

LEGAL BRIEFS

COUNTER-LAWFARE ON KASHMIR: THE CASE FOR A NEW LEGAL NARRATIVE

NOTE-5/2019

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Abstract

This legal brief explores the development of a counter-lawfare strategy for Pakistan concerning the Kashmir dispute, specifically in light of India's recent legal maneuvers. It discusses the legal implications of India's actions, including the abrogation of Article 370 and the reorganisation of Jammu & Kashmir into union territories, alongside a crackdown on Kashmiris. The paper advocates for a shift in Pakistan's legal strategy, from a reactionary stance to an anticipatory one, emphasising the need to develop a new legal narrative grounded in International Humanitarian Law (IHL). By framing the situation as an occupation under international law, Pakistan can argue that India is committing war crimes and crimes against humanity. The document also outlines potential lawfare strategies, such as identifying specific perpetrators of violations and pursuing Universal Jurisdiction for legal actions against them. It further highlights the importance of building a cohesive legal framework to engage with the international community and influence global opinion on Kashmir.

Keywords: Pakistan's Kashmir Policy, Legal Positions, Narrative, Public Diplomacy.

BACKGROUND

In Legal Brief Note No. 2/2019 dated 14 June 2019 the Centre of Excellence for International Law (CEIL), ISSRA, NDU had recommended that Pakistan's legal approach towards Kashmir needs to be exhaustively reexamined and lawfare avenues be explored in order to anticipate and prevent India's efforts to undermine Pakistan's legal position. Since then, the Bharatiya Janata Party (BJP), after their re-election, has attempted to dramatically alter the status quo in accordance with their election manifesto through a series of carefully designed lawfare maneuvers. This has included the abrogation of Article 370 which provided special status to Jammu & Kashmir in the Indian Constitution, superseding the application of Article 35-A which protected native Kashmiris from displacement and demographics change and enactment of the Jammu & Kashmir Reorganization Bill which abolished the State of Jammu & Kashmir and divided the region into two 'Union territories' of Ladakh and Jammu & Kashmir. This 'reorganization' has now been reflected in the revised official maps of India issued by the Survey of India in November 2019.

These legal maneuvers have been accompanied by a major security clampdown on Kashmiris in the form of large-scale arrests and detentions, ban on public gatherings and a complete communications blackout since early August 2019. These actions have renewed the debate on Kashmir and have drawn the attention of the international community back to the long-standing dispute. Till now, a major component of Pakistan's strategy has been to highlight the systematic human rights abuses committed by Indian occupation forces in J&K. In our assessment, however, Pakistan also needs to argue that Indian conduct constitutes war crimes, as it is an occupying power, as well as crimes against humanity. In arguing that international crimes are being committed in the disputed territory, Pakistan can develop a counter-narrative based on lawfare strategies to place pressure upon India and tilt the balance towards Pakistan.

This Legal Brief has been devised by CEIL to highlight the importance of narratives and counter-narratives backed by law in respect to the Kashmir dispute. Pakistan's approach to international law's redressal mechanisms has traditionally been reactionary wherein forums are engaged once an issue blows up – with a tendency to expect immediate legal and diplomatic results.

In our assessment, Pakistan needs to develop consistent political narratives supported by a concerted legal strategy which shifts its approach to anticipatory and pre-emptory policy responses as opposed to those which are purely reactionary in nature.

To this end, this legal brief sets out in broad strokes why an occupation framework exists in Kashmir under international law. It briefly explains the instrumental role that lawfare has played in shaping foreign policy narratives and national security strategies. The legal brief will attempt to provide specific policy options and avenues that may be pursued by Pakistan in order to develop a counter-lawfare strategy against India on Kashmir.

Classifying J&K as an Occupation

Pakistan views Jammu and Kashmir to be occupied territory and has consistently referred to the region as 'Indian-occupied Kashmir' (IOK). However, this is at odds with its practice where it restricts itself to arguing on the world stage that human rights violations have occurred in the region. International Human Rights Law is a regime that governs peacetime and becomes secondary in the state of an armed conflict or an occupation. A far more coherent strategy to argue is that war crimes and human rights violations are occurring in tandem in IOK.

Jammu and Kashmir is a disputed territory which is claimed by both Pakistan and India. The dispute over this territory started after the ruler of the state signed an Instrument of Accession with India in 1947 without reference to the wishes of his subjects. Since then, Pakistan and India have fought three armed conflicts over the region.

The Security Council in Resolution 47 advised that both countries should withdraw their troops and tribesmen from the state and a plebiscite should be held under which the Kashmiri people would decide whether they wanted to accede to India or Pakistan. This referendum has never taken place. Instead, India has taken steps to defy the will of the peoples by abrogating Article 370. Consequently, India remains in occupation of the territory and has committed gross and systematic abuses of the laws of war and human rights in order to maintain its authority and subvert the will of the Kashmiri people. The existence of an occupation from a legal standpoint is explained below.

Under IHL, an occupation of a territory is deemed as an International Armed Conflict as per Common Article 2 of the Geneva Conventions of 1949. The criteria for an occupation are provided in Article 42 of the Hague Regulations (1907) which is deemed to be customary law binding upon all states of the world. The provision states as follows:

‘A territory is considered occupied when it is placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.’

Accordingly, three elements must be fulfilled to establish the framework of an occupation:

Territory: India’s claim to sovereign title over the territory of Jammu & Kashmir is based upon the Instrument of Accession entered into by Jammu & Kashmir’s Maharaja Hari Singh with the Government of India, purportedly on 26 October 1947. An Instrument of Accession is a form of a Treaty of Cession wherein one Sovereign, having control over certain territory, can transfer title of that territory to another Sovereign. However, where such a treaty is subject to the condition of a plebiscite the transfer of sovereign title is not perfected till the plebiscite is conducted and the people vote in favour of such a transfer. The Maharaja’s Instrument of Accession is indeed conditional upon a plebiscite and the evidence for this is unequivocal.

International Law is clear on such matters – a treaty of cession becomes effective only with the actual transfer of title. India has never held a plebiscite in Jammu & Kashmir and, therefore, the date of actual transfer of title has never come to pass. Without sovereign title, India's presence in Kashmir amounts to an 'occupation' under international law, its subsuming of Kashmir into its own territory amounts to an 'unlawful annexation', and the atrocities it commits amount to 'war crimes'. Pakistan's position of Jammu & Kashmir being disputed territory and India's consequent lack of legal title to it has been recognized by numerous UN Security Council resolutions on the matter.

Authority (Effective Control): In order for this requirement to be fulfilled a State must exercise effective control' over the territory. The presence of around 700,000 troops (currently over 800,000) – makes Kashmir the most militarised zone in the world. It is clear from such a large military presence that the region is under the authority and effective control of India. Moreover, the extension of India's legal framework to IOK —before and after the abrogation of Article 370— demonstrates India's ability to exercise both a de facto and de jure control over the region.

Hostile Army: This requirement had historically been interpreted to mean that there must be the presence of an enemy state, and by extension, the presence of foreign troops in the region. However, the current position under international law is that it can also be applied where there is an inherent conflict of interest between the Occupying Power and the Occupied People. It is evident that the will of the Kashmiri people is at odds with the hostile Indian army that has annexed the territory and suppressed any calls for the exercise of their right to self-determination. The brutal security clampdown and communications blackout, now in its fourth month, is further evidence that the Indian forces in IOK are a hostile army under customary international law on occupation.

Consequently, India owes legal obligations under the law of armed conflict to the occupied territory and its population. It places a duty on them to, inter alia, protect the population, uphold public order and safety, allowing and facilitating the rapid, unimpeded passage of humanitarian relief for civilians in need, and to treat the population humanely and respect their fundamental rights.

In our assessment, the occupation paradigm provides an important legal basis for a counter-narrative on Kashmir which can be supported with multiple lawfare manoeuvres to apply legal, diplomatic and political pressure on India in the new regional environment.

NARRATIVES AND THEIR STRATEGIC IMPLICATIONS

Pakistan's reactionary approach to international law, whether for disputes under the Indus Water Treaty, commercial disputes or more specifically, Kashmir, has been to air its position on international forums after an incident takes place or seek an immediate remedy under the redressal mechanisms offered by international law.

This approach has not reaped the rewards that are expected of them, since these mechanisms are very different from those available under a domestic legal system. Rather, International Law owing to its politicization requires a State to manoeuvre and sell its stance consistently to the international community basing it on concrete legal principles. Public and political distaste for the Trump administration's use of the term 'fake news' has entrenched further the need for narratives to be based on facts and evidence.

Historically, Pakistan has always adopted a principled stance on Kashmir based on the UNSCR's. However, it has failed to effectively counter the narrative of being a State sponsor of terrorism which India has spearheaded over the past two decades. There is therefore a need for Pakistan to develop additional narratives which build upon its historical principled stance and target India's actions in Kashmir as war crimes and crimes against humanity under an occupation framework.

In our legal opinion, India's actions of 5 August 2019 and the ensuing unrest provides Pakistan with a unique and historic opportunity to reset the dynamic and undo the damage done to the Kashmir cause post 9/11.

UNDERMINING SELF-DETERMINATION: THE INDIAN NARRATIVE OF TERRORISM

The Indian narrative of portraying Pakistan as a state-sponsor of terrorism has been a long-drawn measure spanning across almost two decades. Before 9/11, India itself was openly in favour of supporting non-state actors in movements of self-determination. It was the first non-Arab state to recognise the Palestinian Liberation Organization in 1974 and during the 1970s and 80s, it provided financial aid to many non-state actors that were engaged in their freedom struggle all over the world, especially in Africa.

Post-9/11, India pre-empted the paradigm shift against non-state actors — from those engaged in freedom struggles to terrorists — and adapted their practice in a way to build a narrative against Pakistan. Over time, they highlighted incidents and projected them to the international community through a range of lawfare measures to reinforce that narrative. These incidents included the Parliament Attacks (2001), Mumbai Attacks (2008), Pathankot Attack (2016), Uri Attack (2016) and finally, Pulwama (2019). This narrative resulted in a series of legal measures being taken against Pakistani entities and individuals under US Domestic Law, EU Law, UNSC Sanctions Regime and repeated grey-listing of Pakistan by the Financial Action Task Force.

Not only did these actions undermine and de-legitimize the Kashmiri freedom struggle but it also projected Pakistan as an irresponsible State for supporting the Kashmiri cause. It was then put on the defensive in its pursuit for the rights of Kashmiris – effectively putting a stop to the discussion about the Kashmir dispute, restricting our policy options and diverting international attention to terrorism.

THE CASE FOR A NEW NARRATIVE

India's actions of 5 August 2019 have re-ignited the debate with respect to Kashmir on the international stage. There has been a considerable amount of negative media attention given to India's actions in the region. This has been accompanied by protests in many countries in favour of Kashmiri's rights, a US Congressional Hearing on the issue, and a UK Labour Party resolution. States and the Security Council's P5 Nations are once again being called on to play their role to bring this dispute to an end.

India's actions have not received support both globally and domestically. It has once again attempted to rely on the terrorism card but this time its logic is not convincing and international and domestic pressure is rising against its actions. Accordingly, India's narrative of terrorism for the first time has become porous – giving Pakistan an opportunity to deploy its counter-narrative, change the debate over Kashmir, and actually engage in policymaking.

Pakistani leadership and military circles have already begun to project the BJP leadership as a fascist regime inspired by Hindutva, a right-wing supremacist ideology seeking to establish Hindu hegemony in India. This narrative, grounded in facts, can be developed significantly to gain Pakistan moral high ground over India. The same can be done by pursuing legal measures that are triggered due to the violations of International Human Rights Law, International Humanitarian Law and International Law generally. These measures are as follows:

- **Identifying Perpetrators:** Violations of IHL engage both the responsibility of the State and also Individual Criminal Responsibility under which an individual can be subject to criminal prosecutions under the domestic law of foreign jurisdictions. Additionally, both the State and individuals can also be subjected to targeted financial sanctions applied by the international community as a whole or unilaterally.

Pakistan must therefore identify and publicly highlight Indian perpetrators, including specific units and commanders reported to have committed war crimes in IOK. Just as the Indians focused on creating publicly identifiable ‘villains’ such as Hafiz Saeed, Maulana Masood Azhar, Zakhi-ur-Rehman Lakhvi etc., so should Pakistan begin to highlight specific military commanders and units who commit war crimes and human rights violations in IOK.

- Adopting the terminology of IHL: Pakistan’s state practice has been to deem the region as under Indian occupation, however, this must be backed by solid legal arguments in support which are currently lacking in our foreign policy. In this respect, adopting the language of IHL should be an integral component of any future policymaking. This framework and terminology would allow Pakistan the ability to deny India’s persistent stance that the issue is an ‘internal’ one. Rather, this would have the effect of internationalizing the dispute as in the case of Western Sahara and Palestine. At the same time, this would also impose legal obligations upon the international community as a whole – granting a legal footing for an argument of intervention by third parties.
- Identifying Specific Violations: In Legal Brief No. 3/2019, the CEIL provided a comprehensive list of the war-crimes committed by the Indian armed forces between 1989-2019. The said incidents were documented through open-source material from various NGOs and INGOs which include Human Rights Watch, Amnesty International as well as those collected by the UN’s Office of the High Commission of Human Rights in 2016. In our assessment, these specific instances can help contextualize the gravity of violations but also help identify specific perpetrators, including commanders and units, and undermine India’s narrative that it is a victim of terrorism, rather than a terroriser.

However, building an effective case for war crimes in IOK would involve identifying each specific instance, collecting evidence, reaching out to witnesses and victims and studying and highlighting the relevant applicable laws. This will require intelligence and outreach on the ground and cannot be solely based on open-source material on the internet. However, once these instances are catalogued, Pakistan should then aim to build a public database of violations being carried out by India in IOK and link them with specific violations of IHL and IHRL.

- Capitalizing on future events: More than ten years after the Mumbai Attacks, India is still vigorously pursuing charges against the alleged perpetrators of the attacks with the aim of implicating Pakistan as complicit in the attacks. Similar to this approach, it is imperative that Pakistan must capitalize on the events that may unfold throughout India and not merely the region of IOK. Every legal development which endorses the narrative of a Hindutva based fascist regime in India needs to be aggressively highlighted and explored from a lawfare perspective. Recent examples would include the acquittal of suspects in the Samjhauta Express Case and the Indian Supreme Court's judgment in the Babri Masjid Case.
- Drawing Parallels to Recognized Causes for Self-Determination: Striking legal similarities are found when the situation of Occupied Palestinian Territory (OPT) is compared to the situation in Kashmir as well as the situation in Western Sahara – however both situations have been recognized by the United Nations as involving a legitimate cause for Self-Determination. Since the Indian's are openly adopting Israel's playbook in Kashmir, this is also an opportunity for Pakistan to draw as many parallels as possible of the legal situation in Kashmir with the Israeli Occupation of Palestine.

This opens more UNSC Resolutions, academic articles and an important ICJ Advisory Opinion that can be used to legally support Pakistan's stance on Kashmir beyond the UNCIP Resolutions.

Drawing parallels to these situations lends credence to the Kashmiri freedom struggle and allows Pakistan to gain advantage from the more nuanced positions that have been developed.

IMMEDIATE CONCERNS & RISKS

Once Pakistan begins to highlight Indian atrocities in Kashmir as violations of the law of armed conflict, it must also expect blowback from India and hostile states on its strategic vulnerabilities, which will attempt to highlight and exploit domestic fault lines. The Indians are likely to highlight alleged abuses by Pakistani security forces in the former FATA region and capitalize on judgments of the Peshawar High Court and observations by the Supreme Court on detentions/internment of missing persons etc. These issues were also highlighted in the CEIL Advisory legal brief No.1/2019. To counter this potential narrative, Pakistan needs to anticipate these responses and neutralize them through internal procedures which project accountability, transparency and respect for rule of law.

Further, any narratives based on this legal framework will need to be planned carefully, ensuring correct use of legal terminology and selection of appropriate lawfare manoeuvres. International humanitarian law and the law of occupation is a complex and highly specialized area of international law which requires in-depth academic engagement and internal capacity before it can be effectively utilized. This capacity is currently missing in important state institutions in Pakistan.

SUGGESTED RESPONSES AND WAY FORWARD

By identifying specific instances and perpetrators, Pakistan will be open to pursuing a number of actions under the concept of Universal Jurisdiction as well as sanctions under domestic regimes of a number of States. The concept of Universal Jurisdiction allows States to exercise jurisdiction over and prosecute a person irrespective of his nationality and country of residence if he has committed war crimes or grave human rights violations.

Today, a number of States including Belgium, Spain, France, United States, Germany, Argentina etc. have legal mechanisms in place which allow for universal jurisdiction and can be utilized by victims to institute proceedings against the perpetrators of such crimes.

Additionally, it is important to identify provisions in the domestic laws of foreign States which compel States to take non-penal action against perpetrators of war crimes etc. Examples of such laws include Leahy Laws of the US, Immigration Laws, Visa Restrictions, and the European Union Sanctions Regime. This can prevent Indian officials and possibly their families from getting visas and immigration in countries such as the US, Canada, Schengen states, Australia etc. and can serve as pressure on foreign companies to not invest in IOK.

Pressure must be placed on those countries which continue to provide India with weapons and arms which are being used in Kashmir. States which have ratified the UN Arms Trade Treaty should be targeted from the outset as the agreement prohibits parties from transferring conventional arms if it has knowledge that they may be used for war crimes. Moreover, EU States which continue to supply India with arms are also prohibited under European Commission Regulation No. 428/2009 from exporting items which may be used in violation of human rights or democratic principles. Pakistan should raise awareness of human rights abuses and war crimes with the aim of ensuring that States are cognisant of the fact that they are contravening their international legal obligations by continuing to supply India with arms.

In order to circulate its narrative, Pakistan must engage with a number of avenues and forums, particularly, IHL Experts (Annexure I), Think Tanks, Institutes and Societies (Annexure II), Pressure Groups (Annexure III) and International Organizations and Mechanisms (Annexure IV). Similarly, there is also a need to equip our diplomatic missions with legal capacity, particularly, our Permanent Missions to the UN in New York, Vienna and Geneva but also in our missions in China, Russia, Belgium, United Kingdom etc. so that our diplomats are able to push the narrative in their direct engagement with these entities and governments.

Concurrently, Pakistan must start working towards a long-term solution exploring final options for the resolutions of the dispute. Most notably, this would require a detailed assessment of whether Gilgit Baltistan forms part of the dispute or not.

The Committee on GB Reforms led by Mr. Sartaj Aziz had in 2018 recommended not to alter the Constitutional status of GB since it would be viewed as alteration of the status quo and undermine our principled position under the UNSCR's. A similar conclusion had been made by earlier constitutional committees. However, India's actions of 5 August 2019 have already altered the status quo. A detailed legal study is required on the pros and cons of amending the Constitutional status of GB and its international and domestic legal implications in light of recent developments which can be carried out by CEIL at ISSRA, NDU subject to approval.

On non-state actors, the Prime Minister of Pakistan has set out a new vision for Pakistan's response to this issue at his UN speech this September followed by domestic addresses to the nation. It is imperative that the domestic legal and administrative responses align with the Prime Minister's vision to further reduce the space for the Indian narrative on Pakistan being a state sponsor of terrorism. This includes legislation and a clear strategy for speedy resolution of complicated court cases. Moreover, the Financial Action Task Force has forced the State to upgrade its entire apparatus to deal with Pakistan's compliance of UN Security Council Resolutions 1373 and 1267. The efforts to understand this are improving and must continue. This is also a useful opportunity to upgrade our criminal justice system with focused, structural reform and improve capacity across the board.

There is also a need to invest in research and scholarship on international law, the scope of self-determination in the post 9/11 era, international humanitarian law and countering the Indo-Israeli narrative on terrorism. Collaborations and partnerships can be developed by private sector educational and research institutions in Pakistan with leading global entities.

Finally, there is a dire need for Pakistan to improve its capacity of International Law in the public sector on a war footing, particularly the Ministry of Foreign Affairs and major diplomatic missions, for Pakistan to be more equipped to deal with such lawfare strategies in the future.

‘Lawfare’ capacity must also be built in the AG Office, Law Ministry, Ministry of Human Rights, Interior Ministry, provincial Home and Law Departments, Military Operations Directorate GHQ, Military Intelligence Directorate GHQ, Analysis Wing at Inter-Services Intelligence, Armed Forces JAG, Command and Staff College Quetta, Air and Naval War Colleges, Civil Services Academy, Foreign Services Academy and the National Defence University.

ANNEXURE – I

1.	Marco Sassoli (Professor of International Law, University of Geneva)
2.	Andrew Clapham (Professor of International Law at the Graduate Institute of International and Development Studies in Geneva)
3.	Noam Lubell (Professor of Law at the University of Sussex)
4.	Dapo Akande (Professor of International Law at the University of Oxford)
5.	Eyal Benvenisti (Whewell Professor of International Law at the University of Cambridge)
6.	Elizabeth Wilmshurst (Fellow of the Royal Institute of International Affairs at Chatham House)
7.	Marko Milanovic (Professor of Public International Law at the University of Nottingham)
8.	Kimberley Trapp (Professor of Public International Law at University College London)
9.	Adil Ahmad Haque (Professor of Law at Rutgers Law School)
10.	Kevin Jon Heller (Associate Professor of Public International Law at the University of Amsterdam)

ANNEXURE – II

1.	Geneva Academy
2.	Council on Foreign Relations
3.	United States Institute of Peace
4.	British Institute for International and Comparative Law
5.	International Institute for International Humanitarian Law
6.	International Law Association
7.	Hoover Institution for War, Resolution and Peace
8.	Chatham House
9.	American Society of International Law
10.	European Society of International Law
11.	War Crime Investigation and Prosecution Units in Germany, UK, Sweden, Norway and Denmark
12.	Brookings Institution

ANNEXURE – III

1.	Amnesty International
2.	Human Rights Watch
3.	International Commission of Jurists
4.	Freedom House
5.	International Federation for Human Rights

ANNEXURE – IV

1.	International Committee of the Red Cross
2.	Human Rights Council
3.	Office of Legal Affairs – UN Secretariat
4.	UN Special Rapporteur on Torture
5.	ECOSOC Special Sessions
6.	Office of the Special Representative of the Secretary General for the Children in Armed Conflict
7.	Office of the High Commissioner for Human Right

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