

3-15-X31-2981

THE POLITICS OF THE INTERNATIONAL LAW OF CONFLICT MANAGEMENT: A CASE STUDY OF BANGLADESH–INDIA CONFLICT MANAGEMENT

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ABSTRACT

This paper explores the management of border disputes on the India-Bangladesh frontier, focussing on specific aspects of land border disputes. Drawing on a critical theory approach that problematises the politics of international law, it asks how Bangladesh has been able to pursue its interests in a complex dispute with India, a much more powerful actor. The specific approach used is taken from Koskenniemi (2005 and 2011), who has argued that international legal theories tend to universalise conflicts; these are better understood as problems arising from specific historical and political contexts, and it is the politics of a dispute rather than its legal dimensions in law that shapes both the process and the possibility of resolution. The paper will ask how effective the available means for conflict resolution have been, and will analyse why the ongoing border disputes between India and Bangladesh have proved so intractable.

Keywords: International Law, Politics, Conflict Management, Border Dispute, Critical Theory

INTRODUCTION

India and Bangladesh are two neighbouring states with a long history of cultural, historical and linguistic commonality. Both countries have a history of struggling for independence. These similarities could not, however, help solve their long-standing border dispute. The Bangladesh-India border dispute has been influenced and reshaped by their domestic politics, which bears dramatically on their political and economic relations. This paper explores the management of border disputes on the India-Bangladesh frontier, looking at specific facets of land border disputes. Drawing on a critical theory approach which problematises the politics of international law, it asks how Bangladesh has been able to pursue its interests in a complex dispute where its relationship with a much more powerful actor –India – is rendered more difficult because of their colonial and post-colonial history. The specific approach used is taken from Koskenniemi (2005 and 2011), who has argued that international legal theories tend to universalise conflicts that are better understood as problems arising from specific historical and political contexts, and that it is a dispute's politics rather than its legal dimensions that shape both the process and the possibility of resolution.

The paper will ask how effective the available means for conflict resolution have been, and will analyse why the ongoing border disputes between India and Bangladesh have proved so intractable. It also takes the opportunity to critique and develop Koskenniemi's contribution to the analysis of conflict, since his work has been used to examine a number of different kinds of dispute, including some post-colonial conflicts, but has not so far been used specifically in analysing border disputes. The methods used are to examine the substantive issues between the two countries, their history and their politics, and then to examine more closely how the disputes are seen, defined and acted on by key players on both sides. The paper will include a case study analysis drawing on evidence from both sides, but the primary focus is on the weaker actor, making sense of Bangladesh's response to attempts to dominate its border policies by a much larger country that was also, in the early 1970s, the sponsor of its independence. It will

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include a critical appraisal of their negotiation process and the interlocking of legal and political arguments in the management of the conflict.

TERRITORIAL CONFLICT MANAGEMENT IN INTERNATIONAL LAW

Territorial conflict resolution is a salient factor for international peace and security. Conventionally, any territorial dispute should be resolved according to the norms, rules and procedures of the existing international order. According to the present international law framework, a territorial dispute can be solved by any of the following processes:

- Negotiation;
- Arbitration;
- Mediation; or
- Litigation (Usually by International Court of Justice) (Sumner, 2004).

PROBLEMS OF CONFLICT MANAGEMENT IN INTERNATIONAL LAW

Conflict management is challenging because of its systematic complex approach. Huth et al. argue:

In a system defined by anarchy, there are reasons to question whether international law can play a central role in the orderly and peaceful resolution of disputes when security issues are at stake for leaders (2011, p. 415).

Unresolved territorial disputes, particularly in Asia and Africa, critically challenge the effectiveness or compliances of international law in solving territorial conflicts. Border conflict management is extremely complicated. Modern international law has no understandable “prioritised set of norms” (The Carter Center, 2010, p. iii) or rules to resolve it, but the traditional international law approach ignores these because it is liberal in nature: “It is difficult to understand “liberalism” as materially controlling because it does not accept for itself the status of grand political theory” (Koskenniemi, 2005, p. 5). It rejects the influences of politics in the international law mechanism and it is even hostile to politics, which places it into liberally biased premises. Another problem is that territorial disputes are frequently rooted in the post-colonial era, as these approaches are mostly set up within the context of the colonial perception of the nineteenth century. As a result, the international law of territorial boundaries, which is still based on those concepts of territorial boundary created by the colonial powers, privileges some states and neglects some others. In some cases, it divides a group of people with the same language, culture, identities or religions into two, three, or four different entities. For example, although the inhabitants of Calcutta, India and the Bangladeshi people have the same culture, identity, and language, the British colonial power divided them in 1947 into two separate countries (India and Pakistan) based purely on religion. They have since been carved up into two further parts, one Indian and the other Bangladeshi. The demarcation of the boundary encountered difficulties, because the description presented by Sir Radcliff did not tally with the boundary line drawn on the map. Furthermore, he divided many districts arbitrarily between India and Pakistan. There were many border disputes between India and Pakistan before Bangladesh was even born.

THE INDIA–BANGLADESH CONFLICT: A CASE STUDY OF CONFLICT MANAGEMENT IN INTERNATIONAL LAW

The India–Bangladesh border conflict: an overview

India and Bangladesh share one of the most permeable borders in the world. Territorial disputes between them are a severe threat to the peace and stability of Asia. India surrounds Bangladesh on three sides, and the countries share a 4,098 km long border (Ahmed, 2013). Their border conflict is seen as a major challenge to the security of both countries, and causes a potential threat to the regional security of South Asia. This border contains both demarcated and

undemarcated lands, which creates tension between India and Bangladesh. In addition, there are some enclaves² situated in both countries and also some adversely possessed land rooted in the colonial past of these two neighbouring states. These are also major exacerbations of their border dispute. On either side, the BGB (Border Guard Bangladesh) and the BSF (Border Security Force, India) guard the border to protect it. Land border disputes with India revolve around the following matters:

- The enclaves;
- The 6.5 km of undemarcated border;
- The 3,500 acres of adversely possessed land;
- Firing on innocent Bangladeshi people at the India-Bangladesh border, resulting in deaths;
- Fencing around Bangladesh;
- The boundaries of common rivers; and
- The “push-in/push-back” problem.

Firstly, 111 Indian enclaves exist in Bangladesh, and 51 Bangladeshi enclaves exist in India (Das and Raju, 2013), including some counter enclaves and counter-counter enclaves. Secondly, there are approximately 2,326.61 acres of Indian land in Bangladeshi possession (Source: Bangladesh land record and survey office), which has been the case since 1947. Similarly, there are nearly 2,504.89 acres of Bangladeshi land in Indian possession. These domains are called adversely possessed land (APL). These issues have remained unsolved since 1947. Moreover, at least 54 major trans-boundary rivers flow into Bangladesh from India. Since these rivers are within Indian territory, India does not discuss, consult or come to any agreement with Bangladesh over the closure, diversion or consumptive use of the waters of these rivers, even though a joint river commission was established in 1972. On top of these issues is the question of fencing off the border. The entire measurement of the India–Bangladesh border which was approved to be fenced was 3,436.59 km, of which 2,709.39 km of fencing has been finished. As of June 2007, India has been quietly sealing itself off from Bangladesh, fencing off a total of 2500 kilometres in the past seven years (Rashid, 2010).

The people living in the border area always live in fear of dying. The BSF’s bullet can end their lives at any time. In the majority of cases, the people killed by the BSF are innocent. The number of killings are increasing day by day. Finally, pushing Bengali-speaking people across the border from India to Bangladesh – called “push-in” or “push-back” – has not been defined until now. Push-in and push-back is a significant reason for the India–Bangladesh border conflict. Push-in and push-back often raises tension on the India–Bangladesh border, and has also caused a deterioration in BGB–BSF relations.

MARTTI KOSKENNIEMI AND THE POLITICS OF INTERNATIONAL LAW

Martti Koskenniemi (2005 and 2011) focusses on trying to explore the major contradictions of the legal rules of international legal philosophy that make case-solving difficult. Using some relevant examples and explanations, he argues that international law is a societal contract. There are no means by which an international lawyer or conflict management procedure (through negotiation, arbitration, mediation, etc.) can escape from the influence of politics. The major limitation of Martti Koskenniemi’s work is as a contribution to the analysis of conflict: his work has been used to examine a number of different kinds of dispute, and helps to explain

² In International law, states exercise sovereignty over their dominions. There is no necessity that the territory must be contiguous or geographic proximate (Das and Raju, 2013). This possibility of territories lacking geographical contiguity forming parts of one state sometimes results in some parts being surrounded with territory of another state. These soils are called enclaves.

differences in territorial conflicts (for example, the Lake Lanous case of 1957 and the Eastern Greenland Case of 1933), including many post-colonial conflicts, but it has not so far been used in the specific analysis of border disputes. Hence, it is quite challenging as well as unique to use this approach in a specific border conflict.

A CRITICAL ANALYSIS OF THE INDIA–BANGLADESH BORDER CONFLICT MANAGEMENT

Peaceful settlement of territorial conflict is considered very difficult and the outcome of any settlement is not always predictable: “An award of territory to one nation or another should be consistent with international law, even if the award is result of negotiations by the parties that have led to mutually agreed terms” (The Carter Center, 2010, p. iii). The India–Bangladesh border conflict is not a new topic. Although both countries have engaged in a number of “negotiation” to solve this conflict in last 45 years, some issues unfortunately remained unsolved, which has caused severe violations of human rights in the border areas, including killings, issues surrounding the boundaries of common rivers, human rights violations by the border security fences, “push-in/push-back” problems, and gunfights between the BGB and BSF.

According to the International Court of Justice statute 38, a treaty is considered the basis of a territorial claim. Mostly, the treaty can be specified as any agreement made internationally. States are free to reach any agreement. In the case of the India–Bangladesh boundary conflict, a couple of treaties were made, but they could not resolve the conflict completely. According to Higgins (1994), the “consent” or “will” of states is the fundament of international law. This “consent based theory” (Higgins, 1994) has been elaborated by Koskenniemi. According to him, modern international law is based on a state’s consent or will. It simply depends on the consent of a state, not an effective obligation. To solve the enclaves conflict, India and Pakistan signed a treaty in 1958 before Bangladesh became independent. According to international legal rules, if conflicting states make any treaty or agreement, they consent to fulfil it by law. The pact is considered superior to customary international law. The 1958 accord was signed between Firoz Khan Noon, prime minister of Pakistan, and Zauhar Lal Nehru, prime minister of India, and is known as the Nehru–Noon Accord. This accord was not, however, able to solve the dispute because of hostile relations between India and Pakistan. As a basis of consent, a state can decide which rules or norms it will obey and which it will not. In this situation, the legal rules of international legal philosophy are not obligatory, so the two countries decided not to implement the Nehru–Noon Accord.

The hostile environment changed after Bangladesh became an independent country in 1971. India helped Bangladesh’s war of independence as a trusted partner. The motive for supporting Bangladesh was to weaken its rival, Pakistan, by which it could also weaken the rival USA–China–Pakistan bloc during the cold war period. Koskenniemi argues: “There is no space in the international law which would be free from decisionalism.” (2011, p. 65). Thus, India decided to attain a good relationship with its newly independent neighbour, Bangladesh. Former president and leader of the Awami League of Bangladesh, Sheikh Mujibur Rahman, and the former prime minister of India, Indira Gandhi, took their inherited border conflict issue seriously and talked it over. They signed a treaty on 16 May 1974, known as the Indira–Mujib Treaty. According to the 12th Paragraph of this pact, Bangladesh would hand over the enclaves located in the Berubari, Panchagor district, India. In return, India handed over the Dahagram–Angarpota enclaves in the Lalmonirhat district of Bangladesh (Ahmed, 2013). As this area was completely separate from the Bangladeshi mainland, it was decided that to communicate between Bangladesh and the Dahogram–Angorpota enclaves, India would permanently lease Tin Bigha Land (178 metres in length and 85 metres in width) as a corridor to Bangladesh.

Both countries required parliament's approval to carry this out. Bangladesh got approval from its parliament, but India did not.

The Indian government faced legal troubles when an Indian citizen challenged the validity of the Indira–Mujib treaty and appealed to the Kolkatta Supreme Court. The Supreme Court provided a prohibitory order holding back the corridor lease. The tribunal said that India should amend its constitution before providing a permanent lease of this corridor. The Indian central government appealed against this, and the legal process took 16 years to come to a decision. On 5 May 1990, the Indian Supreme Court decided that Bangladesh could use the corridor. In the meantime, however, Sheikh Mujibur Rahman had been assassinated on 15 August 1975, and the friendly relationship with India came to an end. “In the aftermath of Mujib’s assassination, following the coup and counter coup of November 3, 1975 and November 7, 1975, General Ziaur Rahman (Zia) emerged as a strongman in Bangladesh politics” (Haider, 2006, p. 36).

Rosalyn Higgins (1994) argues that international law is a normative rule, and is not obligatory in the same way as domestic law. She adds that “All organized groups and structures require a system of normative conduct – that is to say, conduct which is regarded by each actor, and by the group as a whole, as being obligatory” (Higgins, 1994, p. 1). The norm of this normative international law is only obligatory when actors take it as mandatory. At the same time, there are no centralised authorities that make it obligatory. For instance, any conflict related to security issues are more difficult to resolve because the leaders become reluctant to sign any treaty or make any agreement under the terms of international law because they believe it could affect state security. They only agree to a solution when it goes in their favour; otherwise, they refuse to accept any solution. With the emergence of Zia, Bangladesh–India relations were clouded with mistrust and mistrusting. According to Haider:

Through the air of suspicion apparently disappeared from the scene and both countries stressed the need to maintain peace, stability and cooperation in the region, still the relations were not expanding because of Bangladesh’s close links with Pakistan, China, the USA, and the Muslim world (2006, p. 36).

Zia’s close relations with India’s rival states, China and Pakistan, made India suspicious and concerned about its own national security in that cold war epoch. As a way of dealing with this, India decided not to reach any deal with Zia’s government, which meant this conflict remained unresolved. With the reappointment of Mrs Indira Gandhi to power in India in 1980, the relationship between the two countries deteriorated further. Nonetheless, in September 1980, President Zia again paid a visit to India, but this failed to satisfy Mrs. Gandhi. The Indian river flow blockade attempts, the unilateral seizure of two newly raised islands in the Bay of Bengal and the failure to implement the 1974 border agreement seriously strained Bangladesh–India relations. These took a turn for the worse between Mrs. Gandhi’s return to power and Zia’s assassination in May 1981.

After Zia’s assassination, President Ershad came to power in Bangladesh. President Ershad continued with the main thrust and directions of the policy that had been followed by President Zia. This policy could be described as pro-western, with strong connections with China and the Islamic countries (Rashid, 2010). As a consequence, Ershad could not improve relations with India; nor was there any improvement in the India–Bangladesh border dispute. Koskenniemi’s arguments of political influences over the legitimacy of international law (Koskenniemi, 2011) is significant in demonstrating the influence of politics in settling disputes by negotiation between India and Bangladesh. Under the circumstances of the India–Bangladesh conflict, this tool 45 years. After the Ershad regime, the Bangladesh Nationalist Party (BNP), led by the widow of President Zia, Begum Khaleda Zia, came to power after winning an election on 27 February 1991. Begum Khaleda Zia visited India in May 1992 and

held bilateral discussion on the unresolved issues. Following this, Begum Khaleda Zia, Prime Minister of Bangladesh, and Narsimha Rao, Prime Minister of India, signed a treaty regarding Dahagram and Angoepota, which came to a temporary solution for those enclaves. From 26 June 1992, the Tin Bigha corridor was opened for only six hours a day. This treaty was seen as a diplomatic defeat for Begum Khaleda Zia's government. It clearly established Indian political predominance and was not of equal interest to Bangladesh at all. As a weak counterpart to India, Bangladesh had no other choice but to accept the settlement. Koskenniemi (2011) argues that it is entirely possible to produce a decision which is only political: "A choice which must ultimately defend itself in terms of a conception of justice – or then remain substantively unjustified. We accept it because that is what we do" (Koskenniemi, 2011, p. 40). According to specialist opinion (Rashid, 2010; Ahmed, 2013), the Khaleda–Rao treaty could not meet Bangladesh's national interests and demands at all, for it has been decided in this treaty to open the corridor only for 6 hours each day. However, despite this treaty, Khaleda Zia led BNP couldn't convince India to resolve the bilateral border dispute between these two neighbours. The question is why? According to an international relations specialist (Rashid, 2010), India perceived that Begum Zia pursued right-wing policies and was not strong in pursuing secular policies. President Zia, founder of the BNP, had deleted the word 'secularism' from Article 8 of the constitution in 1977 (Rashid, 2010). India was not comfortable with this "Islamisation" of the establishment.

The Awami League lost political power in a coup in 1975 and remained in opposition for 21 years. After the 12 June 1996 election, the Awami League came to power with the support of the Jatiya Party, with Sheikh Hasina (the eldest daughter of Sheikh Mujibur Rahman) as prime minister. With this government, a new era of relations began with India. The leaders of the Indian government appeared more inclined to deal with this government than they had been with any previous Bangladeshi government since 1975. In April 1997, the BGB and BSF discussed the enclave exchange issue in a flag meeting, but BSF said that this subject needed to be discussed at government level. On 14 October 1997, the BGB raised this subject again at a flag meeting with the BSF, but they said that India needed to amend its constitution before exchanging enclaves. Most significantly, a dramatic change took place on this issue after Sheikh Hasina came to power in Bangladesh in 1996. On 13 December 2000, the foreign ministers of India and Bangladesh met, followed by another meeting on 11 December between Abdus Samad Azad, the former Foreign Secretary of Bangladesh, and Budhadeb Guha, Chief Minister of West Bengal. India discussed the enclave exchange issue, the question of adversely possessed land and the push-in and push-back problem. Following that initiative, the Bangladesh Land Ministry carried out a rough enclave measurement, which was sanctioned by Prime Minister Sheikh Hasina.

Surprisingly, after Khaleda Zia led the BNP to power in 2001, India halted the discussion. For instance, on 22 January 2003, in a joint working committee between India and Bangladesh, India did not even want to talk about the push-in/push-back issue at all, and the meeting ended without any decision being taken. Moreover, the BSF did not co-operate with the joint measurement commission to solve this issue. On 27 February 2002, while the BNP was in power, the BSF did not even turn up at the Panchagor border to assist with enclave measurements, and the BGB needed to manage it without any BSF representatives present. Nevertheless, the Indian government, led by the Bharat Janata Party, did not seem to be enthusiastic to resolve the border dispute with Bangladesh's new government. Instead, they raised issues such as the rise of Islamic fundamentalism and the harbouring of Indian terrorists in Bangladesh.

Sheikh Hasina succeeded in the general election in 2008 in Bangladesh, and the Congress party came to power in India in 2009. These two parties, governing for a term of five years, created a congenial ambience for dealing with the long-standing border dispute through

constructive negotiation because of the historic links between the two parties since the 1971 Bangladesh War. Ahmed (2013) claims that Indian leaders feel more comfortable with the ideology of the Awami League, which is committed to four main principles: nationalism, democracy, socialism and secularism. In 2010, Sheikh Hasina went to India to discuss the unresolved issues with them and agreed to solve the disputes by ratifying the Land Boundary Treaty of 1974. In September 2010, Indian Prime Minister Manmohan Sing visited Bangladesh and both of them discussed to forward the issue. This was entirely possible because of Bangladesh's new foreign approach towards India. "As prime minister, Sheikh Hasina moved quickly to reassess the country's foreign policy orientation, particularly its India policy. ... The Hasina government clearly chose to draw closer to India and bandwagoned with this rising power" (Chakma, 2012, p. 11). The Foreign Ministry of Bangladesh and The Ministry of External Affairs of India signed "*the Protocol to the Agreement between Government of India and Bangladesh Concerning the Demarcation of Land Boundary between India and Bangladesh and Related matters (the 2011 Protocol)*" (Wirsing and Das, 2016, p. 8) on 6 September 2011.

The 2011 Protocol was an integral development of the Land Boundary Treaty of 1974, which included the exchange of enclaves and adversely possessed lands and delineated 6.5 km of undemarcated border. Bangladesh ratified the Protocol instantly, but India took more time due to domestic political opposition from the Assam and West Bengal state governments. Koskenniemi (2011) argues that the absence of a centralised authority and dispute resolution mechanism provides more room for political leaders to play political monopoly to achieve their interest. In this case, West Bengal's state government was against settling this dispute, since the Land Boundary Treaty signed in 1974 was also a main reason for this dispute remaining unresolved. Nevertheless, with the strong leadership of Prime Minister Narendra Modi, India ratified the protocol. His initiative succeeded by ignoring the previous veto:

The West Bengal Government, which too had serious reservation with the Centre in the past including over its bilateral commitment to Bangladesh, now rescinded its earlier position. Possibly the prospects of fiscal support by the Modi Government has helped facilitate the process (Datta, 2016, p. 9).

This decision significantly proved the "consent or will" approach discussed earlier of international law, which has been elaborated by Koskenniemi. India always argued that it was not possible to implement the Land Boundary Agreement of 1974 because it required a constitutional amendment. This constitutional amendment needed a majority vote in the Indian parliament, but due to the veto of West Bengal's state government they could not approve the amendment. After significant changes in India's leadership, however, when Narendra Modi came to power, he resolved the issue easily because it was his government's "will" or "consent" to resolve it. Hence, the historical 119th Indian constitutional amendment bill regarding the LBA was passed in 2013. Indian prime Minister Narendra Modi visited Bangladesh on 6 June 2015 and finally approved and signed the protocol. On 31 July 2015, at 12 am, the exchange of enclaves took place along with the demarcation of 6.1 km of border. The demarcation of adversely possessed land is scheduled to complete by 30 June 2016.

CONCLUSION

The India-Bangladesh border conflict is a unique case of a long-standing conflict rooted in the colonial past. It is also considered to be a distinctive example of the negotiation process for solving disputes within the structure of the international law of conflict management. It took about 45 years to reach a partial resolution. Some significant issues are still pending, such as "border killing", "boundary of common rivers", "push-in/push-back", "frequent firing between BGB and BSF", "border fences", and "human rights violations by border security forces". The negotiation process was enormously influenced by the domestic political environment, political

choices, interstate relations and international affairs, especially in the cold war era. These subjects explicitly affected decisions taken by the government of both countries in the negotiation process. Critical theorist Koskenniemi (2011) explained this kind of ‘decision’ as a ‘political decision’. According to him, “[s]uch a decision would, under the social conception of law and the principle of subjectivity of value, be one which would seem to have no claim for objective correctness at all. It would be a political decision” (Koskenniemi, 2011, p. 44). Koskenniemi argues that, in this type of situation, politics often influences the effectiveness of international law. These political influences can also be viewed as liberal bias in the conflict management process in the structure of international law. Thus it is reasonable to argue that it is politics rather than legal dimension as law which shaped and determined both the process and the possibilities of the India-Bangladesh border dispute management.

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