

BOFAXE

TRADING BLOWS

ON THE MILITARY TENSIONS BETWEEN INDIA AND PAKISTAN

On Wednesday, February 27th 2019 Pakistan reportedly shot down two Indian warplanes, after India conducted airstrikes on the Pakistani side of the disputed border region of Kashmir against training camps of the Jaish-e Mohammed group which claims responsibility for a terror attack against Indian soldiers earlier in February. India confirmed the loss of one plane and claims to have shot down a Pakistani warplane as a response itself.

The Kashmir region has been the stage for conflicts between the nuclear powers Pakistan, India and China from the beginning of the Indo-Pakistani wars in 1947 onwards. The parties fight about political dominance and the resources of the region. In terms of international law, the incident involving the shooting of the Indian planes is interesting from the perspectives of international humanitarian law, general international law and the Indo-Pakistani agreement on prevention of air space violations and for permitting overflights and landings by military aircraft since 1991. The conflict between India and Pakistan is arguably considered to be an international armed conflict, since both Pakistan and India have regularly exchanged military force across the border. Therefore, international humanitarian law applies. While international humanitarian law does not contain a treaty specifically drafted to deal with matters of areal warfare, there is a well-accepted rule in international humanitarian law which provides that military aircrafts of the other party to the conflict are legitimate targets of attack. Thus, shooting down military planes of both states is generally not prohibited under international humanitarian law.

Pakistan's foreign ministry proclaimed that Pakistan wanted to demonstrate its capability of acting in self-defence. While this statement was not directed at justifying the shooting of the Indian planes, it is interesting to assess the legality of the act with regards to the prohibition on the use of force. Even though international humanitarian law applies, states must nonetheless abide by the United Nations Charter and its prohibition on the use of force, if this prohibition is to be taken seriously. This is further clearly stated in the preamble to the First Additional Protocol to the Geneva Conventions (GCs). It is noteworthy however that neither Pakistan nor India are parties of the First Additional Protocol. However, the simultaneous applicability of international humanitarian law and the prohibition on the use of force is necessary to prevent the doctrine of a "just war". Similarly, the International Committee of the Red Cross concludes in its study on customary international law that "neither the intention of the drafters of common Article 1 of the Geneva Conventions, nor practices since then, justifies the obligation to ensure respect for international humanitarian law being used as the sole basis for resort to the use of force."

Measured solely against the prohibition on the use of force enshrined in Article 2(4) of the UN Charter, Pakistan's action would generally be lawful, since the territorial sovereignty of a state may be defended by means of force. This rule is well accepted in international law, regardless of the exact legal basis for its application. Nevertheless, Pakistan would need to show that its actions were proportional, which based on the facts available is arguable.

Lastly the Indian military plane was not allowed to fly over Pakistani territory according to Article 2(a) of the agreement on prevention of air space violations and for permitting overflights and landings by military aircraft between India and Pakistan. Pakistan did however not try to justify the shooting of the planes as a countermeasure.

One of the Indian pilots was captured by Pakistani authorities. Under international humanitarian law, specifically Article 4(A)(1) of the Third Geneva Convention the pilot must be treated as a prisoner of war by Pakistan. He is, however, not entitled to being released. Pakistan nevertheless released the pilot on March 1st as a gesture of peace hoping to de-escalate the tense situation. Since both Pakistan and India possess nuclear weapons, a further escalation of the conflict would be extremely dangerous.