

# Lawfare Options for Kashmir Dispute

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Oct 2020

## Executive Summary

India has consistently violated the international law in case of Kashmir issue right from the beginning of the conflict. Starting with its illegal occupation to non-implementation of UN Security Council resolutions India has displayed a continual disregard of international law while imposing a repressive regime of human rights violations and crimes against humanity. In order to counter above there is a requirement of a focused, comprehensive and well-resourced lawfare campaign by Pakistan as well as Kashmiris to complement our diplomatic efforts.

## Recommendations

- The legal regimen exists both within domestic jurisdictions of countries as international law that needs to be exploited through a well-resourced and organized effort to point human rights and IHL violations. To achieve this end, Kashmiris should be helped to collect solid evidence of precise acts by entities as well as individuals, followed by its proper documentation and presentation in front of UN bodies, like Human Rights Council and General Assembly.
- Evidence collection of atrocities/human rights violations through special committees instituted through statutes.
- Capacity building of AJ&K government, Ministry of Foreign Affairs and Ministry of Defence in international law.
- A Center of Excellence/Think Tank in public sector preferably in a university should be established to create a pool of international law experts.

## Analysis

- To put pressure on India for revocation of Article 370, Pakistan must play its part in countering Indian attempt by:
  - Proving that Article 370 can be challenged in Indian Supreme Court.
  - Proving that Indian Army and the security forces are an occupation force. As per International Humanitarian Law (IHL) unconsented and effective occupation by an occupying force that does not have sovereign title to the land constitutes occupation. Factual criteria for occupation to be highlighted to treat Indian Army's human rights violations as war crimes proving that law of armed conflict applies to Kashmir conflict.

- Some of the ways to do so include:-
  - Invocation of Article 4 of Geneva Convention of 1949.
  - Preventing transfer of population from IIOJK to India and vice versa.
- Since, IIOJK is under occupation, other than Human Rights Law, Law of War squarely applies to it. To this end, provisions of Geneva Conventions and Customary International Human Law ought to be applied to provide relief and protection to victims. Similarly, the use of pellets by Indian security forces is a grave breach of human rights law, equivalent to a war crime. Likewise, the Indian Army's stepping into a house, torture on victims under detention or habeas corpus is a war crime as well. As per article 427 of UN International Covenant on Civil and Political Rights (ICCPR) and Human Rights Watch (HRW) state sponsored militias should abide by International Humanitarian Law (IHL). And as per article 59 of 4th Geneva Convention, occupying force has to ensure provision of basic services to population<sup>1</sup>. In addition, according to Article 56 of 4th Geneva Convention<sup>2</sup>, free moving of international relief work has to be facilitated. Failure of obligations/duties to be performed as an occupying force, especially in natural emergencies like COVID-19 to help the population of occupied territory in getting access to basic health and security needs also constitute breach of above article.
- All of the above obligations should be utilized as exploitable vulnerabilities of Indians.
- The theme of genocide of Kashmir Muslims at the hands of Indian occupation forces needs to be projected. The risk factor, early warnings of massacres and ten steps of Genocide (as defined by Genocide Watch) should be vociferously highlighted at international fora, like Human Rights Council.
- Instead of generalized condemnation of Indian atrocities against Kashmiris evidence of precise and specific Indian human rights violations under law of peace as well as law of war should be collected and documented both in case of entities as well as individuals, to be presented in fora like UN General Assembly and Office of High Commission for Human Rights (OHCHR).
- The clear categorization of human rights violations in human rights abuses, war crimes and crimes against humanity should be done as per technical categories agreed upon by international community. (Refer Annex-A) Systematic and widespread nature of the human rights violations to be identified documented and proved with evidence to categorize these violations as crimes against humanity.

<sup>1</sup> "Treaties, States Parties, and Commentaries - Geneva Convention (IV) on Civilians, 1949 - 59 - - Commentary of 1958," ICRC Databases on International Humanitarian Law | International Committee of the Red Cross, accessed October 4, 2020, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=15B5740DF2203BE4C12563CD0042C966>.

<sup>2</sup> "Treaties, States Parties, and Commentaries - Geneva Convention (IV) on Civilians, 1949 - 56 - Hygiene and Public Health," ICRC Databases on International Humanitarian Law | International Committee of the Red Cross, accessed October 4, 2020, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=AD2F7F5D8CF955AFC12563CD0051BE51>.

- Breach of Geneva Convention:-
  - Article 147 of 4th Geneva Convention attracted due to unlawful killings, tortures, causing serious injuries and unlawful deportation or transfer (in context of India's attempts to change demography of IIOJK) or unlawful confinement of civilians<sup>3</sup>.
  - Article 146 of 4th Geneva Convention attracted as India fails in its obligation to help in search for persons who commit grave breaches of Geneva Convention<sup>4</sup>.

## Epistemic Pressure:

- Building narratives to put public pressure on Indian Forces for their atrocities in Kashmir.
- Preparing the narrative of Indian Occupation on international media, think tanks, policy analysts and scholars.
- A global movement to mobilize international civil society, academic institutions and think tanks on the line of Palestinian Boycott, Divestment and Sanctions (BDS) movement needs to be initiated against Indian violations of human rights and international law<sup>6</sup>.

<sup>3</sup>"Treaties, States Parties, and Commentaries - Geneva Convention (IV) on Civilians, 1949 - 147 - Penal Sanctions II. Grave Breaches," ICRC Databases on International Humanitarian Law | International Committee of the Red Cross, accessed October 4, 2020, <https://ihl-databases.icrc.org/ihl/WebART/380-600169>.

<sup>4</sup>"Treaties, States Parties, and Commentaries - Geneva Convention (IV) on Civilians, 1949 - 146 - Penal Sanctions I. General Observations," ICRC Databases on International Humanitarian Law | International Committee of the Red Cross, accessed October 4, 2020, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/380-600168?OpenDocument>.

<sup>5</sup>Zahoor, Sadia. "Kashmir and International Judicial Institutions," Webinar by Islamabad Policy Research Institute, Islamabad, September, 24, 2020.

<sup>6</sup>Ahmed, Shayan, "Human Rights Violations and Legal Recourse," Webinar by Islamabad Policy Research Institute, Islamabad, September, 24, 2020.

## Legal Avenues to Counter Indian HR Violations

- Fact finding mandate of UN to determine human rights violations is one of the best vehicles to collect evidence, against Indian occupying forces. Attempts should be made to get a fact finding mission appointed either through UN General Assembly or through UN's Human Right Council (UNHRC) and Office of High Commission for Human Rights (OHCHR)<sup>6</sup>.
- Inter-state complaints under Article 11 of International Convention on Elimination of All Forms of Racial Discrimination (ICERD) should be launched against Indian state<sup>7</sup> in IIOJK<sup>8</sup>.
- Kashmiris should be facilitated to invoke "Universal Jurisdiction" clause of domestic law of countries like USA, UK, Australia, Argentina, Belgium, Canada, Germany, Spain, Sweden and Norway. According to this clause, an offender can be prosecuted under domestic law of a country (for examples, refer Annex-B) committed outside their territorial jurisdiction. Countries like Argentina do not even require presence of an offender on Argentinian soil for his prosecution, thus, it should be treated as a priority country for filing of such cases. Domestic laws that prevent aid to a human rights' violator like "Autonomous Sanctions Act 2015" of Australia should also be invoked to get aid blocked for Indian security forces or individual sanctions against individual perpetrators. For example of such laws refer to Annex-C.

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<sup>7</sup>"UNTC," United Nations Treaty Collection, accessed October 4, 2020,

[https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-2&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&lang=en).

<sup>8</sup>"OHCHR | International Convention on the Elimination of All Forms of Racial Discrimination," accessed October 4, 2020, <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>.

- Kashmiris should be lent all possible help to collect evidence of systematic atrocities by Indian occupying forces to build a case of crimes against humanity. The crimes against humanity are easy to prosecute at international fora since these are exempted from local law remedies clause. Therefore, there is no requirement in such cases of exhausting local remedies. Cases can be instituted either by victims or their families or by NGOs on behalf of the victims. NGOs, offering pro bono services in this area, comprise Trial International, Center for Justice and Accountability, International Federal for Human Rights and REDRESS.

## Recommendations

- The legal regimen exists both within domestic jurisdictions of countries as well as international law that needs to be exploited through a well-resourced and organized effort to point out human rights and IHL violations. To achieve this end, Kashmiris should be helped to collect solid evidence of precise acts by entities as well as individuals, followed by its proper documentation and presentation in front of UN bodies, like Human Rights Council and General Assembly.
- Under any University or its affiliated Area Study Center's Act, a Vice Chancellor may notify a committee as a statutory entity for collection and documentation of evidence which should be funded as a project by Ministry of Finance.
- There is a need for capacity building of Foreign Office as well as Ministry of Foreign Affairs and Ministry of Defence in legal matters, especially International law.
- Capacity building of AJ&K Government in International law and use of lawfare options through better human resource and funding is de rigueur.
- A Center of Excellence/Think Tank in public sector preferably in a university should be established to create a pool of international law experts.
- For actionable matrix, refer to the next page.
- All of the above measures to be supported by a proper budget.

Annex-A<sup>9</sup>

## INDIAN LIABILITY FOR INTERNATIONAL CRIMES

## Human Rights Abuses

Violations of Human Rights  
Treaties ratified by India:

- ICCPR
- ICESCR
- CEDAW
- CRC

Violations of Rights afforded  
by Indian Law

## War Crimes

Serious Violations of the Law  
of War (IHL)

- Targeting of  
Civilians/Civilian Property
- Murder,
- Torture,
- Forced Transfers of  
Population,
- Rape,
- Transfer of own Population  
into Occupied Territory.

## Crimes Against Humanity

- Murder,
- Torture,
- Forced Transfers of  
Population,
- Rape,
- Persecution,
- Enforced Disappearance

“committed as part of a  
**widespread** or **systematic**  
**attack** directed against any  
civilian population.”

<sup>9</sup> Ahmed, “Human Rights Violations,”

## Annex-B Some States with Universal Jurisdiction

### Argentina

Article 118 of the Constitution of Argentina (Spanish only), articles 3 and 4 of the Rome Statute Implementation Law (Spanish only), and Article 144ter of Argentina's Penal Code (Spanish only).<sup>10</sup>

### Belgium

Belgium's Genocide Law 1993

### Denmark

Section 8 (5) of the Danish Penal Code

### Germany

Code of Crimes Against International Law [Völkerstrafgesetzbuch (VStGB)] 2002.

### Netherlands

International Crimes Act of June 19, 2003 (ICA)

### Norway

Article 12.4 of the Norwegian General Civil Penal Code (Criminal Code).

Sections 5 and 6 of the Norwegian Penal Code.

### Spain

Article 23.4 of the Judicial Power Organization Act (LOPJ) 1985.

### Sweden

Swedish Act on Criminal Responsibility for Genocide, Crimes Against Humanity and War Crimes (Universal Crimes Act or UCA) 2014

### Switzerland

Swiss Criminal Code 1937 with provisions of Universal Jurisdiction.

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<sup>10</sup> Ahmed, "Human Rights Violations,"



## Annex-C<sup>11</sup>

### ● United States

- **Global Magnitsky Human Rights Accountability Act, 2016** which allows the President to impose US entry and sanctions against foreign person or entity.
- S. 502B Foreign Assistance Act 1961 enables the United States government to stop security assistance to countries or governments that engage in gross human rights violations.
- S.620M of the Foreign Assistance Act 1961 requires the United States government to render any assistance to a unit of the security forces if the Secretary of State has credible information.
- S. 116 of the Foreign Assistance Act 1961 enables the United States government to withhold developmental assistance.

### ● Canada

- S.4 of the Special Economic Measures Act 1992 enables the Governor in Council to designate sanctions in response to the commission of gross human rights violations.
- Justice for Victims of Corrupt Foreign Officials Act 2017.  
Crimes against Humanity and War Crimes Act 2000.

### ● Australia

- Autonomous Sanctions Act 2011.

### ● United Kingdom

- Global Human Rights Sanctions Regulations 2020.

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<sup>11</sup> Ahmed, "Human Rights Violations,"

## ABOUT THE AUTHOR



**Usama Nizamani**

Mr. Usama Nizamani joined IPRI as a Consultant in 2017, bringing along his professional experience of behavior sciences, after having conducted national and international training sessions as a Psycho-Social Trainer (2015-2017) with IREX and Bytes for All, Pakistan. At IPRI, he has developed extensive experience on emerging technologies, application of Artificial Intelligence and cyberspace and maps their impact on future strategic landscape. He also augments his academic and professional experience of behavioral sciences in studying strategic decision making. On strategic affairs, he focuses on Pakistan-India, India-China, US-China engagement in South Asia and Asia Pacific. Mr. Nizamani has published rigorous research-based policy papers on technology and policy related issues. Mr. Nizamani has featured as a speaker, discussant and panelist in various national and international conferences/webinars. He regularly contributes in national and international dailies. Mr. Nizamani has also participated as a delegate of Track-II dialogue, 'Beyond Politics and Polemics New Beginning on a Difficult Trail' at Islamabad by Regional Policy Institute (RPI) and United States Institute of Peace (USIP) in 2019. Mr. Nizamani is a graduate of National Defence University (NDU), Islamabad where his post-graduate research specialized on "Emerging Shifts in India's Nuclear Strategy: From No First Use to First Use?" He also holds a BS in Psychology from Virtual University of Pakistan, Lahore.

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