

Occupied Kashmir

Making a Case for
Humanitarian Intervention

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Ejaz Haider has been a journalist for over two decades, starting his career at The Frontier Post, Lahore. During his career, he has held several editorial positions including the News Editor of The Friday Times and Executive Editor of Daily Times. Mr. Haider has also hosted talk shows on Dawn News and Samaa TV. He was a Ford Scholar at the University of Illinois at Urbana-Champaign (1997) and a Visiting Fellow at the Foreign Policy Studies Programme at the Brookings Institution in Washington D.C (2002-03). Ejaz Haider has written extensively for publications at home and abroad including The Friday Times, Daily Times, Express Tribune, Pakistan Today, Times of India, India Abroad, The Indian Express, Daily Star (Beirut), The Washington Post, Janes Sentinel (Crisis Assessment for Pakistan) and The Hindu, among others. His areas of interest include defence and foreign policies, nuclear strategy, theories and concepts of war, international relations, statecraft, literature, and satire. He is currently Executive Editor at Indus News and also anchors a programme, Indus Special.

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The decision on August 5 by India's current Bharatiya Janata Party (BJP) government to annex Occupied Jammu and Kashmir is a very significant development at multiple levels.

Firstly, within the ambit of India's own constitution and the negotiated settlement between the Indian state and Jammu and Kashmir, the move is unconstitutional and has been done through a sleight of hand. This observation, it should be noted, is *sensu stricto* with reference to the standing of article 370, which granted Occupied Jammu and Kashmir a special status within the Indian Union.

It is imperative to point to the narrow sense of this 'special status' clause because Pakistan has never accepted either the so-called Instrument of Accession by Maharaja Hari Singh or the negotiated settlement that came into being between India and the Occupied State of Jammu and Kashmir, given the disputed nature of J&K whose people still await the application of UNSC and UNCIP (United Nations Commission for India and Pakistan) resolutions to exercise their right to self-determination.

Outside of the ambit of India's own constitution, the move goes against both the UNSC resolutions as well as the 1972 Simla (now Shimla) Agreement. India cannot change the status of J&K by annexing the territory until the enacting of UNSC resolutions to determine what the Kashmiris under Indian occupation want. Similarly, the Simla Agreement clearly states that "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."

Corollary: Pakistan's objection to India's move is therefore related to (a) India's annexation of an occupied territory and (b) the act of annexation being one that seeks to alter, unilaterally and against UNSC resolutions as well as bilateral understandings, the situation on the ground.

Two, since August 5, in the run-up to its illegal annexation of J&K, India has kept the Kashmir Valley under total lockdown and a communications blackout. It has inducted 200,000 additional troops in the area who have turned the Valley into a large prison. Protests have been met with suppressive tactics; hospitals are instructed to either not admit victims of violence by the security forces, or to discharge them quickly; death certificates are not being issued or, in cases when they are, the cause of death is not registered as injuries related to violence by the security forces.

Three, since August 5, India has resorted to shelling and firing across the Line of Control (LoC) on an almost daily basis and at least on one occasion used cluster munitions. A cluster munition is a form of an air-dropped or ground-launched explosive weapon that disperses smaller sub-munitions that are designed to kill personnel, destroy vehicles or scatter landmines. While India is not a signatory to the May 2008 Convention of Cluster Munitions adopted in Dublin, it is widely understood that a state will not use such munition where there is danger of collateral damage to civilian populations, which is the case along the LoC.

Four, India's Defence Minister Rajnath Singh, has said that while India remains firmly committed to the No First Use doctrine, what happens in the future would depend on the circumstances.

Singh's statement, India's earlier anti-satellite test and its development of MIRVs (Multiple Independently Targetable Re-entry Vehicles) clearly indicate that India is not wedded to no-first-use and its declaration is a political eyewash. Concurrently, it raises the possibility of India resorting to preemption against Pakistan through counter-force (specific targeting of military assets and other infrastructure) nuclear strikes. This serves to further destabilize deterrence between the nuclear dyad, especially if the graph of violence and retaliatory violence in Occupied Kashmir goes up.

Five, in case of retaliation in Occupied Kashmir by Kashmiri freedom fighters, India could plan and execute strikes against Pakistan; it could also do so by conducting a false flag operation and stage-managing conflict with Pakistan. Prime Minister Imran Khan, as also Foreign Minister Shah Mehmood Qureshi, have already said so and briefed the international leaders about such a possibility.

What does this mean? It means (a) that India's move is not its internal matter, its propaganda to that end, notwithstanding; (b) the move violates with impunity the disputed nature of J&K as clearly stated in multiple United Nations resolutions; (c) it also violates bilateral arrangements between India and Pakistan; (d) India is clearly embarked on a project to change the demography of the territory; (e) to that end it is likely to resort to statist violence to kill Kashmiris. This is not a figment of Pakistan's imagination. Genocide Watch has already issued a Genocide Alert with reference to Occupied and annexed Kashmir. The non-governmental watchdog says the alert is based on Professor Barbara Harff's risk factors for genocide. It lists them with reference to Kashmir as:

1. Prior genocidal massacres and continuing impunity for such killings;
2. Continued armed conflict between India and Pakistan over border areas

in Kashmir;

3. An exclusionary ideology of “Hindutva” – India as [a] Hindu nation – by Modi’s ruling BJP;
4. Authoritarian military rule without legal restraints imposed by civilian Indian officials;
5. Rule by a minority military force (Hindus and Sikhs) over majority Muslim citizens;
6. Cut-off of communications and outside access by internet, media, and trade;
7. Widespread violations of basic human rights – torture, rape, 2-year detentions without charge, arbitrary arrests and deportations of Muslim political and human rights leaders.

In other words, the world is witnessing a situation where India’s August 5 actions and its subsequent policies flowing from that have deeply destabilized the South Asian region. Kashmiri retaliation is a clear possibility. India could, as it did after Pulwama, use any such attack as a ruse to attack targets inside Pakistan. That would lead to Pakistan’s retaliation. Thereafter, it is difficult to see how such a spiral could be controlled.

Corollary: the time to act is now and this makes a perfect case for humanitarian intervention.

Let’s consider what that means.

The Dutch scholar, diplomat and politician, Hugo Grotius, generally considered to be the father of international law, wrote a canonical book, *On the Laws of War and Peace*. In that he advanced two theories of humanitarian intervention: Theory of International Law Enforcement and Guardianship Theory.

Grotius’ argument in relation to the first theory is that if international law is to be taken as a normative order, then violations of that order must be punished. Corollary: when states use force externally in response to human rights violations, the primary purpose is to punish the violation of international norms in order to protect the integrity of international law as a normative order. Essentially, that all states are entitled to punish violations of the law of nature and the positive law of nations, irrespective of where or against whom the violations occur.

The problem with this approach is a) who sets the norm; b) how is the unilateral, punitive action of a state against another consistent with the principle of sovereign equality; c) how is the punitive approach consistent with the primarily defensive character of humanitarian intervention; d) when and how a state/or states intervene in a humanitarian crisis?

At another place in his book under the heading Causes of Undertaking War for Others, Grotius argues that the law of nature authorises the states to serve as temporary guardians for foreign nationals abroad who have suffered intolerable cruelties at the hands of their own state. This denotes a fiduciary relationship and obligations to use force solely for the benefit of a foreign people.

Critics are not convinced and point out that fiduciary concepts such as “guardianship” and “trusteeship” have a disturbing historical legacy, especially in relation to colonial powers. Also, the theory allows each state to judge for itself the legality of its intervention. If allowed, there can be no limiting principle on its potential for abuse.

So, what next? Modern international law experts have generally argued for taking the guardianship-trusteeship idea and multi-lateralising it — i.e., wed the UN Charter’s collective security regime to the juridical structure of humanitarian intervention as authorised by the UN Security Council.

Steps

Security Council green-lights humanitarian intervention and entrusts states to use force in a fiduciary capacity. As Evan Criddle argues in a paper Three Grotian Theories of Humanitarian Intervention, “Like other fiduciaries in private and public law, states that engage in humanitarian intervention hold discretionary power over the legal and practical interests of their designated beneficiaries (foreign nationals), and they bear a concomitant fiduciary obligation to exercise this power exclusively for their beneficiaries’ benefit.”

Even so, the concept faces many problems: first, how to marry the ideal (universal concept of human rights) with (a) state sovereignty and (b) subjective assessments of state(s) that can intervene. Second: how can one ensure that the seeming altruism is not tainted by considerations of realpolitik. Third: what happens if the UNSC cannot reach a consensus or one of the Permanent Five decides to veto the consensus over intervention? Should the powerful state choose to circumvent the UNSC and go alone or create a coalition of the willing outside the juridical structure of humanitarian intervention?

If the concept is so riddled with problems, how can one make a case for humanitarian intervention?

In the case of Kashmir, however, the problems of state sovereignty, subjective assessments and consideration of realpolitik are not relevant because Kashmir is an occupied and disputed land. This is where Pakistan has the space to look into the possibility despite its own standing objections to the concept as

practiced in cases where other states have intervened. It would be interesting to see how legal experts would apply the international law of occupation to Kashmir (which, incidentally is heavily criticized by human rights advocates), India's breaches of its provisions, given the more encompassing, modern definition of occupation.

The essential point is that humanitarian intervention, in the end, is about use of force, multilaterally or unilaterally, whether in keeping with the juridical requirements or through a unilateral military push. In the latter instance, Indira Gandhi's letter to President Nixon in the run-up to India's military push into erstwhile East Pakistan was an attempt to present the East Pakistan situation as the unfolding of a humanitarian crisis and to create a quasi-legal justification for Indian military action there.

The question for Pakistan thus would be: Can it effectively make a case for a multilateral, UNSC-sanctioned intervention in Occupied Kashmir; if not, can it unilaterally go for a military push?

These questions are important not in relation to the facts on the ground with reference to India's occupation and brutal oppression of Kashmiri people — those facts are known and recorded — but the reality and do-ability of what can be done, or not done.





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