking inwards and determining economic, social and political interests gained space in the conception of security. This was a major period for a widened scope of state responsibility. The questions of how a state will guarantee economic development which in turn will help in improving the social lives of citizens were widespread. Issues like, health care, education, welfare, employment, and individual rights were supposed to be the concern of the State itself, which as a result increased the State’s internal legitimacy or otherwise in case of deviance.

Consequently, in the realm of theory, the realist view of security is a ‘derivate of power’. Particularly, this view was prevalent during the era of major wars, in which there was an intra-State power struggle. However, after the Cold war, security became a different concept with diverse domains. In his book ‘People, States and Fear’, Barry Buzan suggests that, the security as a concept is ‘too narrowly founded’. In other words, he indicated that, there is a need of a more broad security framework that includes concepts which were not catered for previously, including economic and regional security. His approach is indeed very holistic. Although he relates the analysis with beliefs from neo-realism, including anarchy, but his ideas are more constructivist in nature with analyzing security step by step in order to reach a tangible conclusion. Particularly, due to the change in nature of threats and major events like the Two World Wars, Nuclearization of the world, global economic crisis, boom of globalization and now trans-national terrorism, security has evolved to become a fluid concept.

In this regard, for the purpose of understanding security, an amalgam of the various elements that have evolved over a period of time is preferable. The discussion above highlights the salient features of the process of evolution and also highlights arbitrariness. This is true, because internal values may vary in different societies and external threats may evolve dramatically depending upon the perceptions and narratives of a state. It is in this purview that no state has been able to present a wholesome package of what it considers as security and how it aims to deal with it. However, for addressing the threats posed to a state both from the internal and external domains, time and again strategies and policies are formulated. They are based on three major parameters:

1. Power

Possession of power and having ultimate control over the sovereignty and territory of one’s own state is a basic criteria of ensuring security. States maximize power and strength in relation to its fears. Hence, the defining feature of possessing this ability in the realist paradigm is the impression of a highly dangerous international arena. States either adapt to the dangerous of the environment, or they attempt to change their environment with relation to the aims and objectives set up by them in consonance of foreign policy objectives. Either way, the ability to exercise control and influence, in order to gear up with the requirements of responsibility is

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19 Ibid.
power. Interestingly, in the theoretical domain, this ability has evolved from being only internal to a combination of both external and internal influences. However, the relation between power and influence is quite complicated and perhaps only David Baldwin was able to bring about a thorough debate on the difference and machinery of both the phenomena\textsuperscript{20}. The question of what constitutes a ‘Great Power’ remains unsettled even today in theory, as Harrison Wagner observes that the term ‘has no standard meaning’\textsuperscript{21}. In strict political terms, power and influence have been used so interchangeably that, power has sometime existed of being devoid of meaning. In simple terms, power for a State requires it to be influential both within its territory and outside its borders. This becomes relevant in a realist world with concerns of security of state evolving continuously, where power is a major attribute of a state. Consequently, the major division of states into ‘great’, ‘middle’, ‘super’ and ‘hyper’ in the study of traditional international relations is thus based on the very attribute of power. There are numerous factors on which States are rated within these divisions, which include; size of military, population, resource base, efficiency of institutions and quality of leadership. Some of these factors are unassailable like geography and size, while others remains changeable with relation to the interests of states and the changing environment around it. These points allow us to differentiate between actual and latent power; where the latter is possessed by a state at any one point in time as opposed to the power it could generate in a given time period.

It is worth mentioning here that, the ability to exert influence in order to protect the security objectives of a State, depends on numerous factors and also the environment at that period of time. For example, if power is an attribute of a State from which the influence is measured, the effective defeat of the United States by North Vietnam, merits detailed analysis\textsuperscript{22}. The situation illustrates that, not only size of military and economic base play major role in determining influence and power, but also the features of effective and strong leadership along with the role of other institutions of State, like media are significant. The United States was defeated due to the lack of support of its own media, inability to ally with effective States in the region against Vietnam, and lack of skill in jungle warfare. All this, despite of the US being a ‘powerful’ state at that point of history.

Hence, the idea of power being the major element for ensuring security of a State according to the traditional political thought found in assertions of Aristotle and Machiavelli have lost credibility in the modern times\textsuperscript{23}. They stressed on military and tangible influence as the defining feature of power, which after the Second World War was deemed as ‘hard power’ in the study of security. With examples like the defeat of the US and ramifications of the Cold War, dawned an elaborate understanding of power and influence. It was considered that, not hard power alone will guarantee security of a State. If the US had modeled its environment by forming allies and numerous third parties had not exerted influence during the War, the result would have been in favor of the US. Hence, power depends not only on hard facts, but also on perceptions of will and reputation. So the ability and power to influence elements of instability for the purpose of persuading them is ‘soft power’. It involves all the methods and means other than use of military or war in order to protect ones security.

This brings the reader to another dimension of power; the ability to resist change. In the security studies, a defensive posture determines tactical advantages as compared to an offensive one. It gives time and space to gather resources and devise strategy for using the available power and influence to resist offense; in other words shun change. Catch phrases like ‘balance of power’ have developed through this debate. However, as difficult as it remains to understand power an influence, the idea of striking a balance between units of power in the international


\textsuperscript{22} MAJOR JAMES M. BRIGHT, ‘A FAILURE IN STRATEGY: AMERICA AND THE VIETNAM WAR 1965-1968’, United States Marine Corps Command and Staff College Marine Corps University 2076 South Street Marine Corps Combat Development Command Quantico, Virginia 22134-5068.

\textsuperscript{23} KEVIN HARRISON and TONY BOYD, ‘Understanding Political ideas and movements’, Manchester University Press, 2003.
arena is more difficult of a task. Questions like what may be balanced, how can it be balanced and importantly, will there be an environment feasible for balancing power? As a basic understanding, power may be the ability to exercise influence in order to shun external and internal intrusions. This is true because, an element which overwhims the power of a state and is not controllable may bring serious damage to its wellbeing. On the contrary, exercise of extreme power by a state, which is damaging to the sovereignty of another state may not be considered an element of national security.

Key to these presumptions are the phenomenon of independence and sovereignty. States maximize power and influence by being watchful for sustaining these significant features. This is true because, States determine their own interests while keeping in view its abilities and influence in order to reach the desirable goal of 'survival'. The state aims to survive not only within its tangible boundaries but also to protect its intangible established norms and capacity to determine its own destiny, without external influence. Here the notion becomes rather complicated when survival becomes a goal at the stake of exercising influence over the sovereign boundaries of another State. A clash of interests emerge and power becomes a relative term dependent upon environment and pursuit of authority exercised in the international arena.

As a matter of fact, fear and insecurities are the permanent feature of the international arena. They drive the interests of the State and determine the patterns opted for survival by them. In this regard, the traditional realist paradigm account for a very dangerous world, where States as units of international relations rely on selfishness and aggressive designs to survive. Power and influence is used to undermine other States and any susceptible competition. This very nature of States, as a basic animal instinct, is key in dealing with insecurities and fear. Contrarily, the neo-realists emphasize on a less aggressive posture of States while exercising power. States are considered to be more rational and do not get influenced by fears or insecurities. As for threats of war and instability, Hobbes stresses on the fact of war being a possibility and not a continuous process. Hence, power is exercised as a key factor of States but not in the most aggressive designs.

The idea of this security paradigm is essential as far as the real world is concerned. The problem starts when States opt for extremes and fail to strike a balance between fearfulness and watchfulness. Despite the fact that fear and insecurities will drive the level of power used by States still the idea of their attempts to maintain relations is not obsolete. The neo-realists believe in a world of no friends and no enemies, while traditional realism is driven by adversary in principle. The fact remains that, power and influence are used for managing insecurities. Some States use aggressive designs but also face the fear of isolation. While others maintain a social relationship by following certain rules and norms to regulate insecurities. The rules of international law mandate non-aggression and non-intervention, while some States do not follow the rules but still affirm their existence in non-compliance or excuses for exemption.

2. Force

What is force? Generally speaking, it is the use of military might or law enforcement capacity in order to achieve some objective. It is actually the use of strength which should be deemed equivalent to power per se. However, force should also be use cautiously or otherwise it can diminish the strength and power. On the other hand, if it is used effectively it can actually enhance the power. In fact, force is an instrument and tool used for showing power, particularly by the Armed forces of a state. It eventually should be viewed separately from tools that are static including military capacity. Hence, force is a narrower concept than power and is applied as a coercion instrument.

3. National Defense

Categorically speaking, this may refer to the ability in terms of strength of the armed forces of a state to protect its sovereignty and territorial integrity. Hence, it is about using kinetic options for protecting national interests. This has been one of the major criteria for ensuring national security and has evolved dramatically in the post-9/11 world. Hence, with the boom of
globalization and emergence of trans-national threats, national defense by armed forces become very much internal in addition to external.

Within the ambit of these parameters, and conceptual evolution of the terms related to security of a state, domains other than the traditional ones gained importance. This meant that, states became more cautious about political, economic, human, environmental and even cyber security. They are described as follows:

**Political Security**

Providing for the protection and security of the sovereignty of the government of a state against any undue pressure and involvement in domestic affairs refers to political security. It is a concept which enshrines the supremacy of a state, the law of its land and also its citizens.

**Economic Security**

As far as economic security is concerned, it is related to the protection of a State’s capacity of providing opportunities for economic development. It involves not only the protection of capacity of providing economic development to its people, but also how the government and people are able to take and control their own economic and financial decisions. Economic security also entails a State’s capacity to protect its economic freedom from external threats and coercion. Hence, it entails not only a policy for economic development but also the ones of law enforcement agencies, international agreements on finance, trade and commerce. Very recently, it has also been defined as a subset of human security once it deals with eradication of poverty and inequality in income.

**Human Security**

The concept of human security is related to idea that was developed at the United Nations in the post-Cold war era. It actually entails the protection of people from hunger, poverty, disease, and repression, which includes instances of inflicting harm on dealings of daily life. In the recent past the concept of human security has expanded to include: environmental, economic, personal, food, community and political security. The characteristic that distinguishes human security from other domains is the idea to avoid considering national security as a military issue between States. It instead focuses on causes of social and economic domains and considers the ‘international responsibility to protect’ as protection from violence. Consequently, it is overseen by the United Nations.

**Cyber Security**

Cyber security is related to protecting the Government and citizens of a State from exploitation through computer and data processing infrastructure from interference of harmful systems, either from within the country or outside. Hence, it involves both national defence, law enforcement and homeland security.

**Environmental Security**

Environmental security entails numerous meanings. Traditionally, it is related to a response to conflicts that cause environmental problems like energy shortages, water shortages and severe climate changes. There is a common assumption that, these problems are ‘transnational’ and can cause a severe conflict amongst nations. Following which, a little recently, the concept has involved to include protecting environment and climate from exploitation by man-made threats. Hence, there is a need for entering into treaties and agreements which allow international governance. Earlier natural disasters were not considered as threats to national security, but now very recently, they are being considered as one of the most major threats posed to States.

Primarily, national security policy is crafted keeping in mind various threats posed to a country both from the internal and external domains. As it is evident from the explanation above,
parameters for identify the policy may vary in different countries. Realities like geography, ethnicity, sectarian diversity and efficacy of the government and armed forces may profoundly affect the policy formulation phase. On the other hand, the change in nature of threats from traditional to non-traditional has also revolutionized the concept of both national and international security. Today, threats are trans-national, the enemy is faceless and realities change very rapidly. This is contingent upon many factors and owes to a systemic change in the international arena before and after the twin tower attacks on 9/11.

**Role of foreign policy and external challenges vs. traditional and internal challenges**

As discussed earlier, the aim of a state is to protect within its boundaries its internal values from external threats. In light of a shift from a nation-state perspective international security environment to significance of individual and societal endeavours, a state is posed with immense challenges while crafting its foreign and domestic policy. In fact, a carefully developed foreign policy and exhaustively deliberated domestic policies play a key role in determining the national security policies of a country. These then further impact regional and international security, especially after the era of globalization and terrorism as a major threat. Various factors determine the aspects of this model including: geography, ethnicity, sectarian divide, economic strength and military might. They majorly impact the threat perception of a country and also helps it in developing strategies in milieu of its national interests.

**External Challenges and Role of Foreign Policy**

The article 55 from the UN Charter points out that: "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a) higher standards of living, full employment, and conditions of economic and social progress and development; [...]c) universal respect for, and observance of, human rights and fundamental freedoms for all [...]". Under this same model and during the 20th century, "alliances" were the main form of regional security and they originated Collective Defence with which a group of countries of similar ideology faced a common military threat. 24 Consequently, the United Nation actually creates agencies that may promote this purpose where the individual is the centre of interest. This recent idea, claims to be a more liberal political thought that is materialized through the concept of 'Collective security', that allows the use of violence proscribed for protecting national interest, except for self-defence. 25 For Ballesteros "collective security results from a joint decision of certain countries and in which the commitment to agree with the respective security policies of other countries is reached by balancing, in solidarity, differences in interests, as well as by reducing uncertainty and discouraging aggressive behaviours". 26 However, it is influenced by confrontation at the bipolar level in the second half the 20th century, where the Collective security system of the UN shows its limitations.

**Traditional and internal challenges**

There are various fundamental elements that lie at the core of domestic policies and internal challenges of a country which help in shaping its national security policy two of which are extremely important:

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24 Article 55 of the UN Charter 1945.
25 The concept of Self-Defence is proposed in Article 51 of the UN Charter.
1. **Socio-Political Stability**
   Peace and harmony amongst the state as one unit is at the heart of promoting socio-political stability. This is a challenge when a state inhabits a diverse ethnic and sectarian population.

2. **Territorial Integrity**
   This includes both the physical and ideological borders of a state. It is of significance to note that, the very essence of maintaining sovereignty is over physical boundaries and ideological narratives.

3. **Economic well-being**
   A country's image is radically changed in the international arena based on its economic strength and sustained development. Options which help in promoting economic activity lies at the heart of domestic policies of a country.

A case study of Pakistan

Pakistan placed at the cross roads of Central, South and West Asia is at the heartland of understanding the dynamics of national security as a phenomenon. This is true because, although the country is placed at a prime geo-strategic location, this virtue has proved to be more of a reason of challenges rather than opportunities. Numerous attempts have been made to jot down the key factors determining Pakistan's national security imperatives but still this remains as contentious as the phenomenon of security itself. This part of the chapter attempts to analyze the imperatives of national security for Pakistan within the theoretical understanding of the concept as discussed earlier. It takes key notions of the conceptual evolution of security and provides for the reader an understanding of how important it is to carefully craft a national security policy by taking Pakistan as a case study. It starts by giving a brief account of Pakistan's threat perceptions, linking them with the external and internal security imperatives, and subsequent policy formulations.

**Pakistan’s Threat Perceptions**

Pakistan finds itself at the heart of a turbulent neighbourhood and instable domestic environment since its independence in the year 1947. Divided in to two halves (East and West), the country was initially posed with grave external and internal challenges. A strong nation at the core was given a weak footing, which later led to the fall of East Pakistan in the year 1971, further stabbing the strength of the country. On the other hand, traditional rivalry with India overwhelmed the security policies of Pakistan. After the boom of globalization, when non-traditional security challenges overwhelmingly changed the imperatives of national security in the world, Pakistan was faced with even graver challenges. So today, not only are Pakistan’s threat perceptions overly India centric but are also deluded with extremism and terrorism as one of the prime existential threats, both internally and externally.

The fact that Pakistan was put to test and trial from time and again to protect its territorial sovereignty from neighbours like India and Afghanistan, has majorly shaped Pakistan’s national security policies since its independence. They have been extra ordinarily defence centric with giving prime importance to the armed forces and as a matter of fact traditional approach of building upon a nation-state as the prime subject. It is one of main reasons of why Pakistan is considered as a ‘garrison state’ with weak civilian institutions. Pakistan has been using ‘hard power’ and force multiplier initiatives to deal with this demon of instability. This sadly resulted in heavy reliance on external help and alliance formation with the United States which proved to be counter-productive.

Simultaneously, terrorism and extremism proved to be a major game changer in the threat perception of Pakistan. It had to launch wars within its own territory, with operation Zarb-e-Azb and Radd-ul-Fasaad as one of the key kinetic steps. On the other hand, it also tried to deal with the extremist mindset through a National Action Plan (NAP) after the barbaric attack on a school in Peshawar on 16th December 2014. Today, the country is considered to be going
through special circumstances, as mentioned in the 21st amendment and is taking special steps like the establishment of military courts in order to deal with the situation.

These factors coincide with Pakistan’s perception of non-military threats to its security including human, cyber, economic, environmental, and political security. Today, the country is amidst acting as a ‘zipper’ of the region, through the China-Pakistan-Economic Corridor – CPEC, and is looking towards converting its geo-strategic location into an opportunity rather than a liability as it has been since its inception.

However, the fact remains that, the country perceives itself to be amidst graver challenges as the ones it was posed with after its inception. Today, it is about survival against an unknown enemy, a delusion, an idea, a narrative. The rest of the threats, including the ones from India, Afghanistan, and also from weak economy, energy crisis, and lack of a concrete basis of human security, all are overwhelmed with this idea. With this token, it is imperative to delineate Pakistan’s internal and external security challenges from a strict perspective of the factors as mentioned earlier.

**Internal and External Security Imperatives of Pakistan**

The evolution and transformation of the term of National Security, from merely a state centric to societal and individual approach is profoundly prominent in the international arena. For Pakistan, the multitude of internal and external threats from a turbulent region to human security, economic and political security, this evolution has been far more prominent. It has not only been overly defence centric in traditional terms, but has also proved to be more military oriented with the boom of globalization and trans-regional militancy and extremism as major sources of instability. The country has been criticized for having a narrow understanding of security which resulted in a blow back of its division in the year 1971 and also the gravity of the situation it faces today. Some even believe that due to the extra importance of India as a threat, Pakistan was not able to deal with other security challenges the way it should.

These arguments may be somewhat true, however, the fact remains that, Pakistan has been posed with a magnitude of traditional and non-traditional security threats from the Indian realm since its inception. In order to deal with this imbalance due to India’s regional aspirations, Pakistan has not given priority to unwarranted things, sometimes at the stake of its political security. In this regard, a general overview of Pakistan’s internal and external security challenges are enlisted below:

**Internal Challenges**

Composed of around 180 million people, Pakistan is posed with a magnitude of internal challenges. Although demarcating strict phenomenon is not possible, but the following factors play a pivotal role in shaping Pakistan’s internal compulsions since its inception:

Firstly, the multi-ethnic and sectarian divide of the country is not devoid of sharp fault-lines which are easily exploitable by entities having diverse vested interests. A Sunni dominated population with percent overshadows the mindset of the ruling elite, sending vibes of insecurity in the Shia population.

Secondly, the country since its inception had a weak economic backbone. The GDP has been growing with a slow pace.

Thirdly, since its inception, the country’s governance has swung amidst a fragile democracy. This has also led to undue foreign involvement in its internal affairs and has also sometimes been at the stake of its sovereignty.

**External Challenges**

The host of the internal challenges as posed to Pakistan also are directly linked with the external challenges. They may be enumerated as following:
1. **India and the unresolved disputes:** Outbreak of the first Indo-Pak war over Jammu and Kashmir in the year 1948 embarked a magnitude of tensions between the two neighbours. This factor particularly has been a bone of contention ever since and has been extremely significant in shaping the security policies of both the countries. Both the countries have distinct notions over the issue where India considers it to be merely a ‘territorial’ issue, whereas Pakistan stresses on the triangular nature of the dispute with supremacy of the will of the Kashmiri people. Furthermore, after Pakistan's attainment of the nuclear bomb in the year 1998, contention in the issue was exasperated.

2. **The Afghan Quagmire:** Threats from Afghanistan although a legacy of historical and policy choices of Pakistan, are becoming graver by each passing day. Starting from the territorial dispute of the ‘Durand line’, linking to the flow of instability from the porous border, the threats are multifaceted. Primarily, with the prolonged wars in Afghanistan and inability to curtail the Taliban threat, have greatly impacted Pakistan's security.

3. **Trans-national militancy and extremism:** Militancy although not a new phenomenon has emerged as evolved as an existential threat to Pakistan. Most of the militancy undoubtedly home-grown is influenced by external factors including the indigenous sectarian fault-lines, greatly impacted by the divides and wars in the Middle East. Fighting an enemy which transcends borders is a mammoth task. Pakistan has lost more than 60,000 lives in the process and fought wars on its ground with most recent being the Zarb-e-Azb.

**The Questions of Policy and Strategy**

As discussed earlier, national security is not a strict phenomenon. It is flexible and evolves with the change in threat perceptions of a state according to its own national interest. However, limitations demand a scrutiny of the policies adopted by States which are damaging to the security and sovereignty of other states. Pakistan had a rough ride when it came to dealing with internal and external challenges. With too much on the plate, the policies actually lacked cohesiveness and seemed to be crafted in isolation of each other. To achieve a success in defending its internal values from external threats, a step towards moving from a strict traditional state centric approach to an individual and societal approach is the key. Some policy options to link internal and external threats are as following:

- The sectarian divide is a natural phenomenon and is bound to have linkages outside the borders of Pakistan. However, concerted efforts are required to restrict exploitation on the basis of this divide. It will require a wholesome package of providing job opportunities on equal basis, shunning possibilities of nepotism and promoting a narrative based on unity and solidarity. Religious and sectarian extremism is to be fought with the ideology of Pakistan.

- Promoting economic activity is the key to development. States like China and Japan have managed to attain a quantum jump in their image in the international arena due to a strong economic base. For Pakistan, converting its geo-strategic location into an opportunity is the key. The CPEC, CASA-1000, TAPI, and IPI all are not merely projects but also imply on how Pakistan may play a significant role in its own and regional development. For this Pakistan will have to first put its own house in order and strengthen local governance.

- Rage against India is a prime factor in shaping Pakistan’s policy. No doubt India has been a source of instability for Pakistan internally and also shaped its external threat perception. The key lies in resolving issues bilaterally and also keeping the option of internationalizing the issues if stagnancy is forced by India.

- For Afghanistan and related instability, options of creating mutual stakes should be formulated. Pakistan should not be seen as an intruder in Afghan affairs, however the reconciliation process amongst the factions in Afghanistan should always be promoted
and given supremacy. The solution of Afghanistan rests in the hands of the local stakeholders.

Nevertheless, as much as Pakistan has been criticized, the fact remains that it has shown resilience and commitment against factions of instability. It has managed to survive through thick and thin of external challenges and have come up to realize its potential as a ‘zipper’ of the region. However, the gaps in linking its internal and external challenges have impacted its national security policies greatly. The key lies in applying a ‘sustained smart power’ strategy in order to defend the territorial and personality integrity of the country. This includes a holistic understanding of the policy issues at hand and response crafted from every option available including the ones in the international law framework.

Conclusion:

During the course of this chapter, we have managed to understand how national security as a term has evolved since its acceptance as a tangible concept. Initially, its idea was famously regarded by Barry Buzan as ‘contested’. However, with the emergence of new power structures and actors playing a role in the international arena, in addition to States, national security has emerged with considerable significance in the realm of international relations. It has amalgamated both tangible and intangible dimensions to emerge as a complete whole. Undoubtedly, it has not remained as contested as it was in the early 1950’s.

Lessons Learnt!

- National Security is a high Contested Phenomenon.
- It evolved from being strictly external to internal compulsions.
- Today, it is linked with collective security.
CHAPTER NO-2

CONCEPUTAL UNDERSTANDING OF INTERNATIONAL LAW

Fig 4: the nature of International law
International Law: Conceptual Understanding

Prelude

The ‘law of the nations’ or ‘international law’ is rested upon the notion of ‘consent based global governance’. On one hand it has acted as a facilitator and coordinator between nation-states, while on the other hand, it provides a framework for carving out security policies, both external and internal. Although it differs from national legislations, still the relationship between domestic and international law may not be undermined. A conceptual coordination between both the laws is necessary in order to achieve the goal of international security. However, the current era is witnessing a phenomenal evolution in the subject. This is contingent upon the highly security centric international order, especially after the Cold War, and the current threat perceptions in both external and internal domains. In fact, the idea of ‘internationalization’ of security has predominantly hinged upon the international laws. Meanwhile, without a ‘global watch-dog’ or authority overseeing the functioning of international institutions under the auspicious of international law, the potential of international law to act as a true law is often put to question.

Some scholars argue that international law is not law in its actual sense and should not be considered as a vital subject of international relations. Overwhelmed with the realist paradigm, intellectuals and technocrats in fact demonize the existence of such a subject. The international norms and rules technically are devoid of a binding nature, and are applicable to the extent of state intent. However, the fact remains that, with the evolution of the world order, the nature of this subject has changed dramatically. State practices and behaviour have evolved to be more global rather than individual. International law has in fact become a tool of facilitating interactions between states and the question of global authority has somehow diminished. It is now up to the states to evolve a mechanism in order to maximize opportunities from the evolution and not be undermined with the negativities.

In this regard, this chapter brings forth the technical understanding and basics of international law as a concept. It first takes the reader into the details of how international law is defined by various jurists and scholars. Following which, the nature and scope of the subject is investigated separately. The debate about international law being a binding phenomenon has long effected the study of the subject. Due to the anarchic nature of the international arena, the operational aspects of international law are viewed with scepticism. It is this idea that needs thorough investigation in order to truly understand the concept. Within this ambit, the chapter deliberates on the question of where can one find international law? Or more precisely, what are the sources of international law? As a general understanding State practices are often geared by their treaty obligations. It is hence imperative to understand what and how important are these obligations in finally being qualified as sources of international law.

Finally, the chapter elaborates the major subjects of international law, particularly, States, individuals and non-state actors. Undoubtedly, States have been the major and primary subject of the international arena. However, today, with the boom of Globalization, this understanding is subject to question. In this regard, the chapter will leave threads to be picked up by the next chapter which deals with the evolution of both the areas of international law and national security as relevant subjects.

28 Ibid
29 Ibid
30 Ibid.
Definitions

Defining international law has rather been a difficult attempt altogether. Primarily, the key notions of its nature and scope were the benchmarks of defining this law since its evolution in the 19th century. Ever since, there are numerous definitions attempting to define the concept. However, for the purpose of this book, we will pick three definitions projecting its meaning in the absolute sense. It states that,

Firstly, International law is a

“Set of rules generally accepted as binding in relations between states. It serves as a framework for the practice of stable and organized international relations”.32

Within the framework of this definition it may be argued that, the basic concept of international law is derived from laws and rules which govern State interaction. It is actually a platform for States to interact for cooperation or deal with conflict. Hence, international law is a body of laws which may in other words induce stability in the international arena. This structure in which States interact is primarily known as ‘Public International Law’. Secondly, the law of nations is,

“that body of rules which nations generally recognize as binding in their conduct towards one another”33

Furthermore, the law of nations is also a body of laws which is considered binding by States on themselves. The general principal lies on the idea of how may the States consider it binding upon themselves. The laws, rules and regulations which are accepted by States by their consent is in fact binding. Without their mutual consent, the laws which are not considered binding are subject to speculation by States. Thirdly, the law of nations also a perspective of interaction of individuals from States. Hence, international law is also defined as:

“A combination of treaties and customs which regulates the conduct of states amongst themselves, and persons who trade or have legal relationships which involve the jurisdiction of more than one state”34

Hence, international law is a body of ‘legal rules’ that govern the interaction of States and the rights and duties of the citizens of those sovereign States. This nature of law is popularly known as ‘Private International Law’. As there is no body that actually makes international law of both the domains, it has actually been made step by step through agreements, conventions, MoU’s, protocols, treaties and charters.

Nature and Scope

In view of the definitions mentioned above it is rather agreeable that, a set of rules and obligations considered binding by nation-states will truly perform the function of international law. It even extends to the rules which were ‘customary’ in nature and usage, accepted either tacitly or expressly by states through conventions or treaties. It is this nature of the concept which forced theorists like Samuel Pufendorf, Thomas Hobbes and John Austin to deny its identity as true law.35 It lacks the tools of obligation, deterrence and retribution which are fundamentals of a legal regime. On the other hand, in the absence of a super national body which ensures enforcement of the concept, international law sometimes becomes devoid of credibility. Ironically, the argument is not totally incorrect.

However, the underlying principles of this idea also suggest that, due to this consent based binding nature of international obligations, nation-states have changed the paradigm of international relations. This is rather true with the boom of globalization and role of international

31 Ibid
33 Ibid
34 Ibid
treaties and conventions in further integrating the globe. This aspect of the nature of international law and evolution of nation-states will be discussed in the next chapter in detail. Currently, it is to be ascertained that, international law may not be law in the true sense, but is a major tool for creating obligations on states and their practices, primarily due to its consent based binding nature.

Contrary to popular belief, the scope of international law is not limited to nation states only. Traditionally, it is believed that international law will evolve from a mandate followed by sovereign states in dealing with other sovereign states. The diplomatic relations, territorial issues, military disputes all are regulated by international law. Hence, it is important to understand that although states are the fundamental entities with which international law is concerned, it works in corroboration with the municipal law effecting individuals and international bodies like INGO’s and NGO’s. The extra focus of international law on states had rather proved counter-productive and effected the international system adversely. New rights and duties were thus imposed on individuals within the framework of international law by the decisions in the war crimes trials as well as the treaty establishing the International Criminal Court, by the genocide convention, and by the Declaration of Human Rights.

Sources

So where do one find the principles of international law? How do entities like nation-states show their consent for accepting a legal obligation internationally? And most importantly how a legal obligation attains the status of law accepted at the international level? Poplarly, treaties and customary practices are considered as answers to these questions.

Treaties

Firstly, as indicated by the statute of International Court of Justice (ICJ)\(^\text{36}\), the ICJ chooses cases and undertakings given to it inside of the order of worldwide arrangements and traditions. Consequently, the essential wellspring of international law is in this way international agreement, in composed structure. These can be bilateral, multilateral and even creating universal obligations for state practices. Called upon by various names such as settlements, Memorandum of Understanding (MoUs), contracts and traditions, these agreements shape the significant hotspot for global law.

Most of these settlements and agreements have been very effective. They have also been acknowledged by most of the States and have portrayed steadiness to global laws. The recent and best example is Vienna Convention on Diplomatic Relations, which actually charges approaching an all-inclusive acknowledgement and investment.

However, such fractional achievement can’t mask the way that law-making by multilateral treaties which experience genuine weaknesses. The procedure is both bulky and extended. For instance the making of the Law of the Sea Convention which was started in the year 1973, as a result of the United Nations conference on the law of the Sea actually took until 1994, for 60 states to become its member.\(^\text{37}\)

Consequently, for a multilateral legislative treaty to conclude there are a few steps that need to be followed. Firstly, a special body reviews the postulates of the treaty, for e.g. the International law Commission. Which is then acknowledged as a draft arrangement by a political body, like the United Nations General Assembly.

At that point here is typically a state Conference at which the content of the draft arrangement is finished. In the end, the settlement will be approved by individual nations prompting its entrance into power. Indeed, even in the wake of going into power an arrangement

\(^{36}\) According to Article 38 (1) of the Statute of International Court of Justice, Treaties are the primary source of International law.

just ties those expresses that unequivocally agree to be bound. In case of suppressing such agreement by a major power like the United States, can truly minimize the adequate gains.

Regardless of the possibility that states ascertain, in the end they confirm a settlement that can lessen its effect by connecting reservations. A reservation is a one-sided explanation given by a State, once it decides to either reject or accept the impact of those reservations. There might be even complaints about the reservations by different states. Suitability in a reservation is achieved once the settlements target is achieved alongside reason. However various different nations have restricted these reservations as being in opposition to the target and reason for the Convention.'

What’s more, the translation and use of bargains is every now and again convoluted through various dialect renditions and by legal advisors who work under various legitimate customs. The multilateral law-making or law-production settlement is up to this point from being considered as a compelling instrument of international enactment.

Respective arrangements additionally now and then serve as an instrument of law making. Truth be told, certain zones of universal law are principally controlled through a progression of reciprocal settlements. Prime samples are removal bargains, air transport understandings and two-sided venture settlements. In any case it is evident that this technique is neither proficient nor rich. To make a system of two-sided bargains on a solitary theme, among every one of the 188 individuals from the United Nations, would require more than 17,000 such arrangements, with each of these settlements being arranged separately! Albeit regularly comparable these settlements are prone to show variety and thus don’t make consistency and uniformity of treatment.

Customary Law

Secondly, a major source of international law is rested in customary law followed at the international level as compared to the domestic legal systems. This in a way reflects inability of the law of nations to make a credible system of legislative process. The Customary law entails systems of how states behave and interact. These patterns are actually termed as practice. If these are considered to be based on a legal obligation or ‘pinto furtus’, which can be deemed as customary international law. Consequently, there are numerous problems in the theoretical domain, for example how pervasive this practice is? What is the time frame for it be established? How are rules replaced in international law? For purpose of this publication such a discussion may lead the reader astray, however it is appropriate to consider that this system is accepted widely in practice rather than in theory. Mainly due to the reason that predictability and stability are phenomena in which most of the states are interested.

However, there are also numerous disadvantages. It can be difficult to conclusively prove, which requires rigorous study and research of general practices of states, in order to find a legal conviction. This law is a vague and conflicting entity. As once interests of states or groups of states change so will their attitude towards the customary law, which will also challenge numerous rules followed at the international arena.

Subjects

Subjects of International Law are those individuals or entities who are considered as an international identity. During the nineteenth century, States were considered as a sole subject of international law. However, in the Post- 2nd World War scenario, new entities emerged as performers in addition to States. Like, INGO’s and NGO’s made by people and multinationals and even individuals. These can now be considered as having to a vast or here and there restricted extend the ability to wind up global persons.

States and non-State performers like people, global associations, multinational organizations and universal non-government associations are controlled by, or subjected to, worldwide law. They are called subjects of international law. These subjects have international
legitimate identity. As it were, they have certain rights and obligations under international law and they can practice these rights and obligations. Do all subjects of universal law have the same rights and obligations? Give a few illustrations of the rights and obligations controlled by States, people and global associations.

Who is a Subject of International Law?

Generally, a subject of international law is:

An individual, body or entity which is recognized or accepted being capable of possessing and exercising rights and duties. Hence, subjects of the law of nations are, States and Non-State Actors including individuals and international organizations. Most theorists argue that international NGO’s and multinational companies may also be considered as subject of international law.

How do we determine if an Entity is a Subject of International Law?

Hence, we come to a very valid question, how to consider and determine an entity as subject of international law? Generally, they are entities who have an ‘international legal personality’ and have rights and duties alongside powers to exercise those rights and duties. These powers, rights and duties may change owing to the status and functions. For example, if an individual is vested with right of freedom from torture, so states may have a duty to refrain from sending him to countries or places from where there is a possibility of being tortured. It is a right given under some laws of treaties, for instance, the International Covenant of Civil and Political Rights (ICCPR). The Convention against Torture and Cruel, Inhuman and Degrading Treatment places obligations on States not to torture and to extradite or prosecute those who torture.

Legal personality also includes the capacity to enforce one's own rights and to compel other subjects to perform their duties under international law. For example, this means that a subject of international law should be able to:

1. Bring claims before international and national courts and tribunals to enforce their rights, for example, the International Court of Justice.
2. Have the ability or power to come into agreements that are binding under international law, for example, treaties:
3. Enjoy immunity from the jurisdiction of foreign courts; for example, immunity for acts of State.
4. Be subject to obligations under international law.

Conclusion

International law may not be deemed as law in the true sense, but it is a tool of State interaction. It provides a set of rules and principles, which are deemed binding by States in their interaction. Meanwhile, the subject with its basic understanding remains an evolving concept and has emerged as a significant entity of the international political arena. The subsequent chapters will now draw a relation between the concepts of international law and national security. This is within the purview of presenting their case of evolving together as highly contested yet rested with similar dimensions of growth and importance.
Lessons Learnt!

- International law has evolved dramatically after the securitization of the international arena.
- The primary source of international law are treaties
- A state has been the sole subject of international law, however, after the major evolution of NGO’s and INGO’s in the international arena, they managed to hold position of a subject of international law as well.

Fig 5: lessons learnt
CHAPTER NO-3

EVOLUTIONARY PHASES OF NATIONAL SECURITY AND INTERNATIONAL LAW
International law and National Security:
The Evolutionary Phases

Prelude:

In the study of international law and its relevance for furthering national security imperatives of States, drawing a picture of their evolution is necessary, rather than being merely functional. The idea rests on the notion of States being the prime subjects of the international arena, at least in theory, viewed through a prism of rational operatives of the world at large. National security has dramatically evolved as a subject ever since its formal acceptance in the world, while international law despite its evolution is still subject to scepticism. Due to this factor, there has been a gap in the underlying principles that provided an amalgam of these phenomenon, despite their consistent, and in some cases simultaneous period of evolution. As a matter of practice rather than theory, international law has formed its shape according to the major national security imperatives of states. On the other hand, a counter argument suggests that the changing national security imperatives have actually influenced international law objectively in the past few decades. No matter which principle one follows, the inevitable linkage and connectivity between the two phenomena may not be undermined.

Since ancient times, States have sporadically followed some principles of the law of nations in their dealings with each other. Although some jurists suggest that the need of formally declaring these laws as a subject of the international arena, was not felt until the 17th century after the Renaissance in Europe which spread to the rest of the world.\footnote{David Bloomfield, Teresa Barnes and Luc Huyse, ed. 'Reconciliation after Violent Conflict A Handbook', International Institute for Democracy and Electoral Assistance, 2003.} It is due to this reason that international law is considered as a European product. Later on, major wars, including the Cold war when categorically changed the nature of world interaction and shifted the concerns of the world to security and peace, international law and its operatives also changed dramatically. The United Nations was formed in the year 1945 to facilitate the protection of international peace and security, through which principles of national security got a more international character. Ideas like Globalization and regional connectivity, herald major compulsions of corroborative international rules. However, no other phenomenon has compelled the international community in evolving the concepts of national security and international law, like terrorism. The world shifted from a traditional military based prism to economic and strategic compulsions and due to a transregional terror surge, also enhanced the significance of domestic security alongside international. Today, terrorism has dramatically evolved the concept of national security and along with which the role of international law in furthering the objectives also changed dramatically.

In this regard, this chapter provides a thorough description of how both national security and international law have managed to evolve in their present shape over the past decades. For students of politics and international relations, it is rather significant to be able to identify the role international law plays in furthering the imperatives of national security for a state, while they analyze the international arena. This chapter hence signifies the journey of the world from a highly warring state of affairs to the current rise of non-traditional security threats and the way international law has been able to mould these state of affairs through its operatives or States have used international rules to devise strategies to deal with the upcoming issues. Consequently, law and rules have been subject to criticism due to the expectation of negative restrain from the body. It has been misjudged to provide a body of rules and regulations that carve out strict interaction of States and penalize ignorance like domestic judicial systems. On the other hand, failure of international institutions in providing relief to the oppressed and exploitation by major powers according to their own desires have contributed in the sceptic approach to the relevance of international law in the world.

Hence, it will be rather complicated to view the entire scenario from this prism of cynicism and disbelief. As a matter of fact, in order to prove the relevance of international law as a body of
rules which facilitates state interaction and acts as a tool in furthering national security objectives, reviewing ones understanding of how international law works in international arena is necessary. This will be taken up in the next chapter, while the current chapter builds up a case for the amalgam of both these phenomena. The basis of national security has been survival and protection of self-interest, while the major role international law is expected to play is to assist in securing these imperatives of a State. Hence, in order to identify the periods of evolution of both these phenomenon’s, for the benefit of the reader, two major concepts in which the two have managed to evolve together are enlisted below:

a) Sovereignty:

With the evolution of a state-centric international order, the fundamental nature of the Westphalian Sovereignty became the basis of international law.\(^{39}\) Where State has remained the major subject of the international arena, its sovereignty in terms of control over a territory and protection against external aggression has been the key in the last few decades, particularly amidst evolution of the concept of national security. Subsequently, international law evolved to facilitate in furthering this concept. The UN Charter Article 2(4), explicitly declares the States to refrain from aggression and use of force against each other, while also respecting ‘sovereignty, territorial integrity and political independence’ of each other.\(^{40}\)

The ideals of a supreme sovereign state authority, as mentioned in this Article has evolved implicitly rather discreetly from the ‘bedrock’ of the Peace of Westphalia 1648. This treaty was a cornerstone in ending war against the hegemony of the Roman Empire. It also delegitimized the wide spread role of the catholic church and gave way to the notion that the international relations should be based on balance of power rather than Christendom.. Where this peace provided a retreat from religious authority in one provision, it on the other hand as a glaring feature, kept it intact in practice. Hence, challenging the idea of supreme authority of the Prince over his own territory.

This idea of how citizens of a State or a territory under a sovereign authority is expected to be treated has long been debated under the concept of supreme sovereignty. In the 17th century, philosophers like Jean Bodin and Thomas Hobbes elaborated the concept by establishing the idea of a ‘single hierarchy of sovereign authority’.\(^{41}\) Hence, in their opinion, law was what the sovereign desired and the citizens may not have the right to revolt against it. This idea despite of being compelling and extravagant, fell prey to the realities of the conscious. Soon after Hobbes gave his phenomenal work of the Leviathan, authority in Britain was divided between the King and the Parliament. Within the United States, while the foundations were being laid, authority was divided into various local orders, which was against the idea of a single hierarchy.\(^{42}\)

Hence, sovereignty for the modern state system has evolved from an ideal of religious toleration to rights of citizens including minority rights and today has majorly tilted towards human rights and how the sovereign treats its citizens within the territory of a State. This particularly, has been vital in the study and evolution of the security studies, questioning that whether a sovereign and its actions are devoid of checks and balances in matters significant for national security? As far as history is concerned, the answer varies from case to case basis. Despite the high ideals injected by the concept of sovereignty in the international arena, the sovereign has acted in way of intervening in


\(^{40}\) Article 2(4) UN Charter 1945.


\(^{42}\) Ibid.
another state’s sovereign boundaries and have violated the rights of its own citizens in the name of national security.

In a few cases in point, states voluntarily embraced international supervision, but generally, the weak have complied with the inclinations of the strong. In this regard, the settlement of Vienna after the Napoleonic wars was indeed a religious toleration of Catholics residing in Netherlands. Almost all of the States as successors of the Ottoman Empire, starting from Greece in the year 1832 and going to Albania in the year 1913, accepted limitations on the equality of civic and political domains for religious minorities, which was a condition for acknowledgement at the international level. After the World War- I, the peace settlements necessitated the protection of minorities. For example, Poland then agreed to abstain from elections on a Saturday, which meant a violation of Jewish Sabbath. The League of Nations also conferred rights of minorities in its in provisions of a bureau in which the complaints could be filed against violating Governments by individuals, which later ceased to exist with the initiation of holocaust.

In the Post-World War II scenario, the world’s attention shifted from the rights of minorities to the upholding of human rights. The Charter of the United Nations in the year 1945 also envisaged the classic idea of sovereignty, neutrality and human rights. Nearly more than 20 accords were signed for upholding human rights principles in the last half of that century which ranged on a wide variety of subjects like, torture, genocide, slavery, ill treatment against refugees and stateless person, children and women rights, racial and sectarian discrimination and forced labour. These agreements of the United Nations, however, did lack the enforcement machinery and even the idea of highlighting violations were majorly futile. In addition, discrimination on the basis of ethnic differences was also given very less importance until there was the catastrophic disintegrating Yugoslavia saga. It actually led to the formulation of an international convention which provided for the recognition of newly born States only if they gave guarantee to the rights of minorities. Following which, the Dayton accords, also provided for establishing authorities externally monitoring human rights structures in Bosnia. NATO also created a protectorate of a de-facto nature in Kosovo. The motive behind such interventions that are humanitarianism and security, have not changed. However, the issues which arose after the enhanced movements of ideas, goods and people is not something new. There are various ways in which States are responding in a better way now as compared to their previous behaviour because of the advancement in the technological domain. The effects of the international media on the political authority will lessen as compared to the topsy-turvy situation that arose after the making of print media. In a decade or so, when Martin Luther supposedly nailed his 95 thesis on the Church door of Wittenberg, his ideas had already reached entire Europe. Some of the political leaders seized on the Protestant principles of Reformation as a way out for legitimizing the secular authority. There was no sovereign monarch that was able to stop the spread of such concepts that led to them losing their lands and also cost them their lives and lands. The controversies generated by sectarian differences in the 16th and 17th century were perhaps more controversial in the political domain instead of the related transnational flow of ideas. There were some ways in which the capital movements of the international level were more important than even they were earlier.

In the 19th century, the States in Latin America, were effected by the international financial crisis. The period of Great depression, had a very strong effect on the internal politics of almost all of the major States, as it was triggered by the collapse of international credit. The late 1990’s financial crisis was actually not that devastating. The flow with such countries recovered from this issue shows how we were working better with knowledge of economic theories and central banks with more effects made it easier for States to ensure advantages of the international financial market.

In addition, the idea of controlling the capital and ideas flow of states has long been a struggle that is managed by the global trade. In the 19th century, the opening up of trade at long distance made some basic cleavages in all of the major States.
This has been a challenge to the traditional concept of sovereignty. Particularly after the boom of Globalization, where the ideals of governing citizens have become more transnational, challenges to its security and well-being have evolved at an unprecedented pace.

**b Common Consent:**
Common consent has been the basis for the evolution of international law. It has also been phenomenal in terms of operation, for the evolution of a state-centric international order while furthering national security imperatives. The idea rests on the notion that, over the past few decades States have mutually consented for the primacy of national security interests, through various international regulations and laws, literally acting as a source of modern international law. They have managed to operationalize this idea by using the sources of international law as tools of operation; particularly, treaties. In addition, the Security Council Resolutions as international obligations have also acted as a bridge; linking the states national security imperatives with international law. Some scholars even suggest that in today’s era, common consent has somehow replaced the rules of equally sovereign states and has created international norms through consent and practice, as demonstrated by the actions of the US in instances like the Iraq and Afghanistan wars.

This debate of common consent being one of the major tools of furthering national security imperatives of States, hails over old arguments amongst the positivists and naturalists; dedicating common consent solely to the creation of law while the former support international law as deduced from moral decrees existing independent of state consent. Irrespective of the philosophy opted, significance of common consent may not be denied as far as national security issues arise for states. Some lawyers also suggest that while the Article 38 of the International Court of Justice (ICJ), refers to treaties, customs and recognized general principles, as to sources of law, it also implies on common consent of states creating rules of general application.

State consent is the foundation of the international law which gives them maximum leverage. Because if a state does not want to comply to an international law, it can withhold its agreement then and there. This leverage, however, poses a serious threat to the benefit of every affected state. This creates a burdensome status quo bias. Although legal reforms that would lead to a loss of well-being are avoided, so are reforms that would increase well-being for most but not all states.

With this idea, a description of how both national security and international law have evolved is as follows in the subsequent paragraphs under separate headings:

**Evolution of National Security:**
Amidst the discussion on the evolution of nation-state, and its position as a major subject of international law, a key factor on how it has viewed security is extremely vital. Generally, the underpinnings of the core values of state including cohesion, survival and character are considered the dimensions of security. William T.R. Fox rates this understanding as a result of the two great wars and the post periods. This was also reflected in Bernard Brodie’s famous essay ‘Strategy as a Science’ from the late 1940’s, stressing on the importance of making the military leaders understand strategy for limiting the costs of war on security of a state. Hence, the prism through which a State viewed security was in strict military terms, with primary focus on protection against threats to national interests. It is this notion that simultaneously defined a State’s impression about the ‘law of nations’ as well.

As a general principle, a State has gauged survival and interest on the canvas of threats posed to its ‘Sovereignty’ as discussed earlier. The primary function of international law has thus

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been considered the protector of this authority of the State. This was in contrast to the theory and practice of law, when Jean Bodin and Thomas Hobbes first elaborated the concept of sovereignty in the 16th and 17th century. In other words, Hobbes and Bodin presented a case for domestic authority and legitimacy of its single hierarchy, while sovereignty evolved to be more of a restrain from intervening in to domestic issues of each other. In this regard, the initial phases of security studies and concept of law of nations squarely focused on the use of armed forces in international politics. The formative years however, evolved dramatically with the dawn of the nuclear era. It not only changed the perception of war but also the undertones of security for a State. Challenging the traditional Clausewitzian notion of war as ‘continuation of politics by other means, nuclear weapons proved entirely conducive to academic contemplation of security and law due to limited empirical data available. Theoretically and potentially challenging, the strategic dilemmas presented by the emergence of nuclear weapons influenced studies of both the phenomenon for a major portion of the next two decades.

Nonetheless, the primary objective of this chapter is to view the evolution of both security studies and international law from their operational underpinnings. At this stage, with the basic understanding of national security and international law, an idea of how both the concepts evolved over the past centuries, will indeed be helpful in presenting a case for the relevance of law in the international security dilemma’s. This chapter will also present a realist-jurist debate which has played a role in spreading some misconceptions about international law as an operative tool in furthering national security interests. This will lead the reader to the next chapter for understanding the interplay of national security and international law, objectively.

The era of 1960’s, with a major standoff between the US and Soviet Union, rapidly brought the golden age of military centric security studies up to a close. Shortcomings in the approach were also identified by scholars like Nye and Sean Lynn Jones, particularly in the light of the deterrence theory. Other domains including economic and strategic received greater attention and the international arena got overwhelmed by the concept of interdependence

Altogether, the national security studies have shifted back and forth from military centric to dominant economic and strategic voices and today with the dawn of the 21st century they have evolved to be more complex than ever. Globalization and interdependence as major drivers of international relations have fallen prey to voices of terrorism from every corner of the globe. Today, the major national security concern has evolved to be from internal factors instead from outside the borders of the State.

The Evolution of International law:

International law reflects the establishment and subsequent modification of a world system founded almost exclusively on the notion that independent sovereign states are the only relevant actors in the international system. This modern understanding of the law of nations is primarily based on the idea of ‘common consent’ of these States and is considered to be an outcome of the Christian civilization, being some four hundred years old. Although the origins of this law lay deep down in history; in the ancient world where wars were a major feature between different nations and peace accords was a regular feature. In fact, interaction between nations who had different religions, laws, moral values and language, was unavoidable. These acceptable usages were considered to be under the protection of gods and its violation religious reparation. Despite this significance, nations lacked the mental horizon of formally declaring their routine interaction as internationally acceptable rules or international laws. In this regard, it will be of interest to the reader to take a glance of the respective rules and usages of different nations that followed different religions yet contributed either intentionally or intentionally to the development of the law of nations the world follows today.

46 Ibid.
47 Ibid.
The nature and idea of a nation-state has been at the epicentre of the evolution process of international law. From dominance of civilizations of the Greek, Roman and then the Europeans, the law of nations has been moulded from one form to another. However, the defining feature of the inability to declare it formally as law of nations before the Europeans was the pride of the Greeks and lack of unity into one national whole. However, this turned out to be a misnomer, when the Romans took this feature as a benchmark for defining their own foreign relations with other nations. The Greek left them an example that, independent States can live in a community where there international relations may be governed by certain set of rules and usages based on a common consent of the community. The underlying notions of governance, political relations, and of the interaction of independent units provided by ancient Greek political philosophy and the relations between the Greek city-states constituted important sources for the evolution of the international legal system.

In this backdrop, the Romans formally constituted a base line for the governance of their international relations with their own flavor. In fact many of the basic principles of the law of nations followed today were constituted within the Roman Empire. The jus gentium (Latin: “law of nations”), for example, was invented by the Romans to govern the status of foreigners and the relations between foreigners and Roman citizens. In accord with the Greek concept of natural law, which they adopted, the Romans conceived of the jus gentium as having universal application. They had a set of twenty priests the- fetiales for managing their relations with foreign nations, who followed a divine law- jus sacrum, in times of war, peace and even treaties of friendship. The relations of the Romans with other countries majorly depended upon the existence of a treaty and its absence. In case of the former, protection to goods and travel through Roman territory was guaranteed along with privileges during war. In case of the latter, the goods and travel were not granted any kind of protection leading to even slavery of the men.

The concept of international interaction for the Romans was overwhelmed by wars and situations in the post-war arena. Treaties were also made with a three-fold focus: friendship (amicitia), hospitality (hospitium), and of alliance (foedus). These treaties also had clauses facilitating arbitration in case of conflict known as the recuperatores. War for the Romans was a legal institution for which four violations were enlisted as reasons for going to war, namely: Violation of the Roman territories, ambassadors, treaties and support extended by a friendly country to the opponent. Four fetiales were sent in case of these violations to the foreign country in order to receive satisfaction, in the absence of which war was declared. There were no rules that governed wars and extreme cruelty of the Romans is encoded in history, however, there were laws to end the war. It could be achieved either by a peace treaty leading to treaty of friendship, or surrender- deditio, or occupation of the foreign land- occupio.

The Romans gave ample illustrations of a legal setup for regulating ones international interaction. Despite the fact that today the law of nations is entirely different than the one in ancient Roman Empire, still it provided a ready reckoner of understanding the operation of international interaction through a legal cover. On the other hand, while the Romans jus-gentium was a success in times of war and post-war period, the Empire was not much privy to interactions in other situations. The expanded empire practiced these regulations within its own borders. This situation did not even change with the dawn of Christianity on the Romans under Constantine the Great (306-337) and Byzantium its capital instead of Rome. Wars were the benchmark for interaction even after the split of Rome into the Western and Eastern part and later diminishing of the Western Rome, particularly at the hands of people of Germanic linkages. All these people were in fact barbarians, overwhelmed by wars, despite being guided by Christian religious norms. It was not until the eight century when Charlemagne built up a vast Frankish Empire and was crowed the Roman Emperor by Pope Leo III. The world yet again was not in need of laws for international interaction other than in times of war.

It was the treaty of Verdun that divided the Frankish Empire into three parts and later paved way for the rise of several States in Europe. Theoretically, the Emperor was supposed to be the master of the entire Empire, but in practice several German Princes challenged his writ. Christian teachings were subject to deviance and split of the empire in to independent nations was inevitable. It was the beginning of an era for practice within the framework of the law of the
nations, laws governing relations other than times of war. Hence, in the fifteenth and sixteenth century with the reign of Fredric III coming to an end, several independent States in Europe had managed to achieve existence. They were also passing through the period of what is known as the Renaissance or Reformation of science and art. It transformed the process further in to the revival of philosophical ideals of Greek life, transforming them in to the modern life. This also proved to be a turning point for the development of the law of nations in to its present form.

The seventeenth century, which was overcrowded by sovereign European States, was influenced by the urge of having rules and usages to keep the States knitted together for securing personal interests. With the Renaissance, Europe had turned out to be much more privy to ideals of connectivity and interactions other than wars amongst each other and outside the continent. It was a time of opening up, and international law proved to be a tool for furthering this objective of the European continent. This was the reason for declaring the work of Hugo Grotius, De Jure Belli ac Pacis, libri iii, published in 1625, as the major source for understanding the international world through the prism of law. His book was so widely consulted and accepted as authority in international interaction that he was also considered as the ‘father of international law’. Hence, at the end of the seventeenth century, the Europeans along with the rest of the world had accepted and were widely interacting through a body of law of nations.

The essential structure of international law which was mapped out during and after the European Renaissance, widely spread to the rest of the world. In fact, some jurists also claim international law to be solely a European product. In the 15th century the arrival of Greek scholars in Europe from the collapsing Byzantine Empire and the introduction of the printing press spurred the development of scientific, humanistic, and individualist thought. On the other hand, while the expansion of ocean navigation by European explorers spread European norms throughout the world and broadened the intellectual and geographic horizons of western Europe. Early writers who dealt with questions of governance and relations between nations included the Italian lawyers Bartolo da Sassoferrato (1313/14–1357), regarded as the founder of the modern study of private international law, and Baldo degli Ubaldi (1327–1400), a famed teacher, papal adviser, and authority on Roman and feudal law. The essence of the new approach, however, can be more directly traced to the philosophers of the Spanish Golden Age of the 16th and 17th centuries. Both Francisco de Vitoria (1486–1546), who was particularly concerned with the treatment of the indigenous peoples of South America by the conquering Spanish forces, and Francisco Suárez (1548–1617) emphasized that international law was founded upon the law of nature.

In 1598 Italian jurist Alberico Gentili (1552–1608), considered the originator of the secular school of thought in international law, published De jure belli libritres (1598; Three Books on the Law of War), which contained a comprehensive discussion of the laws of war and treaties. Gentili’s work initiated a transformation of the law of nature from a theological concept to a concept of secular philosophy founded on reason. The Dutch jurist Hugo Grotius (1583–1645) has influenced the development of the field to an extent unequaled by any other theorist, though his reputation as the father of international law has perhaps been exaggerated. Grotius excised theology from international law and organized it into a comprehensive system, especially in De Jure Belli ac Pacis (1625; On the Law of War and Peace). Grotius emphasized the freedom of the high seas, a notion that rapidly gained acceptance among the northern European powers that were embarking upon extensive missions of exploration and colonization around the world.

The scholars who followed Grotius can be grouped into two schools, the naturalists and the positivists. The former camp included the German jurist Samuel von Pufendorf (1632–94), who stressed the supremacy of the law of nature. In contrast, positivist writers, such as Richard Zouche (1590–1661) in England and Cornelis van Bynkershoek (1673–1743) in the Netherlands, emphasized the actual practice of contemporary states over concepts derived from biblical sources, Greek thought, or Roman law. These new writings also focused greater attention on the law of peace and the conduct of interstate relations than on the law of war, as the focus of international law shifted away from the conditions necessary to justify the resort to force in order to deal with increasingly sophisticated interstate relations in areas such as the law of the sea and commercial treaties. The positivist school made use of the new scientific method and was in that
respect consistent with the empiricist and inductive approach to philosophy that was then gaining acceptance in Europe. Elements of both positivism and natural law appear in the works of the German philosopher Christian Wolff (1679–1754) and the Swiss jurist Emerich de Vattel (1714–67), both of whom attempted to develop an approach that avoided the extremes of each school. During the 18th century, the naturalist school was gradually eclipsed by the positivist tradition, though, at the same time, the concept of natural rights—which played a prominent role in the American and French revolutions—was becoming a vital element in international politics. In international law, however, the concept of natural rights had only marginal significance until the 20th century.

Positivism’s influence peaked during the expansionist and industrial 19th century, when the conception of state sovereignty was bolstered by the ideas of exclusive domestic jurisdiction and non-intervention in the affairs of other states—ideas that had been spread throughout the world by the European imperial powers. In the 20th century, however, positivism’s dominance in international law was undermined by the impact of two world wars, the resulting growth of international organizations e.g., the League of Nations, founded in 1919, and the UN, founded in 1945 and the increasing importance of human rights. Having become geographically international wide spread through the colonial expansion of the European powers, international law became truly international in the first decades after World War II, when decolonization resulted in the establishment of scores of newly independent states. The varying political and economic interests and needs of these states, along with their diverse cultural backgrounds, infused the hitherto European-dominated principles and practices of international law with new influences.

The international political events highly influence the rules and institutions of the international law. During the cold war era, the western and eastern bloc tussle was a constant threat to international peace. The development of international law both its rules and its institutions is inevitably shaped by international political events. From the end of World War II until the 1990s, most events that threatened international peace and security were connected to the Cold War between the Soviet Union and its allies and the U.S.-led Western alliance. The UN Security Council was unable to function as intended, because resolutions proposed by one side were likely to be vetoed by the other. The bipolar system of alliances prompted the development of regional organizations—e.g., the Warsaw Pact organized by the Soviet Union and the North Atlantic Treaty Organization (NATO) established by the United States—and encouraged the proliferation of conflicts on the peripheries of the two blocs, including in Korea, Vietnam, and Berlin. Furthermore, the development of norms for protecting human rights proceeded unevenly, slowed by sharp ideological divisions.

The Cold War also gave rise birth to the union of a group of nonaligned and often newly decolonized states, the so-called “Third World,” whose support was eagerly sought by both the United States and the Soviet Union the major blocs. The developing world’s increased prominence focused attention upon the interests of those states, particularly as they related to decolonization, racial discrimination, and economic aid. It also fostered greater universalism in international politics and international law. The ICJ’s statute, for example, declared that the organization of the court must reflect the main forms of civilization and the principal legal systems of the world. Similarly, an informal agreement among members of the UN requires that no permanent seats on the Security Council be apportioned to ensure equitable regional representation; 5 of the 10 seats have regularly gone to Africa or Asia, two to Latin America, and the remainder to Europe or other states. Other UN organs are structured in a similar fashion.

The collapse of the Soviet Union and the end of the Cold War in the early 1990s the post-cold war era saw increased political cooperation between the United States and Russia and their allies across the Northern Hemisphere, but tensions also increased between states of the north and those of the south, especially on issues such as trade, human rights, and the law of the sea. Technology and globalization—the rapidly escalating growth in the international movement in goods, services, currency, information, and persons have —also became significant forces, spurring international cooperation and somewhat reducing the ideological barriers that divided the world, though globalization also led to increasing trade tensions between allies such as the United States and the European Union (EU).
Since the 1980s, globalization has increased the number widened sphere of influence of international and regional organizations and required the expansion of international law to cover the rights and obligations of these actors. Because of its complexity and the sheer number of actors it affects, new international law is now frequently created through processes that require near-universal consensus. In the area of the environment, for example, bilateral negotiations have been supplemented—and in some cases replaced—by multilateral ones, transmuting the process of individual state consent into community acceptance. Various environmental agreements and the Law of the Sea treaty (1982) have been negotiated through this consensus-building process.

International law as a system is complex. Although in principle it is “horizontal,” in the sense of being founded upon the concept of the equality of states—one of the basic principles of international law—in reality some states continue to be more important than others in creating and maintaining international law.

Lessons Learnt!

- National security and International law have evolved concurrently.
- International law in fact played a role in furthering national security objectives of a state in two main phenomena
  1. Sovereignty
  2. Common Consent

Fig 6: Lessons learnt
INTERPLAY OF INTERNATIONAL LAW WITH NATIONAL SECURITY

Prelude

It can be tricky to have a holistic understanding of complex subjects like national security and international law. Each passing day heralds a new chapter in the global reckoning of their areas of influence and operational mechanisms. Even more complicated is the idea of gauging them through a single prism of impact. In other words, suggesting that the change in nature of security and threat perceptions may also influence the international legal system and its operation is a tedious task. Hence, the ‘securitization’ of international law is indeed a major evolution as is the global shift of power and economic axis in the current decade.

However, it may be argued that, the legal inquiry is overwhelmed by the multidimensionality of security and there is still room for inquiring about the probable impacts of ‘national security law’ on the evolving nature of international security itself. In fact, Kim Lane Scheppele even asks in an article that, what could be more national than national security law.48 In his opinion, the national security law ‘establishes the way that each state handles threats to its government, its values, and its very existence’49 and what could be more specific than what makes each state feel threatened.

Meanwhile, within this reckoning, international security should be the way governments protect their values together for co-existence. Hence, international security is deemed in the doctrine of collective security system within the ambit of Article 24 of the UN Charter. It vests in the UN Security Council responsibility to maintain international peace and security.50 In other words, delegation of power by sovereign States for providing a ‘collective security’ system is implied as a principle. However, providing security to one entity by putting at stake the security of another puts in to question, the impact of international law on the national security phenomenon altogether.

Nonetheless, despite the scepticism, and different areas of focus, faith in national security law and numerous areas of convergences between law and security may not be lost. In fact, where national security is related to the inquiry of the international system and also to the attributes of its actors,51 concurrently, international law may also operate as a tool in furthering the inquiry externally and internally. A subliminal relationship between the two phenomenon’s has been the focus of inquiry since quite a while now. In this regard, where the previous chapters provided an overview and basic understanding of the phenomenon, this chapter will be an endeavor to pick up threads from the previous ones and construct a better picture of the interplay of the two.

More precisely, it will focus on building a narrative about how international law can manage national security issues, in contrast to the more prevalent perceptions of the other way around. It will first provide a three phase model for understanding the operational mechanism of

48 Laurance S. Rockefeller Professor of Sociology and Public Affairs in the Woodrow Wilson School and University Center for Human Values as well as Director, Program in Law and Public Affairs, Princeton University, wrote this Article as George W. Crawford Visiting Professor of Law and Robina Foundation Senior Fellow at Yale Law School during the academic year 2009-2010, based on remarks given at a panel on comparative terrorism law at the annual meetings of the Association of American Law Schools in January 2010 in New Orleans.

49 Ibid.


legal tradition in national security issues and hence present a case for uplifting legal considerations in economic, social and political decisions of a State. This will be supplemented by highlighting the use of treaty as a tool in achieving the very purpose in various domains like terrorism, protection of environment and role of armed forces and the phenomenon of ‘use of force’.

**Interplay of National Security and International Law: The Operation**

Security is an elastic and diverse concept that can be understood in different forms, depending on its objects: the perception of threats, the protected values, and the means through which these values can be protected. The changing perception of security threats that already emerged in the 1980s, and ways in which these threats are addressed, has led to comprehensive and scientific studies of security concept. Traditionally, security issues posed to a State were restricted to notions of physically protecting national interests. Thus when Hans Kelsen published Collective Security under International Law in 1957, he confined the scope of his study to ‘the protection of men against the use of force by other men’. Generally, this idea was more prevalent before the Cold war, and has now evolved in both nature and related perceptions. This is true because, the idea of international security has managed to bifurcate from the notion of state/national security.

The collective security system as recognized by the UN charter allows actions against threats to the wellbeing of states. It is this space between national and international security that allows States to manoeuvre in a manner so as to protect interests of oneself through policy making. The idea is to allow the legal tradition in facilitating this process swiftly and with a major international appeal. The operation is carried on in a three step process:

![Policy formulation](image)

**Figure 7: process of interplay**

a) **Policy Formulation**

Once an issue is considered as a national security challenge by a State, debate for managing it from the benchmark of core interests is a general practice. National institutions actively engage in discussion for comprehensive policy formulation and analyze repercussions of various options. However, for legal tradition to play a role, there should be efforts to strike a balance between ‘interest’ and ‘morality’. In absence of the latter, precedents may be set which later may go against the interests of international

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55 The collective security system of the UN is based on two structural criteria: first, ‘to ensure prompt and effective action by the UN; its members confer on the Security Council responsibility to ensure international peace and security (Article 24). Second, all members of the Security Council on its call contribute to the international peace and security, in accordance with a special agreements or agreements, armed forces, assistance and facilities, including right of passage, necessary for maintaining international peace and security.
security. Hence, creating a dis-balance between national and international security, as discussed earlier.

When policies are craved out, both for national or international manoeuvrability, a legal cover in all cases is available for all the parties involved. From one side it may sometimes lead to devastating events, while for the other it may just be very difficult to pursue. The US led wars in Afghanistan and Iraq are an example of how a legal cover may be engaged with a policy and also be disastrous for international security. Initially, it was claimed that the invasion of Afghanistan in the year 2001, was necessary based on the doctrine of ‘collective self-defense’. Afghanistan was ‘believed’ by the former President George W. Bush to be harbouring the perpetrators of the 9/11 attack, and gave two weeks to the Taliban to hand over the terrorists. Article 51 of the UN Charter was invoked, for the ‘collective security’ of the World leading to a coalition attack on Afghanistan. Today, there are not only questions on how this attack was led, but also there is a wave of instability caused through it which threatens the peace and security of not only Afghanistan but also of the region and its periphery.

In contrast, interestingly, this Article 51 could have been invoked by the people of Afghanistan as a retaliation of the US led war, in name of individual self-defense as well. They could claim that a resistance movement was in fact launched against the pre-emptive strike of the US on their land. Hence, it can be argued that, for the interplay of policies with legalities, there are two flip-sides of the coin, both can be admissible, both can be justified.

So, how do we base a national policy with a legal cover that does not turn out to be devastating like the invasion of Afghanistan? Here ‘morality’ as a basis of international law comes in to play. As discussed already in Chapter 2, international law is normative in nature. Its operation is dependent upon the extent of morals envisaged in a policy. The initial phase of policy formulation for attacking Afghanistan, should have included ideals like State Sovereignty, Human Rights and contentious area of state using force against a non-state actor. If they were accorded, today Afghanistan would have been in a different state altogether. On the other hand, the idea of creating a balance between national and international security would have been taken from a different perspective altogether.

Furthermore, during the policy formulation phase, a country also has to keep in mind the practices and precedents followed at the international level. If a law is universal, like basic human rights, states are expected to adhere to them strictly. This is understandable in the case of universal norms for dealing with refugees. Although the practices followed at the regional level differ from each other, yet while dealing with refugees universal practices are to be followed. The Universal Declaration of Human Rights 1948, Article 14, is a guiding principle for the Geneva Convention 1951, and its protocol for the rights of refugees. It was a post-World War two instrument, which addressed the policy formulation concerns of countries from the prism of international law.

Theoretically, there is contradiction in how and why States would adhere to international norms and laws while making a certain policy and to what extent they would limit to the

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56 Article 51 of the UN Charter states: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security


58 Ibid.


60 Article 14(2) of the Universal Declaration of Human Rights provides that the right to seek and to enjoy asylum, as guaranteed in article 14(1), “may not be invoked in the case of prosecution genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations”
idea of national interest only. Neo-Realists believe that the national interest cannot be put under legal constraint and the policies are formulated by States by keeping in mind the international structure, which is anarchic. Taking it a step further, Hans Morgenthau, the popular realist, suggested that, if a state is following a legal regime while formulating a policy, this will be enough of a proof of its convergence of interest with the law. Hence, high compliance rate does not prove the functionality of the law which is being followed.

On the other hand, Constructivists opine that a law is devoid of a constraining power and is just providing a system or an ideology which is to be followed in policy formulation. Hence, the constraints of law are the shackles of morality and norms, which are to be followed by States in formulating a policy and further it towards implementation. In other words, there is consensus amongst the popular theorists about law being devoid of a constraining power, they differ in the way it operates and why it operates, to be more precise. Consequently, the question arises that, if there is little power in international law to constraint States particularly in national security issues, then how is it still surviving in the international arena?

The idea rests on the notion of how a State perceives its national security threat. With the internationalization of issues, laws have also gone global. Today, with threats emanating from across regions and transcending borders, like terrorism, environmental hazards and ‘Use of Force’ through phenomenon like ‘Hot Pursuit’, security laws are being opted quite frequently. These laws allow the state to pursue a reasoning and driving force for its actions, that too from a legal prism. The preceding part carries a debate on how is this made possible by States in their interaction at the international level.

b) Legalizing the Policy

Once a national security issue is considered for a policy, the notions of law formulation become significant. This is because of two reasons: first the idea of showing adherence to international norms and laws and being a law abiding country. Second, for easy manoeuvring, and dealing with the issue collectively through agreements and treaty formulation. As a matter of fact, this behaviour of a state forms the basis of sources of national security law and allows setting precedents for states. Although national security is very ‘national’ in scope, yet the law regulating it remains of a very international nature. Threads are picked from conventions and treaties in order to formulate national security laws. For instance, the United Nations Resolution on Suppression against Terrorism-1373, mandates States to ‘Criminalize terrorism in their domestic laws’, the Paris Agreement 2015, requires all parties to put forward their best efforts for dealing with climate change through ‘Nationally Determined Contributions’ (NDC’s) and the International Covenant on the Protection of Civil and Political Rights (ICCPR), (Articles 2 – 5) obliges parties to legislate where necessary to give effect to the rights recognized in the Covenant, and to provide an effective legal remedy for any violation of those rights.

From a legal perspective, however, this framework was most stunning for requiring all member states to change domestic law in order to carry out the international law requirements. Previous Chapter VII Security Council resolutions had generally been more specific and less directed at domestic law. For example, Security Council resolutions had blocked arms sales to particular countries, authorized both peacekeeping missions and international tribunals for discrete conflicts, and outlier states not to engage in certain conduct lest they be subject to sanctions regimes. Security Council resolutions did not require large-scale change of domestic law, certainly not of all member states at once.

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Resolution 1373 therefore started a new era for the Security Council, which now has the capacity to require all U.N. member states to change their domestic laws in parallel in order to tackle common threats. The U.N. Security Council framework for fighting terrorism included an ambitious list of things for states to do, focusing on domestic changes that would present a united front against terrorism when enacted in parallel across all U.N. member states. From a legal perspective, however, the Security Council framework for fighting terrorism was most stunning for requiring all member states to change domestic law in order to carry out the Security Council’s requirements.

Previously Chapter VII Security Council resolutions had generally been more specific and less directed at domestic law. For example, Security Council resolutions had blocked arms sales to particular countries, authorized both peacekeeping missions and international tribunals for discrete conflicts, and warned outlier states not to engage in certain conduct lest they be subject to sanctions regimes. Security Council resolutions did not require large-scale change of domestic law, certainly not of all member states at once. Resolution 1373 therefore started a new era for the Security Council, which now has the capacity to require all U.N. member states to change their domestic laws in parallel in order to tackle common threats.

Once the Security Council enacted Resolution 1373, a whole host of other international organizations followed suit by signalling their support for the resolution. Regional bodies eagerly joined in the task of designing frameworks for fighting terrorism and requiring their member states to comply. They adopted much the same program as did the U.N. Security Council, typically citing Resolution 1373 in their resolutions and action plans as the motive and the inspiration for their efforts. As a result, in addition to requirements from the Security Council, regional bodies also compiled a mandatory “to do” list requiring states to criminalize terrorism, block terrorism financing, take steps to root out terrorist groups in their territories, and harden borders while increasing surveillance. Not only did regional bodies take these steps, but they took them quite promptly after Resolution 1373 went into effect. In fall 2001, the European Union created an action plan to fight terrorism that tracked the essential aspects of Resolution 1373.

The EU also sped up initiation of the European Arrest Warrant to create a Europe wide system for arrests and prosecutions of terrorists. A few months later, the EU announced the creation of Euro just to coordinate some aspects of terrorism investigations across Europe. In spring 2002, the EU promulgated a Framework Decision on Terrorism specifying how terrorism offenses were to be defined in the laws of EU member states and the EU has continued its anti-terror campaign by pushing member states to enact many more regulations, including extensive rules about blocking terrorism financing and freezing the assets of suspected terrorists. The EU has been a strong defender of Resolution 1373 and has vowed to encourage states to implement it. While the EU might have the most elaborate strategy for responding to terrorism and supporting the implementation of Resolution 1373, it is not the only regional body to have taken action.

The African Union (AU) held a number of high-level meetings in fall 2001 and announced a plan of action explicitly intended to bring Resolution 1373 to African states. The Association of South-East Asian Nations (ASEAN) also developed a detailed regional plan to fight terrorism “especially taking into account the importance of all relevant U.N. resolutions.” The Organization of American States, which had already created an Inter-American Committee against Terrorism before 9/11, sprang into action and developed new action plans in fall 2001, culminating in the adoption in 2002 of the Inter American Convention against Terrorism. The Organization for Security and Co-operation in Europe adopted an action plan in fall 2001 explicitly tracking the U.N. framework for fighting terrorism. The South Asian Association for Regional Cooperation (SAARC) pledged its support for Resolution 1373 by reinforcing its existing SAARC Convention on the Suppression of Terrorism. Practically every major regional organization in the world signed onto the program outlined by Resolution 1373 and added its moral and legal force to the effort to get states to comply. Member states overwhelmingly applauded these
efforts – and rapid changes in domestic anti-terror laws followed around the world. While international law famously has compliance problems, such problems seemed to disappear here. All 192 U.N. member states filed at least one report with the Security Council’s Counter-Terrorism Committee (CTC), a subsidiary body that was created to monitor and enforce compliance with Resolution 1373. These reports explain how states have implemented Resolution 1373.

By August 2006, 107 countries had filed four reports, and 42 had filed five. The reports show that there was extraordinary uptake of the new anti-terrorism framework. As early as 2003, CTC experts said that 30 countries had fully complied with the resolution, 60 countries were well on their way toward complying, 70 countries intended to comply but were unable to do so without assistance, and only 20 states resisted compliance. The CTC then launched a program to facilitate the provision of technical assistance to member states that needed help in order to speed their compliance. More recently, in November 2009, the CTC, by then no longer compiling quantitative assessments of compliance as it had previously done, reported a significant additional uptake of Resolution 1373’s mandate:

Most States in the Western Europe and other States, Eastern Europe, and Central Asia and the Caucasus regions have introduced comprehensive counter-terrorism legislation. More than half of States in South Eastern Europe and almost half of the States in South America have comprehensive counter-terrorism legislation. In Africa, Western Asia, Southeast Asia, Central America and the Caribbean, many States do not have comprehensive counterterrorism legislation in place, although most do have some elements in place.

Such widespread compliance with the Resolution 1373 framework makes the anti-terrorism campaign an extraordinary example in international law. The success is especially noteworthy in light of what Resolution 1373 required states to do, which was to make changes in some of the most sensitive areas of domestic law. Hence, we get an illustration that, after 9/11, national security law was not so national anymore.

c) Implementation

Once a policy is formulated pertaining to security issues, the factor of how they should be implemented comes in to the fore. The refugee crisis in Europe after instability in Syria and Iraq, in the backdrop of war against Daesh (ISIS), resulted in an uprising amongst the Europeans against accepting refugees. Questions rose on the idea of allowing refugee influx within the framework of law and states started inquiring about how strict their refugee policy can be. Is this possible? Can States have their own individual policy which is devoid of pressing international security issues? If yes? How are they implemented?

The principles through which international law is governed, specify respect of treaties by States particularly for their application in the judicial, executive and legislative machinery. Despite this connotation, there is no specific way defined for the implementation of those treaties. It is entirely a State’s discretion to opt methods according to its legal system to implement the treaty provisions. Meanwhile, according to a positivist solution, two doctrines in the legal tradition play a role once implementation of treaty provisions are concerned: Dualist and Monist. They are discussed in detail as follows:

i) Dualist:

Where the question of implementing international law acquired through treaty provision in a domestic legal system arises, in a dualist approach there cannot be any question of contradiction between the two. This approach hails from the idea

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64 Article 28, Vienna Convention 1969.
of domestic and international laws being separate entities and intertwining between the two is out of question. There is no chance of conflict between the two as both the entities are operating in different domains. In this regard, the approach suggests that an international treaty will only be applied in a domestic system of a State, once a legal method is adopted by it to introduce the treaty provisions. In other words, a State will have to legislate in light of the underpinnings of the treaty so as to apply it in true nature and spirit. The treaty is in fact nationalized and passed through a phase of transformation in order to fully facilitate implementation. Hence, both international and domestic legal systems are two separate entities creating two different kinds of legal responsibilities. Hence for the dualist approach the following should be kept in mind:

- The mandatory force of domestic law is based in the Constitution of a country, whereas; the bases of international law is *pacta sunt servanda*.
- Both the provisions of international and domestic law do not have the ability to influence each other directly or without a proper channel.
- The systems will not be able to deliver if they have contradictory provisions.

Consequently, this doctrine is a product of the 19th century world order, where international law was predominantly inter-state and place of individuals in the international arena was minimal. Hence, it allows the intersecting of both the international and domestic legal tradition as consequence of deliberate actions.

**ii) Monist:**

This dogma is primarily based on State Sovereignty. It suggests state discretion to be vested as a major right in State manoeuvring. Hence, if a State enters in to a treaty it has allowed the international treaty provisions to infiltrate in to its Sovereignty. This in fact is a predominant theory in the European Union, where supremacy of an international provision is priority for unity of juridical order. In other words, for the monist doctrine, an international treaty provision is applied directly in the domestic legal system. There is no special mechanism required in order to create a link between the two systems. Consequently, both the doctrines were worked upon by revolutionary theorists like Hans Kelson. He actually proposed differences between the international legal traditions alongside the domestic one. According to Kelson, individual responsibility is not excluded from international law neither is collective responsibility excluded from domestic law. He however believed that there is no difference between international and domestic law, as in both cases individual is the main subject. International law is just decentralized and domestic law is centralized.

**Conclusion**

In the study of international relations and politics, the operation of international law has received minimum attention. The idea of viewing the national security imperatives of a State through the prism of the law of nations is a 'victim' of liberalism and the early understanding of how this law is expected to behave. The fact remains that, viewing the operation of both these fields through the narrow prism of derivatives and not by the quality of regulation, has undermined their synchronization. Ever since States are in need of formulating a policy of interaction both for coordination and conflict, the roadmap is provided by law of nations. Hence, it is not to be considered only as a 'regime' that legalizes an action or otherwise. International law is also to be considered as a facilitator in State interaction, albeit the compulsions of having a legal order that punishes the mighty and provides justice to the underprivileged. The future of law of nations is placed in the hands of what happens inside the borders of a State, instead of outside. It is more domestic than international.
Lessons Learnt!

- International law plays a role in national security considerations in wake of three steps:
  - Policy formulation
  - Legalization
  - Implementation
A VIEWPOINT ON PAKISTAN’S NATIONAL SECURITY IMPERATIVES AND RELEVANCE OF INTERNATIONAL LAW

Challenges to Pakistan’s National Security: A Prism of International Law

Prelude:

Pakistan's security compulsions have traditionally been guided by a hostile India as an external factor and repercussions of the two-decade long Afghan war on the social fabric as a major internal security challenge. This is what Stephen Cohen also identifies in his book 'The Pakistan Army', that 'hostilities with India and threats from the West created a security environment for Pakistan, in which strategic options open to Pakistan never were extremely attractive….. extremely risky and limited in number'.

Theoretically, Pakistan’s security concerns should flow from its threat perceptions and the required capabilities to deal with the challenges perceived. However, it may be argued that, viewing these concerns in isolation of Pakistan’s geographical realities may be delusional. As, discussed earlier, compulsions of national security also flow from where and how a country is placed on the face of the earth and how it is connected through land and sea. Pakistan's geographical location has driven its security compulsions since its inception. As a 'burden of history' Pakistan’s division in to the West and East half and later on with its breaking off, still drive its policies. Today, its location at the juncture of South, East and West Asia, has the potential to either liberate the region or encage it forever. It are these geographical underpinnings that drive Pakistan's internal and external compulsions, along with their overlaps.

The national security imperatives of Pakistan were subject to strict military interpretation since its inception. Owing to the ‘toxic’ past with its traditional rival India, Pakistan’s security concerns remained dominated by the urge of maintaining a balance against the threats posed by its neighbor. On the other hand, the two-decade long Afghan war had a fallout on the social fabric of Pakistan, forcing the country to look inwards. Theoretically, a country’s security concerns flow from its threat perceptions and the required capabilities to deal with the challenges perceived.

These compulsions of looking both inwards and outside the borders, have overwhelmed Pakistan's attempts of furthering its national security objectives. Resources have been pooled in for generating tangible options of protection, while policies i.e. 'Pakistan first', depicted notions of options of the country within the international security perspective. The country is signatory to more than 12000 treaties and 60-70 percent of its domestic law is made up of the obligations generating from these legal documents. Despite this coherence, it has not yet entered into a phase of consistent legalization of international politics. Hence, major issues, particularly the ones critical to national security are being managed through traditional approaches.

As a matter of practice, Pakistan follows the dualist approach in matters of treaties and customary international law. In other words, for the domestic application and usage of treaty obligations, an act of the executive or a legal cover in form of domestic legislation is required. The question of applying international obligations amidst the internal compulsions becomes critical once external incidents and happenings have a direct impact on internal issues. Particularly, for Pakistan national security has become a major concern after the 9/11 twin tower attack. Extremism and militancy following the course of terrorism has in fact accentuated Pakistan’s legal

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compulsions, once a war was launched in the western parts of the country. Politics was securitized, alongside legislations overwhelmed by international security concerns.

Nonetheless, this chapter picking up threads from the discussion in the former chapter, attempts to link Pakistan’s national security concerns with its international law obligations. It projects a framework of security compulsions viewed through the prism international law. For this purpose, the chapter first provides an insight on how Pakistan’s legal system works after the 18th Constitutional amendment which allowed the devolution of power to the provinces, following which, within the ‘conflict paradigm’ of international law, an analysis current security situation in Pakistan is deliberated upon, alongside the nature of Durand Line. This is intended so as to provide a case study to the students of international law and international relations, of how international law plays a role in the national security imperatives of Pakistan.

The legislative framework for Local Government System in Pakistan after 18th amendment: An Analysis

Prelude

Pakistan has a chequered history of attempting to introduce a local government system in the country. However, it was for the first time that the system was referred to in the Constitution through the 18th amendment. The legislation firstly implied upon a three-tier setup with devolution of political, administrative and fiscal responsibilities from the federal to provincial and then to an elected local body system. Secondly, it vested in the provinces a responsibility to engineer the local body system for which the elections were to be held under the auspicious of the election commission of Pakistan. Furthermore, while implying upon ‘provincial autonomy’ the amendment desired to secure equitable share for the provinces in the Federation and also to bring a ‘balanced structure of governance in Pakistan’.

While this framework has its own merits and demerits, however, five years after the amendment was passed it is pertinent to analyze the legislative and administrative benchmarks the system was able to achieve under the umbrella of the amendment. It is imperative because the amendment besides introducing changes in numerous articles of the Constitution devolved numerous subjects exclusively to the legislative and executive domain of the provinces. In this regard, this part of the book aims to analyze first, the legislative and administrative framework as evolved at the provincial level under the auspicious of the amendment. Second, it provides an insight to the merits and demerits of the local government system introduced. Third, it delves upon findings and conclusions by segregating realities from theories.

Today, six years after the revival of a decentralized federating system of Governance in Pakistan, the 18th Constitutional amendment still remains in the realm of debate. Through the amendment, the Parliament substituted by modifications 102 Articles out of 280; 36 percent of the 1973 Constitution of Pakistan. In this major upturn, the 17th amendment was repealed and Parliamentary sovereignty was restored. Following which, powers of the President were brought down to the limits of what were bestowed upon him by the Constitution earlier and the rest had gone to the Prime Minister. In this regard, prominent features of the amendment also include inclusion of an article in the Constitution which support paradigm shift from a centralized to a multi-tiered decentralized local governance system in the country and also that of provincial autonomy.

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66 This research was conducted in the year 2015, amidst different phases of the local body elections.
67 Text of 18th amendment which is available at: http://www.pakistani.org/pakistan/constitution/amendments/18amendment.html.
68 The powers of the President are curtailed in the 18th amendment by repealing the Article 58 (2 (b) of the Constitution of Pakistan.
69 Ibid.
70 Article 140 (a) in the Constitution makes the local government system in Pakistan mandatory. On the other hand, Articles 241-A and 219 entrusts the Election Commission of Pakistan to conduct local body elections.
Various factors may be ascertained through this shift, however it is noteworthy that:
Firstly, decentralization and federalism as a system of governance as introduced by the amendment including devolution of authority and power to the district sub-district and community level is not new to Pakistan. The country’s experience in establishing federalism as a system of governance is topsy-turvy. Earlier, there have been three attempts to introduce a similar kind of system with some variations. Interestingly all three were introduced when the military was in power, and this is for the first time that a civilian government devolved powers to provinces and brought down the role of President as it was ascertained in the Constitution of 1973.

Secondly, conducting elections and appointing representatives for establishing a local government system is just one aspect of introducing federalism in a country. There is a much deeper requirement of devolving the fiscal, administrative and legislative authorities across the three-tiers: center, provinces and then to the local bodies creating a trickledown effect. Following which, the provinces should ensure to evolve a flexible yet tangible legislative framework which ensures provincial autonomy and devolves powers to the grass root level simultaneously.

However, the revival of local governance as a system continues to be debated and rather is subject to skepticism despite its mandatory nature as ascertained by the Constitution. The provincial leaderships very reluctantly passed the Local Government laws in the year 2013 and in fact were keener in restoring the Commissioner system from the previous Local Government Act 2001,\(^1\) in order to manage local government functions directly through provincial bureaucracy. In this regard, the higher judiciary had to intervene in order to uphold the local government elections, which were carried out in different phases in the year 2015.\(^2\) These trends raise several questions. Why have the provincial governments been reluctant to revive the local governments in its true form, why do these provinces still lack a political consensus on the main characteristics of the LG laws? What can be done to ensure that the revival of the LG Acts improves governance, service delivery and citizens’ participation at the local level?

 Nonetheless, this ‘federalist’ form of governance, with a defining feature of inducing ‘partial autonomy’ to subdivisions or subunits, is quite popular since the past century.\(^3\) According to Daniel Elazar, currently 100 out of the 180 sovereign and recognized countries of the World follow federalism as a system of governance. This list includes countries like India, Switzerland, Canada, Australia and even the United States. Peter Hogg, a scholar of law, while defining federalism in the Constitutional law of Canada wrote that, the federalist form of Government will always talk about two ‘levels’. In his opinion, although the federal law will have precedence over the regional one, however it does not ipso facto imply on its dominance over the later, in fact both will work in consistency with each other with equal status.\(^4\)

In this regard, Pakistan’s sixty-eight years of independence and attempts of applying federalism as a system of governance may be described by high level of arbitrariness. Despite numerous efforts of Constitutional and administrative efforts the country has been unable to construct a system of governance which champions consistency and effectiveness. Legislations seem to be easily engineered but unable to deliver according to the desired nature and spirit. In this regard, it is imperative to analyze at this point of history, the causes and halting factors behind this discourse. Are the legislations faulty? Or the method of implementation till the lowest tier needs revision? And most importantly, is it the legacy of the ‘imperial monocracy’ which still haunts the governance setup of Pakistan and for that matter the Subcontinent? In structural terms, this study aims at answering these questions by revisiting the legislative framework as introduced by the 18th amendment. Needless to say that, legislations and regulations are not just

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\(^2\) The Supreme Court of Pakistan while passing a detailed judgment in Civil Appeal No. 297 of 2014 and case titled: Election Commission of Pakistan vs. Province of Punjab, ordered the provinces to hold local body elections under the auspicious of the ECP, till Nov’ 2015. The order was in response of an appeal by the ECP against a Lahore High Court verdict giving authority of delimitation of constituencies to the Government of Punjab.


\(^4\) Hogg, Peter, Constitutional Law of Canada (Toronto: Thomson-Carswell, 2007), 5-2.
mere tools but if framed properly may act as the driving force of a society towards stability and strength.

**Historical Overview**

The body of rules as provided by a particular legislation in a country should ideally reflect the mindset of a society and not of the ruling elite. The unfortunate upturn for countries in the Subcontinent has in fact been the inability to let go of the colonial legacy, which is also depicted staunchly in the regulations and administrative setup. For Pakistan, sustainability in local government system has not been achieved due to various reasons, however majorly the inability to strike a balance between the past and the present has been the most prominent reason.

In Raja Rab Nawaz vs. Federation of Pakistan, the Supreme Court also noted this issue when in its detailed judgment it stated that: It may be observed that prior to the Partition of the Subcontinent, the territory of Indo-Pak remained under the foreign domination for a long period, during which its traditional institutions were badly mutilated if they escaped extinction. The vast majority of people in the country lived in villages and small towns; therefore, it was required to evolve a system that would increasingly associate them with the ordering of their affairs. This could only be achieved through decentralization of the authority which had been vested in the District Officer under the British rule.\(^{75}\)

To recall, during the British era, the British Parliament enjoyed extreme supremacy over the East India Company. This was to the extent that annually Indian accounts were to be laid in front of the Parliament for which it also appointed auditors itself.\(^{76}\) A vice-regal council was formed which enjoyed executive veto, with members being the Viceroy, six regular members, and the Commander-in-Chief of the Indian Army. This council met regularly once a week with its attention focused on issues of an inter-departmental nature, matters of policy, and also budgeting. Secretaries of concerned departments were also present at the meeting, who gave advice and were also responsible for implementation of decisions. Their autonomy was guaranteed by the fact that, they were from the covenanted Indian civil service owing their appointments to the secretary of State and not the viceroy.

This broad spectrum of administration involved the center to lay down policies and general outline of important measures and leave the provincial administrations to fill in the details by rules drafted by them but approved by Government of India. As a matter of fact, this structure presents the notion that the Victorian British rule was not democratic. It was not until the nineteenth century that the men got the right to vote even in Britain. Hence, the representative system of government introduced by them in the Subcontinent later on was a conscious effort of maintaining supremacy of the secretaries of State. This legacy unfortunately was carried on even after independence of the Subcontinent in the year 1947.

As for Pakistan, the nascent State was not able to agree upon a Constitution till the year 1956, whereas India’s first Constitution was formulated in the year 1948. In this purview, the first decade after independence of Pakistan was governed by the Government of India Act 1935 as the interim Constitution. It in fact made the basis of a ‘quasi federal’ system of Governance with immense powers vested in the Center, which was once presumed with the British Parliament.

Following which, after the first Constitution was promulgated a confusion of applying federalism and retaining a “vice regal system” simultaneously created huge gaps which were later on filled by bureaucracy and military. As a result, Pakistan’s governance fluctuated between civil and military establishments. However, ironically federalism and for that matter local government system in Pakistan has been a favorite of military regimes. Thrice the military governments in the reign of General Ayub Khan, General Zia-ul-Haq and General Pervez Musharraf switched the system to local governance and sought major powers to the President by introducing 8th and 17th amendment to the Constitution of Pakistan respectively.

\(^{75}\) Raja Rab Nawaz vs. Federation of Pakistan.  
\(^{76}\) Courtenay Ilbert, the Government of India (London: Humphrey Milford and Stevens & Sons, Ltd., 1916), 138.
i) **The ‘Governor Raj’: Federalism under President Ayub:** At the lower level, local governance may indeed be considered as a drill of democracy and a source of political education. In this regard, President Ayub’s local government was based on ‘basic democracy’ introduced through an Ordinance in the year 1959. It was primarily under the Governor’s required to continually stimulate people’s interest in the general advancement and development of the country and also to keep the central government more effective but leaner in terms of size. This however induced instability in the system.

ii) **President Zia-ul-Haq: a reign of bureaucratic supremacy:** On the other hand, Gen Zia-ul-Haq reviewed the system after coming into power and tried to induce much more stability. Most of the authors especially IjlalHaidar Zaidi in his summaries relates stability with this era in terms of insight and diagnostic capacity. However, in the long run President Zia’s attitude of not getting swayed away easily started bringing more negativity than positivity in the system. Corruption got rampant and the district and divisional administrations had become more powerful in terms of patronage and resources at their disposal. They had become more arbitrary, personalized and corrupt. Nonetheless, bureaucracy took the lead of the local administration.

iii) **President Musharraf and the ‘devolution of power plan 2001:** When the military took over in the year 1999, with Gen Pervez Musharaf as the President, the political institutions were exhausted and the administrative institutions were haunted by the ghosts of colonialism. Hence, on 14th August’ 2001, a new local government scheme- ‘the devolution of power plan’, with elected Nazims as the heads of the districts with overall control of the district bureaucracy were constituted. With an aim to transfer responsibility to the grass root level, the DCO’s replaced the deputy commissioners and enjoyed extreme powers as compared to the other departments. The basic principle was clear that, the local government would function clearly within the provincial framework. However, due to this devolution, coordination got worse than under the old system where the divisional and deputy commissioners had powers to control prices of food, settle property disputes and supervise the police. Nonetheless, Musharraf’s devolution of power to the local governments in way of forming a parallel system to the existent one and constant interference in petty details ran aground the civil administration.

**The 18th amendment: A bird eye view**

In the year 2010, for the first time a civilian government revived the local government system through the 18th amendment. Prior to this, there existed a hierarchical relationship between the center, provinces and local bodies, with the center enjoying extreme dominance. In this regard, 36 percent of the 1973 Constitution was amended redefining the structural contours of Pakistan to a decentralized system of governance after the 18th amendment. With these amendments greater autonomy was extended to provinces through insertions and deletions in numerous Articles. The Constitution delineates the scope of authorities in the executive domain of both the provincial and federal Governments by Articles 137 and 90 respectively. In this purview, the executive authority of the Federal Government extends to matters under the Parliament’s discretion of making laws, i.e. rights and duties, or jurisdiction within and outside Pakistan. This meant that in principle and in legal terms, the executive authority is accustomed with the authority of legislating at the provincial and federal level.

Technically, the 18th Amendment has revised the Federal Legislative List Part 1 and Part II and abolished the Concurrent Legislative List by demarcating jurisdictions of a multi-tiered governance system at the Federal, Provincial and inter-provincial levels. As a result, the executive and legislative authorities of the provincial and federal governments are delimited by exclusively handing over 53 subjects to the federal government, 18 subjects to the Council of Common Interests (CCI) and the rest subjects to the jurisdiction of the provincial governments.

From the Administrative prism, it further redistributes functions at the district, tehsil and union council levels under the auspicious of the provincial governments by Article 140 (a) of the Constitution. This very Article also makes the applicability of a local government system in
Pakistan mandatory and directs the Election Commission of Pakistan to oversee local government elections in the country.

**Appraisal**

As a matter of fact, the 18th amendment may be considered as an ‘old wine in a new bottle’, with creating more confusion instead of bringing clarity. It is restrictive in nature when it refers to in the Article 140 (a) about only three areas of devolution i.e. political, administrative and financial and also leaves numerous loopholes while not providing for a particular mandate for devolution of power to the local bodies in the Constitution. Furthermore, it does not bring drastic changes in the power structure of the local bodies as they were already provided with the similar kind of framework in the devolution of power act 2001.

Nonetheless, the Amendment with its nature and spirit emphasized on introducing major changes in the regulatory, legislative and policy frameworks on subjects that were devolved and also shared between the federal and provincial governments. Almost 48 federal laws were identified to be amended and regulations pertaining to businesses both at the provincial and federal level were amended. Despite the holistic approach, there are numerous issues in the legislative and administrative framework as emerged after the amendment was passed.

The Amendment seems to be a piece of law passed in haste when numerous Articles particularly 32, 163 and the Federal Legislative List II are viewed from the prism of the Amendment. Ironically, while Article 140 (a) was added in the Constitution, Article 32 (promotion of local government institutions by the State) was neither amended nor deleted, similarly, Article 163 still retains the power of Provincial assemblies to impose taxes, which makes the idea of devolving fiscal responsibilities and power to the local bodies questionable.

Keeping this in view, a new World Bank policy paper also declared the amendment to have created a 'jungle of confusion' between the regulatory functions of the federal and provincial governments. While this remains true, on the other hand, the provinces are still unable to devolve the desired power to the grass root level. These aspects are further delved upon in the following sub-headings:

- **Making Provincial Autonomy work**: Very recently, a power tussle between Sindh, Baluchistan and the Federal Ministry of Petroleum and Natural Resources- MPNR depicts how making provincial autonomy work is an issue in Pakistan. According to Article 172(3) of the Constitution 50 percent ownership of resources like oil and gas is entitled to the mineral producing provinces. Although, this provision is not a result of 18th amendment still it is subject to tussle of interpretation between the stakeholders. Where Sindh claimed exclusive rights in extending licenses to companies buying oil and gas, Baluchistan demanded the abolition of the Ministry altogether. Due to this tussle and inability to reach a consensus 50 blocks allotted to international and national exploration companies was not able to begin.

  In this regard, there may be many examples illustrating this issue even after the 18th amendment, like the devolution of higher education was termed as ‘unconstitutional’ by HEC, on the other hand despite empowerment of provinces to access foreign loans the Executive Committee of the National Economic Council (ECNEC) was not able to provide a framework for it to work. The amendment no doubt aimed at empowering the provinces to reduce the concept of centralization and strengthen democracy by dividing roles and duties between the center and provinces, however, it has somehow created more confusion. The entire institutions seem to be reluctant in giving away power and in fact retain it by declaring devolution ‘unconstitutional’.

  The major cause of such confusion is the lack of streamlining structures of federal organizations with the new mandate as provided by the amendment. Ownership of major institutions including financial and educational was given to the provinces in the absence of reforms to the mandate of federal government. The result is retaining of
Redundant institutions by the federal government and tussle with provinces. There is a dire need for the federal government to carry out analysis and formulate a framework which induces harmonization in the roles of provinces and federal government for major avenues like, tax collection, distribution of mineral resources, higher education commission and so on.

On the other hand, amidst confusion of sharing federal and provincial institutions, devolution of power to the third-tier of governance - local bodies, is still viewed with skepticism. In fact, in the absence of an established pattern of governance, the local government is practically an extension of ‘provincial autonomy’.

- **Provinces and Local bodies: a power struggle**

  i) **Legislative framework**: The Constitution and for that matter the 18th amendment does not define powers of local government as it is done for other tiers and declares it to be the responsibility of the provinces to oversee local government system under their auspicious. In this regard, the provinces passed Local Government Acts in the year 2013. These Acts are viewed both with skepticism and hope due to numerous reasons. These mixed feelings are due to fact that where it took three years for the provincial governments to pass these legislations, the local body elections were conducted only after the Supreme Court emphasized on their speedy conduction. On the other hand, these Acts are also considered to be fragmented pieces of law driven towards maintaining a status quo by being ineffective in bringing local governance arrangements through devolution of adequate political, fiscal and administrative power to local councils.

  The credibility of the Acts is also questionable by the fact that some parts of them are challenged by the opposition in Punjab, Sindh and Khyber Pakhtunkhwa. Furthermore, if compared with the LGO 2001, there is a major difference that none of the Acts devolve sufficient powers and functions to the local governments and the provincial governments seem to retain major authority. Even the Local Government Fund is managed by the provincial finance minister and his Finance Department. As a matter of fact, the entire Acts seem to be subordinating local governments to the provincial ones. These Acts are allowing the Chief Ministers to dismiss the head of Councils and even local governments and also appoint holders of office after their dismissal. For example, the Punjab government is authorized to suspend eight local government officials for 90 days, in Baluchistan and Khyber Pakhtunkhwa it is allowed for 30 days, and in Sindh for six months. During and after this period the dismissed officials can file review petitions to the provincial governments.

  The LG Acts of Punjab and Baluchistan also state that the District Councils are to function by the directives of the Provincial Government, which gives leverage to provincial governments over the local ones; whereas, in Sindh and KPK, the provincial governments have greater autonomy for suspecting and inspecting the local governments. Although the LG Acts in the entire provinces devolve major delivery function of services to local governments, the provincial governments formulated exceptions to retain big entities like the Karachi Water and Sewerage Board, Sindh Building Control Authority, Lahore Development Authority (LDA), and Solid Waste Management (SWM), etc.

  On the other hand, the LG Act of Punjab also provides for the creation of health and education authorities comprising members from the provincial government, local governments, technocrats and the private sector. The Chief Minister will be the appointing authority and can dismiss the heads of the authority or dissolve the authorities.

  ii) **Administrative framework**: As far as the administrative framework is concerned, the LG Acts of 2013 provide for a local body election on party basis. The constituencies of Baluchistan, Punjab and Sindh are divided into Union Councils and District Councils in the rural areas while Municipal Committees and Union Committees in the urban areas;
while the KPK Act provides for Tehsil Councils and Village Councils in the rural areas and neighborhood Councils in the urban areas. However, the confusion starts when the Acts rests in the Provincial government’s authority to restructure and redesign a constituency according to their will. This has created vagueness in the Acts and maintaining unity along with delimitation of constituency has become a serious problem legally. Major areas of administrative authority as distributed by the LG Acts 2013 are illustrated in the table below:

<table>
<thead>
<tr>
<th>Sr</th>
<th>LG Acts 2013</th>
<th>Delimitation of Constituencies</th>
<th>Term limits and Electoral process</th>
<th>Police</th>
<th>Financial Powers</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Punjab</td>
<td>Preservation of Union Councils</td>
<td>Five years /Direct elections for chairman and Vice Chairman of UC</td>
<td>Not under LG</td>
<td>Under provincial Finance Commission headed by the provincial finance minister.</td>
</tr>
<tr>
<td>2.</td>
<td>Sindh</td>
<td>Preservation of Union Councils</td>
<td>Four Years /Indirect Election for Chairman and Vice Chairman</td>
<td>Not under LG</td>
<td>Under provincial Finance Commission headed by the provincial finance minister.</td>
</tr>
<tr>
<td>4.</td>
<td>KPK</td>
<td>Delimitation Authority, which bodes well for the local governments provided the composition and membership is balanced and allows broader representation and participation.</td>
<td>•Three Years/ Direct elections for all seats. •Proportional representation for women and minorities</td>
<td>Village and Neighborho od Councils have powers to supervise the police and make recommendations to the district government</td>
<td>Village and Neighborhoo d Councils to supervise all local government functionaries including revenue officials in their jurisdiction</td>
</tr>
</tbody>
</table>

As illustrated above, there is major inconsistency in the distribution of administrative powers between the provinces. The delimitation of constituencies in Punjab and Sindh were also declared illegal by judgments of Lahore and Sindh High Courts respectively. On the other hand, the terms of limits of local governments are also not consistent. A major drawback is the establishment of Provincial Finance Commissions for overseeing imposition of taxes and other fiscal functions. This is the result of loophole in the 18th amendment and retaining of Article 163.
in the Constitution as discussed earlier. Furthermore, the Acts also authorize an out of court dispute resolution mechanism, Panchayat in rural areas and Muslehat-e-Anjuman in urban areas. However, there members are to be nominated by the provincial governments.

Consequently, the LG Acts 2013 seem to be an extension of the Local Government Ordinance 1979, and these existing laws do not devolve major powers down to the grass root level. On the other hand the 18th amendment aimed at creating a balance between the three-tiers of governance; however, due to the loopholes it was unable to create a trickle-down effect of devolution of power to the lowest tiers of the system. The fiscal and policy controls are retained by the provincial governments and there is still requirement of substitutions in various Articles of the Constitution in order to make federalism work in its true sense.

Findings and Recommendations

The 18th amendment in its nature and spirit revived a system of decentralization and devolution of power in Pakistan. This required major redistribution and reallocation of subjects within the federal government. On the other hand, it vested wholesome responsibility in the provinces to devolve further powers to the local government system. The elections for local bodies were to be conducted by the federal institution of the Election Commission of Pakistan. This devolution of power plan injected mixed feelings in the entire tiers of governance and hence resulted in a delay of actualizing the mandate of the amendment. There may be numerous reasons for this reluctance, however some of the key findings in this regard are as follows:

1. **Centralist Tendencies**: Pakistan’s governance system is haunted by the past. The Government of India Act 1935 when acted as the interim Constitution for nearly a decade after independence, unfortunately formed the basis of a centralist mindset in the ruling elite of Pakistan. The Constitutions of 1956, 1962 and 1973 all have reflections of the imperial monocracy which once ruled this area. Due to this very reason, even after legislations like the 18th amendment or the devolution of power plan 2001, the provincial and bureaucratic step up in the federal government are reluctant to devolve powers amongst one another. As compared to Pakistan, India was able to let go of this centralist tendency in the year 1959 when Rajasthan became the first State to implement ‘Panchayti Raj’ as a system of local governance. Today this system is successfully working under the auspicious of the 73rd amendment to the Constitution of India.

**Recommendation**: Inducing change in the centralist mindset is a hefty process. While it is important to build a counter-narrative against this consistent tendency; learning lessons from the panchayti system in India may be helpful. This is because with authority these institutions may serve as a platform of making vocal the desires of the local community and result in toning down autocratic ideas in the establishment.

2. **18th amendment**: a hasty legislation: while the local government system referred to by the 18th amendment is not new to Pakistan, the legislation itself seems to be formulated in haste. Numerous cases of confusion in how the federal and provincial institutions are supposed to manage devolution and ensure provincial autonomy and also devolve powers to the local body level, depict haste in the formulation of the amendment.

**Recommendation**: Continuous contest, institutionalized negotiation and quest for consensus-building for equitable inter-governmental relations can be the building blocks of a functional federal structure of Pakistan. There is a need to revise the sharing of subjects amongst the federal and provincial governments. This is to be done by harmonizing the mandate of the federal government with the one as brought forward by the 18th amendment. Federal government needs to emerge as a ‘coordinating government’ facilitating the provincial governments to address intra-governmental disparities and create an enabling environment for equitable inter-governmental relations. Appointing provincial representations in federal regulatory authorities and
developing mechanisms for joint management of electricity, ports, national planning supervision and public debt; and defining standards in higher education are some critical issues which need in-depth policy debates and appropriate decision making processes.

3. **Provincial autonomy vs. local government system**: Where ensuring provincial autonomy seems to be a major issue between the federal and provincial governments, simultaneously, vesting the entire powers of engineering a local government system in the provinces themselves in fact has turned to be counter-productive. It seems to be a recipe of ensuring provincial 'autocracy' by not defining constitutionally how the local government system is supposed to be formulated.

**Recommendation**: Provincial governments need to review their rules of business and bring amendments therein to further devolve fiscal, policy and planning authorities to the district, tehsil and union councils through elected local governments. This may be done by substituting by modification main articles like 32 and 163 of the Constitution of Pakistan. Furthermore, some key subjects enlisted in the Federal Legislative List II need to be studied in order to determine as to how the policy, regulatory and supervisory control of these subjects can be governed by the CCI under the framework of shared responsibility and joint control.

4. **Lack of coordination between the three-tiers**: The confusion in applicability of the 18th amendment in nature and spirit is also due to the lack of coordination between the federal and provincial governments. Lack of harmonization in the system is due to very fact that the governments are reluctant to coordinate and devolve subjects amongst each other.

**Recommendation**: A comprehensive coordination and communication mechanism on implementation and reporting on international agreements, treatise, protocols and covenants need to be established for a consolidated reporting at international fora. Inter-provincial mechanisms need to be developed on devolved subjects by creating interface between provinces for experience sharing and mutual learning on effective management of devolved subjects with special reference to social sector.

**Way Forward**

In a nutshell, the history of introducing local governance as a system in Pakistan has been irregular and long. Technically, the Constitution sets forth Pakistan as a Federal Parliamentary Republic with four provinces, while today its administrative setup is further divided into Districts, Sub-districts (Tehsils), and Union Council comprising of various villages. However, the legislative history of distributing power between the federation and its units has remained elusive mainly because of an inability to agree on a Constitution for almost 11 years after independence and experimentation with the system of local governance thrice at critical junctures of the country’s history.

The 18th amendment provided a ‘golden opportunity’ for reforming the multi-tier governance system in the country, but up till now the desired result is not achieved. Meanwhile, the federal government is not able to deal with some major issues of delineating responsibilities and resetting roles and duties in milieu of the changes introduced by the amendment at the federal, provincial and local levels. This was imperative in order to smoothly address the country’s governance flaws and reach sustainability in the process. Nonetheless, it is imperative to construct legislations in a manner that they inject sustainability in the country’s functioning and not create further confusions. The way forward rests in further deliberating on the very aspects and introducing legislations which inject sustainability in federalism for Pakistan.
Conflict Paradigm: International and Local laws

Within the purview of the prevalent situation in Pakistan, it is first necessary to establish if it can be termed as a conflict. A ‘conflict’ state under international law is recognized either on the subjective factor or intent of the parties to the conflict or upon objective factors of the scope and extent of the hostilities. Militant non-state actors including the TTP and their affiliates have unequivocally expressed their intent to assert and establish unlawful control over the territories of Pakistan through private armies and private military organizations forbidden under the Constitution’s Article 256. Driven by a murderous ideology, they take direct instructions from elements hostile to Pakistan and obey them, and have established channels to launder funds to procure arms. Through their express intent and overt acts, these militants have withdrawn their loyalty to the state in contravention of Article 5 of the Constitution and are waging war against the state in contravention of the Pakistan Penal Code’s Sections 121-140.

Along with the subjective intent of the parties, the sustained and organized violence by militants against the state and its functionaries and citizens that has claimed the lives of over 50,000 civilians and 5,000 military and other state personnel conclusively raises an irrefutable legal presumption under international law that a ‘conflict’ state exists between the state and militant non-state actors including the TTP and their affiliates. Therefore, the appropriate body of international law that applies to COIN operations in Pakistan is International Humanitarian Law, which has displaced the International Human Rights Law applicable in normal or peace times with respect to the conduct of these operations and the legal treatment of militant non-state actors.

While acknowledging the distinction between ‘law of war’ and ‘law of peace,’ the Court, in paragraphs 121-145 of its detailed judgment, justifies the creation of military courts as a necessary and appropriate response to defend Pakistan against internal threats of war from militant non-state actors in a time-bound manner. The Court characterizes the existing situation as ‘warlike’ where the law and order situation has degenerated beyond mere civil disorder and rioting to insurrection, mutiny or open armed rebellion against the state.

Significantly, this entails the duty of the Federation under Article 148 (3) of the Constitution to defend the Provinces against external aggression and internal disorder through the Armed Forces using all necessary means, including the military courts, to effectively carry out this constitutional duty.

Hence, the way forward rests in first, extension of the military courts in Pakistan. The military courts should be extended for two more years to speedily bring ‘jet-black terrorists’ to justice and hence comply with our obligations under UNSC Resolution 1373. These courts should be strictly viewed as a stop-gap and necessary measure, a least bad option in the prevalent circumstances, and should in the next two years spur rather than detract from much-needed holistic reform of the civilian criminal justice system. As until now, very few and genuine cases of ‘jet-black terrorists’ are continue to be referred to the military courts.

Second, Tailored and well thought-out reforms of the substantive and procedural aspects of criminal/anti-terrorism laws must be undertaken immediately. Police laws should be upgraded and harmonized to enable the Police to effectively act as the front-line force against terrorism. Protection of Judges and witnesses should be prioritized. A case-management system should be introduced across the board to streamline handling of criminal and terrorism cases. Shift focus from ocular evidence to electronic and forensic based evidence. Thirdly mainstreaming the tribal areas, politically, legally economically and administratively. Lastly, it is to be understood that an effective counter-insurgency is a shared responsibility of the military and civilian authorities. Hence, all of the 20 points of the National Action Plan should, therefore, be fully adhered to and strictly implemented by all the stakeholders through enhanced will and improved co-ordination.

The complexities of the Pak-Afghan border are immense. It is not as simple as people crossing border every day. When a person carries a step against a writ of the state it is an act of waging war against a state under Pakistan Penal Code Section 121. Legally, border management comes into play during ventures of trade and tourism, but what we face across the Durand line is wagging of war paradigm. The Non State actors on both sides of the border have exempted
themselves from the Constitution of both Pakistan and Afghanistan. They have started to disobey the Constitution by holding arms against state and building their own armies. International law tells about the state’s obligation to cooperate with the other state when hostile elements at one side of border take illegal actions on the other side under the extradition laws.

There are two approaches towards this cooperation one is war approach i.e. using force straight away against non-state actors and finding collaborative strategy. Second is law enforcement approach which envisages a move of conveying justice. Unfortunately there has been no extradition requests on both sides of the Durand Line and border management has unfortunately become a one sided paradigm, where Afghanistan denies the legal status of the border. It is worth mentioning that the Durand line has been accepted as an international border by Security Council documentation and by bilateral agreements between Pakistan and Afghanistan. Meanwhile, the issues of refugees remain on the forefront and their repatriation is questioned. As per international law, when the danger or instability from the country of origin minimizes, refugees are to be repatriated from the host country as its obligation ends. However, in the situation where the refugees prolong their stay and engage in economic ventures at the host state, then visa and immigration laws are applied as they acquire the status of an economic migrant. These laws are in fact quite relevant for the status of Afghan refugees in Pakistan.

The way forward rests in provision of providing economic incentives on both sides of the border. Economic zones need to be managed with political consent of both the Governments. Pakistan as a neighboring nation wants to rebuild Afghanistan and it is the duty of the coalition forces and Afghan government to provide collaborative security in carrying out the mission of reconstructing Afghanistan for the better future of both the states.

**Conclusion**

Ever since the inception of Pakistan, security imperatives have played a very significant role in formulation of its policies and subsequent strategies. This owes to a turbulent neighbourhood and threats emanating from India. In the post-9/11 world, the imperatives were deepened and compulsions to protect and project the efforts of dealing with various challenges were objectified. Today, it is not just the war of bullets and tanks but of ideas, rules and narratives. For Pakistan, the biggest challenge was to win both the wars and defy elements of instability, both known and unknown. This is possible through the prism of ‘law-fare’ instead of just ‘warfare’. The 18th amendment could have provided a lead in generating response against various challenges including the ones emanating from India and Afghanistan. It is about time that Pakistan realizes about the importance of winning over narratives through interaction based on facts that are to be presented by the operative prism of international law. Such wars are not fought on the battlefield, but in meeting rooms and table talks. It needs to be mindful of the importance of ‘words’ based on actual facts and build a positive perception in the international arena, as a responsible member of the international community.
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Prof Mary Ellen O’ Connell, summary of the international law Discussion Group meeting, Chatham House, Thursday, 21st Oct ‘2010, 3.

Articles 35- 41 of the 1907 Hague Convention (IV) Respecting the Laws and Customs of war on Land.


According to article 6 (1) of this covenant every individual has the right to life and no one shall be arbitrarily deprived of his life. It says that the penalty of death can only be rendered by a competent court.

Beginning with the Charter of the United Nations the international human rights law is depicted in its Article 1(3) which affirms the “international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.


Article 20 of International Law Commission draft on Responsibility of State for International Wrong.


Farhat Taj, “Drone Attacks: Pakistan’s Policy and the Tribesmen’s Perspective”: Terrorism Monitor Volume: 8 Issue: 10,March 11, 2010


http://wfol.tv/index.php?option=com_content&view=article&id=6773:we-were-right-again-pakistan-military-political-leadership-support-for-drone-attacks&catid=42:nations&Itemid=34 accessed on (1st Nov’ 2011)


Convention on the High Seas, Art. 1, Apr. 29, 1958, 13 UST 2312, 450 UNTS 82.

UNCLOS 1982, Arts. 58(1), 87 (1).


Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies, 967, Arts. 1, 18.


Ibid.

On the night of Oct. 11, U.S. Defense Secretary Leon Panetta stood inside the Intrepid Sea, Air and Space Museum, housed in a former aircraft carrier moored at a New York City pier.

Ellen Nakashima, ‘When should a cyber attack be considered an act of war?’ Japan Times, 31st Oct’ 2012


India’s INS Arihat is one of the world’s leading nuclear submarines. It was launched at the Indian Navy’s dockyard in Visakhapatnam, home to India’s Eastern Naval Command.
Annex A

Constitution (Twenty-First Amendment) Act, 2015
Passed by the National Assembly: January 6, 2015
Passed by the Senate: January 6, 2015
Presidential Assent Received: January 7, 2015

A Bill further to amend the Constitution of the Islamic Republic of Pakistan

WHEREAS extraordinary situation and circumstances exist which demand special measures for speedy trial of certain offences relative to terrorism, waging of war or insurrection against Pakistan and prevention of acts threatening the security of Pakistan by the terrorist groups using the name of religion or a sect and also by the members of armed groups, wings and militias;

AND WHEREAS there exists grave and unprecedented threat to the integrity of Pakistan and objectives set out in the Preamble to the Constitution by the framers of the Constitution, from the terrorist groups by raising of arms and insurgency using the name of religion or a sect, or from the foreign and locally funded anti-state elements;

AND WHEREAS it is expedient that the said terrorists groups including any such terrorists fighting while using the name of religion or a sect, captured or to be captured in combat with the Armed Forces or otherwise are tried by the courts established under the Acts mentioned hereinafter in section 2;

AND WHEREAS the people of Pakistan have expressed their firm resolve through their chosen representatives in the all parties conferences held in aftermath of the sad and terrible terrorist attack on the Army Public School at Peshawar on 16 December 2014 to permanently wipe out and eradicate terrorists from Pakistan, it is expedient to provide constitutional protection to the necessary measures taken hereunder in the interest of security and integrity of Pakistan;

It is hereby enacted as follows:-

1. **Short title and commencement:**
   (1) This Act may be called the Constitution (Twenty-First Amendment) Act, 2015.
   (2) It shall come into force at once.
   (3) The provisions of this Amendment Act shall remain in force for a period of two years from the date of its commencement and shall cease to form part of the Constitution and shall stand repealed on the expiration of the said period.

2. **Amendment of Article 175 of the Constitution:**
   In the Constitution of the Islamic Republic of Pakistan, hereinafter called the Constitution, in Article 175, in clause (3), for the full stop at the end a colon shall be substituted and thereafter, the following proviso shall be inserted, namely:-

   Provided that the provisions of this Article shall have no application to the trial of persons under any of the Acts mentioned at serial No. 6, 7, 8 and 9 of sub-part III or Part I of the First Schedule, who claims, or is known, to belong to any terrorist group or organization using the name of religion or a sect.

   Explanation:- In this proviso, the expression 'sect' means a sect of religion and does not include any religious or political party regulated under the Political Parties Order, 2002."

3. **Amendment of First Schedule of the Constitution:**
   In the Constitution, in the First Schedule, in sub-part III of Part I, after entry 5, the following new entries shall be added, namely:-


**Statement of Objects and Reasons**

An extraordinary situation and circumstances exist which demand special measures for speedy trial of offences relating to terrorism, waging of war or insurrection against Pakistan and prevention of acts threatening the security of Pakistan. There exists grave and unprecedented threat to the territorial integrity of Pakistan by miscreants, terrorists and foreign funded elements. Since there is an extraordinary situation as stated above it is expedient that an appropriate amendment is made in the Constitution.

The Bill is designed to achieve the aforesaid objects.


Source:: Formatting into pakistani.org XML by ShehzaadNakhoda. Conversion into HTML using pakistani.org xlst by ShehzaadNakhoda.
Annex B

International Covenant on Civil and Political Rights
Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.
Entry into force 23 March 1976, in accordance with Article 49.

Article 14

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (order public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt.

In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.
Balance of power: Balance of power, in international relations, the posture and policy of a nation or group of nations protecting itself against another nation or group of nations by matching its power against the power of the other side. States can pursue a policy of balance of power in two ways: by increasing their own power, as when engaging in an armaments race or in the competitive acquisition of territory, or by adding to their own power that of other states, as when embarking upon a policy of alliances.

Combatants: a person who fights in a war

De-colonization: Process by which colonies become independent of the colonizing country. Decolonization was gradual and peaceful for some British colonies largely settled by expatriates but violent for others, where native rebellions were energized by nationalism. After World War II, European countries generally lacked the wealth and political support necessary to suppress faraway revolts; they also faced opposition from the new superpowers, the U.S. and the Soviet Union, both of which had taken positions against colonialism. Korea was freed in 1945 by Japan's defeat in the war. The U.S. relinquished the Philippines in 1946. Britain left India in 1947, Palestine in 1948, and Egypt in 1956; it withdrew from Africa in the 1950s and '60s, from various island protectorates in the 1970s and '80s, and from Hong Kong in 1997. The French left Vietnam in 1954 and gave up its North African colonies by 1962. Portugal gave up its African colonies in the 1970s; Macau was returned to the Chinese in 1999.

Federalism: A principle of government that defines the relationship between the central government at the national level and its constituent units at the regional, state, or local levels. Under this principle of government, power and authority is allocated between the national and local governmental units, such that each unit is delegated a sphere of power and authority only it can exercise, while other powers must be shared.

Soft law: Soft law is defined as a residual category: realm of ‘soft law' begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation. Thus, if an agreement is not formally binding, it is soft along one dimension. Similarly, if an agreement is formally binding but its content is vague so that the agreement leaves almost complete discretion to the parties as to its implementation, then the agreement is soft along a second dimension.