



India-Pakistan Joint Investigation A Zero Sum Game?

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Within the rubric of joint mechanisms to counter terrorism, an idea that has been put forward is the desirability of joint investigations. This brief aims to explore the possibility of such joint investigations, and juxtapose its desirability against its feasibility, look for models for such cooperation, and finally analyse whether using these models this current zero sum game can be altered to result in alternate payoffs to create optimal wins for both players. The analysis is contextualised against the backdrop of the Mumbai attack (November 2008), which gave rise to suggestions on joint investigations.

LEGAL ARCHITECTURE (ASSESSING FEASIBILITY)

According to the Pakistan Code of Criminal Procedure, Sections 186-189 outline the power and procedures for the arrest and trial of a Pakistani citizen for an offence committed beyond the jurisdiction of the local courts, and in a foreign land. For instance, according to Section 186:

When a District Magistrate, a Sub-Divisional Magistrate, ... sees reason to believe that any person within the local limits of his jurisdiction has committed without such limits (whether within or without Pakistan) an offence which cannot, under the provisions of section 177 to 184 (both inclusive), or any other law for the time being in force be inquired into or tried within such local limits, but is under some law for the time being in force triable in Pakistan such Magistrate may inquire into the offence as if it had been committed within such local limits ...

Section 188 lays out the procedures relating to liability of offences committed outside Pakistan. According to it:

When a citizen of Pakistan commits an offence at any place without and beyond the limits of Pakistan ... he may be dealt with in respect of such offence as if it had been committed at any place within Pakistan at which he may be found.

What this implies in the context of the 26/11 Mumbai attacks is that, Pakistan could easily place the conspirators for the crime on trial. For instance, instead of arresting Jamaatud Dawa chief Hafiz Mohammad Saeed, the 'mastermind' of the Mumbai attacks under UN Security Council Resolution 1267, Pakistan, if it had been convinced of Hafiz Saeed's role and investigated it further on Pakistani soil, could have easily tried him under the provisions available in its CrPC. And even if it wanted to invoke its responsibilities to UNSC resolutions, the resolution it should have taken note of is UNSC Resolution 1373, which calls for states to either investigate or extradite terror suspects.

Conversely, for the case to be tried in India, the Indian Code of Criminal Procedure, Sections 166 A and 166 B describe the relevant procedures:



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Notwithstanding anything contained in this Code, if, in the course of an investigation into an offence, an application is made by the investigating officer or any officer superior in rank to the investigating officer that evidence may be available in a country or place outside India, any Criminal Court may issue a letter of request to a Court or an authority in that country or place competent to deal with such request to examine orally any person supposed to be acquainted with the facts and circumstances of the case and to record his statement made in the course of such examination and also to require such person or any other person to produce any document or thing which may be in his possession pertaining to the case and to forward all the evidence so taken or collected or the authenticated copies thereof or the thing so collected to the Court issuing such letter... (166 A)

If the Indian government were to receive a request from a foreign court for investigation in India, according to Section 166 B:

the Central Government may, if it thinks fit...forward the same to the Chief Metropolitan Magistrate or Chief Judicial Magistrate or such Metropolitan Magistrate or Judicial Magistrate as he may appoint in this behalf, who shall thereupon summon the person before him and record his statement or cause the document or thing to be produced; or send the letter to any police officer for investigation, who shall thereupon investigate into the offence in the same manner, as if the offence had been committed within India.

In the context of the Mumbai attacks, India has followed this procedure and requested additional information from Pakistan. None of its letters rogatory have received a response. Despite the formal transfer of evidence stipulated in the above mentioned two Sections, nothing in the CrPC prohibits India from inviting a Pakistani police officer to sit along with the Indian investigator to observe the details of the case and collection of evidence. The evidence available first hand to the

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Pakistani officer could enable Pakistan to prosecute the perpetrators based in Pakistan, if it so desires.

Another instrument that could provide an additional legal architecture is the recently signed SAARC Convention on Mutual Assistance in Criminal Matters, after it is ratified by all its member states. While "recalling the discussions in SAARC on cooperation measures for combating criminal activities including those related to terrorism," the Convention calls for mutual assistance in:

- locating and identifying persons and objects;
- service of judicial documents;
- providing information, documents and records;
- providing objects, including lending exhibits;
- search and seizure;
- taking evidence and obtaining statements;
- making detained persons available to give evidence or assist investigations;
- facilitating the appearance of witnesses or the assistance of persons in investigations;
- taking measures to locate, restrain or forfeit the proceeds and instruments of crime;
- taking measures to locate, freeze and confiscate any funds or finances meant for the financing of all criminal acts in the territory of either State Party; and
- Any other assistance consistent with the objectives of this Convention and the laws of the requested State Party, as may be mutually agreed upon.

An additional benefit rendered within this Convention is its retrospective salience:

This Convention shall apply to all requests for assistance after its entry into force and subject to laws and or concurrence of the concerned States Parties, even if the relevant criminal acts occurred before its entry into force prior to that date.

However, the provisions of the Convention cannot be used for

- The arrest or detention of any person with a view to the extradition of that person;
- The transfer of persons in custody to serve

sentences;

- The transfer of proceedings in criminal matters;
- The enforcement in the requested State Party of judgments in criminal matters passed in the requesting State Party, except to the extent permitted by the law of the requested State Party; and
- Offences under military law, which are not offences under ordinary criminal law.

Nevertheless, the Convention does provide a broad framework within which legal cooperation is possible for investigative purposes.

GAMING COOPERATION (ASSESSING DESIRABILITY)

While a brief analysis of the legal architecture has indicated the feasibility of joint investigations between India and Pakistan, that alone does not determine actual cooperation. For two nations to cooperate together, they should have a common goal or benefit. In this situation, it is true that Pakistan is a victim of terrorism, as much as India is. However, the perpetrators of terrorism are different in both countries. This makes the situation complex for the countries to cooperate, not to mention the historical baggage and mistrust and animosity shared between the two countries.

Game theory suggests that nations are more likely to cooperate if they are able to win something in return for their cooperation. Conversely in a zero sum game, where gain for one player implies loss for the other player, cooperation is less likely in the long run or in iterated game plays. Unfortunately, cooperation in joint terror investigation, at least in the specific case of the 2008 Mumbai attacks, is a zero sum game if India and Pakistan are the principal players. For instance, if a joint investigation were to take place, it would establish that the conspiracy for the attacks was carried out by Pakistani citizens on Pakistani soil. Whether the investigation throws up linkages between these citizens and the Pakistani government is another issue altogether. Nevertheless, even the minimal establishment of origin of terrorism to Pakistan would result in a win situation for India in terms of being vindicated for all its accusations of Pakistan being the origin of terrorism, and a loss for Pakistan in terms of international image and standing. Given that post 9/11 Pakistan has received immense negative reporting internationally for abuse of its territory by terrorist

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elements, an additional confirmation of the same through a joint investigation that it is a part of, is an embarrassment that the Pakistan government would like to avoid, if possible. However, it should be noted that if the same game were to be played between Pakistan and US, the dynamics of the game changes and it is no longer a zero-sum game. In such a game, Pakistan's position displays both vulnerability in the face of US power and pressure, and strength in terms of providing the strategic and operational space for US to achieve its goals in the neighbourhood, particularly Afghanistan. As this results in payoffs for both countries, cooperation is more likely between them than Pakistan and India. A case in point is Khalid Sheikh Mohammed who was neither extradited nor deported, but rather extraordinarily rendered to the US.

Therefore while desirability for a joint investigation is apparent between Pakistan and US, the same is not true in an India-Pakistan context. Even as game theory helps us understand state behaviour and situation under which it will cooperate or not, it does not have the ability to predict outcomes when nation states act beyond set rational boundaries. As a result, cooperation may still be obtainable if it is posited within a larger strategic plan rather than joint investigation alone.

MODELS FOR JOINT INVESTIGATION

What are the models available for India and Pakistan should they favourably consider joint investigation?

- *Bilateral, single issue-based, long-term*

One model is the bilateral one between US and Colombia, based on the US Colombia Defence Cooperation Agreement, whereby joint investigation has been possible on the issue of drug cultivation, trafficking and trade.

Working jointly, Colombia has been able to bring the situation very much under control; the flip side has been the balloon effect where reduction and control of the drug trade in Colombia has resulted in an increase in Mexico and other Caribbean islands. In the case of India and Pakistan, this model can work only if there is congruence in interests and similar value accorded to its importance. Given the current politico-strategic equation, this is unlikely.

- *Regional, multi-issue, short-term*

The second model that is available for consideration is the multilateral EU Joint Investigation Team (JIT), made possible by the EU Convention on Mutual Assistance as well as the Framework Decision on JITs. The benefits of this model is that the JIT operates within a legal framework; is truly multinational in its composition thereby enabling easy information flow; and many JITs can be set up simultaneously for specific purposes with specific mandates and duration, very much similar to the Special Investigation Teams set up by India for various serious crimes. Despite being a political union, the setting up of JITs has not been easy in Europe and has come with its share of political as well as operational hurdles. However, the availability of such a mechanism places the EU at a distinct advantage to initiate joint investigations quickly when required in the face of new and emerging threats. This model is worth considering for SAARC where, apart from terrorism, there are many transnational organized criminal activities that need attention and intervention.

- *Multilateral, incident-based, short-term*

The Lockerbie trial and investigation offers the third model. Countries, whose citizens had died in the bombing were invited to be part of the investigation. To ensure a fair hearing, the trial was held at The Hague, Netherlands. The 26/11 attacks could also follow a similar arrangement, where the investigation is carried out by a joint team of experts from countries whose citizens had died in the incident. And the trial could be held in a

neutral country to offer fair and transparent proceedings. The Lockerbie trial model, therefore, could actually serve to be a cooperative investigative model for incidents involving more than two countries.

Of the suggested three models, the multilateral, incident-based, short-term Lockerbie model would be most suitable in the current context. However the limitation with this approach is that it is reactive, and can be set up only after the incident has occurred. The first two models, on the other hand, can be adopted for third generation pro-active initiatives as well. For example, a regional, multi-issue, short-term JIT could be set up on the subject of terrorist financing in South Asia to proactively monitor and arrest flow of such monies. Similar JITs on terror networks, arms and weapons and narcotics could provide a cooperative framework for regional engagement. There is also a greater need to have the prosecutors work alongside the police during investigation. This will ensure a higher conviction rate than one possible now.

Which ever model the countries wish to choose, a fundamental shift in policy is required to criminalize terrorism, and deal with it as such. Every terror incident involves a host of organized criminal activity that is commissioned and committed. So, why not term these as serious organized crime, and prosecute foreigners and locals accordingly, instead of waiting for consensus on definitions of terrorism, and special procedures to prosecute them as terrorist activities? The ultimate aim is to ensure that terrorism does not go unpunished, and the perpetrators are brought to justice. The Maharashtra Control of Organised Crime Act (MCOCA) is an effective and stringent legislation that is best suited to combat serious organized crime. The countries in the region, at least India and Pakistan, could consider introducing a similar legislation at the respective national levels. The emerging trend in recent terror activities in the region indicates the blurring of boundaries between organized crime and terrorism. Criminalizing terrorism, therefore, may prove to be the way forward in countering terrorism.