

# LEGAL BRIEFS

SHORT-TERM LAWFARE STRATEGIES TARGETING  
ABUSES IN ILLEGALLY INDIAN OCCUPIED KASHMIR

NOTE-7/2020

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## **SHORT-TERM LAWFARE STRATEGIES TARGETING ABUSES IN ILLEGALLY INDIAN OCCUPIED KASHMIR**

### **Abstract**

This legal brief discusses short-term lawfare strategies aimed at addressing human rights abuses and violations of International Humanitarian Law (IHL) and International Human Rights Law (IHRL) in Indian Illegally Occupied Jammu & Kashmir (IIOJK). It highlights the use of legal mechanisms to uncover violations, including establishing fact-finding missions under the United Nations and domestic frameworks. The brief further explores strategies such as targeted sanctions, Boycott, Divestment and Sanctions (BDS) movements, and the use of Universal Jurisdiction to hold Indian officials accountable. The document provides detailed recommendations for Pakistan to engage in these lawfare measures, including gathering evidence, mobilising international support, and pursuing international legal actions to address the atrocities committed in IIOJK.

**Keywords:** Lawfare Strategies, Fact-Finding Missions, International Law, Kashmir Conflict.

## Overview

The use of law and legal systems has become a potent tool for States and international institutions, and is being deployed by them as a means to further their strategic objectives. This phenomenon—termed as ‘lawfare’—is being deployed increasingly and successfully against Pakistan by States such as India. The manifestations of this were at its most evident in 2019 when Pakistan encountered a number of complex national security issues in the form of the Pulwama attack and the subsequent Balakot Strikes; the judgment of the International Court of Justice in the Jadhav Case; the ongoing efforts to keep Pakistan on the Financial Action Task Force’s grey list; and, finally, the unlawful annexation of Jammu & Kashmir. At the same time, these lawfare measures have also highlighted Pakistan’s lack of capacity to pre-empt and adequately respond to these moves, exposing the State’s vulnerability in this domain.

In this broader context, this legal brief seeks to highlight and propose short-term lawfare strategies aimed at uncovering the violations of International Human Rights Law (IHRL) and International Humanitarian Law (IHL) being committed in Indian Illegally Occupied Jammu & Kashmir (IIOJK) through the establishment of impartial fact-finding missions—under the auspices of the United Nations—or by collecting evidence through domestic mechanisms coupled with the assistance of NGOs and civil societies operating in IIOJK. Using this as a basis, the legal brief shifts its focus towards lawfare strategies that can ensure accountability for the documented violations of international law by engaging the mechanisms of targeted financial sanctions under domestic laws of various States and international organizations such as the European Union; mobilizing international support to boycott India through movements such as Boycott, Divestment and Sanctions; and, finally, by pursuing prosecutions of Indian officials under the mechanism of ‘Universal Jurisdiction’.

## **SHORT-TERM LAWFARE STRATEGIES AGAINST INDIA IN RELATION TO ITS ACTIONS IN IIOJK**

### **Fact-finding Mission and Database for IHRL and IHL abuses and abusers**

The process of ensuring accountability for the atrocities committed by the Indian security forces in IIOJK requires the documentation of evidence that can point to the specific instances which violate IHRL and IHL, and can identify the Indian officials that have committed them. It is this process of evidence and data collection that will lay the groundwork upon which Pakistan can deploy other short-term lawfare measures highlighted in this legal brief.

#### **United Nations:**

- Although a number of UN mechanisms can be utilized to engage fact-finding missions, the easiest to target at present is the UN Human Rights Council which can constitute Independent Investigative Mechanisms, Commission of Inquiries, Fact-Finding Missions provided a resolution is passed by the HRC through a simple majority.<sup>1</sup>
- In addition to the mechanisms which require a resolution to be passed by the Human Rights Council, Pakistan can also engage pre-established mechanisms that do not require the existence of a resolution to undertake fact-finding missions. These include the Special Rapporteur on Torture—mandated to undertake fact-finding country visits and to transmit urgent appeals to States with regards to individuals reported to be at risk of torture and/or to communicate past alleged cases of torture<sup>2</sup>—or the Working Group on Arbitrary Detention which is mandated to investigate cases of arbitrary detentions, seek and receive information from governments and NGOs, and families on such issues and to present annual reports to Human Rights Council.<sup>3</sup>

Particularly, the Special Rapporteur on Torture has already expressed his concern over the prevailing situation in IIOJK and has written to the Indian government urging them to permit the investigation of atrocities that have been committed in IIOJK.<sup>4</sup>

- The following table illustrates the various UN fact-finding Mechanisms that can be engaged and their requirements:

<b>Sr. No</b>	<b>UN Mechanism(s)</b>	<b>Requirement(s)</b>
1.	Human Rights Council	A resolution to be passed through a simple majority in the Council.
2.	Special Rapporteur on Torture	No procedural requirement; the Special Rapporteur has the discretion to initiate such mechanism(s).
3.	Working Group on Arbitrary Detention	No procedural requirement; the Working Group has the discretion to initiate such mechanism(s).
4.	UN General Assembly	A resolution to be passed through a simple majority in the Assembly.
5.	UN Security Council	Nine votes from fifteen members without any veto(es) from the permanent members of the Council.
6.	Secretary General	No procedural requirement; the Secretary General has the discretion to initiate such mechanism(s).

7.	High Commissioner for Human Rights	No procedural requirement; the High Commissioner has the discretion to initiate such mechanism(s).
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**Domestic Mechanisms for Fact-finding:**

- Domestic Fact-finding mechanisms offer distinct advantages to Pakistan but may suffer from a lack of international recognition or allegations of bias. However, well planned and transparent domestic mechanisms, especially those initiated and led by Kashmiris in Azad Jammu and Kashmir (AJK), can play an important role in holding India and Indian officers/functionaries accountable for their atrocities in IIOJK. Importantly, the evidence and data collected by such mechanisms can be used for further lawfare measures against India.
- While Pakistan can deploy several fact-finding measures, it is recommended that any such option carry the legal weight of a judicial body and be Kashmiri initiated and led. It is, therefore, proposed that the Supreme Court of AJK constitute a Judicial Commission for Inquiry into the human rights abuses and Crimes Against Humanity in IIOJK. The purpose of such a Judicial Commission will be multifold:
  - Identify instances of Indian abuses of international law in IIOJK;
  - Identify individuals, military/paramilitary/police units, government functionaries, and corporate entities involved in abuses of international law in IIOJK;
  - Document Indian abuses of international law in IIOJK by:
  - Recording testimony of victims and heirs of victims.

- Recording documentary, electronic, photographic, audio/visual, forensic, and other types of evidence.
  - Engage with the Kashmiri diaspora, IIOJK Journalists, IIOJK civil society organizations, and IIOJK political entities to collect data and evidence (See Annexure A).
  - Establish an online public database of instances of Indian abuses with detailed evidence.
  - Recommend to the Government of Pakistan the initiation of Extradition proceedings for accused Indian officers and functionaries.
  - Recommend to the Government of Pakistan the initiation of Extradition proceedings for accused Indian officers and functionaries.
  - Engage with international experts, think tanks, universities, judicial bodies and governments on holding violators of international law accountable.
- The procedure for establishing such a Judicial Commission would require a law to be enacted by the AJK Legislative Assembly. Article 42 of the Interim Constitution of Azad Jammu and Kashmir provides that “subject to the provisions of the Constitution, the Supreme Court of Azad Jammu and Kashmir shall have such jurisdiction as is or may be conferred on it by the Constitution or by or under any law.”<sup>5</sup>
  - Based on this, it is recommended that the AJK Legislative Assembly enact a law empowering the AJK Supreme Court to establish a Judicial Commission for Inquiry into the Human Rights Abuses and Crimes Against Humanity in IIOJK.

## **Human Rights Sanctions Regimes under various domestic laws**

Building upon this fact-finding exercise, Pakistan can pursue immediate lawfare options by utilizing domestic sanctions regimes in various states for grave human rights abuses.

In today's legal paradigm international sanctions have become a key tool in the modern diplomatic toolbox and are being utilized as a means of coercion short of war. Holistically, sanctions are measures imposed by a State which are used to restrict or prohibit certain types of interactions with a foreign State, individual, or organisation.

In the following paragraphs, CEIL NDU has highlighted the potential legal mechanisms that can be invoked in the United States of America (USA); Canada; Australia; United Kingdom (UK); and, the European Union. It is to be noted that the majority of the sanction regimes, operating in these countries, and highlighted hereunder, focus on economic sanctions (financial and investment) and diplomatic sanctions (visa and immigration), as these are often low-cost (for the imposing State) and highly effective (against the sanctioned State). Moreover, the legislations discussed in this paper operate autonomously, such that they operate individually from the United Nations (UN), and any United Nations Security Resolutions (UNSC) and/or agreements.

### **United States of America:**

- The USA has some 30 different sanction programmes that it is currently operating.<sup>6</sup> These are mainly targeted at specific States or activities. They are administered by the Department of the Treasury, Washington DC; more specifically, by the Office of Foreign Assets Control (OFAC). In relation to human rights abuses, the following general statutes apply:
- **Global Magnitsky Human Rights Accountability Act, 2016:** This Act was signed into law by as Sections 1261-1265, Subtitle F, Public Law 114-328 of the National Defence Authorization Act 2015.

The Act allows the President of the US to impose US entry and property sanctions against any foreign person or entity who is responsible for gross violations of internationally recognised human rights.<sup>7</sup> The scope of this act was significantly broadened by Executive Order 13818 of 2017 which defined the term “gross violations of internationally recognized human rights” to include torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty, or the security of person.<sup>8</sup> Additionally, the sanctions also now target a broader range of persons including foreign leaders or officials within entities that engage or attempt to engage in these types of activities; or any persons (including non-foreign persons) that do or attempt to materially assist, sponsor or provide financial, material, or technological support for, or goods or services to or in support of these activities.<sup>9</sup>

- This means that non-governmental actors (such as terrorist organisations and organised crime groups) may now be sanctioned as well as governmental actors. There is no requirement for petitioners to show multiple incidents of abuse. The Global Magnitsky Sanctions can be implemented in response to a serious human rights abuse against any person, regardless of their status. Since the Act can now target a broader range of persons, this essentially means that the law’s de facto “command responsibility” standard has been replaced by the “status-based” responsibility standard, such that it is possible for an individual to be sanctioned simply for his or her status as an official or leader in an entity that is engaged in serious human rights abuse, corruption, or the transfer of the proceeds of corruption (however, it is still advised to demonstrate command responsibility where possible).<sup>10</sup>

- In making determinations on the credibility of information, the US Government tends to place weight on the credibility of the individual and/or organization making the claim. For example, for torture claims, reports from the Committee Against Torture and the Committee on the Prohibition of Torture are afforded significant credibility. The credibility of unaffiliated individuals making claims is generally assessed using criteria such as whether the individual has a criminal record and/or can reasonably be assumed to be objective.
- The annual report published in December 2019<sup>11</sup> states that 198 foreign persons (individuals and entities) have been designated by the US to date, under this Act and Order. The report details the 49 persons designated in the last year, in relation to financial sanctions. No visa sanctions were imposed under the Act in 2019.
- **Foreign Assistance Act 1961:**<sup>12</sup> There are three key sections in this Act: Section 502B which stipulates that no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights; Section 620M relates to limitation of assistance to security forces; and Section 116 relates to human rights, including the withholding of developmental assistance.
- **International Emergency Economic Powers Act (IEEPA) 1977:** This Act gives the President of the US broad authority in relation to regulating the economic activity of the US, following a declaration of national emergency. Traditionally used in reference to specific States and the acts of particular governments, it has more recently been used to combat issues such as human rights violations.
  - In the past, President Reagan used this act to impose sanctions on South Africa concerning human rights abuses during the 1980s in relation to the Apartheid, as well as against the Government of Nicaragua.<sup>13</sup>

- The US also invoked the Act in 1990 to impose trade and other sanctions in Iraq, partly due to the human rights violations in the Persian Gulf region. More recently, it has been used by President Obama in relation to human rights violations in Syria and Iran, where property was blocked, and visas were denied. It has also been used by President Trump in relation to human rights violations in Venezuela, Sudan and Mali.<sup>14</sup>
- The Act can be invoked if there is a threat to the national security and foreign policy of the USA. Therefore, international human rights violations come under the umbrella of this Act. However, with the Global Magnitsky Act and 2017 Order, the latter of which was invoked using the IEEPA, it is unlikely that the US will now rely on the IEEPA alone but will instead use the Global Magnitsky Act and the 2017 Order to further any foreign policy objectives relating to human rights abuses. However, whether this holds true or not, is yet to be seen, as the Global Magnitsky Act and 2017 Order are relatively new pieces of legislation. Since their enactments, the IEEPA has only been used once for human rights violations, in relation to Mali.
- **Alien Tort Statute:**<sup>15</sup> Under this statute, one can gain universal jurisdiction over violations of international law. It has been held that genocide, war crimes, and crimes against humanity (and torture contributing to these crimes) are violations of international law under this statute.<sup>16</sup> However, as the statute concerns the civil jurisdiction of the USA, the remedy under this statute is usually damages. Moreover, the statute also requires prior exhaustion of remedies in the home country.

#### **Canada:**

- Canada has two key general statutes that apply in relation to human rights abuses:

- **Special Economic Measures Act 1992:** The Act provides for the “imposition of specific economic measures” in certain situations, including gross and systematic human rights violations being committed in a foreign state.
- **Justice for Victims of Corrupt Foreign Officials Act 2017 (Sergei Magnitsky Law):** This Act allows Canada to impose economic sanctions, including asset freezing and prohibitions in dealings, with respect to foreign nationals responsible for gross violations of internationally recognized human rights, or individuals who are foreign public officials, or their associates, who are responsible for or complicit in acts of significant corruption. The determination of the above said is made by the Governor in Council. There are currently 70 individuals on the Foreign Nationals list that are sanctioned under this Act.<sup>17</sup> exactly how Canada arrives as its decision to impose sanctions has been nearly impossible to predict. There is argument that Canada’s decisions to sanction a foreign country, based on its practice thus far, is not based on a legal principle but a political determination.<sup>18</sup> Furthermore, it seems that Canada never seems to sanction on its own without an ally. In addition, Canada’s practice illustrates that it aims its sanctions at companies, banks and private individuals, as opposed to Governments.<sup>19</sup>

#### **Australia:**

- Australia does not yet have a Magnitsky-style Law, or a specific legislation that can be used to apply sanctions explicitly on those who violate human rights. Nonetheless, there is growing pressure on Australia to adopt such a legislation.
- **Autonomous Sanctions Act 2011:** This Act is used to “make provision relating to sanctions to facilitate the conduct of Australia’s external affairs, and for related purposes.”<sup>20</sup> The Act is regulated by the Department of Foreign Affairs and Trade. The autonomous sanctions can include arms embargoes, travel and

financial sanctions, civil aviation restrictions and import and export bans of certain commodities.

### **United Kingdom:**

- Global Human Rights Sanctions Regulations 2020 (the ‘Regulations’): The UK global human rights sanctions regime has recently been overhauled and provides interesting lawfare opportunities. The main regime is set out in the Global Human Rights Sanctions Regulations 2020 (the ‘Regulations’) which has been implemented under the Sanctions and Anti-Money Laundering Act 2018 (‘SAMLA’ 2018). The Regulations enable the UK Government to designate persons who are “involved” in serious violation of the following human rights: right to life; right to freedom from torture or cruel, inhuman or degrading treatment or punishment; and right to freedom from slavery. Both state and non-state actors may be designated under the Regulations
- Accordingly, the Regulations impose sanctions against state or non-state actors who are determined to have engaged in conduct that would amount to a serious violation of an individual’s: right to life, right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment; right to be free from slavery, not to be held in servitude or required to perform forced or compulsory labour.<sup>21</sup> This applies to activities carried out outside the United Kingdom by any person, or in the United Kingdom by a person who is not a United Kingdom person.<sup>22</sup>
- The effect of the Regulations is to impose asset freezes,<sup>23</sup> travel bans<sup>24</sup> on designated persons, subject to certain exceptions and licenses.
- Contravention of the Regulations by dealing financially with a designated person is a criminal offence, punishable by a maximum penalty of seven years imprisonment and/or a fine. Currently, 49 persons have been sanctioned under the Regulations.<sup>25</sup>

## European Union (EU)

- In addition to implementing UN sanctions, the EU imposes autonomous sanctions or EU additions to UN sanctions in line with the stated objectives of the EU's Common Foreign and Security Policy ('CFSP'). The Council of the EU decides whether sanctions should be renewed, amended or lifted. At present, the EU has 42 sanctions programmes in place.<sup>26</sup> The most commonly used EU sanctions are asset freezes, visa bans and arms embargoes targeted at individual persons and companies, aiming to influence foreign governments while avoiding the humanitarian costs for the general population. The declared purpose of EU sanctions is to uphold the international security order as well as defending human rights and democracy standards, by encouraging targeted countries to change their behaviour.
- EU sanctions regulations apply: to any person who is a national of a Member State; to any entity incorporated under the law of a Member State; to any person or entity in respect of any business done in whole or part within the EU (irrespective of whether the person/entity is EU-incorporated or an EU national); and, within the territory of the EU (including airspace); and on board any aircraft or any vessel under the jurisdiction of a Member State.
  - **Human Rights Thematic Sanctions Regime:** In December 2018, the Council of the European Union initiated discussions about the creation of a new sanctions regime designed to address gross human rights violations, following a proposal from the Netherlands.
  - There are reports of a recent European Commission draft of the EU's new human rights sanctions regulations. The regulations are said to consist of targeted asset freezes and travel restrictions on people and entities, including foreign officials and non-state actors.

The targets are reported to be people/entities responsible for widespread, systematic or otherwise serious human rights violations including genocide, torture, crimes against humanity, slavery, extrajudicial killings, enforced disappearances and arbitrary arrests, human trafficking, sexual violence, and abuses of freedom of peaceful assembly, expression or religion.<sup>27</sup>

### **Boycott, Divestment and Sanctions Movement**

Boycott, Divestment and Sanctions (BDS) is a global movement, initiated by the Palestinian civil society in 2005, urging the international community to Boycott, Divest and Sanction Israel as a peaceful means to pressure Israel to comply with international law and basic principles of human rights.

The Movement involves boycotting i.e. withdrawing support for Israel, its sporting, cultural and academic institutions and from all Israeli and international companies engaged in violations of Palestinian human rights; divestment through campaigns urging banks, local councils, churches, pension funds and universities to withdraw investments from the State of Israel and all Israeli and international companies that sustain the Israeli apartheid; and, sanctions to pressure governments to fulfil their legal obligations to end the Israeli apartheid and not aid or assist its maintenance, by banning businesses with illegal Israeli settlements, ending military trade and free-trade agreements with Israel, as well as suspending Israel's membership in international forums such as UN bodies.

Following the revocation of Article 370 in the Indian constitution and the construction of an increasingly nationalist Indian ideology under the BJP government, there have been calls for a BDS movement against India for its actions in IIOJK. AJK President Sardar Masood Khan recently called upon the Organisation of Islamic Cooperation (OIC) member states to initiate a BDS movement against India in an Emergency Meeting of the OIC Contact Group on Jammu and Kashmir.<sup>28</sup>

Furthermore, the Palestinian Boycott, Divestment and Sanctions National Committee (BNC) expressed solidarity in opposing the 2019 increased militarisation in Kashmir.<sup>29</sup>

They called for international pressure on the government of India to reverse its 2019 measures that violate the rights of the people of Kashmir under international law and to recognize and respect those rights. They also appealed to the people of India to work towards ending India's military and security alliance with Israel.

There is also increasing academic literature which identifies the similarities between the actions of the BJP government in IIOJK and the Israeli government in the West Bank such as settler colonialism.<sup>30</sup>

A colonising power may use military and legal structures to further occupation agendas. Indian occupation forces have kept Kashmir under a continuous inhuman lockdown, military siege, and communications blockade since 5 August 2019.<sup>31</sup> IIOJK, known for being one of the most militarised territories in the world, faced increased militarisation when India deployed an additional 35,000 troops, ordered tourists, pilgrims and journalists to leave and implemented a curfew in August 2019.<sup>32</sup>

Appropriation of indigenous people's land is central to the settler-colonial state process. Prior to the abrogation of Articles 370 and 35A of the Indian Constitution in August 2019, land ownership in Kashmir had been restricted to Kashmir state subjects. The unilateral decision of the Indian government to strip the occupied territory of the limited autonomy that had protected the area from demographic change and colonial settlement heightened the existential crisis that Kashmiris have long faced at the hands of the Indian government.

The revocation of Article 370 serves to transform the demography of Muslim-majority Kashmir by settling members of the Indian army, bureaucrats, and migrant laborers in the region. As with Israeli settlements in Palestine, India may soon start establishing Indians- only settlements in Kashmir. The ruling BJP party has already called for segregated Hindu enclaves in Kashmir.<sup>33</sup>

The Disturbed Areas Act and Armed Forces Special Powers Act which requires huge masses of land to be allocated for military camps and structures of control<sup>34</sup> is also another example of appropriation of Kashmiri land.

Additionally, there are multiple reported and documented incidents of massacre, sexual violence, custodial killings, torture and forced disappearances in IIOK indicate the violation of basic human rights through violence inflicted on Kashmiris by the Indian armed forces.

Accordingly, the Kashmiri BDS may urge for nonviolent pressure on India until it complies with international law by meeting three main demands:

- Ending its occupation and colonisation of Kashmir
- Recognising and protecting the fundamental rights of Kashmiri citizens; and
- Respecting UNSC Resolution 122 (1957) that the final disposition of the State of Jammu and Kashmir will be made in accordance with the will of the people expressed through a free and impartial plebiscite.

### **Universal Jurisdiction**

Universal Jurisdiction allows any state with competence to try or assert jurisdiction (investigate, prosecute and judge) over persons irrespective of their nationality and country of residence if he has committed grave human rights abuses, including genocide, war crimes, crimes against humanity, torture and enforced disappearance.<sup>35</sup>

The theory behind universal jurisdiction is that certain crimes are so horrific that they affect the fundamental interests of the international community as a whole.<sup>36</sup>

In case of traditional forums such as territorial state of state of the perpetrator is unable or unwilling to act, victims may seek assistance through the intervention of an international jurisdiction or through the permanent International Criminal Court (ICC).

However, international jurisdictions are constrained by a limited mandate specific to a territory or to a conflict of a State part and the jurisdiction of the ICC is limited to crimes committed after 01 July 2002. This presents a “risk of an impunity gap unless national authorities, the international community and the ICC work together to ensure that all appropriate means for bringing other perpetrators to justice are used.”<sup>37</sup>

Universal Jurisdiction plays a crucial role in closing this impunity gap. Accordingly, a number of States around the world has enforced legislation on universal jurisdiction to hold perpetrators accountable for their crimes including, Germany, France, Spain, United Kingdom and Argentina. Currently, under the principle of universal jurisdiction there are ongoing prosecutions in 16 countries, 11 accused are on trial, 16 convictions have been made, 207 suspects are identified, 146 individuals are brought forth on the charges of Crimes Against Humanity Charges, 141 on War Crimes Charges, and 92 on torture charges.<sup>38</sup>

Within the region of IIOJK, the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 (AFSPA) and the Jammu and Kashmir Public Safety Act, 1978 provide a legal cover to the atrocities committed by the Indian forces. The Office of the High Commissioner of Human Rights noted that in the nearly 28 years that the AFSPA has been in force there has not been a single prosecution for the atrocities committed in the region.

Documentation of Evidence and Fact-Finding Processes can assist in instituting universal jurisdiction proceedings. The cases may be instituted by victims and/or their families; or NGOs on behalf of the victims.

Therefore, Pakistan must support victims and NGOs operating in Indian Occupied Kashmir to seek assistance from and build collaborations with International NGOs specializing in Universal Jurisdiction.

Pakistan should also look into and pursue the Universal Jurisdiction option once perpetrators have been identified, and build momentum in its narrative. In particular, Argentina has been identified as a suitable jurisdiction to pursue a legal case against Indian perpetrators due to the lack of any territorial or citizenship nexus requirements. Article 118 of the Argentinian Constitution lays the groundwork for such litigation, read in conjunction with Article 3(d) and 4 of Law 26.200, which lays out the specific framework for complainants.

In this manner, Pakistan would be able to advance a solid case against war crimes committed in Indian Occupied Kashmir. A subset of building this case would require the identification of each specific instance, collecting evidence, reaching out to witnesses and victims, studying and highlighting the relevant applicable laws. This will require Pakistan to develop legal expertise in this specialist form of litigation. Pakistan may look at these international entities that specialize in universal jurisdiction litigation and fact finding: The Center for Justice and Accountability; International Federation for Human Rights; Trial International; Civitas Maxima; Human Rights Watch; REDRESS; International Federation for Human Rights; and, the Jammu Kashmir Coalition of Civil Society.

### **Recommendations**

Pakistan's broad lawfare strategy against India must contain concrete steps aimed at ensuring accountability for the IHRL and IHL abuses that are being committed by the Indian security forces in IIOJK. To this end, the following recommendations are proposed:

- Collect evidence and develop databases that can identify specific violations of IHL and IHRL as well as the perpetrators of these violations. The collection and development of databases must be done in a manner that reflects impartiality and transparency.

To this end, Pakistan must, firstly, engage the UN Mechanisms such as the United Nations Human Rights Council, Special Rapporteur on Torture, and the Working Group on Arbitrary Detention. Secondly, on the domestic plane, Pakistan must initiate this process through an indigenous AJK Kashmiri led initiative which can then collaborate and engage with the Kashmiri diaspora; politicians, journalists, and civil society organizations from IIOJK; and, international experts, think tanks, universities, and judicial bodies.

- Aggressively pursuing a multipronged lawfare strategy aimed at designating Indian officials under the domestic law of powerful States and International Organizations, for grave human rights abuses, such as: United States of America (USA); Canada; Australia; United Kingdom (UK); and, the EU.
- Initiate political campaigns and movements—similar to the BDS Movement deployed against Israel—to exert a global political pressure on India to comply with its obligations under international law; and, to apprise investors/business entities etc. about the gross violations being meted out to Kashmiris in IIOJK, and to pressurize them to withdraw from business relations or economic support, of any kind, that could contribute to these international wrongs. Additionally, if successfully deployed, such a strategy can forcefully enhance the other short-term lawfare measures that are listed in the legal brief.
- In the absence of ICC’s jurisdiction over India, Pakistan must look to alternates in the form of ‘Universal Jurisdiction’ and commence proceedings aimed at prosecuting Indian officials for the IHRL and IHL abuses committed by them in collaboration with entities listed in para 28. However, such a strategy can only be effectively deployed if strong evidence has been collected in accordance with Recommendation ‘a.’

## Annexure A

### **Non-governmental Organizations and Private Entities**

Human Rights Commission of Pakistan (HRCP): The HRCP carries out the following duties (amongst others) conduct fact-finding missions to investigate grave human rights violations at the local, provincial and national levels; help provide redress to victims of human rights abuses by referring complaints and grievances to the authorities concerned.

National Commission for Justice and Peace (NCJP)

Jammu and Kashmir Coalition of Civil Society: Founded in 2000, this organisation has the following three relevant constituents:

- Public Commission on Human Rights (PCHR): The PCHR carries out fact-finding teams to documents human rights violations, disseminates the information found through a newsletter, and provides free legal service assistance to victims of human rights violations
- Association of Parents of Disappeared Persons (APDP): The APDP currently consists of family members of about one thousand victims. The organisation actively campaigns for an end to the practice and crime of involuntary and enforced disappearances at local, national and international platforms; and have been engaged in documenting enforced disappearances in Kashmir since 1989 and have collected information on over one thousand such cases
- The International People's Tribunal on Human Rights: The tribunal examines charges of, and expand awareness and understanding regarding, institutionalized violence, social trauma, and human rights abuses; and inquire into various human rights abuses, ongoing and systematic nature of violence, and the actions of the Indian State and its institutions for allegations of injustices.

Jammu and Kashmir Council for Human Rights (JKCHR): An NGO established in 1984 which is in Special Consultative Status with the United Nations Economic and Social Council (ECOSOC).

## References

- <sup>1</sup> United Nations Human Rights Council, International Commissions of Inquiry, Commissions on Human Rights, Fact-Finding Missions and other Investigations, <https://www.ohchr.org/EN/HRBodies/HRC/Pages/COIs.aspx>.
- <sup>2</sup> The United Nations Commission on Human Rights, in Resolution 1985/33, decided to appoint an expert, a special rapporteur, to examine questions relevant to torture. The mandate was extended for 3 years by Human Rights Council Resolution 34/19 in March 2017.
- <sup>3</sup> The Working Group on Arbitrary Detention was established by Resolution 1991/42 of the former Commission on Human Rights. Its mandate was clarified and extended by Commission's Resolution 1997/50. The mandate was most recently extended by Human Rights Council Resolution 42/22 of 26 September 2019 for a further three-year period.
- <sup>4</sup> Accordingly, on 4th August 2020 the Special Rapporteur called upon India to look into allegations of torture within Indian Occupied Jammu and Kashmir. See: UNOHCHR, UN Experts Call for Urgent Action to Remedy “alarming” Human Rights Situation in Jammu and Kashmir (2020). <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26148&LangID=E>. See also: On 5th August, 2020 the Special Rapporteur tweeted the following regarding IIOJK: ‘For a straight 4 years, every year, I have formally requested to meet the Ambassador of #India to @UNGeneva to discuss an official fact-finding visit to the country, including #JammuAndKashmir, in line with the #SRTorture mandate. I have not even received a response. Not Once
- <sup>5</sup> Article 42 of the Interim Constitution of Azad Jammu and Kashmir 1974.
- <sup>6</sup> For further details, see: Thomas B. McVey, ‘US Sanction Laws: Dangers ahead for Foreign Companies’ (Williams Mullen, 25 February 2019) <[https://www.williamsmullen.com/sites/default/files/files/U\\_S\\_%20Sanctions%20Laws%20Dangers%20Ahead%20For%20Foreign%20Companies%20\(Part%20I\)%20McVey.pdf](https://www.williamsmullen.com/sites/default/files/files/U_S_%20Sanctions%20Laws%20Dangers%20Ahead%20For%20Foreign%20Companies%20(Part%20I)%20McVey.pdf)> accessed 15 September 2020.
- <sup>7</sup> Global Magnitsky Human Rights Accountability Act, s.284 (Bill).
- <sup>8</sup> E.O. 13818 of Dec 20, 2017; Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption.
- <sup>9</sup> E.O. 13818 of Dec 20, 2017; Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption.
- <sup>10</sup> Command responsibility generally requires proving: 1. Effective Control: The individuals who committed the relevant acts were subordinates of the superior person, either as a matter of fact or law. 2. Actual or constructive knowledge: The superior knew or should have known that subordinates were about to commit, were committing, or had committed relevant acts, given the circumstances at the time. 3. Failure to prevent, halt, or investigate: The superior failed to take necessary and reasonable measures to prevent or halt the acts or to investigate the acts in a genuine effort to punish the perpetrators.
- <sup>11</sup> State Department, ‘Global Magnitsky Human Rights Accountability Act Annual Report’ (84 FR 72424, 2019) <<https://www.federalregister.gov/documents/2019/12/31/2019-28231/global-magnitsky-human-rights-accountability-act-annual-report>> accessed 15 September 2020.
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- <sup>13</sup> Executive Order 12513, ‘Prohibiting trade and certain other transactions involving Nicaragua’ (May 1, 1985) <<https://www.archives.gov/federal-register/codification/executive-order/12513.html>> accessed 15 September 2020, 50 FR 18629, 3 CFR, 1985 Comp., p. 342.
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