

LAWFARE OPTIONS ON KASHMIR DISPUTE

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Abstract

The Kashmir dispute has remained unsolved for more than 70 years now and the right of self-determination is denied to the Kashmiri populace. This paper addresses the context and background of the Kashmir dispute. It references Pakistan's efforts in trying to bring the dispute to the forefront of international affairs. In this paper, it is argued that India's occupation of Kashmir and its recent constitutional changes are not justifiable under any bilateral treaty or even under international law. It highlights the recent developments in India regarding Indian Illegally Occupied Jammu and Kashmir (IIOJK) and outlines the lawfare options available to Pakistan to counter Indian actions.

Key Words: *Indian Illegally Occupied Jammu and Kashmir (IIOJK), self-determination, international law, international humanitarian law, international human rights law, United Nations, Security Council, General Assembly Resolutions, Simla Agreement*

Introduction

The debate around Indian Illegally Occupied Jammu and Kashmir (IIOJK) usually centres on politics or human rights. But it is also one of great legal importance. India has shown a blatant disregard for international obligations. This is apparent in their flaunting of non-compliance with UN Security Council Resolutions and the constitutional changes of 5 August 2019. Its recent actions have made

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it very clear that the state of India is an illegal occupying power in IIOJK and all its post-5 August actions were undertaken to illegally annex the territory of Jammu and Kashmir. This is a complete and total disregard of the right to self-determination of the Kashmiri people.

Despite being one of the oldest agenda items of the UN Security Council (UNSC), the dispute has remained unresolved. India's recent actions have led to a rise in tensions between India and Pakistan, which is a serious threat to the peace and stability of the world. Further exacerbating the situation is the fact that both these countries have nuclear weapons. In this paper, it is argued that India's occupation of Kashmir and its recent steps are not justifiable under any bilateral treaty or even under international law. There are voices of dissent even within the Indian state that have declared that these actions are unconstitutional under India's own state laws. This raises the question: what are the policy or lawfare options available to Pakistan on this dispute? This paper examines the developments in Kashmir and provides a list of lawfare options for Pakistan.

Background

The India Independence Act of 1947 gave the princely states within the British Indian colony the option to accede either to Pakistan or India or remain independent. However, partition was taking place largely on the basis of the two-nation theory and the division was according to Muslim and non-Muslim majority areas. Hence, the Cabinet Mission had decided that an Indian state with the ruler having a different religion than his subjects could not decide to accede without a referendum being held. The ruler of Kashmir, Maharaja Hari Singh, initially chose to remain independent till 15 August 1947 and then signed a Standstill Agreement with Pakistan that effectively handed over certain administrative responsibilities from India to Pakistan.

By mid-October, the situation inside the State forced the Maharaja to leave Srinagar and before leaving he allegedly signed the

Instrument of Accession on 26 October 1947.¹ In the Indian Governor General's response of 27 October, he declared, "as soon as law and order [was] restored in Kashmir and her soil cleared of the invader the question of State's accession should be settled by a reference to the people."² This led to an armed conflict between Pakistan and India, resulting in India referring the case to the UN Security Council on 1 January 1948.³ The UNSC formed the United Nations Commission on India and Pakistan (UNCIP) to investigate this matter further.⁴ One of the most important steps taken was Resolution 47 of the UNSC, on 21 April 1948. It declared that troops and tribesmen should withdraw, stressed the formation of an interim government, and vowed to send 5 members of UNCIP to Kashmir in order to arrange a free and fair plebiscite. The demilitarisation, being the first step, never happened as both states were fearful that the other would try to benefit from the situation. India has repeatedly refused to demilitarise the region to allow for a plebiscite.

India's Unlawful Annexation

It is a well-established fact that the former princely state of Jammu and Kashmir has been under Indian Occupation. However, this situation has now grown to be an occupation with an unlawful annexation. Keeping in view that under international law, the occupying power does not need to make a formal statement or any sort of official recognition of its occupation. However, if the situation comes under the defined criteria for occupation, that is enough. We find the following definition of occupation in Article 42 of the 1907 Hague Regulations:

Territory is considered occupied when it is actually 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.⁵

Thus, it is apparent that it does not matter where the occupying power intends to take advantage of or benefit the area under its control, only the factual situation counts.

Under international law, having competing claims of sovereignty does not prevent it from being termed as an occupied territory. Hence, a territory can be termed as occupied even if its status is contested. Pakistan's long-held stance is that since no legal title has been transferred to India regarding IIOJK, any and all attempts to incorporate it into its territory is an act of illegal annexation. This position has been supported repeatedly by UNSC resolutions on this matter. Thus, India does not have any legal authority to take unilateral action and change the status of IIOJK and subsume it within India. The Security Council has unequivocally rejected previous attempts by India to change the status of Jammu and Kashmir unilaterally in Resolutions 91 (1951) and 122 (1957).

This illegality has also been reiterated within in the 1972 Simla Agreement, where it is declared:

Pending the final settlement of any of the problems between the two countries, neither side shall unilaterally alter the situation and both shall prevent the organisation, assistance or encouragement of any acts detrimental to the maintenance of peaceful and harmonious relations...the representatives of the two sides will meet to discuss further the modalities and arrangements for the establishment of durable peace and normalisation of relations, including the questions of prisoners of war and civilian internees, a final settlement of Jammu & Kashmir and the resumption of diplomatic relations.⁶

Additionally, the very Instrument of Accession on which India bases its legal claim to Kashmir states in Clause 5:

The terms of this my Instrument of Accession shall not be varied by any amendment of the Act or of the Indian Independence Act, 1947, unless such amendment is accepted by me by an Instrument supplementary to this Instrument...Nothing in this Instrument shall be deemed to be a commitment in any way as to acceptance of any future Constitution of India or to fetter my discretion to enter into arrangement with the Governments of India under any such future Constitution...Nothing in this Instrument affects the continuance of my sovereignty in and over this State, or save as provided by or under this Instrument the exercise of any powers, authority and rights now enjoyed by me as Ruler of this State or the validity of any law at present in force in this State.⁷

Revocation of Article 370

Regarding the concessions given to Kashmir in the Indian Constitution of 1950, the two most pertinent were Article 370 and Article 35-A. Article 370 gave the IIOJK autonomy in all areas except defence, communication, and foreign policy. Article 35-A gave only 'permanent residents' of Kashmir the right to own property. Ever since these articles came into power, Hindu nationalists had opposed them vehemently. They argued that India should not bend its rules for the Muslim majority Kashmir. It was during the 2019 election campaign that the ruling Bharatiya Janata Party (BJP) promised that it would revoke Kashmir's 'special status' and clamp down on separatism within India.⁸

On 5 August 2019, the special status of IIOJK and its limited autonomy were revoked by the Indian government. India's central laws were applied in IIOJK, similar to all other Indian states and territories. The penal code and the state flag of Kashmir were invalidated. A plan was put into motion to split IIOJK into two separate Union Territories.⁹ The first being Jammu and Kashmir with its own

separate legislature and the second being the region of Ladakh, which will be ruled directly by the Central Government.

In doing so, India will greatly increase the Delhi government's control over both regions. India has added to the suffering of the Kashmiris by maintaining a strict curfew and a complete media blackout since 5 August 2019. Mehbooba Mufti, the former Chief Minister (CM) of IIOJK, who was also a coalition partner of the BJP in the state, called 5 August "the darkest day in Indian democracy." Omar Abdullah, another former CM of IIOJK, called this Indian action a "total betrayal of trust" and an "aggression against the people of state."¹⁰

After revoking Article 370, India issued a new political map of occupied Jammu and Kashmir, in contravention of the bilateral agreements and UN resolutions on the matter, where it shows Azad Kashmir as a part of the newly created union territory of occupied Jammu and Kashmir and Gilgit Baltistan as part of the Union Territory of Ladakh.¹¹ Jammu and Kashmir reorganisation (Adaptation of State Laws), 2020, was passed on 31 March 2020. It repealed 29 state laws and amended 109 laws of occupied Jammu and Kashmir. This law determines new rules for obtaining domicile or residency in Jammu and Kashmir.

The reasons given by the Indian government for the revocation of Article 370 have also been varied in nature. Amit Shah, the Home Minister of India, cited security concerns while Prime Minister Narendra Modi highlighted economic concerns. Other leaders claimed legislative efficiency as the cause for the revocation. Opposition politicians and critical voices in India have claimed that this move is an attack on Indian democracy, and analysts have described it as unprecedented. The special status revocation was termed illegal and unconstitutional by political leaders. Mehbooba Mufti warned that it would render India an "occupational force" in the area and called it the "darkest day in Indian democracy."¹²

Jammu and Kashmir acceded to India based on certain terms, which were represented by Article 370 and 35(A). This was mentioned in the Instrument of Accession. The 5 August unilateral abrogation of Articles 370 and 35-A has damaged the Instrument of Accession weakened the Indian claim to Jammu and Kashmir.

The 4th Geneva Convention explicitly states that it is illegal for an occupier to move people from their own territory to the occupied territory.¹³ This rule has been set into place to prevent occupiers from bringing about major demographic changes within the occupied territory as it will solidify their claims of sovereignty and will weaken the native people's inherent right to self-determination. Article 35-A was holding up this requirement as, due to this article, it was prohibited for non-Kashmiris to buy land there or to settle permanently in this area. Now with the abrogation, India is going to be able to change the demographics of this territory.

Since Jammu has a Hindu majority and Ladakh constitutes a Buddhist majority, Kashmir was the only Muslim-majority state within India. The bifurcation of the state and the demographic changes caused by non-Kashmiri settlers will influence the results of any referendum held in the future. These steps are a violation of Article 49 of the Fourth Geneva Convention.

Under the constitutional changes set in motion by the state of India, the following steps were to be initiated with immediate effect:

- a. All references to the 'Government of Jammu & Kashmir' would henceforth be construed as references to the 'Governor of Jammu & Kashmir';
- b. All references to the 'Constituent Assembly of Jammu & Kashmir' shall be construed as references to the 'Legislative Assembly of Jammu & Kashmir';
- c. The Constitution (Application to Jammu & Kashmir) Order 1954 was superseded with immediate effect.¹⁴

This was India's blatant move to finish the autonomy and the special status of IIOJK.

Violation of Human Rights

The toll the siege has taken, whether political or economic, on IIOJK, is excessive. According to a report by The Forum for Human Rights in J&K (as published in the *Times of India*), over 6,600 people were arrested, including minors and 444 political leaders under the J&K Public Safety Act. This Act allows for detention (without trial) for up to two years.¹⁵ This report does address the number of political leaders that have been released, however, it does not address how many civilians had been released.

Mobile service, landlines, and internet were all suspended post-August 5. Since then, all three communication services were restored and revoked sporadically and at will. This political lockdown initially and the COVID-19 lockdown subsequently have caused great damage to the education and economy of IIOJK. There are claims that between August 2019 and March 2020, schools were open for not more than two weeks.¹⁶ The rest of the Indian kids had the option of studying online, however, Kashmir didn't have internet services.

Although some businesses had resumed functioning when the security and communication clampdown was moderately lifted at the start of 2020, the harsh COVID-19 lockdown damaged the local economy further. The Kashmir Chamber of Commerce and Industries has estimated that the economic losses in the region amount up to \$5.3 billion and almost half a million jobs had been lost since August last year.¹⁷

Even Indian sources are now admitting that the Kashmiri involvement, that is, the local involvement in terrorism, has skyrocketed after 5 August 2019. The share of locals in terrorist fatalities rose to almost 79% from 55% in 2018, according to an Indian source.¹⁸ The Indian government has resorted to harsher and harsher counterterrorism and sedition laws to clamp down on public dissent.

There are many more allegations of arrest and torture by the security forces. The United Nations High Commissioner for Human Rights, Michelle Bachelet, has repeatedly voiced concern about human rights violations in Jammu and Kashmir.¹⁹

Issues with the Simla Agreement 1972

India views J&K through the lens of the bilateral structure of the 1972 Simla Agreement. The foundation of their stance is that the Simla Agreement supersedes any other UN Resolutions on Kashmir and, thus, this issue needs to be resolved bilaterally between the two countries. Nowhere in the agreement is it declared or suggested, however, that it will supersede the UN Resolutions on J&K. Once the Kashmir dispute was taken up by the various UNSC resolutions, it gained a multilateral character and it cannot be relegated to simply a bilateral issue. Furthermore, it was India that first took this dispute to the UN in January 1948. This has also been termed as Nehru's grave mistake, as policymakers within and outside of India agree that it is almost impossible to retract an issue once it has been submitted to the UN for deliberations.

Pakistan's stance is upheld by the very text of the agreement, which states, "without prejudice to

- i. The existing position of the parties; and
- ii. The parties remaining bound by the UN Charter. Given that the UN Charter applies to J&K, Pakistan has rightly invoked Article 103 of the UN Charter which in unequivocal terms states: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."²⁰

Without amending the Charter of the UN, India's argument of bilateralism over multilateralism does not hold weight. However,

keeping in view India's rather aggressive policy related to Kashmir, it is about time that Pakistan changes its tactics.

Policy Options for Pakistan

The core of the bilateral relationship between Pakistan and India has been shaken up due to India's aggressive constitutional changes. This will most definitely have long-lasting regional effects. With the plans of demographic changes and the continual violations of human rights, Pakistan must also consider changing its policy stance towards India and this issue.

Lawfare Options

India's Illegal Occupation:

If we go by Article 42 of the Hague Regulations of 1907, India is an Occupying Power in IIOJK and its annexation is illegal under international law. The article declares, "territory is considered occupied when it is actually placed under the authority of the hostile army."²¹ We see an example of this in the Wall Opinion of The International Court of Justice, where the ICJ recognised that Israel, under the 4th Geneva Convention, had occupied Palestinian Territories in 1967. This is similar to how India occupied Kashmir after 1947.

IIOJK has been under India's forceful authority, puppet governments, and extremely harsh laws. These include the Armed Forces (Special Powers) Act that gives the security forces the right to search and destroy property, kill on suspicion and arrest without trial. The Jammu and Kashmir Public Safety Act allows security forces to detain individuals without legal trial for up to two years. This is a gross violation of human rights and it prevents Kashmiris from utilising their inherent right to self-determination. The revocation of Article 370 was essentially the nullification of the Instrument of Accession. Kashmir has essentially returned to its pre-1947 identity as an independent state. In essence, India has lost its legal case on Kashmir.

The revocation of Article 35-A is seen as a means to bring about demographic changes within the state. Again, it is a breach of the 4th Geneva Convention and this issue must be raised on the international stage. Pakistan needs to approach the UNSC under Chapter VII Article 39, which is related to 'Threats to International Peace and Security'²². Following are the three conditions under which the UNSC Article 39 can be triggered: the existence of any threat to peace, breach of peace, or act of aggression. The first two conditions are fulfilled by India regarding the Kashmir Dispute. Recent actions of India go against (i) UNSC Resolution 38 that calls on each Government to inform the Council of any material change and consult the Council in this regard;²³ (ii) UNSC Resolution 47 that states in its preamble that India and Pakistan desire that the question of the accession of Jammu and Kashmir to India or Pakistan should be settled by a free and fair plebiscite;²⁴ and (iii) The Simla Agreement, which states that India and Pakistan relations will be governed by the Charter of the United Nations.

Pakistan, as a member of the United Nations Human Rights Council, should raise the issue of gross violations of human rights, including the right to self-determination, enshrined in the UN Charter.

Bilateralism cannot trump Multilateralism

India has weakened its case on IIOJK by forcing Pakistan to take the Kulbhushan Jadhav case to the ICJ. What this did was to bring up the debate of bilateralism vs. multilateralism. India's basic argument was that the Vienna Convention on Consular Relations (1963) trumped the 2008 Bilateral Treaty and this was accepted by the ICJ. The very same argument can be used to declare that the status of IIOJK is a multilateral issue according to the UNSC resolutions.

India argued in the aforementioned case that "bilateral treaties cannot modify the rights and corresponding obligations which are set out in Article 36 of the Convention [Vienna Convention]", and that "there is nothing in the language of the 2008 Agreement which would

suggest that India or Pakistan ever intended to derogate from Article 36 of the Vienna Convention."²⁵ Interestingly, there is no declaration in the Simla Agreement that shows that the intention is to derogate from the previous UNSC resolutions. This can now be used by Pakistan to push its multilateralism argument further as the ICJ has global significance and its decisions and judgments are the final words on international issues, whether countries decide to follow them or not.

The Simla Agreement has been breached

India has consistently weakened the Simla Agreement with its policies and statements. The recent constitutional changes and the repeated declarations of Kashmir being an integral part of India all point to breaches of the agreement. The Simla Agreement quite clearly states that neither side can unilaterally change the situation until and unless a final solution is reached. Article 60 of the Vienna Convention on the Law of Treaties (VCLT), 1969, provides, "Material breach of a bilateral treaty by either party entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part."²⁶

Article 60 of the VCLT defines 'material breach' as "a repudiation of a treaty not sanctioned by the present Convention [VCLT]" or "the violation of a provision essential to the accomplishment of the object or purpose of the treaty." However, India and Pakistan are both not parties to the VCLT. Nevertheless, in the ICJ case concerning the Gabčíkovo-Nagymaros Project (1997) Hungary/Slovakia, many of the rules in VCLT are considered the reiteration of customary law.²⁷ Thus, Article 60 applies to the Simla Agreement regardless of Pakistan and India not being party to the VCLT. It may be the right moment for the policymakers to discuss whether ending the Agreement might be more beneficial for Pakistan in the long run.

Right to Self-Determination as Jus Cogens

The primary fact that cannot be ignored when discussing Kashmir is the right of its people to self-determination. That is a principle of jus cogens and it is impossible to deny it. It is, therefore, essential that Pakistan continues to offer its political and moral support to Kashmiris and recognise that its people have the right to self-determination. As confirmed by the International Commission of Jurists in their 1995 report on J&K, the right to self-determination accrued to the people at the time of partition and it continues to this day. Moreover, as a matter of international law, no patent illegality (occupation, suppression, colonialism, etc.) can extinguish the right of self-determination through lapse of time or otherwise.²⁸

Change of Demography is a breach of International Law

The 4th Geneva Convention explicitly states that it is illegal for an occupier to move people from their own territory to the occupied territory.²⁹ This rule has been set into place to prevent occupiers from bringing about major demographic changes within the occupied territory as it will solidify their claims of sovereignty and will weaken the occupied people's inherent right to self-determination. Article 35-A was holding up this requirement as, due to this article, it was prohibited for non-Kashmiris to buy land there or to settle permanently in this area. Now with the abrogation, India is going to be able to change the demographics of this territory.

Since Kashmir was the only Muslim majority state within India, the bifurcation impacts any future referendums and any demographic changes caused as a result of non-Kashmiri settlers. This would be contrary to Article 49 of the Fourth Geneva Convention. By attempting to alter Jammu and Kashmir's demographics, India is also ending any chance of a plebiscite under the UN Security Council resolutions on the disputed territory. Conducting a referendum after initiating and facilitating demographic changes is illegal under international law.

This would also be a blatant disregard of the many UNSC resolutions regarding this topic.

It further is a breach of various international humanitarian law and international human rights law treaties such as the International Covenant on Civil and Political Rights³⁰ (ratified by India in 1976) and the International Convention on the Elimination of All Forms of Racial Discrimination³¹ (ratified by India in 1968). India will also be in breach of the Rome Statute of the International Criminal Court³² (Rome Statute). Crimes under Article 7³³ (Crimes against Humanity) of the Rome Statute include any forcible transfers of the population if committed as part of a widespread or systematic attack against any civilian population.

Focus on International Humanitarian Law (IHL)

Currently, Pakistan focuses on the International Human Rights Law (IHRL) narrative. However, IHRL is applied mainly during peace times and the IHL is applied during times of international armed conflicts. We have effectively shown, in this paper, that J&K is under Indian illegal occupation and there is clear evidence of war crimes, the intent of ethnic cleansing, changing of demographics and even genocide. This is the purview of IHL and provides Pakistan with a rare chance to bring India in front of the international criminal tribunals for war crimes.

Ever since UNSC Resolution 47,³⁴ which demanded a plebiscite in the region, the territory is contested and is under Indian occupation. India is bound by the Laws of Occupation under Hague Regulations of 1907.³⁵ Furthermore, without a free and fair plebiscite, India has no legal claim and essentially that makes Kashmir an international armed conflict. This means that several clauses of International Humanitarian Law apply to India under these circumstances. These laws have been breached by India; civilians have been arrested, murdered and executed by Security Forces. Many neutral international observers have written about the thousands of cases of torture, coercion etc.

There have been reports of rape as retribution, use of pellet guns to blind or maim civilians. If the international community turns a blind eye to these war crimes, then they are in breach of the Geneva Conventions.

Conclusion

Keeping in mind all the aforementioned options, Pakistan needs to realise that lawfare is the best possible solution for the Kashmir dispute. But we need to take a different direction than the one we have been in for more than 70 years. Mediation will not work, considering the divisions in international politics right now. Bilateralism is a moot point till the Modi government is aggressively pursuing its Hindutva policies. The OIC has consistently proven useless when it comes to this dispute, as is seen by the recent events. Hence, Pakistan must focus on the breach of the Simla Agreement by India due to its latest actions. It must focus on the human rights violations and the IHL violations being committed by India, even now.

Pakistan has consistently been on the right side of history when it comes to the Kashmir dispute. Hopefully, that is a trend it can continue in the future by adopting some of the lawfare recommendations suggested above. A new strategy is needed now and focusing on the violations of International Law will bring attention back to a topic that has been repeatedly brushed aside under the guise of bilateralism.

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