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International Dispute Settlement Mechanisms and India-Pakistan Disputes

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The primary purpose of law is to provide security. While national laws, or municipal laws as they are called, have evolved in content and sophistication to aspire to cover a wider gamut of human life such as social and economic development, international law has struggled to keep pace. Despite an explosion in laws regulating various aspects of international affairs, maintaining peace and security remains its primary and most challenging preoccupation. This paper deals with dispute settlement mechanisms and India-Pakistan disputes.

War as an Instrument of State Policy

War has always been regarded as a legitimate instrument of state policy and an essential attribute of sovereignty. It has been treated as the default mode of settling disputes. Peaceful means of resolving disputes were not unknown to earlier civilisations but these were at best demands for or offers of surrender or other terms of submission. Mediation too was not unknown but mediators were more couriers of terms and conditions than independent arbitrators. This does not mean that ancient civilisations were devoid of voices against war or the use of force. Many civilisations have had wise people who sought to circumscribe the option of war but these were mainly philosophers and religious leaders who were heard but not listened to.

The more mainstream political thinking was concentrated on enunciating the circumstances in which resorting to war was to be regarded as legitimate.

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Such wars were given names like *dharma yuddha* in India, *justum bellum* in the Roman Empire and 'just war' in Christian Europe.

Avenging injury, redressing a wrong or punishing a wrong-doer, were some of the essential pre-requisites of a 'just war'. In such political thinking the need for a dispute settlement mechanism was rarely felt, especially by the dominant powers whose views were more likely to prevail. If one wanted justice one had to fight for it on the battlefield. This began to change only in the 19th century. The change began in Europe. That is where the international legal order took shape and where most dispute settlement mechanisms are based.

The idea of renouncing war as an instrument of state policy and accepting peaceful settlement of international disputes was taken up vigorously by countries in Europe towards the end of the 19th century. The first of the international treaties produced by these efforts was the Convention for the Pacific Settlement of International Disputes of 1899 at the First International Peace Conference held in The Hague. It also led to the formation of the Permanent Court of Arbitration in the Hague. The Convention was updated in 1907 by another peace conference. It identified four main mechanisms for peaceful settlement of disputes: (i) Good offices and Mediation, (ii) Commission of Inquiry, (iii) Arbitration, and (iv) Permanent Court of Arbitration. Though nearly all the major countries of the time were parties to this convention, Europe plunged into the Great War very soon thereafter.

After the First World War, more serious efforts were made to provide for compulsory recourse to peaceful means of settling disputes. Some of these ideas were well before their time. The Covenant of the League of Nations provided for a Permanent Court of International Justice, but was not able to provide for compulsory jurisdiction nor was it able to outlaw war. The League was also unable to take away from members the right to wage war. The Covenant of the League provided that if the Council of the League was unable to reach a decision because of obstruction by the representatives of the parties to the dispute, the aggrieved member state could take action as deemed necessary for the maintenance of "right and justice".

A more ambitious enterprise was the Geneva Protocol of 1924, proposed by Britain and France. It provided for compulsory arbitration, but the proposal did not fly. It was approved by the General Assembly of the League of Nations but Britain itself did not ratify it because its government had changed by that time.

Less ambitious ventures were then undertaken. Two of them materialised in close succession in 1928. One was the General Treaty for the Renunciation of War as an Instrument of National Policy, commonly known as the Kellogg-Briand Pact and the other, the General Act for the Pacific Settlement of International Disputes. Both identified various mechanisms for peaceful settlement of disputes, but refrained from making them compulsory. The General Act suggested setting up a conciliation commission or an arbitration tribunal in case of a dispute and for referring the matter to the Permanent Court of International Justice in case these failed.

Thus started the practice of incorporating, in treaties, a provision for the peaceful settlement of disputes. According to a UN survey, between 1928 and 1948 as many as 234 treaties were concluded with such a provision. However, these efforts were no more successful in preventing war than the ones before the First World War. An inadvertent outcome was that while countries still waged war they preferred to call it by other names. However, the General Act remained an inspiration and the European Convention for the Peaceful Settlement of Disputes of 1957 was influenced by it.

International Law

It would be useful here to take a quick look at the nature and sources of international law. International law is recognised as originating in international customs and practices of sovereign states, whose principles were captured by scholars and formulated in legal terms in treatises. Many of these treatises are respected as reliable sources of international law and are also recognised by the Statute of the International Court of Justice, though left unnamed. Since the 19th century, a more authentic and precise source of international law, the multilateral treaties, started emerging. Multilateral treaties, which go by such names as international conventions or covenants, increased exponentially after the formation of the United Nations and the setting up of the International Law Commission, which was charged with the responsibility of drafting treaties on various issues. Once a multilateral treaty has been drafted and made available for accession or ratification countries are obliged to take a clear stand on them. It is well recognised that multilateral treaties are enforceable only on countries that are party to them. This removes the limitations inherent in international custom. Nevertheless, the debate whether there are certain principles of international law that all countries are obliged to follow continues.

This question had been raised in 1932 by Hersch Lauterpacht, who did not accept the notion that international law is nothing more than a series of contracts entered into by countries, bilaterally or multilaterally, and that there are no common practices and rules that bind all of them mandatorily. In practice states feel bound now only by the treaties they have ratified and in dispute settlement mechanisms only such obligations can be effectively invoked, though there is a view among civil society groups, especially in the West, that prohibition of certain crimes and protection of human rights should be treated as universally binding.

Dispute Settlement Mechanisms

Article 33 of the UN Charter gives a comprehensive list of options available to countries seeking to resolve disputes peacefully. Negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements are the mechanisms mentioned with the additional possibility of other peaceful means of their choice.[1]

Negotiation: A direct talk among the disputing parties is the first step recommended to resolve any dispute. Most treaties provide for it and some specify a time-limit for responding so that the subsequent proceedings can be activated.

Enquiry: Enquiry by independent experts can be helpful in resolving disputes where the facts of the case are not clear or are contested. They have been used by organisations like the Human Rights Council to ascertain violations of human rights. Such enquiries may not resolve the dispute but they can fix responsibility in individual cases, mobilise public opinion and make it easier for countries to take action against their own nationals if they are found to be at fault.

Mediation: This is the most common and simple form of dispute settlement in vogue for ages. The Hague Convention of 1907 states that a country can offer its good offices at any time to disputing states, even after hostilities have broken out, and such an offer should not be treated as an unfriendly act. The assistance provided by the Soviet Union to India and Pakistan on the agreement in Tashkent in 1965, and by France to the United States and North Vietnam for talks in Paris in the 1970s are examples of good offices and mediation by third parties.

Conciliation: Conciliation is a process where a third party investigates a dispute and gives its decision, which unlike in arbitration, in not binding.

Conciliation is a little more formal and pro-active than mediation but less so than arbitration. Conciliation can throw up cooperative solutions that a judicial body would look upon as beyond its mandate. Several international conventions such as the 1985 Vienna Convention on the Protection of the Ozone Layer, the 1982 UN Convention on the Law of the Sea and regional agreements in Europe, Africa and America provide for conciliation. In the 1980s, the Iceland-Norway dispute on the demarcation of the continental shelf was resolved through conciliation. It proposed a joint development zone, which was accepted by both parties.

Arbitration: Modern arbitration is generally regarded as beginning with the Treaty of Amity, Commerce and Navigation of 1794 between the United States and Britain. The treaty resolved many of the outstanding disputes left over between the two countries after the American War of Independence. This article referred earlier to the Permanent Court of Arbitration. The body, which is not a court but a forum, offers a panel of arbitrators to interested parties. 32 arbitrations were held under its auspices between 1900 and 1932, after which its use declined sharply. It has picked up once again in recent years. Arbitration is a judicial process, where the parameters for the arbitrators are laid down in a *compromise*, negotiated first by the disputing parties. The arbitration award is binding on the parties, though it can be rejected if the tribunal exceeds its powers. Arbitration provides faster decisions and is more flexible than judicial settlement. The Rann of Kutch dispute between India and Pakistan in the 1960s, the Anglo-French continental shelf dispute, and the Taba dispute between Egypt and Israel are some of the famous cases successfully resolved through arbitration.

Judicial Settlement: Judicial settlement involves recourse to international courts and tribunals. The Permanent Court of Arbitration was the first cautious attempt to set up a court to deal with international disputes but the first world court was set up by the League of Nations, the Permanent Court of International Justice in the Hague in 1920. This court had a busy agenda in the 1920s during which it dealt with about 50 cases. However, in the 1930s its utilisation declined and it was replaced by the International Court of Justice when the United Nations was set up.

The ICJ is one of the six organs of the United Nations. It has its own statute and is based in the Hague. It has 15 judges elected by the UN General Assembly and the Security Council for a nine year term. No two judges may be from the same country and a system of regional representation is applied in their election. In case a judge belongs to one of the litigant state parties, he

is not required to recuse himself. The state party is entitled to appoint an ad hoc judge.

The Statute of the ICJ authorises it to decide cases submitted to it, in accordance with international conventions, international custom, general principles of law, judicial decisions and views of "qualified publicists". (Art.38). It can also decide cases *ex aequo et bono,* that is, according to what is just and fair. The Court can deal with matters specially provided for in the UN Charter or in treaties and conventions in force (Art. 36). It can also give advisory opinion on request in accordance with the UN Charter. This appears to give it fairly wide powers but each of these provisions is circumscribed. The Court can only deal with such disputes as are submitted to it by both parties and it must be remembered that only states can bring cases to it, individuals cannot. Besides, the Court can only apply conventions that are "expressly recognised by the contesting states".

The ICJ's jurisdiction in not compulsory. Its Statute provides for states to recognise as compulsory *ipso facto* the jurisdiction of the Court unconditionally or otherwise. 72 states currently recognise its compulsory jurisdiction, albeit with conditions. This includes only one permanent member of the Security Council, the United Kingdom. India's acceptance dates back to 1974 and it has 11 exceptions. Pakistan too accepts its compulsory jurisdiction, with nine exceptions.

Regional Mechanisms: Among the regional organisations, the European Union has by far the most evolved arrangements for dispute settlement. The European Court of Justice adjudicates in all disputes relating to EU law. The 1957 European Convention on the Peaceful Settlement of Disputes is quite comprehensive in content. It provides disputes to be submitted to its Permanent Conciliation Commission or to the ICJ or to other means. The aggrieved state can turn to the EU if the decision is not implemented. In the Americas, four Central American states have the Central American Court of Justice, and the African Union has the African Court of Justice and Human Rights, but these inspire even less confidence than their global counterparts. Regional organisations like ASEAN and the EU and those in America and Africa have courts for adjudicating human rights cases.

Dispute Settlement in Multilateral Treaties

Many multilateral treaties provide for their own dispute settlement mechanisms, some optional, others compulsory. The World Trade Organisation in Geneva

has an elaborate and compulsory mechanism for trade disputes. The International Tribunal for the Law of the Sea deals with disputes relating to the interpretation and application of the UN Convention on the Law of the Sea. Disputes in the International Civil Aviation Organisation are considered by its Council, but its decision can be submitted by the mutual consent of the parties to arbitration or taken to the ICJ. Foreign investment disputes were traditionally the preserve of national courts, but many bilateral investment treaties now provide for international arbitration. The Human Rights Council has developed an elaborate system of review of human rights situation in member states and in some of its treaties; it has procedures for complaints to be made by individuals in countries which are parties to these protocols directly to the treaty bodies.

Individuals in International Law

This brings us to the status of the individual in international law. International law is the law among states, not individuals. However, an influential school of thought now regards fixing individual responsibility for certain egregious crimes as an essential element of international law. Individuals, thus, may not be the subjects of international law but they are being made its objects and international dispute settlement mechanisms are struggling to keep pace.

We have seen that war was considered in international law as a legitimate instrument of state policy. The sovereign, therefore, could not be put on trial for waging war. Instead, instant punishment was meted to him. In 1870, when Prussia, which later became Germany, defeated Napoleon III of France, Bismarck, the Prussian Chancellor, contemplated setting up an international tribunal to try him for provoking the war, but he refrained from doing so. After the First World War a Commission was set up by the Peace Conference in 1919 to fix the responsibility for the war but the Commission did not consider the actions of the rulers of Germany and Austria-Hungary as being subject to penalties that could be imposed by an international tribunal.

The Peace Conference did not accept the recommendations of the Commission and decided, under Article 227 of the Treaty of Peace, to charge William II, the German Emperor for the "supreme offence against international morality and the sanctity of treaties".[2] However, it was difficult for the allied powers to make a legal case for the trial of the German Emperor and they were unable to get the Netherlands, where he had gone into exile, to extradite him.

After the Second World War the United States, France, Britain and the Soviet Union decided to hold a conference in London to decide on the framework for the trial of German leaders by an international military tribunal. They decided to try them for crimes against peace, including waging a war of aggression and a war in violation of international treaties. A similar provision was made for the trial of Japanese leaders.

During the Cold War, progress in fixing individual responsibility for acts of state was halted but it was revived soon after, this time adding a new genre of crimes: war crimes, crimes against humanity, genocide and ethnic cleansing. Some even add human rights violations to this list. In 1993, the Security Council set up the International Criminal Tribunal for former Yugoslavia to try Serbian leaders accused of crimes in the Yugoslav civil war. The next year it set up a similar tribunal in Rwanda for the genocide there. This idea gathered steam and at a conference in Rome in 1998 a statute was adopted setting up the International Criminal Court, also to be based in the Hague. This Court currently has eleven cases under investigation in ten countries, nine of them in Africa. It has indicted 39 individuals, including prominent leaders like Uhuru Kenyatta of Kenya, Omar al-Bashir of Sudan, Laurent Gbagbo of Côte d'Ivoire and Muammar Gaddafi of Libya. However, there have been only three convictions, all of them of leaders from Africa. 123 countries have ratified the Rome Statute, but the list famously does not include the United States, Russia, China, Turkey, Israel and India. In fact, the US has signed bilateral immunity agreements with over a hundred countries for mutual non-extradition of their nationals to face trial in the ICC. The ICC faces flak from African countries because, with the exception of Georgia, all those convicted by it belong to that continent. Burundi withdrew from the Court in October 2017.

Implementation of Decisions

How do these tribunals and courts implement their decisions? In municipal law the government and in particular the police are required to enforce court decisions. But internationally the only body authorised to use force is the UN Security Council, which is a political body controlled by the five permanent members. So no action can be contemplated against them or their allies. Besides, the Security Council does not have its own enforcement mechanism. It depends upon members to act on its behalf and the only country with the military capacity to act globally is the United States. Others have to depend on peer pressure and public opinion.

India-Pakistan Disputes

Let us now consider disputes between India and Pakistan. Disputes have been endemic to India-Pakistan relations, as can be expected in a case of secession. India and Pakistan have signed about 50 agreements since independence. Some of these like the Lahore Declaration, the Simla Agreement, the Tashkent Agreement and the agreement setting up the joint commission in 1983 are over-arching in character and seek to promote peaceful bilateral relations. Some agreements deal with general issues like trade, culture, customs, post, telecom and transport links and visits to religious shrines. There are also some very specific agreements to prevent untoward incidents. These are on reducing the risk of nuclear accidents, pre-notification of ballistic missile tests and military exercises, drug trafficking, prevention of air space violations and prohibition of attack on nuclear installations.

There are also agreements on specific bilateral problems such as the Nehru-Liaquat Agreement of 1950 for the security and rights of minorities. There is the Indus Waters Treaty of 1960 and the agreement on the Salal hydel project. Most of these agreements were signed bilaterally after direct talks between the representatives of the two countries. However, some like the Indus Waters Treaty was mediated by the United States and the World Bank, the Tashkent Agreement was mediated by the Soviet Union. Apart from the air services agreement of 1948, which provided for arbitral tribunals or a tribunal within ICAO, only the Indus Waters Treaty has a dispute settlement mechanism, under the auspices of the World Bank. In the case of other treaties issues are expected to be resolved through negotiations.

The Kashmir Dispute

The most famous of the disputes, the Kashmir dispute, started almost immediately after independence but this was not the only princely state whose accession to India was questioned by Pakistan. Pakistan staked a claim to Junagadh in Gujarat, whose ruler fled to Pakistan soon after independence. Pakistan also questioned Hyderabad's accession to India. The Hyderabad issue was raised in the UN Security Council briefly but it fizzled out after India's conclusive action.

In the case of Jammu and Kashmir, as we all know, India decided to take the issue to the Security Council, complaining of aggression from Pakistan by armed tribesmen, aided by the Pak army. The Security Council set up a commission, the UN Commission on India and Pakistan, to go into the matter.

The Commission adjudged that there had been infiltration from Pakistan and adopted two resolutions calling on Pakistan to withdraw all its regular and irregular forces after which India would be required to withdraw the "bulk" of its troops. Once these conditions had been met a plebiscite would be held under the supervision of a plebiscite administrator to be appointed by the UN.

Pakistan did not withdraw its troops. It insisted on simultaneous withdrawal and the administration of the state to be handed over to the United Nations before the plebiscite. India turned down these demands. Then followed nearly two decades of fruitless negotiations under the auspices of the United Nations.

The Jammu and Kashmir Question and the India-Pakistan Question continue to remain on the agenda of the Security Council. There has been no discussion on these issues for several years, and in accordance with the rules of procedure that an issue lapses if there is no discussion on it for three years these should have been dropped a long time ago. But they remain there since Pakistan asks for it every year. India's stand on the matter is that J&K's accession to India was ratified by the Constituent Assembly of J&K in 1956 and now, in accordance with the Simla Accord of 1972, both countries are committed to resolving all outstanding issues between them "by peaceful means through bilateral negotiations or by any other peaceful means mutually agreed upon between them".

The accession of the princely states was not the only dispute between the two countries. Pakistan was unhappy with the partition plans of Punjab and Bengal drawn up by Cyril Radcliffe, but did not challenge them. The refugee issue and the safety of minorities was a much bigger problem. There were riots in both countries and an exodus of the minorities in both directions. Prime Ministers Nehru and Liaquat Ali Khan met in 1950 and signed an agreement to provide protection to the minorities. This agreement was the result of bilateral negotiations. It provided for commissions to be set up by each country in West Bengal, East Bengal and Assam to implement its provisions.

The Indus Waters Treaty

The other major agreement between the two countries was the Indus Waters Treaty in 1960. This treaty was mediated by the United States and the World Bank became its custodian. The treaty provides for a joint Permanent Indus Commission to oversee its working and an elaborate compulsory dispute

settlement mechanism. This mechanism has been invoked twice so far, in the Baglihar and Kishanganga projects.

The Rann of Kutch Arbitration

In 1965, after a brief border skirmish in the Rann of Kutch in Gujarat, where the border was disputed by Pakistan, the two countries, with Britain's good offices, agreed to submit the matter to arbitration. Three arbitrators were appointed, one each by India and Pakistan from Yugoslavia and Iran, respectively. The chairman was picked by the UN Secretary General from Sweden since they could not agree on anyone. The *compromis* was agreed upon in 1965 and the tribunal gave its award in 1968. India got ninety percent of its claim. Both countries implemented the award, but the creek on the western side, the Sir Creek, and the maritime boundary beyond it remain disputed.

Disputes in the ICJ

Kulbhushan Jadhav's case is the sixth case involving India in the ICJ and the second to be taken to the Court by India. Both of India's cases are against Pakistan. Pakistan too has filed two cases against India in the ICJ. The other two cases were by Portugal and the Marshall Islands.

In 1971 India filed a complaint against Pakistan for challenging its decision to suspend over-flight by Pakistani aircraft in the ICAO. Pakistan had challenged India's position as being in violation of the 1944 Convention on International Civil Aviation and the International Air Services Transit agreement. India took the matter to the ICJ questioning ICAO's jurisdiction. Pakistan maintained that the ICJ had no jurisdiction in the matter. The ICJ upheld its jurisdiction but rejected India's plea that ICAO was not competent to deal with the matter.

In 1973, Pakistan challenged India's decision to hand over 195 Pakistani PoWs to Bangladesh for trial for genocide and crimes against humanity during the Bangladesh liberation war. However, Pakistan withdrew its plea before the Court could take a decision.

In 1999, Pakistan filed for proceedings against India for shooting down its military aircraft on the border between Sind and Gujarat. Pakistan based its case on the General Act for Settlement of International Disputes of 1928. The Court ruled that the applicability of the General Act was questionable

since India had never regarded as being bound by it after independence. On the other hand, India had expressly excluded all Commonwealth countries past and present from its declaration of acceptance of the Court's compulsory jurisdiction and the Court was obliged to accept this reservation.

In the Kulbhushan Jadhav case India confined its plea to Pakistan's refusal to fulfil its obligation under Article 36(1c) of the Vienna Convention on Consular Relations which gives consular officers the right to visit their nationals in prison in another country. India also referred to Article 6 of the International Covenant on Civil and Political Rights, 1956, on the right to life and Article 14, which gives all persons the right to a "fair and public hearing by a competent, independent and impartial tribunal established by law". Pakistan questioned the jurisdiction of the ICJ on the ground that its acceptance of its compulsory jurisdiction, as stated in March 2017, excludes all matters relating to the national security of Pakistan. It claimed that since Kulbhushan Jadhav had been accused of terrorism his case fell within the ambit of Pakistan's national security. Pakistan also invoked the bilateral agreement between India and Pakistan on consular access concluded in 2008 which permits denial of consular access on grounds of national security.[3]

In its provisional measures the Court directed Pakistan not to execute Kulbhushan Jadhav pending its final judgment. The Court held that it has jurisdiction in the case on the basis of Article 1 of the Optional Protocol to the Vienna Convention to which both India and Pakistan are parties, with neither stipulating any reservation. It noted that the India-Pakistan consular agreement of 2008 also has no provision excluding the ICJ's jurisdiction. The Court also ruled that Pakistan's obligation to provide consular access under Article 36 of the Vienna Convention does not exclude cases involving national security since Pakistan had not made such reservation in its accession to its Optional Protocol.

While the main ruling of the Court did not go into the issue of the right to a fair trial under ICCPR, one of the judges, Judge Cançado Trindade, gave a concurrent opinion that in contemporary international law the rights of states and of individuals are to be considered together. This opinion is based on the idea which is gaining currency among some jurists and non-government organisations that individuals should also be treated as subjects of international law, not just states.

It can be seen that India and Pakistan have taken recourse to all the established modes of dispute settlement: negotiation, mediation, conciliation, arbitration and judicial settlement. While some, chiefly the Kashmir dispute,

continue to linger, many have been resolved or have faded away. I will leave it to the reader to decide which methods have been successful.

Conclusion

Coming back to the international legal order, the big challenge for it today is that Europe has been in the forefront of its development and continues to be its protagonist. However, Europe still carries a colonial baggage that makes its dominance suspect in the eyes of most countries of Asia and Africa. Besides, Europe no longer has the global reach to enforce verdicts of courts and tribunals. This power is currently possessed only by the United States, which underpins the international security system but is an outlier in the international legal order. We have seen how it does not accept the compulsory jurisdiction of the ICJ and has worked to undermine the International Criminal Court. It is tragic that the other super power that is emerging in the world, the People's Republic of China, is equally unilateralist.

In such a situation it is easy to become cynical about dispute settlement mechanisms in international affairs. But a globalised world needs global institutions. It is not only the small countries that need them but also democracies like India, which have built a strong tradition of resolving internal disputes constitutionally. Such countries have to develop expertise and participate in the international mechanisms to strengthen them and make them truly universal. The Europe-based institutions are all that one has at the moment. We have to work to make them less Europe-centric and to bridge the gap between the law and practice in international affairs.

Notes :

[1] http://www.un.org/en/sections/un-charter/chapter-vi/ accessed on 29 July 2017.

[2] Ian Brownlie, *International Law and the Use of Force by States,* OUP, London, 1963. P. 53.

[3] Clause 6 of the India Pakistan Agreement on Consular Access of 21 May 2008, signed at the end of the 4th round of the composite dialogue states, "In case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its merits".