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It's time to engage in 'lawfare'



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India has failed to fully appreciate the usage of international law as a means to advance its national security interests

Military experts, international relations academics, and practitioners like retired diplomats dominate the debates on global security in India.

International lawyers are largely absent in these debates despite security issues being placed within the framework of international law. Today, international law covers a wide array of security issues ranging from terrorism to maritime security. Article 1(1) of the UN Charter recognises the maintenance of “international peace and security” as a principal objective of the UN.

Notwithstanding the central role that international law plays in security matters, India has failed to fully appreciate the usage of international law to advance its national security interests.

Several misses

In recent times, several examples demonstrate India’s failure to use an international law-friendly vocabulary to articulate its security interests. First, India struck the terror camps in Pakistan in February 2019, days after a dastardly act of terrorism in Pulwama was carried out by a Pakistan-based terror outfit. In justifying the use of force, India did not invoke the right to self-defence since Pakistan was unable or unwilling to act against the terrorist

groups operating from its soil; rather, it relied on a contested doctrine of 'non-military pre-emptive action'.

Second, after the Pulwama attack, India decided to suspend the most favoured nation (MFN) status of Pakistan. Under international law contained in the General Agreements on Tariffs and Trade, countries can deviate from their MFN obligations on grounds of national security. Instead of suspending the MFN obligation towards Pakistan along these lines, India used Section 8A(1) of the Customs Tariff Act, 1975, to increase customs duties on all Pakistani products to 200%. The notification on this decision did not even mention 'national security'.

Third, India wishes to deport the Rohingya refugees who, it argues, pose a security threat. However, India's argument to justify this deportation is that it is not a signatory to the Refugee Convention. This is a weak argument since India is bound by the principle of non-refoulment (a customary international law principle that prohibits a country from returning refugees to countries where they face a clear threat of persecution on account of race, religion, nationality, political opinion, among others). National security is one of the exceptions to the non-refoulment principle in international refugee law. If India wishes to deport the Rohingya, it should develop a case on these lines showing how they constitute a national security threat.

Fourth, to put pressure on the Taliban regime to serve India's interest, India has rarely used international law. For instance, India could have made a case for the South Asian Association for Regional Cooperation (SAARC) using its implied powers under international law to temporarily suspend Afghanistan from SAARC's membership.

That being said, there have been some instances where India has ably used international law for its national security objectives, such as in the Kulbhushan Jadhav case when it dragged Pakistan to the International Court of Justice and also in developing international law to counter terrorism.

At the margins

There are several reasons for international law remaining at the margins of foreign policymaking in India. First, there is marginal involvement of international lawyers in foreign policymaking. B.S. Chimni, a leading Indian international lawyer, argues, “the Legal and Treaties Division of the Ministry of External Affairs, which advises the government on international law matters, is both understaffed and largely ignored on policy matters”. Moreover, an international law expert has far greater incentive to join the government as a generalist diplomat than as an international lawyer. Second, apart from the External Affairs Ministry, there are several other Ministries like Commerce and Finance that also deal with different facets of international law. They have negligible expertise in international law. Third, there has been systemic neglect of the study of international law. Institutions created to undertake cutting-edge research in this discipline have institutionalised mediocrity and university centres mandated to develop the stream suffer from uninspiring leadership and systemic apathy. Fourth, many of the outstanding international law scholars that India has produced prefer to converse with domain experts only. Thus, they have failed in popularising international law among the larger public. If India wishes to emerge as a global power, it has to make use of ‘lawfare’ i.e., use law as a weapon of national security. To mainstream

international law in foreign policymaking, India should invest massively in building its capacity on international law.

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