

LEGAL BRIEFS

EVOLVING GLOBAL FRAMEWORK ON INVESTIGATION
IN ARMED CONFLICT: OPPORTUNITIES
AND THREATS FOR PAKISTAN

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EVOLVING GLOBAL FRAMEWORK ON INVESTIGATION IN ARMED CONFLICT: OPPORTUNITIES AND THREATS FOR PAKISTAN

Abstract

This document examines the evolving global framework for investigating International Humanitarian Law (IHL) violations and their implications for Pakistan. It highlights the increasing international focus on the accountability of armed forces, particularly the role of organisations such as the International Committee of the Red Cross (ICRC) and the Geneva Academy in shaping the standards for investigations in armed conflicts. The document explores the 2019 draft Guidelines on Investigating Violations of IHL, which provide a framework for conducting effective investigations, and discusses Pakistan's position within this context, particularly in the face of lawfare threats related to past military operations. It identifies strategic opportunities for Pakistan to engage in the global legal narrative, improve internal procedures for military investigations, and respond proactively to international pressure. Additionally, the document discusses the potential risks of universal jurisdiction being invoked against Pakistan's armed forces and offers suggestions for strengthening Pakistan's legal and disciplinary frameworks to mitigate such threats.

Keywords: Lawfare, International Humanitarian Law, Geneva Academy, International Committee of the Red Cross, Military Investigations.

BACKGROUND

The law of armed conflict, also known as International Humanitarian Law (IHL), has undergone significant evolution in recent years due to the efforts of international organizations such as ICRC, academic entities like the Geneva Academy and certain Western European states. There is an increasing focus today on improving mechanisms to ensure the accountability of armed forces given the multiple active conflict zones worldwide. A significant development in this regard has been the efforts of the Geneva Academy and the ICRC to codify the State Practice on ‘investigations in armed conflict’. The purpose behind this exercise was to identify how countries globally investigate alleged violations of IHL by members of their armed forces. It also aimed to evaluate whether internal procedures and mechanisms were robust enough to inquire into a State’s own actions in an armed conflict and their lawfulness. In September 2019, the Geneva Academy and the ICRC published draft “Guidelines on Investigating Violations of International Humanitarian Law”, which was the outcome of a five-year consultative process involving senior government lawyers, military lawyers, academics, and civil society organizations from all over the world. The Guidelines aims to create international standards which provide clarity on how to conduct effective investigations of IHL and serve as a benchmark against which domestic procedures of armed forces can be objectively assessed. It is pertinent to note that the Guidelines also focus on the Pakistan Army and its procedures as set out in the Pakistan Army Act, 1952.¹ However, a complete picture of the internal disciplinary procedures and safeguard mechanisms in Pakistan’s armed forces has not been presented in these Guidelines and so subsequently has not been used in order to inform the framework.

STRATEGIC IMPLICATIONS

The need for credible and effective investigations in armed conflict have become a growing concern in the international community in recent years. The inadequacy of such investigations in certain States have led to the armed forces of their States being targeted by international legal manoeuvres which have proved extremely damaging. The rise of universal jurisdiction and particularly Western European States' increasing proactiveness in using this to investigate and prosecute international crimes highlights the need to reduce any potential for criticism and interference through the use of lawfare.

The Sri Lankan experience is a pertinent recent example, where the UN Office of the High Commissioner for Human Rights in their 2015 report found that gross violations of international human rights law, serious violations of IHL and international crimes had been committed by all parties to the conflict. The report strongly condemned Sri Lanka for having failed to hold the perpetrators accountable noting that the Government had not conducted a genuine investigation “nor shown signs of any intention to do so” and that the victims had been deprived of their rights to a remedy and reparations. Subsequently, Sri Lanka faced immense international pressure, particularly through the Human Rights Council as all of the Council's Member States passed a resolution immediately after the report was published calling on the country to implement its recommendations including calls for establishing a “hybrid special court, integrating international judges, prosecutors, lawyers and investigators”.² Unanimous censure at the Human Rights Council can seriously damage a country's reputation and render her position more vulnerable. As a result, adequate and effective steps must be taken to reduce any potential for reproval. Robust domestic legal mechanisms for effective investigations which conform to international law and good practice can provide a critical safeguard against any potential lawfare manoeuvres in this area.

A strong lawfare threat exists to Pakistan by hostile elements for the fallout of recent military operations, especially in the former FATA region on matters relating to the use of force, internment centres and military courts. The underlying criticism in these three domains have been highlighted below:

- **Use of Force:** In 2014, Pakistan’s armed forces launched large scale military operations against non-state actors in North Waziristan and Khyber tribal agency. According to an Amnesty International Report of 2016/2017³ the security forces under the command of the Pakistani Army carried out human rights violations such as arbitrary arrests, torture and other ill treatment, enforced disappearances⁴, extra judicial executions. The report stated that these were committed with impunity due to the “absence of any independent mechanisms to investigate the security forces and hold them accountable”.
- **Internment Centres:** The Actions in Aid of Civil Power Regulations, 2011 (AACPR) was promulgated under the erstwhile Article 247 of the Constitution and provided the legal basis for internment centres in the former FATA/PATA region. However, with the deletion of Article 247 by the 31st Constitutional Amendment (FATA Merger), the legal ‘source’ for the AACPR was removed, necessitating the promulgation of an Ordinance by the Khyber-Pakhtunkhwa Assembly.⁵ But the FATA merger has also extended the jurisdiction of the superior Courts to the former FATA region, allowing citizens to file writs for the enforcement of fundamental rights. This has resulted in petitions being filed before the Peshawar High Court which challenge the legal validity of the Khyber-Pakhtunkhwa Actions (in Aid of Civil Power) Ordinance, 2019.⁶ The Ordinance has also been denounced by the International Commission of Jurists as grossly incompatible with Human Rights protections.⁷ Amnesty International has also highlighted indefinite detention without judicial supervision and control by Pakistan as a breach of the ICCPR as well as the Convention against Torture.

Under the Rome Statute of the International Criminal Court, unlawful confinement constitutes a war crime pursuant to Article 8(2)(a)(vii) and can be used as lawfare manoeuvre by hostile elements in the future.

- **Military Courts:** There is a long history of Military Courts coming under censure for trying civilians. In 2018, the Peshawar High Court concluded that these trials were a ‘complete prosecution show’ as the accused were denied their legal and fundamental rights. The Court also questioned the rehearsed nature of the military court’s proceedings; the arbitrariness in sentencing and the secrecy surrounding the entire process. This judgment has recently been relied on by International Commission of Jurists to deliver a scathing indictment on the military courts in Pakistan.⁸ This report was extensively relied upon by the Indian government in the Jadhav Case before the International Court of Justice to discredit the judicial process in Pakistan.⁹

LEGAL FRAMEWORK

Under customary international humanitarian law, it is incumbent upon a State to investigate alleged war crimes committed by their nationals and forces and, if necessary, to prosecute them.¹⁰ The State must also investigate other war crimes over which it has jurisdiction. Conventionally, the methodology by which investigations in armed conflicts are conducted is left exclusively to the will of States. Accordingly, there has been a significant disparity in the rigour with which such investigations have been pursued. However, international courts and tribunals have over the years specified the need for an ‘effective investigation’ in order to punish the perpetrators of a crime.¹¹ Furthermore, international humanitarian law also imposes a positive obligation on States to comply with its rules and to “ensure respect for them in all circumstances”.¹² If a member of the armed forces violates this obligation, it would be a breach of a “primary rule” which would engage State responsibility.¹³

According to the Geneva Conventions of 1949 and Additional Protocol I, States are under an obligation to enact any legislation necessary to provide effective penal sanctions for persons suspected of having committed or ordering the commission of ‘grave breaches’ of their provisions.¹⁴ Moreover, the Rome Statute of the International Criminal Court also codifies war crimes and is for the most part considered to be reflective of customary international law.

The legal sources for a duty to investigate acts committed in armed conflict can also be found in other branches of international law. Certain international human rights law treaties explicitly provide for a duty to investigate specific human rights violations,¹⁵ with provisions that have been further developed through the interpretations of human rights bodies.¹⁶ International and regional human rights treaties have likewise been interpreted by relevant bodies as containing a general requirement to investigate alleged violations to give effect to the rights provided for.¹⁷

Finally, a number of international treaties also provide for the obligation of States parties to take appropriate measures to deal with violations of their provisions, including the Hague Cultural Property Convention and its Second Protocol, the Chemical Weapons Convention, the Amended Landmines Protocol, the Ottawa Convention on Landmines, and the Dublin Convention on Cluster Munitions.¹⁸

IMMEDIATE CONCERNS

Can Pakistan contribute to and shape the global narrative in this area? What are the repercussions of Pakistan not engaging in this narrative?

The recent guidelines indicate that the full breadth of processes in Pakistan’s military manuals have not been taken into account. Accordingly, this risks Pakistan being viewed as an irresponsible State when it comes to investigating and prosecuting war crimes.

Past experience shows that international organizations have exerted pressure and maligned Pakistan in the international community for its attitude towards alleged violations that may have been committed by the armed forces.¹⁹ In our assessment, participating in the narrative would result in two benefits. Firstly, it would project to the international community that there are already existing rigorous standards within our military manuals which must be highlighted.

Secondly, it would show to the international community that as a responsible State which takes its international obligations seriously, Pakistan is open to the idea of improving its current framework for investigating and prosecuting perpetrators for war crimes.

What is the current risk of lawfare moves against the Pakistan armed forces for violations of IHL and human rights law in its operations against militants?

As mentioned, customary law obliges States to investigate alleged war crimes by their nationals, their forces, and anyone over which they have jurisdiction. Although these provisions do not explicitly refer to the concept of Universal Jurisdiction, they do form the treaty basis for its exercise. Universal jurisdiction over war crimes ensures that perpetrators do not benefit from impunity and that there are no safe havens in third countries for war criminals. States have increasingly taken this principle more seriously. Indeed, in the Syrian context, domestic courts in Europe, particularly Germany, have initiated trials involving events and actors in Syria in order to proactively punish individuals deemed responsible for acts in their homeland. Hence, a lawfare move initiated against the Pakistan armed forces in the future could result in the use of universal jurisdiction by hostile countries, under which officials of the armed forces may be made subject to prosecutions in foreign territories and be susceptible to arrests for the same around the globe, although this is at present a very remote possibility.

Pakistan should also be astutely cognisant of the possibility of censure or sanctions from regional forums.

For instance, human rights abuses in Balochistan were brought before the European Parliament as a written question on 27 February 2019.²⁰ The question cited a Human Rights Watch report stating that these abuses have reached ‘epidemic proportions’ and further noted that CPEC was placing an additional burden on the region. The persistent raising of topics such as this as lawfare at a regional or international level could lead to the submission of a complaint to the Human Rights Council or the taking up of the concern by the UN High Commissioner for Human Rights.

What is the anticipated response of the Indian side to Pakistan’s narrative of occupation and war crimes in Indian Occupied Kashmir (IOK)?

India’s attempt to unlawfully annex IOK on 5 August 2019 has reinforced the occupation paradigm under international law by rendering the Indian Army as a ‘hostile force’ in IOK. The current curfew and expected future unrest provides a historic opportunity for Pakistan to build a legal case for war crimes by Indian security forces in Kashmir. A legal narrative based on war crimes will also allow Pakistan to urge countries around the world to arrest and prosecute officers of the Indian security forces under the legal concept of universal jurisdiction (discussed above). However, the Indian side is likely to employ counter-manoeuvres by highlighting alleged excesses by Pakistani forces in its counter-insurgency operations. It is therefore imperative that robust internal mechanisms exist which can neutralize such manoeuvres by the Indian side.²¹

SUGGESTED RESPONSES AND WAY FORWARD

A pro-active response is required to mitigate these challenges by actively participating in the global legal debate on this area before it evolves into concrete legal obligations and binding standards. Pakistan’s participation will ensure its contribution to any emerging State Practice and also prevent its position from being marginalised by more powerful actors.

Internal legal reviews of disciplinary and investigative procedures under military law are also needed to evaluate conformity with global standards.

The professionalism and robust accountability ingrained in the Pakistan armed forces needs to be forcefully displayed at a time when Pakistan is building the case for war crimes by Indian forces in Jammu & Kashmir. As discussed above, the Indian side is likely to respond in kind by highlighting alleged violations in Khyber Pakhtunkhwa and Balochistan.

Improved internal procedures and a calculated strategy of engagement and dialogue on these sensitive issues by Pakistan will project it as a responsible State and neutralize domestic and international efforts to tarnish the professionalism of its armed forces. It will also allow the country to improve its capacity to engage strategically in legal and diplomatic efforts which will benefit us in international legal forums.

Centre for International Law, NDU may be tasked to peruse through the recent guidelines that have been promulgated by the Geneva Academy and ICRC and give recommendations on upgrading Pakistan's Military Manual and Pakistan Army Act, 1952 for compliance with such international standards.

Legal advisors be available to the armed forces to assist commanders and/or investigative authorities as and when required.

Training programs may be instituted for relevant personnel for investigating war crimes, crimes against humanity, genocide and the most serious human rights violations.

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- ³ ‘Amnesty International Report 2016/17’ (Amnesty International Ltd. 2017) <https://www.amnesty.org/download/Documents/POL1048002017ENGLISH.PDF>.
- ⁴ According to information published in August by the Pakistan Commission of Enquiry on Enforced Disappearances, 1401 out of more than 3000 cases of disappearances had not yet been investigated by the Commission.
- ⁵ Khyber-Pakhtunkhwa Actions (in Aid of Civil Power) Ordinance, 2019 was promulgated on 05 August 2019.
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- ⁸ International Commission of Jurists, UN Human Rights Committee, 120th Session, Geneva, 3rd to 28th July, 2017
- ⁹ See paras 185 and 186 of the Memorial Submitted by the Republic of India to the Jadhav Case
- ¹⁰ Art. 49 of the Geneva Convention I; Art. 50 of the Geneva Convention II; Art.129 of the Geneva Convention III; Art.146 of the Geneva Convention IV; and Customary International Humanitarian Law, Rule 158.
- ¹¹ International Criminal Tribunal for the former Yugoslavia [hereinafter “ICTY”]: Prosecutor v Ljube Boskoski and Johan Tarculovski, Trial Chamber Judgment (IT-04-83-T) (10 July 2008) para 418; Prosecutor v Pavle Strugar, Trial Chamber II Judgment (IT-01-42-T) (31 January 2005) para 376; European Court of Human Rights: Al-Skeini v UK, Judgment, 7 July 2011 (55721/07) para 166; InterAmerican Court of Human Rights: Acosta et al v Nicaragua (2017) para 136; African Commission on Human and Peoples’ Rights: Sudan Human Rights Organisation and Centre on Housing Rights and Evictions v Sudan (2009) para 147.
- ¹² Common Article 1 to the Four Geneva Conventions 1949; Pictet, J. S. (ed.), Commentary on the First Geneva Convention, ICRC (1952) p. 26; ICRC Commentary on the First Geneva Convention (2016) para 118; International Court of Justice: Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA), Judgment of 27 June 1986 (Merits), para 220.
- ¹³ International Law Commission, ‘Commentary to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the work of its fifty-third session’, Yearbook of the International Law Commission (2001), vol. II, Part Two, p. 31, para 1.
- ¹⁴ Art. 49 of the Geneva Convention I; Art. 50 of the Geneva Convention II; Art.129 of the Geneva Convention III; Art.146 of the Geneva Convention IV; Art. 85 of the Additional Protocol I.
- ¹⁵ This includes the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) UNTS 1465, Article 6; International Convention for the Protection of All Persons from Enforced Disappearance (2006) Article 12; Inter-American Convention to Prevent and Punish Torture (1985) Article 8; Inter-American Convention on the Forced Disappearance of Persons (1994) Article VI.

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- ¹⁶ UN Human Rights Committee, ‘General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)’ (10 March 1992) para 14; UN Human Rights Committee, ‘General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life’ (10 October 2018), CCPR/C/GC/36, paras 27-29; Inter-American Court of Human Rights: Velasquez Rodriguez v Honduras, Judgment, 29 July 1988, (Ser. C) No. 4, paras 166- 181; Santo Domingo Massacre v Colombia, (Ser. C) No. 259, Judgment of 30 November 2012 (Preliminary objections, merits and reparations) paras 154-173; European Court of Human Rights: Isayeva v Russia, Judgment, 24 February 2005 (57950/00) paras 209-214; Al-Skeini v UK, Judgment, 7 July 2011 (55721/07) paras 161-167.
- ¹⁷ For example: The International Covenant on Civil and Political Rights (1966) UNTS 999, Article 2.2 as interpreted by the Human Rights Committee in ‘General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (26 May 2004), CCPR/C/21/Rev.1/Add.13, paras 8 and 15.
- ¹⁸ Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) 249 UNTS 240, Article 7; Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1999) 38 ILM 769, Articles 15-17; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993) 1974 UNTS 45, Article VII(1); Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Amended Protocol II (1996) 35 ILM 1206, Article 14; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (1997) 36 ILM 1507, Article 9; Convention on Cluster Munitions, (2008) 48 ILM 357, Article 9.
- ¹⁹ Pakistan: “The Hands of Cruelty”: Abuses by Armed Forces and Taliban in Pakistan’s Tribal Areas, 2012; <https://www.amnesty.org/en/documents/asa33/019/2012/en/>
- ²⁰ ‘Human Right Abuses in Balochistan’ (European Parliament, 2019) http://www.europarl.europa.eu/doceo/document/E-8-2019-001047_EN.html.
- ²¹ By way of example, the Indian Army, embroiled in immense complaints regarding its counter insurgency efforts, has instituted “Human Rights Cell” and supplemented it by Ten Commandments issued by the Chief of Army Staff. These are further supplemented by Ten Directives issued by the Corps. Commanders of the Indian Army. The Cell is mandated to monitor events, receive complaints, conduct investigations/inquiries and submit reports for further action within the structure of the Indian Army.

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