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The Mumbai Bombings and the Law of US-Pakistan Relations

JURIST Guest Columnist **Kevin Govern** of Ave Maria School of Law says that the most recent bombings in India and the furor over the "targeted killing" of Osama Bin Laden raise questions about US-Pakistani relations and places the legality of US aid to Pakistan into doubt...



The world has been left to contemplate the role of international law and politics in the wake of yet another devastating terror attack in what used to be called the Global War on Terror, now dubbed "Overseas Contingency Operations" (OCOs).

On July 13, 2011, just before 7pm, explosions erupted in three separate crowded business districts in Mumbai, India. Initial reports counted at least 21 dead and one hundred wounded. Mumbai is no stranger to terrorist attacks. In 1993, a series of bombings killed approximately 260 people. In 2006, Islamist militants **bombed commuter trains** killing over 180. New Delhi has long claimed that Pakistan's military and Inter-Service Intelligence (ISI) has aided attacks on Indian soil, including a previous **attack in 2008**, where militants killed 166 people in Mumbai during a 60-hour siege. Islamabad swiftly condemned the bombings; only time will tell whether it is merely coincidence that the chief of ISI, Ahmed Shuja Pasha, left for Washington the same day as the attack.

What has emerged from the controversy over the **"targeted killing"**

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of Osama Bin Laden and domestic and international concerns about the capability (or ineptitude) of Pakistani military and governmental agencies is increased indications of human rights abuses as well as the very significant and fundamental realignment of multilateral political and military relations underway. These conditions may profoundly affect not only US relations with Pakistan, and operations in Afghanistan, but multilateral relations with China, India and security beyond those borders.

Pakistan is an important foothold for the US in the region, and an important staging point for operations against the anarchistic border of Afghanistan. However, continued aid to Pakistan may well have become both illegal and politically imprudent. In summer 2011, amongst other prior occasions, the State Department had expressed concerns to Congress over major human rights problems in Pakistan, including extrajudicial killings, disappearances and torture. If founded, further funding would be prohibited under the so-called "Leahy Law." Initially appearing as part of the 1997 **Foreign Operations Appropriations Act**, the law then applied only to the State Department's International Narcotics Control (INC) program. It was broadened in fiscal year 1998 to include all security assistance programs funded through the Foreign Operations Act. Then, in fiscal year 1999, it was extended to include training programs authorized under Defense Department appropriations, and was also included in the 2001 **Foreign Operations Appropriations Act**. The law governing foreign operations covers both training and assistance (such as weapons grants), and the Leahy Law in the 2001 **Defense Appropriations Act** covers training, together prohibiting aid to military units that have committed gross violations.

The egregious nature of these violations is compounded by the Pakistani removal of top US military trainers from their soil, limits on visas for US personnel, and the arrest of key intelligence contacts who helped lead to the location and killing of Bin Laden. These facts, along with an impending budget crisis, have set the conditions for the US to recently suspend \$800 million of a \$2 billion dollar defense-spending package to Pakistan. Secretary of State Hillary Clinton told reporters on July 11, 2011, that the suspension "does not signal a shift in policy but underscores the fact that the partnership with Pakistan depends on cooperation." The rewards for such cooperation have been ample for Pakistan in the recent past: US annual bilateral aid to Pakistan went from \$5.3 million in 2000 to \$798 million in 2002 to more than \$4.4 billion in 2010. More than two-thirds of the total \$20.73 billion appropriated assistance over the past eight years has been security-related aid. Additionally, the US has appropriated \$1.5 billion in annual non-military aid totaling \$20 billion in assistance to Pakistan since 2001, including \$8.87 billion in reimbursements. Facing financial and political pressure to crack down on domestic terror from both



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Washington, D.C. and New Delhi, it is curious how Islamabad remains so emboldened in its behavior.

This all must be considered in light of Pakistan's ties with China. These ties go back to the 1950s, when Pakistan was among the first countries to break ties with the Republic of China on Taiwan and recognize the legitimacy of the People's Republic of China on the mainland. Both the countries support each other on foreign policy and military defense issues as well. The **Sino-Pakistan Agreement** was a 1963 document between the governments of Pakistan and China establishing the border between those countries. Under its terms, China supports Pakistan on the Kashmir border dispute with India, while the latter supports China in the ongoing issues of **Tibet**, **Taiwan** and **Xinjiang**. On April 6, 2005, China and Pakistan signed a treaty for friendly and neighborly co-operation, pledging to upgrade their strategic partnership to an even higher level. China lauded the fact that the two countries also signed a dozen other accords, including those on fighting terrorism, extremism and separatism, and on an early harvest program of a free trade agreement.

Scholars have identified the primary purpose for the close relationship between China and Pakistan. Lisa Curtis of the Heritage Foundation testified May 20, 2009, on this very matter before a congressional hearing of the US-China Economic and Security Review Commission. Curtis observed: "Chinese policy towards Pakistan is driven primarily by its interest in countering Indian power in the region and diverting Indian military force and strategic attention away from China." Towards this end, Pakistan and China reached a broad-based agreement in 2006 to strengthen their military-to-military cooperation, to help each other protect their sovereignty, territorial integrity and national independence. The full ramifications of this agreement are still unknown, especially considering the contradictory 1954 US-Pakistan Mutual Defense Agreement, and Pakistan's membership in the Southeast Asia Treaty Organization (SEATO) and Central Treaty Organization (CENTO).

With China fully committed to using Pakistan as a proxy to advance its interests against India, the US seems to be at a crossroads. The delicate nature of this multilateral relationship makes the US's next step critical. For example, by diving into a full-fledged commitment to the stability of India or by invoking Leahy's Law, the US risks what little goodwill it has with Pakistan, thus placing operations in Afghanistan in jeopardy. Further, this kind of commitment risks straining relations with China, the repercussions of which are, at best, unpredictable. On the other hand, reinstating support to Pakistan will further fund a government whose interests are rarely in sync with, and more often contrary to, the interests of the US. China will continue to benefit from the destabilizing effect Pakistan has on India and India's march toward western-approved progress might become

staccato.

Zalmay Khalilzad, former US ambassador to Afghanistan and Iraq, recently suggested ways in which the US should be offering "more carrots along with the sticks" in the multilateral relationship among Afghanistan, Pakistan, India, China and the US. Among other measures, these might include "expanded [International Monetary Fund] and bilateral assistance" and "a major, multilateral diplomatic effort to mediate disputes among Afghanistan, Pakistan and India," leading to "an India-Pakistan peace and normalisation process." If Pakistan's "intransigence" persisted, Khalilzad said, the US would have to consider closer security ties with India "as part of a containment regime against Pakistan."

The multidimensional foreign policy chessboard has been set for some time and it is yet again the US move, consistent with domestic and international law. The events of July 13, 2011 simply serve to reinforce which side the players are on.

Kevin Govern is an associate professor of law at Ave Maria School of Law. He began his legal career as a US Army Judge Advocate. He has also served as an assistant professor of law at the United States Military Academy and has taught at California University of Pennsylvania. Unless otherwise attributed, the conclusions and opinions expressed are solely those of the author and do not reflect the official position of the US government, Department of Defense, or Ave Maria School of Law.

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This article was prepared for publication by **Jonathan Cohen**, the head of JURIST's academic commentary service. Please direct any questions or comments to him at academiccommentary@jurist.org

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