

LEGAL BRIEFS

**BUILDING A LEGAL CASE FOR WAR-CRIMES
COMMITTED IN INDIAN OCCUPIED KASHMIR**

NOTE-2/2019

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BUILDING A LEGAL CASE FOR WAR-CRIMES COMMITTED IN INDIAN OCCUPIED KASHMIR

Abstract

The ongoing conflict in Indian-occupied Kashmir has given rise to widespread human rights violations, including allegations of war crimes committed by Indian military forces. This paper aims to explore the legal framework for establishing a case for war crimes in Kashmir, focusing on the systematic violations of international humanitarian law (IHL) and human rights law in the region. Drawing from international legal principles, such as the Geneva Conventions and the Rome Statute of the International Criminal Court (ICC), the paper examines the nature of crimes committed, including extrajudicial killings, enforced disappearances, torture, and sexual violence. It highlights the legal definitions of war crimes, crimes against humanity, and genocide, and assesses the challenges in prosecuting these crimes in both domestic and international courts. The paper also reviews the role of international bodies, such as the United Nations and the ICC, in holding perpetrators accountable, and discusses the potential legal and diplomatic avenues for justice for the victims. By examining case law, legal precedents, and the political complexities of the Kashmir conflict, the paper seeks to build a comprehensive legal argument for accountability and justice for the victims of war crimes in Indian-occupied Kashmir.

Keywords: Legal Case, War Crimes, Indian-Occupied Kashmir, Human Rights Violations, International Law, Geneva Conventions.

BACKGROUND

The experience of the past seven decades has shown that India has consistently adapted its political positions on Kashmir to suit its strategic objectives. An important hallmark of the fluidity of the Indian approach derives from India's reliance on legal tools and strategies to support its evolving political positions on this issue. In contrast, Pakistan's approach to the Kashmir dispute continues to be frozen in the 1950's. Our entire legal case assumes that the Kashmir issue will be resolved through the United Nations Security Council (UNSC) Resolutions.

The Indians on the other hand, have consistently attempted to dilute the relevance of the UNSC Resolutions by legal strategies, such as the incorporation of Kashmir into India's Constitution, reliance on Simla Agreement to argue that Pakistan and India have 'contracted out' of the UNSC Resolution framework, reliance on the UNSC Counter-Terrorism legal framework to proscribe Kashmiri freedom fighters as terrorists and weaken the principle of self-determination as well as ongoing efforts to repeal Articles 35-A and 370 from the Indian Constitution.

The killing of Burhan Wani in July 2016 has sparked a fresh series of violent protests in Indian Occupied Kashmir (IOK) which has led to high casualties and widespread claims of abuses perpetrated by Indian occupation forces against the civilian population.

The renewed unrest in Kashmir has coincided with a Hindutva government in New Delhi which has adopted a muscular policy on Kashmir, resulting in rising violence and unprecedented oppression in IOK. The BJP's victory in the 2019 Indian Elections is therefore expected to lead to further polarization and further aggravate the situation in the valley.

In our assessment, this situation provides a lawfare opportunity for Pakistan. A major component of Pakistan's Kashmir strategy has been our attempt to highlight the systematic human rights abuses committed by Indian occupation forces in Jammu & Kashmir which has resulted in the loss of more than 70,000 lives, 8000+ enforced disappearances, mass torture and sexual violence spread over decades. However, no significant attempt has been made to study these violations by the Indian security forces from a legal perspective.

In our opinion, the actions of the Indian security forces in Indian Occupied Kashmir (IOK) go beyond mere violation of International Human Rights Law and instead constitute war crimes and crimes against humanity, which are among the gravest crimes in international law. These incidents need to be catalogued and thoroughly analyzed from a legal perspective with a view to identifying avenues for prosecution and redressal at international forums.

This paper attempts to create the foundation on which a legal case can be developed for war crimes by Indian occupation forces in IOK. Part A focuses on establishing the existence of an occupation paradigm in IOK. This is a critical pre-requisite, since it will trigger the application of the law regulating international armed conflicts to IOK. This comprehensive and well established legal framework, known as International Humanitarian Law, is a more pertinent and potent ground for bringing the Kashmir issue to the world's attention.

Part B catalogues the incidents which in our opinion, constitute grave violations of International Humanitarian Law in IOK from a legal perspective. The research team has relied on public data available in print and electronic media and investigative reports by reputable international organizations spanning a period of three decades from 1990 – 2019. Each incident has been evaluated from a legal perspective and identifies the specific violation of the Geneva Conventions, their Additional Protocols, Rome Statute and customary international law on a case-to-case basis.

Part C provides policy options for lawfare strategies and highlights legal forums and political avenues which can be approached for prosecution of the offenders and redressal for victims as part of a broader political strategy.

This maiden effort by the research team is intended to highlight the potential of pursuing legal strategies for improving accountability of the Indian occupation forces in IOK. The incidents highlighted are not exhaustive but attempt to provide the foundations for building a legal case for war crimes committed by India in Kashmir.

1. OCCUPATION PARADIGM: LEGAL CONTEXT

Overview

Jammu and Kashmir is disputed territory which is claimed by both Pakistan and India. The dispute over this territory started after the ruler of the state signed an Instrument of Accession with India in 1947 without reference to the wishes of his subjects. Since then, Pakistan and India have fought three armed conflicts over the region. The Security Council in Resolution 47 advised that both countries should withdraw their troops and tribesmen from the state and a plebiscite should be held under which the Kashmiri people would decide whether they wanted to accede to India or Pakistan.¹ This referendum has never taken place. India remains in occupation of the territory and has committed gross and systematic abuses of the laws of war and human rights in order to maintain its authority and subvert the will of the Kashmiri people. The existence of an occupation as well as Indian actions which constitute war crimes are discussed in the following sections.

Application of International Humanitarian Law

A case for war crimes and crimes against humanity by Indian occupation forces in IOK requires the Indian control of Kashmir to be qualified as an 'occupation'. The law relevant to armed conflicts, namely, international humanitarian law (IHL) applies in an occupation.

The categorisation of an armed conflict in IHL as international or non-international determines which treaty rules apply to the conflict. An occupation is an international armed conflict as per Common Article 2 to the Geneva Conventions of 1949. In the context of IOK therefore, all the laws of war which apply to an international armed conflict will be applicable to India if its legal status is established as an Occupying Power.

Occupation under the IHL Framework

It is for this reason why India prefers to refer to the situation in Kashmir as one of an ‘internal disturbance’, since such a classification would not attract IHL and all the protections it affords to the Occupied Territory and its population. However, under international law, an occupation is a **question of fact** which does not require the Occupying Power to recognize its existence.

It only requires that the situation meet the defined factual criteria to be classified as an occupation. Moreover, the intention of the Occupying Power also does not matter – whether they aim to exploit the country or liberate the population does not make a difference.²

Classification of the Situation in Kashmir under IHL

Based on the above, the situation in Kashmir needs to be evaluated against the defined factual criteria for a state of occupation under international law. This is provided in Article 42 of the Hague Regulations 1907 which states that “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.”³

It is evident from this definition that three central elements must be satisfied for the operation of an occupation over a territory: (1.1.) Territory; (1.2.) Hostile Army; and (1.3.) Authority.

Territory

A territory can be considered occupied if the Occupying Power has established its authority over it without having sovereign title. A territory can also be considered occupied even when its status is contested.⁴

Jammu and Kashmir is contested territory as India refuses to hold a plebiscite in order to have a valid legal claim to the territory. Moreover, Pakistan and India have fought numerous armed conflicts over the region solidifying its disputed status. It is also not a part of the Union of India as the Instrument of Accession was not valid, and neither were the actions of the Constituent Assembly, as recognised by later Security Council Resolutions. Article 35-A and 370 of the Indian Constitution itself recognises Jammu and Kashmir as having a special status and autonomy which further demonstrates its contested status. Therefore, IOK qualifies as a ‘territory’ for the purposes of the occupation definition.

Hostile Army

A territory can only be occupied if it is regarded as falling under the control of a hostile army. The requirement that there be a hostile army has been interpreted to mean that there must be the presence of an enemy state, and by extension the presence of foreign troops on the territory.⁵ However, the army does not need to be necessarily ‘foreign’. An analogy can be struck here with Israel when it gained effective control over the West Bank and Gaza Strip. Neither of these territories belonged to a sovereign state during the 1967 war. Nevertheless, the Security Council deemed Israel to be an occupant of them. It has been argued, therefore, that the law of occupation applies even when there is no foreign army so long as there exists a potential – if not inherent – conflict of interest between the Occupant and the Occupied.⁶ This approach doesn’t focus on formal links of nationality, and instead emphasizes on providing protection to most vulnerable populations. This contemporary approach was also favoured by the International Criminal Tribunal for Yugoslavia (ICTY) in the Tadić case.

This could also be applied to the situation in Jammu and Kashmir, where non-allegiance to the Indian state characterises the relationship between the Occupant and the Occupied. As a result, in order to not deprive those most requiring the protections of the law of occupation, it is necessary to look at bonds of allegiance rather than formal links. It is evident that the will of the Kashmiri people is at clear odds with the hostile Indian army. This can only be corrected if India were to hold a plebiscite and the majority were to vote in favour of accession to India. Until then, there is a clear conflict of interest between the Indian army and the Kashmiri people which satisfies this element. The presence of the Indian army, therefore, is that of a hostile army fulfilling this requirement.

Authority

Lastly, India must be able to establish and exercise its authority over the Occupied Territory. It must have the capacity to be in effective control and substitute its authority for that already present in the state.⁷ The ICTY in the case of *Naletilić & Martinović* used a number of elements to determine the existence of authority, they were:⁸ The occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly;

- The enemy's forces have surrendered, been defeated or withdrawn. In this respect, battle areas may not be considered as occupied territory. However, sporadic local resistance, even successful, does not affect the reality of occupation;
- The occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt;
- A temporary administration has been established over the territory;
- The occupying power has issued and enforced directions to the civilian population.

It is evident that Indian security force easily satisfy the test for establishment and exercise of authority in Kashmir. Indian security forces present in Jammu and Kashmir consist of the army and two paramilitary forces, the Central Reserve Police Force and the Border Security Force. The combined strength of these forces is estimated at 500,000, which oversees a population of around 7.5 million people. This makes IOK one of the most militarized zones in the world.

The presence of this massive security force has subjected Kashmiri resistance forces to Indian control and has substituted their authority. Local authority has also been undermined through persistent election-rigging and the installation of pro-Indian governments. Actual local authority, which is indigenously Kashmiri, is rendered invisible and is subject to Indian control.

The two seminal laws, which enable Indian forces to control the area and the population, are the Armed Forces (Jammu and Kashmir) Special Powers Act (1990)⁹ and the Public Safety Act (1978).¹⁰ The AFSPA grants the security forces special, wide-reaching powers to arrest, kill on suspicion, search and destroy property suspected of belonging to insurgents. The PSA allows the security forces to preventively detain individuals without trial and without charges being laid against them. This satisfies the last condition for authority as directions against the civilian population have been issued and enforced.

2. LEGAL IMPLICATION OF OCCUPATION PARADIGM

In sum, the three requirements that a territory be under the authority of a hostile army are satisfied in IOK. This means that this region is under a state of occupation, with India exercising its authority as an Occupying Power. From a legal perspective, this means that India owes legal obligations under the law of armed conflict to the Occupied Territory and its population.

It places a duty on them to protect the population¹¹ of the Indian-occupied Kashmir and to uphold public order and safety.¹² India bears the obligation to allow and facilitate the rapid and unimpeded passage

of humanitarian relief for civilians in need¹³, it must treat the population humanely, without discrimination¹⁴ and respect all their fundamental rights.¹⁵ India must comply with IHL applicable in international armed conflicts as well as the law of occupation. Failure to comply renders the Indian army liable for any war crimes that may be committed.

IHL VIOLATIONS COMMITTED BY INDIA IN INDIAN OCCUPIED KASHMIR

This section catalogues the incidents which in our opinion, constitute grave violations of International Humanitarian Law in IOK from a legal perspective. The research team has relied on public data available in print and electronic media and investigative reports by reputable international organizations spanning a period of three decades from 1990 – 2019.

The timeline of Indian actions that attract the provisions of the Geneva Conventions of 1949 and their Additional Protocols, the Rome Statute, 1998 and lastly rules of Customary International Law have been laid out below. While neither Pakistan nor India have signed the Rome Statute, many of the crimes listed therein are considered to be customary and bind all States of the world.

It is important to note that Indian atrocities in Kashmir are not limited to war crimes but may also constitute crimes against humanity as defined in Article 7 of the Rome Statute. Under international law, although war crimes only apply in the existence of an armed conflict, crimes against humanity may be triggered in times of war and peace. War crimes may be satisfied by an isolated attack, whereas crimes against humanity must be being widespread¹⁶ or systematic¹⁷ and directed against a civilian population. Lastly, nearly all offences which could qualify as a crime against humanity, would also constitute, all other conditions being met, a war crime.

However, not all war crimes are necessarily crimes against humanity, which is a higher threshold offence.¹⁸

Date	Incident	Violation	Annex Page
20 th January, 1990	Troops from the Central Reserve Police Force (CRPF) opened fire on protestors. Eye-witnesses reported that demonstrators were shot from behind as they turned to run away ¹⁹	<p>Treatment of Protected Persons in Occupied Territories: Article 27 of GC IV</p> <p>Principle of Distinction: Art. 48 of API, Art. 51(2) of</p>	4 17, 18, 34
	At least thirty-five people died with some estimates putting the toll near a hundred people. ²⁰	<p>API and Rule 1 of CIHL</p> <p>Protection of Civilian Population: Article 51 (1), (2), (3), (6) of AP I;</p> <p>Principle of Proportionality: Rule 14 of CIHL; Art. 51(5)(b) of API</p> <p>Grave Breaches of the Geneva Conventions: Art. 147 GCIV</p> <p>Prosecution for War-Crimes: Art. 146 GCIV</p>	18, 19 35 14

		<p>Acts Aimed at Spreading Terror Among the Civilian Population: Art. 51(2) of API and Rule 2 of CIHL</p> <p>Reparations for Violations of IHL: Rule 150 of CIHL</p> <p>Treatment of Protected Persons: Art. 27 GCIV</p> <p>Inviolability of Rights: Art. 47 GCIV</p> <p>War Crime of Wilful Killing and Intentionally Directing Attacks Against Civilians Population or against Individual civilians not taking direct part in hostilities – Article 8 (2)(a)(i) and Article 8 (2)(b)(i) of the Rome Statute</p>	<p>13</p> <p>18, 34</p> <p>39</p> <p>4</p> <p>8</p> <p>29</p>
May, 1990	The 69th Battalion of the CRPF opened fire on the crowd killing 57 ²¹	<p>Treatment of Protected Persons in Occupied Territories: Article 27 of GC IV</p>	4

	<p>Principle of Distinction: Art. 48 of API, Art. 51(2) of API and Rule 1 of CIHL</p> <p>Grave Breaches of the Geneva Conventions: Art. 147 GCIV</p> <p>Protection of Civilian Population: Article 51 (1), (2), (3), (6) of AP I;</p> <p>Principle of Proportionality: Rule 14 of CIHL</p> <p>Prosecution for War-Crimes: Art. 146 GCIV</p> <p>Acts Aimed at Spreading Terror Among the Civilian Population: Art. 51(2) of API and Rule 2 of CIHL</p> <p>Reparations for Violations of IHL: Rule 150 of CIHL</p>	<p>17, 18, 34</p> <p>14</p> <p>18, 19</p> <p>35</p> <p>13, 14</p> <p>18, 34</p> <p>39</p>
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		<p>Treatment of Protected Persons: Art. 27 GCIV</p> <p>Inviolability of Rights: Art. 47 GCIV</p> <p>War Crime of Wilful Killing and Intentionally Directing Attacks Against Civilians Population or against Individual civilians not taking direct part in hostilities – Article 8 (2)(a)(i) and Article 8 (2)(b)(i) of the Rome Statute.</p>	<p>4</p> <p>8</p> <p>29</p>
22 October, 1993	<p>Thirty-seven people were killed by Firing of the 74th Battalion Border Security Force to disperse more than ten thousand people marching in Jammu and Kashmir.²²</p> <p>The Government reported thirty seven people died in the incident.²³</p>	<p>Treatment of Protected Persons in Occupied Territories: Article 27 of GC IV</p> <p>Principle of Distinction: Art. 48 of API, Art. 51(2) of API and Rule 1 of CIHL</p> <p>Grave Breaches of the Geneva Conventions: Art. 147 GCIV</p>	<p>4</p> <p>17, 18, 34</p> <p>14</p>

	<p>Protection of Civilian Population: Article 51 (1), (2), (3), (6) of AP I;</p>	18, 19
	<p>Principle of Proportionality: Rule 14 of CIHL</p>	35
	<p>Prosecution for War-Crimes: Art. 146 GCIV</p>	13, 14
	<p>Acts Aimed at Spreading Terror Among the Civilian Population: Art. 51(2) of API and Rule 2 of CIHL</p>	18
	<p>Reparations for Violations of IHL: Rule 150 of CIHL</p>	39
	<p>Treatment of Protected Persons: Art. 27 GCIV</p>	4
	<p>Inviolability of Rights: Art. 47 GCIV</p>	8

		<p>War Crime of Wilful Killing and Intentionally Directing Attacks Against Civilians Population or against Individual civilians not taking direct part in hostilities – Article 8 (2)(a)(i) and Article 8 (2)(b)(i) of the Rome Statute</p>	29
<p>Incident of 23 February 1991, since then unprosecuted, report in Hindustan Times 8 February 2016; Report on AlJazeera 24 December 2016</p>	<p>“On the night of February 23, 1991, personnel of the 4 Rajputana Rifles of the Indian Army cordoned off the two villages Kunan and Poshpora in north Kashmir’s Kupwara district during an antiinsurgency operation and allegedly gangraped at least 23 women – with some estimates placing it at around 40.”²⁴</p> <p>“Twenty-five years have passed since the 1991 incident</p>	<p>Treatment of Protected Persons: Article 27 of GC IV</p> <p>Grave Breaches of GC: Article 147 of GC IV</p> <p>Individual responsibility, Collective Penalties, Pillage, Reprisals: Article 33 of GC IV</p> <p>Military Authority Over the Territory of the Hostile State - Regulations: Article 56 of HC IV</p>	<p>4</p> <p>14</p> <p>5</p> <p>42</p>

<p>in which Indian army soldiers allegedly raped between 23 and 100 women in Kashmir's Kunan and Poshpora villages during a search operation. "The Indian army has denied the accusations and a delayed investigation of the incident concluded that the allegations were "worthless" and no one was prosecuted for the alleged crimes. "But, in 2013, a group of 50 women petitioned the Supreme Court of India to re-open the investigations. Since then, a reinvestigation was ordered and the Kashmir High Court ordered that victims be paid compensation. The</p>	<p>Collective Punishments: Article 75(2)(d) of AP I</p>	21
	<p>Protection of Women: Article 76 of AP I</p>	23
	<p>Rape and other Forms of Sexual Violence: Rule 93 of ICRC CIHL Study</p>	37
	<p>Collective Punishments: Rule 103 of ICRC CIHL Study</p>	38
	<p>Crimes Against Humanity of Rape and any other form of sexual violence of comparable gravity – Article 7 (1)(g) of the Rome Statute</p>	28
	<p>War Crime of Attacking or Bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives – Article 8 (2)(b)(v) of the Rome Statute.</p>	30

	state government and army have mounted efforts to stop these orders.” ²⁵	War Crime of Committing rape or any other form of sexual violence also constituting a grave breach of the Geneva Conventions – Article 8 (2)(b)(xxii) of the Rome Statute.	31
Incidents between 2004 and 2005, report in The Telegraph on 17 December 2010	According to a Wikileaks release in December 2016, US officials were privately briefed by the ICRC in 2005 that Indian forces were using methods including electrocution, physical beatings and sexual interference with hundreds of detainees. “The ICRC interviewed 1,296 detainees of whom 681 said they had been tortured. “Of those, 498 claimed to have been electrocuted, 381 said	Prohibition of Torture, Corporal Punishment: Art.32, 147 of GC IV Grave Breaches of GC: Art.147 of GC IV; Fundamental Guarantees: Articles 75(2)(a), 75(2) of AP I; Torture and Cruel, Inhuman and Degrading Treatment, Corporal Punishment, Rape and Other Forms of Sexual Violence: Rules 89, 90, 93 of ICRC CIHL Study	5,14 14 20,21 37

	<p>they were suspended from the ceiling, and 304 cases were described as “sexual.” “A total of 294 described a procedure in which guards crushed their legs by putting a bar across their thighs and sitting on it, while 181 said their legs had been pulled apart into the splits.”²⁶</p>	<p>Deprivation of Liberty: CIHL Rule 99</p> <p>Grave Breaches of the Geneva Conventions: Art. 147 GCIV</p> <p>Reparations for Violations of IHL: Rule 150 of CIHL</p> <p>War Crimes of carried out acts of Torture or Inhuman Treatment and Wilfully causing Great Suffering or Serious Injury to Body and Health – Article 8 (2)(a)(i) and (ii) of the Rome Statute</p> <p>War Crimes of Committing Rape or Any Other Form of Sexual Violence – Article 8 (2)(b)(xxii) of the Rome Statute.</p>	<p>38</p> <p>14</p> <p>39</p> <p>29</p> <p>31</p>
<p>2008 and 2010</p>	<p>Two popular uprisings in 2008 and 2010 saw the death of more than 200 people, many of them civilian protesters,</p>	<p>Treatment of Protected Persons in Occupied Territories: Article 27 of GC IV</p>	<p>4</p>

	<p>killed by Indian forces.²⁷</p>	<p>Protection of Civilian Population: Article 51 (1), (2), (3), (6) of AP I;</p> <p>Principle of Distinction: Art. 48 of API, Art. 51(2) of API and Rule 1 of CIHL</p> <p>Principle of Proportionality: Rule 14 of CIHL</p> <p>Grave Breaches of the Geneva Conventions: Art. 147 GCIV</p> <p>Prosecution for War-Crimes: Art. 146 GCIV</p> <p>Acts Aimed at Spreading Terror Among the Civilian Population: Art. 51(2) of API and Rule 2 of CIHL</p> <p>Reparations for Violations of IHL: Rule 150 of CIHL</p>	<p>18, 19</p> <p>17, 18, 34</p> <p>35</p> <p>14</p> <p>13</p> <p>18, 34</p> <p>39</p>
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		Inviolability of Rights: Art. 47 GCIV	8
		War Crime of Wilful Killing and Intentionally Directing Attacks Against Civilians Population or against Individual civilians not taking direct part in hostilities – Article 8 (2)(a)(i)	29
1989 - 2016	Jammu and Kashmir Coalition of Civil Society and Association of Parents of Disappeared Persons claim over 8,000 people have disappeared since 1989. ²⁸ In 2011, Jammu and Kashmir State Human Rights Commission (SHRC) conducted its	Enforced Disappearances: CIHL Rule 98 Deprivation of Liberty: CIHL Rule 99 Grave Breaches of the Geneva Conventions: Art. 147 GCIV Reparations for Violations of IHL: Rule 150 of CIHL	38 38 14 39

	<p>investigation, after the government failing to do so, wherein they identified 574 bodies out of 2,156 bodies.²⁹</p>	<p>Crime Against Humanity for the act of Enforced Disappearances of Persons – Article 7 (1)(i) of the Rome Statute.</p>	28
8 July 2016 – November 2016	<p>Crackdown against protestors, leaving more than 100 civilians dead and thousands injured, mostly at the hands of Indian government forces.³⁰ Within five days of 8th July, 57 civilians were killed in action by the governmental forces.</p> <p>Protestors were picked up by the army and tortured.³¹</p> <p>During this period, the State government has reported that 9,042 people had been injured during protests in the same period including through injuries sustained from the use of bullets, metal pellets</p>	<p>Treatment of Protected Persons in Occupied Territories: Article 27 of GC IV</p> <p>Protection of Civilian Population: Article 51 (1), (2), (3), (6) of AP I;</p> <p>Principle of Distinction Art. 48 of API, Art. 51(2) of API Rule 1 of CIHL</p> <p>Principle of Proportionality: Rule 14 of CIHL</p> <p>Grave Breaches of the Geneva Conventions: Art. 147 GCIV</p> <p>Prosecution for War-Crimes: Art. 146 GCIV</p>	4 18, 19 18, 34 35 14 13

	<p>and chemical shells.³²</p> <p>Investigations into the incidents has still not culminated into any prosecutions.</p>	<p>Acts Aimed at Spreading Terror Among the Civilian Population: Art. 51(2) of API and Rule 2 of CIHL</p> <p>Reparations for Violations of IHL: Rule 150 of CIHL</p> <p>Treatment of Protected Persons: Art. 27 GCIV Inviolability of Rights: Art. 47 GCIV</p> <p>Prohibition of Torture, Corporal Punishment: Art.32, 147 of GC IV</p> <p>Grave Breaches of GC: Art.147 of GC IV;</p>	<p>18, 34</p> <p>39</p> <p>4</p> <p>8</p> <p>5, 14</p> <p>14</p>
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	<p>Torture and Cruel, Inhuman and Degrading Treatment, Corporal Punishment, Rape and Other Forms of Sexual Violence: Rules 89, 90, 93 of ICRC CIHL Study</p>	37
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		<p>War Crimes for the Commission of Wilful Killing and Intentionally Directing Attacks against Civilian Population or Against Civilians not Directly taking part in Hostilities – Article 8 (2)(a)(i) and Article 8 (2)(b)(i) of the Rome Statute.</p>	<p>29</p>
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		<p>War Crime for the Commission of Wilfully causing great Suffering or Serious Injury to the body or health – Article 8 (2)(a)(iii) of the Rome Statute</p>	<p>29</p>

		<p>War Crime for the Employment of methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering – Article 8 (2)(b)(xx)</p> <p>Crimes Against Humanity for the Commission of Murder – Article 7 (1)(a) of the Rome Statute</p> <p>Crime Against Humanity for the Commission of Torture – Article 7 (1)(f) of the Rome Statute.</p>	<p>31</p> <p>27</p> <p>28</p>
<p>mid-August 2016</p>	<p>Indian soldiers forced their way into dozens of homes in Shaar-i-Shalli, driving dozens of men into the town square.</p> <p>Over the next five hours, they beat the men so brutally that one villager died.³⁴</p> <p>In a separate incident, a lecturer is beaten to death by the army</p>	<p>Prohibition of Torture, Corporal Punishment, Grave Breaches of GC: Articles 32, 147 of GC IV;</p> <p>Fundamental Guarantees: Articles 75(2)(a), 75(2) of AP I;</p>	<p>5, 14</p> <p>21</p>

	<p>personnel.³⁵</p> <p>Hundreds blinded as Indian paramilitary rained bullets and millions of buckshot pellets on protesting crowds;³⁶ including a 14-year old girl who consequently lost vision in both eyes.</p>	<p>Torture and Cruel, Inhuman and Degrading Treatment, Corporal Punishment: Rules 89, 90 of ICRC CIHL Study</p> <p>Protection of Civilian Population / Indiscriminate and disproportionate attacks: Articles 51(4)(a), 51(5)(b) of AP I;</p> <p>Principle of Distinction between Civilians and Combatants, Indiscriminate attacks, Proportionality in attack: Rules 1, 11, 14 of ICRC CIHL Study</p> <p>Weapons causing Superfluous Injury or unnecessary suffering: Art. 35(2) of API37</p>	<p>37</p> <p>18, 19</p> <p>34, 35</p> <p>16</p>
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		<p>Crime Against Humanity for the Commission of Inhumane acts or intentionally causing great suffering, or serious injury to body or to mental or physical health – Article 7 (1)(k) of the Rome Statute</p>	28
		<p>War Crime for the Commission of Wilfully Causing Great Suffering or Serious Injury to Body or health – Article 8 (2)(b)(iii) of the Rome Statute.</p>	29
		<p>War Crime for the Commission of Employing Weapons, Projectiles and material and Methods of Warfare which are of a nature to cause Superfluous Injury or Unnecessary suffering – Article 8 (2)(b)(xx) of the Rome Statute</p>	31

<p>September 2016</p>	<p>A Kashmiri human rights activist was arrested and detained for over two months on spurious grounds and then prevented from traveling to Geneva, Switzerland to attend a UN Human Rights Council session.³⁸</p>	<p>Provisions related to Assigned Residence and Internment of Civilians: Articles 41, 42, 43, 78, 79, 80 of GC IV;</p> <p>Fundamental Guarantees: Article 75(3) of AP I;</p> <p>Deprivation of Liberty: Rule 99 of IRC CIHL Study.</p>	<p>6, 7, 11, 12</p> <p>21</p> <p>38</p>
<p>28 September 2016</p>	<p>In last few weeks, 69 people killed by indiscriminate use of pellet guns, around 4500 injured. Deliberate targeting the victims on the face, especially in the eyes, which is against official procedures. Indian security personnel grab a 5-year old boy and insert a sharp metal object in his left eye, thereby blinding him, alleging that he had hurled abuses at them.</p>	<p>Treatment of Protected Persons in Occupied Territories: Article 27 of GC IV</p> <p>Protection of Civilian Population / Indiscriminate and disproportionate attacks: Articles 51(4)(a), 51(5)(b) of AP I;</p> <p>Principle of Distinction between Civilians and Combatants, Indiscriminate attacks, roportionality in attack: Rules 1, 11, 14 of ICRC CIHL Study;</p>	<p>4</p> <p>18, 19</p> <p>34, 35</p>

	<p>Prohibition of Torture, Corporal Punishment, Grave Breaches of GC: Articles 32, 147 of GC IV;</p>	5, 14
	<p>Protection of Children: Article 77(1) of AP I;</p>	23
	<p>Fundamental Guarantees: Articles 75(2)(a), 75(2) of AP I;</p>	20, 21
	<p>Torture and Cruel, Inhuman and Degrading Treatment, Corporal Punishment: Rules 89, 90 of ICRC CIHL Study</p>	37
	<p>Weapons causing Superfluous Injury or unnecessary suffering: Art. 35(2) of API39</p>	16
	<p>Crime Against Humanity for the Commission of Murder – Article 7 (1)(a) of the Rome Statute</p>	27

		<p>Crime Against Humanity for the Commission of Inhumane Acts or Intentionally Causing great Suffering or Serious Injury to Body or to Mental or Physical Health – Article 7 (1)(k) of the Rome Statute</p>	28
		<p>War Crime for the Commission of Wilful Killing, Torture or Inhuman Treatment, and Wilfully Causing Great Suffering or Serious Injury to Body or Health – Article 8 (2)(a)(i), (ii) and (iii) of the Rome Statute.</p>	29
		<p>War Crime for the Commission of Intentionally Directing Attacks against a Civilian Population or Civilians not taking Direct Part in Hostilities – Article 8 (2)(b)(i) of the Rome Statute</p>	29

		<p>War Crime for the Employment of Weapons, Projectiles and Material and Methods of Warfare which are of a Nature to cause Superfluous Injury or Unnecessary Suffering – Article 8 (2)(b)(xx) of the Rome Statute.</p>	31
October 2016	<p>Nearly 5000⁴⁰ people including children, were placed under administrative detention.⁴¹ The figure was 1000 people under the Jammu and Kashmir Public Safety Act between March 2016 and August 2017 as obtained through an application under the Right to Information Act.⁴² Human Rights Watch has reported that between July 9th to October 6th of 2016 authorities have detained over 400 people, including children, under the Jammu and Kashmir Public Safety Act⁴³</p>	<p>Provisions related to Assigned Residence and Internment of Civilians: Articles 41, 42, 43, 78, 79, 80 of GC IV;</p> <p>Protection of Children: Article 77 (1) and (4) of AP I;</p> <p>Fundamental Guarantees: Article 75(3) of AP I;</p> <p>Deprivation of Liberty: Rule 99 of ICRC CIHL Study</p>	<p>6, 7, 11, 12</p> <p>23, 24</p> <p>21</p> <p>38</p>

		War Crime for the Commission of Unlawful Deportation or Transfer or Unlawful onfinement of Persons – Article 8 (2)(a)(vii) of the Rome Statute.	29
July 2016 - November 2016	Schools forced to close for 4 months, with at least 32 schools burned down and several taken over by paramilitary forces who set up camps inside. ⁴⁴	<p>Measures related to Child Welfare: Article 24 of GC IV;</p> <p>Children: Article 50 of GC IV;</p> <p>General Protection of Civilian Objects: Article 52 of AP I</p> <p>Military Authority over the Territory of the Hostile State: Article 56 of HC IV</p> <p>The Principle of Distinction between Civilian Objects and Military Objectives, Public and Private Property in Occupied Territory: Rules 7 and 51 of ICRC CIHL Study</p>	<p>2-3</p> <p>9-10</p> <p>19</p> <p>42</p> <p>34, 36</p>

		<p>Grave Breaches of the Geneva Conventions: Art. 147 of GCIV</p> <p>War Crime for the Commission of Extensive Destruction and Appropriation of Property, not justified by Military Necessity and Carried out Unlawfully and Wantonly – Article 8 (2)(a)(iv) of the Rome Statute.</p> <p>War Crime for the Commission for Intentionally directing Attacks against Buildings dedicated to Education, provided that they are not a Military Necessity – Article 8 (2)(b)(ix) of the Rome Statute.</p>	<p>14</p> <p>29</p> <p>30</p>
August- November, 2016	According to a civil society report, central police forces occupied at least seven schools in the Kashmir Valley. ⁴⁵	<p>Measures related to Child Welfare: Article 24 of GC IV;</p> <p>Children: Article 50 of GC IV;</p> <p>Grave Breaches of the Geneva Conventions: Art. 147 of GCIV</p>	<p>2-3</p> <p>9-10</p> <p>34</p>

		<p>General Protection of Civilian Objects: Article 52 of AP I</p> <p>Military Authority over the Territory of the Hostile State: Article 56 of HC IV</p> <p>The Principle of Distinction between Civilian Objects and Military Objectives, Public and Private Property in Occupied Territory: Rules 7 and 51 of ICRC CIHL Study</p> <p>War Crime for the Commission of Extensive Appropriation of Property, not Justified by Military Necessity and Carried out Unlawfully and Wantonly – Article 8 (2)(a)(iv) of the Rome Statute.</p>	<p>19</p> <p>42</p> <p>34, 36</p> <p>2</p>
2016	In the 10 districts of Jammu and Kashmir 1,726 people were injured by pellets. ⁴⁶	<p>Treatment of Protected Persons in Occupied Territories: Article 27 of GC IV</p>	4

	<p>Protection of Civilian Population / Indiscriminate and disproportionate attacks: Articles 51(4)(a), 51(5)(b) of AP I;</p>	18, 19
	<p>Principle of Distinction between Civilians and Combatants, Indiscriminate attacks, proportionality in attack: Rules 1, 11, 14 of ICRC CIHL Study;</p>	34, 35
	<p>Prohibition of Torture, Corporal Punishment, Grave Breaches of GC: Articles 32, 147 of GC IV;</p>	5, 34
	<p>Protection of Children: Article 77(1) of AP I;</p>	23
	<p>Fundamental Guarantees: Articles 75(2)(a), 75(2) of AP I;</p>	21

		<p>Torture and Cruel, Inhuman and Degrading Treatment, Corporal Punishment: Rules 89, 90 of ICRC CIHL Study</p>	37
		<p>Weapons causing Superfluous Injury or unnecessary suffering: Art. 35(2) of API47</p>	16
		<p>War Crime for the Commission of Wilfully Causing Great Suffering or Serious Injury to Body or Health – Article 8 (2)(a)(iii) of the Rome Statute</p>	29
		<p>War Crime for the Employment of Weapons, Projectiles and Material and Methods of Warfare which are of a Nature to cause Superfluous Injury or Unnecessary Suffering – Article 8 (2)(b)(xx) of the Rome Statute.</p>	31

		<p>Crime Against Humanity for the Commission of Inhumane Acts or Intentionally Causing great Suffering or Serious Injury to Body or to Mental or Physical Health – Article 7 (1)(k) of the Rome Statute.</p>	28
2017	<p>It was reported by the UN that government reports confirmed the military use of four schools for several weeks.⁴⁸</p>	<p>Measures related to Child Welfare: Article 24 of GC IV;</p> <p>Children: Article 50 of GC IV;</p> <p>General Protection of Civilian Objects: Article 52 of AP I</p> <p>Military Authority over the Territory of the Hostile State: Article 56 of HC IV</p> <p>The Principle of Distinction between Civilian Objects and Military Objectives, Public and Private Property in Occupied Territory: Rules 7 and 51 of ICRC CIHL Study</p>	<p>2-3</p> <p>9-10</p> <p>19</p> <p>42</p> <p>34, 56</p>

		<p>War Crime for the Commission of Extensive Appropriation of Property, not Justified by Military Necessity and Carried out Unlawfully and Wantonly – Article 8 (2)(a)(iv) of the Rome Statute.</p>	29
1989-2017	143 cases of rape have been documented. ⁴⁹	<p>Treatment of Protected Persons: Article 27 of GC IV</p> <p>Grave Breaches of GC: Article 147 of GC IV</p> <p>Individual responsibility, Collective Penalties, Pillage, Reprisals: Article 33 of GC IV</p> <p>Military Authority Over the Territory of the Hostile State - Regulations: Article 56 of HC IV</p> <p>Collective Punishments: Article 75(2)(d) of AP I</p> <p>Protection of Women: Article 76 of AP I</p>	<p>4</p> <p>14</p> <p>5</p> <p>42</p> <p>21</p> <p>23</p>

		Rape and other Forms of Sexual Violence: Rule 93 of ICRC CIHL Study	37
		Collective Punishments: Rule 103 of ICRC CIHL Study	38
		War Crime for the Commission of Rape or Any other form of sexual violence – Article 8 (2)(b)(xxii) of the Rome Statute	31
		Crimes Against Humanity of Rape and any other form of sexual violence of comparable gravity – Article 7 (1)(g) of the Rome Statute.	28
9 April 2017	Indian troops shoot at, beat and blind protestors who were throwing stones at the polling booths. This resulted in the killing of 8 civilians, including a 12-year old boy who was shot in the back of his head; and around 20	Treatment of Protected Persons in Occupied Territories: Article 27 of GC IV	4

	<p>people shot with pellets in their eyes.</p>	<p>Prohibition of Torture, Corporal Punishment, Grave Breaches of GC: Articles 32, 147 of GC IV;</p> <p>Fundamental Guarantees: Articles 75(2)(a), 75(2) of AP I;</p> <p>Torture and Cruel, Inhuman and Degrading Treatment, Corporal Punishment: Rules 89, 90 of ICRC CIHL Study</p> <p>Protection of Civilian Population / Indiscriminate and disproportionate attacks: Articles 51(4)(a), 51(5)(b) of AP I;</p> <p>Principle of Distinction between Civilians and Combatants, Indiscriminate attacks, Proportionality in attack: Rules 1, 11, 14 of ICRC CIHL Study</p>	<p>5, 14</p> <p>21</p> <p>37</p> <p>18, 19</p> <p>34, 35</p>
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		Weapons causing Superfluous Injury or unnecessary suffering: Art. 35(2) of API⁵⁰	16
		Protection of Children Art. 77 of API	23-24
		War Crime for the Commission of Wilful Killing, Torture or Inhuman Treatment, and Wilfully Causing Great Suffering or Serious Injury to Body or Health – Article 8 (2)(a)(i), (ii) and (iii) of the Rome Statute.	29
		War Crime for the Commission of Intentionally Directing Attacks against a Civilian Population or Civilians not taking Direct Part in Hostilities – Article 8 (2)(b)(i) of the Rome Statute.	29

		<p>War Crime for the Employment of Weapons, Projectiles and Material and Methods of Warfare which are of a Nature to cause Superfluous Injury or Unnecessary Suffering – Article 8 (2)(b)(xx) of the Rome Statute.</p>	31
12 April 2017	<p>A 26-year old shawl weaver Farooq Ahmad Dar is assaulted by Indian troops while returning from funeral prayers, wounding his hands and arms.</p> <p>He is then tied up to the front of an army jeep, strapped on a handwritten placard and paraded through several villages for hours as a live trophy – a ‘human shield’ against the stone-pelting.</p> <p>A soldier can be heard saying through a public address system, “Those who throw stones will</p>	<p>Treatment of Protected Persons in Occupied Territories: Article 27 of GC IV</p> <p>Torture and Cruel, Inhuman and Degrading Treatment, Corporal Punishment: Rules 89, 90 of ICRC CIHL Study</p> <p>Protection of the Civilian Population (human shields, spreading fear among the civilian population, distinction) Basic Rule, Fundamental Guarantees: Articles, 51(1), (2), and (7); 48 and 75(2) of AP I</p>	4 37 17, 18, 19, 21

	<p>meet the same fate.”</p>	<p>Human Shields, Violence aimed at Spreading Terror among the Civilian Population, The Principle of Distinction between Civilians and Combatants, Torture and Cruel, Inhuman or Degrading Treatment: Rules 97, 2, 1, 90 of ICRC CIHL Study</p> <p>War Crime for the Commission of Torture or Inhuman Treatment, and Wilfully Causing Great Suffering or serious injury to body or health – Article 8 (2)(a)(ii) and (iii) of the Rome Statute</p> <p>War Crime for the Commission of Intentionally Directing Attacks Against Individual Civilian not taking Direct Part in Hostilities – Article 8 (2)(b)(i) of the Rome Statute</p>	<p>34, 37, 38</p> <p>29</p> <p>29</p>
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		War Crime for the Commission of Outrages upon Personal Dignity, in Particular umiliating and Degrading Treatment – Article 8 (2)(b)(xxi) of the Rome Statute.	31
15 April 2017	<p>3 civilians killed, including a 17-year old street vendor whose forehead was cracked open with a bullet.</p> <p>A college is raided by paramilitary forces in full gear, accompanied by an armoured vehicle, injuring around 50 students.</p>	<p>Treatment of Protected Persons in Occupied Territories: Article 27 of GC IV</p> <p>Basic Rule, Protection of Civilian Population: Articles 48, 51 of AP I</p> <p>General Protection of Civilian Objects: Article 52 of AP I</p> <p>Military Authority over the Territory of the Hostile State: Article 56 of HC IV</p>	<p>4</p> <p>17, 18</p> <p>19</p> <p>42</p>

		Principle of Distinction between Civilians and Combatants: Rule 1 of ICRC CIHL Study	34
		Violence aimed at Spreading Terror among the Civilian Population: Rule 2 of ICRC CIHL Study;	34
		The Principle of Distinction between Civilian Objects and Military Objectives, Public and Private Property in Occupied Territory: Rules 7 and 51 of ICRC CIHL Study	34, 36
		Grave Breaches: Art. 147 of GCIV	
		Children: Art. 77 of API	14
		Crime against Humanity for the Commission of Murder –	23
		Article 7 (1)(a) of the Rome Statute	27

		<p>War Crime for the Commission of Wilful Killing – Article 8 (2)(a)(i) of the Rome Statute</p> <p>War Crime for the Commission of Intentionally Directing Attacks against a Civilian Population or Civilians not taking Direct Part in Hostilities – Article 8 (2)(b)(i) of the Rome Statute</p> <p>War Crime for the Commission of Intentionally Directing Attacks against Civilian Objects that are not Military Objectives – Article 8 (2)(b)(ii) of the Rome Statute.</p>	<p>29</p> <p>29</p> <p>29</p>
20 April 2017	Graphic videos surface showing soldiers torturing boys inside an army vehicle as they're exhorted to shout anti-Pakistan slogans.	<p>Treatment of Protected Persons in Occupied Territories: Article 27 of GC IV;</p> <p>Measures related to Child Welfare: Article 24 of GC IV;</p>	<p>4</p> <p>2</p>

	<p>Protection of Children: Article 77 (1) and (4) of AP I;</p> <p>Deprivation of Liberty: Rule 99 of ICRC CIHL Study</p>	<p>23</p> <p>38</p>
	<p>Protection of the Civilian Population (spreading fear among the civilian population, distinction) Basic Rule, Fundamental Guarantees: Articles, 51(1) and (7); 48 and 75(2) of AP I</p>	<p>18, 19, 21</p>
	<p>Violence aimed at Spreading Terror among the Civilian Population, The Principle of Distinction between Civilians and Combatants, Torture and Cruel, Inhuman or Degrading Treatment: Rules 2, 1, 90 of ICRC CIHL Study</p>	<p>34, 37</p> <p>14</p>
	<p>Grave Breaches: Art. 147 of GCIV</p>	

		Crime Against Humanity for the Offence of Torture – Article 7 (1)(b) of the Rome Statute	27
		War Crime for the Commission of Torture or Inhuman Treatment – Article 8 (2)(a)(ii) of the Rome Statute	29
		War Crime for the Commission of Unlawful Deportation or Transfer or Unlawful onfinement of Persons – Article 8 (2)(a)(vii) of the Rome Statute.	30
1 April, 2018	40 people injured and 35 hit in the eyes by Pellet Guns in Shopian and Anantnag districts. ⁵¹	Treatment of Protected Persons in Occupied Territories: Article 27 of GC IV Prohibition of Torture, Corporal Punishment, Grave Breaches of GC: Articles 32, 147 of GC IV;	4 5, 14

	<p>Fundamental Guarantees: Articles 75(2)(a), 75(2) of AP I;</p>	20, 21
	<p>Torture and Cruel, Inhuman and Degrading Treatment, Corporal Punishment: Rules 89, 90 of ICRC CIHL Study</p>	37
	<p>Protection of Civilian Population / Indiscriminate and disproportionate attacks: Articles 51(4)(a), 51(5)(b) of AP I;</p>	18, 19
	<p>Principle of Distinction between Civilians and Combatants, Indiscriminate attacks, proportionality in attack: Rules 1, 11, 14 of ICRC CIHL Study</p>	34, 35
	<p>Weapons causing Superfluous Injury or unnecessary suffering: Art. 35(2) of API52</p>	16

	<p>Protection of Children Art. 77 of API</p>	23
	<p>War Crime for the Commission of Wilfully Causing Great Suffering or Serious Injury to body or Health – Article 8 (2)(a)(iii) of the Rome Statute.</p>	29
	<p>War Crime for the Commission of Intentionally Directing Attacks against a Civilian Population or Civilians not taking Direct Part in Hostilities – Article 8 (2)(b)(i) of the Rome Statute.</p>	29
	<p>War Crime for the Employment of Weapons, Projectiles and Material and Methods of Warfare which are of a Nature to cause Superfluous Injury or Unnecessary Suffering – Article 8 (2)(b)(xx) of the Rome Statute.</p>	31

<p>February 17th, 2019</p>	<p>Houses were destroyed in the village of Pinglan.</p> <p>120 Villagers were exposed to tear gas and alleged beatings.</p> <p>Reuters also reported that at least four villagers were made to act as human shields, wherein they were sent into buildings where local fighters might be hiding.⁵³</p>	<p>Acts aimed at spreading terror among the civilian population: Rule 2 of CIHL; Art. 51(2) of Additional Protocol I</p> <p>Distinguishing between Civilian objects and Military Objectives: Art. 48 and 52(2) of API</p> <p>Removal of Civilians from the vicinity of Military Objectives Art. 58(a) of API; Rule 24 of CIHL</p> <p>Riot Control Agents as Method of Warfare Rule 75 CIHL; Art. I(5) of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction⁵⁴</p>	<p>34, 18</p> <p>17, 18</p> <p>19.1, 35.1</p> <p>36.1, 44</p>
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		<p>Prohibition of Torture, Corporal Punishment: Art.32, 147 of GC IV</p>	5, 14
		<p>Using Civilians as Human Shields: Art. 28 GCIV, Art. 51(7) API, Rule 97 of CIHL Rules.</p>	4, 19, 38

3. POLICY OPTIONS FOR LAWFARE STRATEGIES

The incidents catalogued in Part B of this paper individually and collectively constitute material which can form the building blocks for a legal case of war crimes by Indian occupation forces in Kashmir. This section identifies the various international forums and mechanisms through which this legal argument can be pursued by Pakistan and other relevant States and entities as part of a broader political strategy.

In our assessment, there are seven different forums/avenues which are relevant for this purpose. The research team has identified the legal mandate for each option along with the procedure that needs to be adopted under international law for pursuing the option. We have also included our assessment of the predicted outcome for each option from a legal/strategic perspective.

OPTION 1: UN HUMAN RIGHTS COUNCIL – INDEPENDENT COMMISSION OF INQUIRY

Mandate

The Human Rights Council is an inter-governmental body within the UN which has the mandate to address situations of human rights violations and make recommendations on them. This includes the ability to constitute Independent Commissions of Inquiry.

In light of UNGA Res. 48/141 it may call upon the Office of the High Commission for Human Rights to conduct such an inquiry as was done in 2014 in relation to the Gaza Conflict so as to investigate violations of International Human Rights Law and International Humanitarian Law.⁵⁵ Similarly, the Human Rights Council established the Commission of Inquiry on Human Rights in Eritrea through resolution 26/24 of 27 June 2014.

The Mandate of this commission under HRC resolution 26/24 was to investigate violations of international human rights law, as outlined in the reports of the Special Rapporteur on human rights in Eritrea. This mandate was then extended under HRC resolution 29/18 to investigate systematic, widespread and gross violations of human rights in Eritrea with a view to ensuring full accountability, including where these violations may amount to crimes against humanity.

Procedure under International Law:

Constituting such a Commission would require a resolution to be passed by the Human Rights Council. The resolution may emanate through either an Ordinary Session wherein Human Rights requiring the Council's attention are discussed or through a Special Session which may be called if at least 16 members out of the total of 47 agree to call such a session. Generally, the latter concerns violations of Human Rights and/or International Humanitarian Law being committed.

Predicted Outcomes:

At present, Pakistan is a member of the Human Rights Council. It may table a resolution and seek support from its fellow members which includes its allies and/or members of the OIC. Previously, Pakistan has also tabled a draft resolution in the Human Rights Council in relation to the situation in Occupied Palestinian Territory on behalf of the OIC.⁵⁶ Additionally, due to an absence of a veto power of any Member of the Human Rights Council, there would be a higher likelihood of a successful resolution being made.

Whilst such resolutions are not binding, they contain strong political pressure with them and would significantly help in bringing the situation in IOK in global focus.

OPTION 2: UN HIGH COMMISSIONER FOR HUMAN RIGHTS - FACT FINDING COMMISSION

Mandate:

The Office of the High Commissioner for Human Rights (OHCHR) has been entrusted by the General Assembly to ensure protection of human rights. The High Commissioner, along with the Office, are responsible for human rights activities under the direction and authority of the Secretary General with the authority and decisions of the General Assembly, the Economic and Social Council and the Commission on Human Rights.⁵⁷

Procedure under International Law:

The High Commissioner for Human Rights under his mandate contained in UNGA Res. 48/141 is empowered to mandate Fact-Finding Missions. This has been the case in 2002 when a Fact Finding Mission was sent to Ivory Coast,⁵⁸ 2004 when a Mission was sent to Darfur in 2004⁵⁹ etc.⁶⁰

Predicted Outcomes:

In 2018, OHCHR published its first report regarding the situation in Kashmir. Pakistan made the access of OHCHR in Azad Jammu and Kashmir contingent upon Indian providing access to IOK. However, India refused to do so. Therefore, OHCHR resorted to a remote monitoring system basing it on its report. The findings of the report were damaging to the Indian side and were aggressively rejected by India.⁶¹

The findings, although also critical of Pakistan to an extent, have given Pakistan the moral high ground and also an acknowledgement by a Department of the Secretariat of the United Nations. OHCHR has also proposed the establishment of a commission to investigate the matter. Pakistan must advocate for this at international forums so as to highlight human rights and humanitarian law violations. This will also significantly strengthen Pakistan's diplomatic lobbying at multilateral forums including the UN General Assembly and the Security Council.

OPTION 3: OBLIGATION OF NON-RECOGNITION AND NON-ASSISTANCE AS CODIFIED UNDER ARSIWA

Scope of Application:

Under Article 41 of the Draft Articles on State Responsibility for Internationally Wrongful Acts, States have a duty to cooperate to lawfully end any serious breach which is peremptory in nature. A peremptory norm also referred to as a jus cogens is a fundamental principle of international law that is accepted by the international community of states as a norm from which no derogation is permitted.

Pursuant to Article 41, States must not recognize, and in turn give legitimacy to such situations. They must also not render aid or assistance to maintain that situation. This has been reaffirmed through International jurisprudence as in the Walls Case and the Namibia Case.

The ICJ in the former case found that States were under an obligation not to recognize the illegal situation resulting from the construction of the wall by Israel, and not to render aid and assistance in maintaining that situation.⁶² In Namibia, the ICJ found that United Nations member States were under an obligation to ‘recognize the illegality and invalidity of South Africa’s continued presence in Namibia’ and ‘to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia’.⁶³

Procedure under International Law:

For this obligation to be triggered, there must be a:

- A serious breach which involves a gross or systematic failure by the responsible State;
- The said breach must be a peremptory norm of International Law.

With respect to the first requirement, it has been established above that violations of IHL are indeed systematic in nature coupled with an absolute failure to investigate or prosecute such offences, in addition to providing immunity to the armed forces.

There is also no ambiguity in international law that grave and systematic violations of IHL are peremptory in nature. The ICJ has held the basic rules of IHL to be ‘intransgressible’.⁶⁴ The International Law Commission has interpreted this to state the following:

*In the light of the description by ICJ of the basic rules of international humanitarian law applicable in armed conflict as ‘intransgressible’ in character, it would also seem justified to treat these as peremptory.*⁶⁵

Members of the International Law Commission are regarded as eminent jurists of international law and therefore qualify as a subsidiary source of international law within the meaning of Art. 38(1)(d) of the ICJ Statute.

Further, in the Advisory Opinion on the Legality of the Threat of the Use of Force, President Badjoui⁶⁶ and Judge Weeramantry⁶⁷ have described such obligations as being peremptory in nature. More recently, the ICJ in the Jurisdictional Immunities of the State Case assumed ‘the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory’ as jus cogens for the purpose of analyzing the concept.⁶⁸

Predicted Outcomes:

These legal arguments can support Pakistan’s broader diplomatic and political strategy on Kashmir. Pakistan must remind the international community of its duty under international law to not recognize and give legitimacy to the illegal occupation in IOK and cooperate to end the endemic abuse of the human rights and humanitarian law in the region.

This is an obligation of every State which is owed to the international community as a whole (*erga omnes*) in relation to self-determination and also the violations of IHL that have been committed in the region. These arguments should be emphasized in all our interactions with member states of the UN and at multilateral forums.

OPTION 4: UNIVERSAL JURISDICTION

Scope of Application:

The concept of universal jurisdiction allows States to try or assert jurisdiction over a person irrespective of his nationality and country of residence if he has committed *inter alia* war crimes and/or crimes against humanity. The concept also supersedes any immunity that an official of a State may intend to assert.⁶⁹ For instance, in the Pinochet Case, the former Chilean President was arrested on charges of committing war crimes and crimes against humanity in the United Kingdom for an arrest warrant issued in Spain. Interestingly, the crimes were committed by Pinochet against Chilean nationals and thus neither Spain nor the United Kingdom had any nexus to his actions.

Moreover, even if a person is not in the territory of a particular State, it permits national authorities to conduct investigations and issue extradition requests as was done in the case of Pinochet before the UK House of Lords wherein Spain issued the arrest warrants for the accused and requested extradition for the Chilean president, present within the United Kingdom at the time of his arrest.⁷⁰

Procedure under International Law:

There is generally a requirement of domestic law being in effect so as to exercise universal jurisdiction. However, this is construed loosely. For instance, in the case of Hissen Habre, Senegal asserted universal jurisdiction over the former President of Chad by relying on its obligations under Convention against Torture under which State Parties are required to exercise universal jurisdiction over persons found in violation of the Convention within their territory.

Although, the Court of Cassation held that Senegal had no jurisdiction to try the accused, the Committee against Torture asked Senegal to respect its obligations under the Convention.

In a similar vein, the Geneva Conventions provide that High Contracting Parties are obliged to prosecute those that have committed such actions regardless of their nationality.⁷¹ These provisions, although not referring to the concept of Universal Jurisdiction, have been construed to mandate universal jurisdiction over such offences.

This means that any domestic court is allowed to prosecute crimes against humanity and war crimes without any jurisdictional constraints by relying on the concept of universal jurisdiction found inter alia, in the Geneva Conventions and the Convention against Torture.

Predicted Outcomes:

From a political and strategic perspective, this option would be best utilized if it is exercised by a country that has a good track record of exercising universal jurisdiction, for instance, Belgium.

It is advisable that Pakistani courts should not attempt to exercise universal jurisdiction since the judicial proceedings will be considered as tainted with bias by the international community. However, Pakistan can gather legal evidence of gross violations of IHL and also rely on the reports of impartial entities and the OHCHR to convince friendly countries to pursue this option.

The aforementioned should be coupled with the fact that the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 and the Jammu and Kashmir Public Safety Act, 1978 provide a legal cover to the atrocities committed by the Indian forces in the region by virtue of Section 7 of AFSPA and Section 21 of the PSA. In the nearly 28 years that the law has been in force there has not been a single prosecution for the atrocities committed in the region.

OPTION 5: ADVISORY OPINION FROM THE INTERNATIONAL COURT OF JUSTICE IN RELATION TO THE SITUATION IN KASHMIR

Mandate:

Pursuant to Art. 96 of the UN Charter, the General Assembly or the Security Council can request the International Court of Justice to give advisory opinions on legal questions. Therefore, it is only the UN bodies that are permitted to request the Court for such opinions. The Advisory Opinions are aimed to utilize the International Court of Justice to seek legal guidance in questions of international law.

Procedure under International Law:

As mentioned above, whilst it's the UN bodies like the UN General Assembly that are permitted to transmit legal questions and not member states of the UN, it does not preclude a member state to draft a legal question which may then be adopted by the General Assembly. For instance, in the Opinion of *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo the question was originally drafted by Serbia.*

Similarly, in the Advisory Opinion of the Wall's Case the question was brought to the General Assembly by a number of Member States. Specifically, for our instance, in order for the Court to take up an advisory opinion, there would need to be a question transmitted by the General Assembly to the International Court of Justice as specified in Art. 65 of the ICJ Statute.

It must be noted here that by mere involvement of the UNSC through its prior resolutions would not preclude the Court from exercising its jurisdiction as was the case in *Advisory Opinion of the Wall's Case*. In addition, the question that would be drafted must be a legal one. In this respect, it is observed that the Court may be called upon to answer any legal consequences arising from a factual situation.

Predicted Outcomes:

This is complex option requiring a high degree of political support and legal acumen. Given the current geo-strategic environment, it might prove untenable for Pakistan to muster enough support in the UN General Assembly to pursue this avenue.

Nevertheless, international lawyers in Pakistan should be pursued to undertake detailed research on the legal formulations which can be asked by Pakistan if this option is pursued in the future. The recent *Advisory Opinion of the ICJ in the Chagos Case* has shown that an exceptionally clever legal formulation by Mauritius was instrumental in the tiny country winning its case against the UK and US at the ICJ. This *Advisory Opinion* laid the basis for the UN General Assembly decisively voting in May 2019 that the UK should relinquish control of the island of Chagos to Mauritius. There are therefore many lessons that Pakistan can learn from *Chagos Case* which require further research.

OPTION 6: IMPARTIAL COMMISSION OF EXPERTS SET UP BY SECRETARY GENERAL

Mandate:

In performing its obligations under the UN Charter, the Security Council is empowered to establish subsidiary organs. These organs may be tasked in performing a wide array of tasks which include inter alia the examination of reported violations of International Humanitarian Law. Previously, the use of such a commission to investigate violations of International Humanitarian Law has been observed under UNSC Resolution 780 (1992) in Bosnia & Herzegovina and in Rwanda through UNSC Resolution 935 (1994). Under the latter Resolution, the Security Council also called upon States and International Humanitarian Organizations to collate substantiated information in their possession or submitted to them relating to grave violations of IHL, to make such information available and provide assistance to the Commission of Experts.

Procedure under International Law:

The power to set up such organs may be found in the UN Charter as well as the Provisional Rules of Procedure of the Security Council. Article 29 of the Charter restricts the establishment of such commissions insofar as they relate to the performance of the functions of the Security Council. This is further supplemented and explained by Rule 28 of the Security Council's Provisional Rules of Procedure wherein the Security Council is allowed to appoint a commission or committee or a rapporteur for a specified question. As mentioned above, investigations of violations of International Humanitarian Law fall under the purview of the Security Council.

Moreover, in utilizing this provision, the Security Council becomes empowered to designate a Commission under the Secretary General who is bound to perform functions entrusted to him by the Security Council as per Article 98 of the UN Charter.

Therefore, in order to constitute such a Commission, it would be necessary for the Security Council to pass a resolution to this effect. The issue in Kashmir would fall under the mandate of the Security Council as it is tasked with maintaining international peace and security in accordance with Article 24 of the UN Charter and the numerous UNSC Resolutions on Kashmir which continue to hold the field.

Predicted Outcomes:

This is a potent option but one which is unlikely to succeed in the contemporary environment since it will require a resolution of the UN Security Council. Nevertheless, it represents a legal avenue which can be highlighted by Pakistan to remind the Security Council of its obligation to examine reported violations of humanitarian law as part of a broader diplomatic and political strategy.

OPTION 7: INTERNATIONAL CRIMINAL COURT

Mandate:

The International Criminal Court has jurisdiction to try the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Crimes discussed in Part B of the Paper are those specified in the Rome Statute of the International Criminal Court, 1998. Therefore, perpetrators involved in the commission of these crimes may be tried by the Court, subject to its jurisdictional constraints.

Procedure under International Law:

Although neither Pakistan nor India have ratified the Rome Statute of the International Court, it does not preclude the Court to assume jurisdiction on the matter. This may be done through a referral made by the UN Security Council pursuant to Art. 13 of the Rome Statute.

Predicted Outcomes:

This option suffers from the same difficulties associated with Option 6 above, as it would require a referral by the UN Security Council. However, it remains a legal avenue which can be highlighted by Pakistan to remind the Security Council of its obligation to examine reported violations of humanitarian law as part of a broader diplomatic and political strategy

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- ² Vaivos Koutroulis, *The Beginning and End of Occupation*, UN Audiovisual Library of International Law, available at: http://legal.un.org/avl/lis/Koutroulis_LAC_video_1e.html
- ³ Article 42 of the Hague Regulation 1907 states; “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.” Whilst neither India nor Pakistan is a party to this treaty, the International Military Tribunal of Nuremberg held that the ‘rules laid down in the Convention were recognised by all civilized nations and were regarded as being declaratory of the laws and customs of war (Judgment of the International Military Tribunal of Nuremberg, 30 September and 1 October 1946, p. 65)
- ⁴ Partial Award, Central Front, Ethiopia’s Claim no.2, April 28, 2004 para 29; Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), 9 July 2004
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- ¹¹ Art. 55(1) GC IV regarding food and medical supplies; see also Art. 56 GC IV regarding duty to ensure and maintain medical services; see also Art. 50 GC IV for duty to facilitate proper working of education institutions.
- ¹² Hague Regulations Art. 43, 46
- ¹³ Art. 59 GC IV; ICRC Customary Law Study, Rule 55. As consent of the occupying power remains necessary, it cannot be withheld on grounds other than those set out in art.59 GC IV.
- ¹⁴ Art. 27 GC IV
- ¹⁵ Art. 27 GC IV
- ¹⁶ “Widespread” refers to the large-scale nature of an attack, primarily reflected in the number of victims. “Widespread” may include a massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. See *The Prosecutor v Jean-Paul Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) Para 579-580; *The Prosecutor v Georges Rutaganda* (Judgment) ICTR-96-3-T (6 December 1999) Para 67-69; *The Prosecutor v Alfred Musema* (Judgment) ICTR-96-13-A (27 January 2000) Para 204
- ¹⁷ “Systematic” refers to the organized nature of the acts of violence and the recurrence of similar criminal conduct on a regular basis. It involves “a pattern or methodical plan” that is “thoroughly organized and following a regular pattern.” see *The Prosecutor v Dusko Tadic* (Opinion and Judgment) IT-94-1-T (7 May 1997) Para 646, 648; *The Prosecutor v Dragoljub Kunarac et al* (Judgment) IT-96-23-T and IT-96-23/1-T (22 February 2001) TJ, Para 429; *The Prosecutor v Elizaphan Ntakirutimana and Gérard Ntakirutimana* (Judgment) ICTR-96-10-A and ICTR-96-17-A (13 December 2004) Para 804 *The Prosecutor v Jean-Paul Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) Para 580
- ¹⁸ Guénaél Mattraux, *International Crimes and the Ad Hoc Tribunals*, Oxford University Press at p.320

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