

## **Is India Committing War Crimes in IIOJ&K?**

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Various human rights groups around the world have raised the issues of Indian war crimes in the Indian Illegally Occupied Jammu and Kashmir (IIOJ&K). A London-based law firm, in January 2022, requested the British police to conduct an investigation into the crimes being conducted by the Indian officials within the IIOJ&K.<sup>1</sup> This request was made under the International Law principle of *Universal Jurisdiction*. The request once again brought to fore, the relentless campaign of violence and subjugation that exists in the IIOJ&K. But in order for the international legal system to have jurisdiction, it is necessary to prove that the actions of the Indian Government within IIOJ&K amount to war crimes. There are certain necessary prerequisites for that. Within this paper, the legal definition of war crimes and its conditions will be discussed.

### **War Crimes**

Criminal acts can be termed as war crimes if they constitute those violations of International Humanitarian Law (IHL) which invoke individual criminal responsibility. War crimes must always be taken in the context of an armed conflict, whether international or internal. For this reason, it is essential to first determine whether the situation in IIOJ&K can be designated as an armed conflict.

### **Can IIOJ&K be categorised as an armed conflict?**

To determine whether IIOJ&K is currently a conflict zone, it is essential to determine what constitutes an armed conflict. The Geneva Conventions set forth the guiding principles to determine the status of armed

conflicts. Geneva Convention Article 2 states that:

(1) In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.

(2) The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.<sup>2</sup> Article 1(4) provides that armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes must be considered international conflicts.<sup>3</sup> The aforementioned provisions point to the fact that a conflict can be considered an armed conflict between two parties even if one of them does not recognise it. Essentially, acknowledgment from either of the parties involved (concerned) is enough. Furthermore, an armed conflict exists in occupied territory, even if that occupation is facing no armed resistance. And lastly, any conflicts in which people are fighting against occupation can also be termed as international armed conflicts.

### **Is IIOJ&K an Occupied Territory?**

In order to determine whether IIOJ&K can be declared as an armed conflict, it is necessary to determine whether it constitutes an occupied territory. It is important to remember the occupying force to acknowledge or to make a statement regarding its occupation for it to be considered as such under International Law. Relatedly, the definition of

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occupied territory is provided in the Article 42 of the 1907 Hague Regulations:

“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.”<sup>4</sup>

According to international law, the legal title of IIOJ&K has not been given to India and it is still considered a disputed territory. Hence, Pakistan has long been of the view that any attempts to illegally annex this territory would be a flagrant violation of the international law. The Security Council has unambiguously prohibited any and all attempts made by India to unilaterally annex IIOJ&K or to change its status. This can be clearly demonstrated by the Resolutions 91 (1951)<sup>5</sup> and 122 (1957).<sup>6</sup>

### **1972 Simla Agreement**

This illegality of unilaterally changing the status of IIOJ&K is enshrined within the Simla Agreement 1972. This agreement explicitly stated that;

“Pending the final settlement of any of the problems between the two countries, neither side shall unilaterally alter the situation and both shall prevent the organisation, assistance or encouragement of any acts detrimental to the maintenance of peaceful and harmonious relations [...]. The representatives of the two sides will meet to discuss further modalities and arrangements for the establishment of durable peace and normalisation of relations, including the questions of prisoners of war and civilian internees, a final settlement of Jammu & Kashmir and the resumption of diplomatic relations.”<sup>7</sup>

Furthermore, Clause 5 of the Instrument of Accession of Kashmir states;

The terms of this my Instrument of Accession shall not be varied by any

amendment of the Act or of the Indian Independence Act, 1947, unless such an amendment is accepted by me by an Instrument supplementary to this Instrument [...]. Nothing in this Instrument shall be deemed to be a commitment in any way as to acceptance of any future Constitution of India or to fetter my discretion to enter into arrangement with the Governments of India under any such future Constitution [...]. Nothing in this Instrument affects the continuance of my sovereignty in and over this State, or save as provided by or under this Instrument the exercise of any powers, authority and rights now enjoyed by me as Ruler of this State or the validity of any law at present in force in this State.<sup>8</sup>

This is especially of note because India’s legal claim to Kashmir is based on this very Instrument. Additionally, taking into consideration the above facts, it becomes quite apparent that IIOJ&K is an occupied territory and due to the Indian illegal occupation, it can be termed as an international armed conflict.

### **Demographic Changes**

The 4<sup>th</sup> Geneva Convention lays down the principle that it is unambiguously illegal for an occupying power or state to move citizens from its own territories into the occupied territories.<sup>9</sup> The primary reason for establishing this rule was to prohibit occupying powers from initiating substantive demographic changes within the territory that they have occupied as it could serve to bolster their control and claims, taking away the essential right of self-determination that all people possess.

The 4<sup>th</sup> Geneva Convention Article 49 states that the occupying power shall not deport or transfer parts of its own civilian population into the territory that it occupies. This requirement was upheld by Article 35 (A) of the Indian Constitution as it restricted the buying of land and settling in the area to only

indigenous Kashmiris. By removing this article, India has enabled the demographic changes that it wishes to implement in the region.

By initiating demographic changes, India will also be breaching Article 2(b) (viii) of the Rome Statute of the International Criminal Court which states that:

"The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory[...]"<sup>10</sup>

### War Crimes

The categories of war crimes are enshrined in Article 8 of the Rome Statute.<sup>11</sup> Below is a list of relevant war crimes that India has been accused or proven of committing in the IIOJ&K:

#### Article 2 (a)

- (i) wilful killing
- (ii) torture and/or inhuman treatment
- (iii) wilfully causing great suffering, or serious injury to body or health
- (iv) wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial

#### Article 2 (b)

- (i) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities
- (ii) the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory
- (iii) committing outrages upon personal dignity, in particular humiliating and degrading treatment

- (iv) committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilisation, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions

### Conclusion and Policy

#### Recommendations

Pakistan has the ability to utilise its right under Chapter VII, Article 39 of the UNSC Charter. However, there are three prerequisites for this article to come into effect. These include any act of aggression, any breach of the conditions of peace, or even a threat to peace. The last two conditions have been met by India with respect to IIOJ&K. India has disregarded the various UNSC resolutions and the Simla Agreement.

The United Nations Security Council has the power to refer crimes to the International Criminal Court under Article 13(b) of the ICC which states that:

"The Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations."<sup>12</sup>

The UN and the international legal system has clear cut rules and principles regarding the protection of human rights and the right to self-determination. Being a member of the UN Human Rights Council, Pakistan can raise the issues of human rights violations and the suspicion of war crimes within IIOJ&K.

The United Nations Security Council and the General Assembly, under Article 96 of the UN Charter<sup>13</sup>, also have the option to seek advisory opinion from the International Court of Justice (ICJ) in cases where the ICJ does not

have the jurisdiction or authority. Article 65 of the UN Charter<sup>14</sup> grants ICJ the authority to publish advisory opinions on various legal questions or issues. Pakistan has the option to request the Security Council or the General Assembly to approach the ICJ for an advisory opinion regarding this issue. This may not be binding on countries, but it does serve to apply international pressure on countries and shows a general legal consensus.

It has become quite apparent, specifically since August 2019, that India is

committing war crimes in IIOJ&K. Its actions are a clear violation of the principles of international law. It is essential to now focus on the human rights violations within the occupied territory, to raise awareness regarding the war crimes with factual and evidence based arguments. In doing so, it might be possible to raise the issue anew and remove it from the façade of bilateralism that has kept it unresolved for decades.

### Notes and References

- <sup>1</sup> "UK asked to probe Indian officials over Kashmir 'war crimes'," *AL Jazeera*, 19 January 2022, <https://www.aljazeera.com/news/2022/1/19/uk-asked-to-probe-indian-officials-over-kashmir-war-crimes>.
- <sup>2</sup> International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287.
- <sup>3</sup> International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, June 8, 1977, 1125 UNTS 3.
- <sup>4</sup> International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907.
- <sup>5</sup> UN Security Council, *Security Council resolution 91 (1951) [The India-Pakistan Question]*, 30 March 1951, S/RES/91.
- <sup>6</sup> UN Security Council, *Security Council resolution 122 (1957) [The India-Pakistan Question]*, 24 January 1957, S/RES/122.
- <sup>7</sup> Clause 1(ii) of the Simla Agreement of 1972.
- <sup>8</sup> I Rasool, "The Legal Implications of the Instrument of Accession: A Critical Case Study with Reference to the State of Jammu and Kashmir," *The IUP Law Review* IV, no. 2 (2014).
- <sup>9</sup> International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287.
- <sup>10</sup> UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6.
- <sup>11</sup> UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6.
- <sup>12</sup> UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, July 17, 1998.
- <sup>13</sup> United Nations, *Charter of the United Nations*, October 24, 1945, 1 UNTS XVI.
- <sup>14</sup> *Ibid.*