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Seeking Accountability for Rape Committed by Indian Armed Forces in Jammu and
Kashmir: An International Law Perspective

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Table of Contents

<u>1.</u>	Introduction	3
	- Framework & Literature Review	5
<u>2.</u>	History of the Kashmir Conflict	7
<u>3.</u>	Rape Committed by Members of the Armed Forces	18
<u>4.</u>	An International Law Perspective on the Kashmir Conflict and the Rapes Committed	34
<u>5.</u>	Conclusion	75

Chapter 1: Introduction

Rape has taken place during times of armed conflict throughout all of history. In fact, research has indicated that it occurs during all wars.¹ The frequency of this violation varies from case to case; in some conflicts, it only occurs occasionally when soldiers find themselves with an open opportunity to rape civilians without being held accountable, such as in the Occupied Palestinian Territories², and in others it is widespread and part of a systematic policy, as was the case during the Rwandan Genocide. Both men and women can face this form of violation at the hands of soldiers and insurgents; however, women are raped much more often than men.³ Rape has been internationally prohibited during armed conflict for a long time; in fact, “the protection of women in war is found in several early texts, such as the Belli Treatise of 1563, which held that the crime of rape during wartime was punishable by death.”⁴ In the present day, rape is prohibited on the international level through international human rights law, international humanitarian law, and international criminal law. Additionally, in some cases, rape can be prosecuted as a war crime, crime against humanity, or genocide. Taking this into consideration, it is clear that the international community considers rape to be a serious offense. It is perceived this way not only because it has been committed during conflicts throughout all of history and is sometimes widespread, but also because it is thought to be the most

¹ Eriksson, Maria. *Defining Rape: Emerging Obligations for States under International Law?* Leiden: Koninklijke Brill, 2011. 344. Eriksson is a lawyer and professor of international human rights law and international criminal law at Orebro University. She has also worked as a clerk for the International Criminal Court.

² Ibid, pg. 344

³ Leatherman, Janie. *Sexual Violence and Armed Conflict*. Cambridge: Polity Press, 2011. 5. Leatherman is Director of International Studies and also a professor of politics at Fairfield University.

⁴ Eriksson, Maria. *Defining Rape: Emerging Obligations for States under International Law?* 344.

personal form of violation and therefore has a negative impact on victims that can last a lifetime.⁵ The International Criminal Court currently asserts that rape has occurred when,

“The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.”⁶

Because rape is such a serious crime, and occurs during all armed conflicts, it is important to ensure that all victims receive appropriate justice through the legal system. However, there are many states in which rape frequently goes unpunished. One of these states is Jammu and Kashmir, which is legally a disputed territory, but controlled by India. In fact, Kashmiri women have been raped on a frequent basis by Indian armed forces since 1989 without receiving any justice. Considering how long this abuse has been occurring, it is necessary to figure out a way to bring justice to Jammu and Kashmir, which is the purpose of this paper. Through an analysis of the history of the Kashmir Conflict, the sexual violence Kashmiri women have been subjected to, a couple of cases of such abuse, and the ways in which international law can be applied to the situation, this paper will illustrate that by not holding its troops who have committed rape in Jammu and Kashmir accountable, India is guilty of violating international human rights law, and most likely international humanitarian law as well, and because the article that it is most likely violating in international humanitarian law, Common Article 3, carries

⁵ Leatherman, Janie. *Sexual Violence and Armed Conflict*. Cambridge: Polity Press, 2011. 6.

⁶ *International Criminal Court, Rules of Procedure and Evidence*. <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>. For the purpose of this paper, this is the definition that will be used.

individual criminal responsibility, and the situation in the state probably meets the threshold needed to trigger the application of individual criminal responsibility, India is expected to punish these soldiers.

Framework & Literature Review

Before explaining the history of the Kashmir Conflict, it is important to first explain what types of literature and framework were used to write this paper. As the sexual violence endured by Kashmiri women has been ongoing for almost thirty years, it is unsurprising that there is a vast amount of literature written on the topic. There is literature written on theories in regards to why the armed forces are sexually violating these women⁷, the well-known cases in the state⁸, and how certain laws established by India prevent the soldiers from being held accountable⁹. There have also been many reports written by human rights organizations, such as Asia Watch and Physicians for Human Rights, that contain the similar information to the literature and also illustrate the details of certain cases and state which laws the sexual violence violates both in international human rights law and international humanitarian law.¹⁰ Although these reports state which laws are violated, they do not go into depth in regards to how application of the laws can be triggered by the situation in Jammu and Kashmir. While

⁷ Kazi, Seema. *In Kashmir: Gender, Militarization & the Modern Nation-State*. Brooklyn: South End Press, 2009. Kazi is an Indian-based researcher focusing on women's rights, gender-based violence and militarization. She is also a fellow at the Center for Women's Development Studies in New Delhi, India.

⁸ Mathur, Shubh. *The Human Toll of the Kashmir Conflict: Grief and Courage in a South Asian Borderland*. London: Palgrave MacMillan, 2016. Mathur is an Indian anthropologist who focuses on human rights and violence in South Asia. She has worked with victims of human rights infringements in Jammu and Kashmir to help them in their fight for justice.

⁹ Butalia, Urvashi. *Speaking Peace: Women's Voices from Kashmir*. New Delhi: Kali for Women, 2002. Butalia is an Indian-based author and feminist. She is also the co-founder of Kali for Women, a publishing house based in India that strictly publishes literature pertaining to feminism.

¹⁰ "Rape In Kashmir: A Crime of War." *Asia Watch & Physicians for Human Rights*, 1993. 5.

this is somewhat self-explanatory in international human rights laws, that is not so much the case in international humanitarian law and this is important to understand since international humanitarian law requires criminal accountability in certain cases. Because of this, this paper seeks to fill this gap in literature and explain in detail what criteria needs to be met for international humanitarian law, specifically Common Article 3, to apply in the state and assesses whether the situation in Jammu and Kashmir has met the threshold. Literature on multiple subjects was used to write this thesis. The literature discussed above in regards to the sexual violence faced by Kashmiri was used. Additionally, literature on international humanitarian law¹¹ and human rights law¹² was used, since the framework for this paper is accountability for the rapes committed in Jammu and Kashmir through both international human rights law and international humanitarian law. Lastly, literature on government accountability for crimes, especially rape and sexual violence against women, committed in non-international armed conflicts was used.¹³ Through the use of all of this literature, the paper comes to the conclusion that it is likely that the situation in Jammu and Kashmir does meet the threshold needed for the application of Common Article 3, and then goes on to explain how India is expected to hold soldiers accountable for violating Common Article 3 since it is also

¹¹ Sivakumaran, Sandesh. *The Law of Non-International Armed Conflict*. Oxford: Oxford University Press, 2012. Sivakumaran is a professor of public international law at the University of Nottingham. He is also a researcher at the United States Naval War College Stockton Center for International Law.

¹² Oberleitner, Gerd. *Human Rights in Armed Conflict*. Cambridge: Cambridge University Press, 2015. Oberleitner is a professor of international law at the University of Graz in Austria. He is also the Deputy Director of the European Training and Research Centre for Human Rights and Democracy at the University of Graz.

¹³ Boed, Roman. 2003. "Individual Criminal Responsibility for Violations of Article 3 Common to the Geneva Conventions of 1949 and of Additional Protocol II Thereto in the Case Law of the International Criminal Tribunal for Rwanda." *Criminal Law Forum*. Roman Boed is Senior Legal Officer and Chief of the Appeals Chamber Support Section at the UN International Criminal Tribunal for Rwanda.

likely that the situation in Jammu and Kashmir meets the threshold needed to require criminal accountability for the violation of the article.

Chapter 2: History of the Kashmir Conflict

Kashmir is a northern region on the Indian continent. It contains the state of Jammu and Kashmir, which is controlled by India, the states of Azad Kashmir and Gilgit-Baltistan, which are controlled by Pakistan, and the state of Aksai Chin, which is controlled by China. For the purpose of this paper, the focus will be on the state of Jammu and Kashmir. The state is approximately 40,000 km and contains multiple valleys and mountain ranges. Jammu and Kashmir's population consists of Kashmiris, Dogras, Bakarwals, Ladakhis, and Paharis. The majority of its people, sixty-eight percent to be exact, are Muslim.¹⁴ The second largest religious group in the state is Hinduism, which approximately twenty-eight percent of the population practices.¹⁵ The additional four percent of the community consists of Buddhists, Sikhs, and Christians.¹⁶

The Kashmir region has been divided into different countries as a result of the Kashmir Conflict, which has been ongoing since 1947. Prior to 1947, the Kashmir region consisted of 562 princely states; the term princely refers to the fact that Britain chose a native Indian prince, who was called the Maharaja, to rule each of the states on behalf of

¹⁴ Mathur, Shubh. *The Human Toll of the Kashmir Conflict: Grief and Courage in a South Asian Borderland*. 2.

¹⁵ Ibid, pg. 2

¹⁶ Ibid, pg. 2

the empire.¹⁷ However, during the British partition, two independent nations, India and Pakistan, were formed, and the princely states were given the opportunity to choose which to join. The majority of the states were able to make a decision and transition rather smoothly, but Jammu and Kashmir, on the other hand, was not. The state's Maharaja at the time of the partition, Hari Singh, was having difficulty figuring out what would be the best option. On the one hand, Singh felt a strong tie to India as he was of Hindu descent, and worried about Hindu's living under Pakistani control, but on the other hand, he was aware that the vast majority of his people were Muslim and therefore they might benefit from living under Pakistani rule.¹⁸ After taking all of this into consideration, Singh concluded that creating an independent Kashmir, which would function separately from both Indian and Pakistan, would be the only way to protect all of his people. However, as soon as Singh proposed this plan, it was immediately shut down by the British government, which claimed that it "would not recognize an independent Kashmir because it was not a practical proposition."¹⁹

While attempting to convince the British government otherwise, the Government of Jammu and Kashmir entered a standstill Agreement with Pakistan on August 12, 1947. The treaty was created with the purpose of guaranteeing the uninterrupted continuation of trade and government relations while the future status of Jammu and Kashmir was being determined. Pakistan, however, did not live up to its end of the bargain. The government

¹⁷ Misra, K.K. *Kashmir and India's Foreign Policy*. Allahabad: Agarwal Press, 1979. 40-41. Misra is a researcher who focuses on India's history and foreign policy. He has written multiple books on these subjects.

¹⁸ Ankit, Rakesh. *The Kashmir Conflict: From Empire to the Cold War, 1945-66*. New York: Routledge, 2016. 43-50. Ankit is a professor and assistant director of the Centre for Law and Humanities at the Jindal Global Law School in India.

¹⁹ Misra, K.K. *Kashmir and India's Foreign Policy*. 50.

began to use forms of coercion in hopes of persuading Jammu and Kashmir to accede to Pakistan.²⁰ For example, it tried to pressure the state through the use of an economic blockade; it ended its trade of “food, petrol, cloth, salt and other essential commodities”²¹ with the goal of forcing Jammu and Kashmir into a state of starvation with no choice but to hand over its power. In addition to economic pressure, the Pakistani government also applied military pressure “in the form of hit and run border raids”²² with the use of Pakistani militants. It is important to point out, as a side note, that Pakistan denies that it is responsible for the raids and instead claims that the militants conducted them on their own accord.²³ The Government of Jammu and Kashmir, however, was convinced the Pakistani government was behind them, and demanded it stop conducting such raids or else it would have no choice but to seek help from outside powers. Pakistan responded to such allegations by asserting that the non-Muslim population in the state was attacking the Muslim population and “looting and burning”²⁴ its villages, and demanded that the Government of Jammu and Kashmir take action to restore order or else it would have no choice but to intervene. According to most researchers and academics, such as K.K. Misra²⁵, Rakesh Ankit²⁶, and H.O. Agarwal²⁷, these allegations were false and created by Pakistan to justify its future invasion of the state; on October 13, 1947, thousands of Pakistani soldiers crossed “the frontier from the Sialkot district and committed untold

²⁰ Ibid, pg. 50-52

²¹ Ibid, pg. 52

²² Ibid, pg. 52

²³ Ibid, pg. 52

²⁴ Ibid, pg. 53

²⁵ Ibid, pg. 53

²⁶ Ankit, Rakesh. *The Kashmir Conflict: From Empire to the Cold War, 1945-66*. 56-58.

²⁷ Agarwal, H.O. *Kashmir Problem: Its Legal Aspects*. Allahabad: Kitab Mahal, 1979. 31-33. Agarwal is a lawyer based in India who focuses on human rights and Kashmir. He has written multiple books on these subjects.

atrocities on the non-Muslim populations.”²⁸ This attack stood out from the others since it involved such a high number of combaters. Now that Pakistan had what it claimed was a legitimate motive for attacking the state, which was that the Muslim population was being attacked by the non-Muslims²⁹, instead of just relying on rebels to fight, it also sent in its troops. Additionally, a significant portion of Kashmiri citizens, who feared that the state would be signed over to India, joined the rebels in their fight.³⁰ The high number of combaters allowed for attacks to take place in a number of areas in the state, and therefore, much more damage resulted than from the previous raids. A “full scale invasion”³¹ of the state by Pakistan then began on October 26th. The invaders murdered thousands of civilians and raped thousands of women; this time around both Muslim and non-Muslim individuals were targeted. Considering the severity of the attack, and the fact that the Kashmir State forces were spread apart across the mountainous state with the inability to reach each other in a short amount of time, the Kashmiri government did not feel as if it could control the situation on its own anymore.³²

Due to the intensity of the “full-scale invasion”, Singh fled Srinagar, the capital of Jammu and Kashmir, for the first time since the tension had begun. He retreated to India, and once there, he requested the state’s aid in defeating Pakistani forces and restoring order in Jammu and Kashmir. However, the Governor-General of India at the time, Lord Mountbatten, claimed he could only help in a military sense if the state acceded to India. Mountbatten also stated that considering the diversity of Jammu and

²⁸ Misra, K.K. *Kashmir and India’s Foreign Policy*. 53-54.

²⁹ Ibid, pg. 53

³⁰ Ibid, pg. 53

³¹ Ibid, pg. 56

³² Ibid, pg. 56-57

Kashmir's population, the permanent status of the state had to depend on the wishes of the state's people, which would be determined through a plebiscite after the invaders had been defeated and order had been restored.³³ This deal seemed fair enough to Singh, along with the most powerful political organization in Jammu and Kashmir, the National Conference, and Singh therefore immediately signed Jammu and Kashmir over to India on October 26th through a document known as the Instrument of Accession.³⁴ While the agreement Singh signed does not mention anything along the lines of a plebiscite down the road, Lord Mountbatten's reply to it does. Mountbatten wrote,

“...in the special circumstances mentioned by your Highness, my Government have decided to accept the accession of Kashmir State to the Dominion of India. In consistence with their policy that in the case of any state where the issue of accession has been the subject of dispute, the question of accession should be decided in accordance with the wishes of the people of the State, is it my Government's wish that, as soon as law and order have been restored in Kashmir and its soil cleared of the invaders the question of the State's accession should be settled by a reference to the people.”³⁵

When discussing the response from Mountbatten, it is important to point out the fact that a plebiscite was not demanded by Singh or a part of the deal, and was instead simply offered by India after the accession had been finalized. Author V.M. Dean calls India's decision to offer a plebiscite a “political mistake. For no arrangements were made about a plebiscite in any of the other 561 states, and none were held, even though after 1947 India experienced difficulties with Hyderabad, where a Muslim prince ruled a population with a Hindu majority.”³⁶ However, whether or not it was a political mistake does not change the fact that through Mountbatten's reply, the people of Jammu and Kashmir were

³³ Ibid, pg. 57-63

³⁴ Ibid, pg. 60-63

³⁵ Misra, K.K. “Reply of 27th October 1947, From Lord Mountbatten to Maharaja Sir Hari Singh” in K.K. Misra's *Kashmir and India's Foreign Policy*. Allahabad: Agarwal Press, 1979. 457.

³⁶ Dean, V.M. *New Patterns of Democracy in India*. Delhi: J.K. Offset Press, 1961. 193. Dean is a researcher focusing on South Asia.

promised a chance to choose the future of their nation once it was no longer under a period of turmoil.

When Jammu and Kashmir was adopted as a state by India through the Instrument of Accession, it was granted special autonomous status in Article 370 of the Indian Constitution and has remained under this status ever since. The article states that “except for defense, foreign affairs, finance and communications, Parliament needs the state government’s concurrence for applying all other laws.”³⁷ Essentially, this means that “the state’s residents live under a separate set of laws, including those related to citizenship, ownership of property, and fundamental rights, as compared to other Indians.”³⁸ The autonomous status was supposed to be temporary until the plebiscite was held; however, although this upcoming fall will mark the eightieth anniversary since the signing of the Instrument of Accession and Lord Mountbatten’s reply to Hari Singh, a plebiscite has never been held. Immediately after Singh signed the deed, Indian troops were flown in to support the Kashmiri forces and the First Kashmir War began. By the end of 1947, India could tell that without international aid the war very well might not come to an end anytime soon, as it was having trouble defeating all of the Pakistani forces due to the mountainous terrain in Jammu and Kashmir, and therefore applied for help from the UN.³⁹ It referred the conflict Article 35 of the UN Charter, which is applicable for any situation that is “likely to endanger the maintenance of international peace and security”.⁴⁰ The UN responded to the referral on April 21, 1948 by creating the

³⁷ *The Constitution of India*. <http://lawmin.nic.in/olwing/coi/coi-english/coi-4March2016.pdf>

³⁸ “What is Article 370? Three Key Points” *The Times of India*, 2014.

³⁹ Ankit, Rakesh. *The Kashmir Conflict: From Empire to the Cold War, 1945-66*. 68-70.

⁴⁰ *Charter of the United Nations*. <http://www.un.org/en/charter-united-nations/>

United Nations Commission for India and Pakistan (UNCIP), along with Resolution 47. The Resolution demanded that both sides immediately submit to a cease-fire and then hold a plebiscite in the state. It also asked Pakistan to remove both Pakistani militants and soldiers from the state who had crossed the border in order to fight. Additionally, it asked India to pull out as many forces as possible without sacrificing the security of Jammu and Kashmir. The purpose behind this was to ensure that a plebiscite could be held without the Kashmiris feeling any pressure to side with India.⁴¹ However, a ceasefire line, which is known as the Line of Control, was not created until January 1, 1949, and even once it had finally been created, India and Pakistan were unable to come to an agreement on their own in regards to which state would remove its troops first.⁴²

The UNCIP tried to solve this issue by visiting the state three times throughout 1948-1949, but was unsuccessful. It recommended that Pakistan remove its nationals from the state first, and once the Commission had verified that it had done so, it would tell India to remove the majority of its forces and then a plebiscite could be held. Although India agreed to the plan, the Commission was unable to convince Pakistan to accept it. Pakistan claimed that India was not trustworthy and therefore it could not count on India to withdraw its troops after it had withdrawn its own.⁴³ However, India also did not trust Pakistan and said it could not withdraw its troops first since they were needed to ensure security in the state after Pakistan's attacks.⁴⁴ Additionally, India stated that it had legal possession of Jammu and Kashmir since the moment Singh had signed the

⁴¹ *United Nations Resolution 47*. [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/47\(1948\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/47(1948))

⁴² Misra, K.K. *Kashmir and India's Foreign Policy*. 106-109.

⁴³ *Ibid*, pg. 107

⁴⁴ *Ibid*, pg. 108

Instrument of Accession and that after Pakistan was so hostile by aiding rebels and then sending in its own soldiers, there was no doubt that it should stay in control of the state.⁴⁵ Pakistan, however, disagreed with this claim and has a list of reasons for why it believes that India does not have legal authority over Jammu and Kashmir, which will be explained in detail in the following section of this paper. Lastly, there was a disagreement in regards to whether or not Pakistan started the violence. While India claimed that the first raids had been planned by the Pakistani government, Pakistan denied that and said that they were completely organized by the rebels themselves without any knowledge or assistance of the government and that it did not get involved until it found out that the Muslim community in Jammu and Kashmir was being attacked and the Kashmiri government was not taking measures to protect it.⁴⁶ Either way, Pakistan and India do not see eye to eye on many points in regards to the Kashmir Conflict, and it was because of this failure to agree that the UN and UNCIP were unable to solve the conflict.⁴⁷ Additionally, India was offended that the UN did not label Pakistan as an aggressor in the situation and instead viewed both sides as having an equal part in the conflict.⁴⁸ Because of this, India regretted asking the organization for help and has refused to accept aid from any third parties in regards to solving the conflict ever since.⁴⁹ Without the help of any third parties, along with the inability to agree amongst themselves, Pakistan and India have been in an ongoing stalemate since 1949.

⁴⁵ Ibid, pg. 109

⁴⁶ Ibid, pg. 109

⁴⁷ Ibid, pg. 109

⁴⁸ Ibid, pg. 110

⁴⁹ Ibid, pg. 111

Since the late 1940's, the tension between India and Pakistan over Jammu and Kashmir has only increased, and this has led to two additional wars. The first one was the second Indo-Pakistani War, which occurred in 1965 when the Pakistani army infiltrated the state in hopes of gaining control of the land felt it was entitled to. It lasted seventeen days before the UNSC got involved and passed Resolution 210. This resolution, which was binding since it was ordered by the Security Council, demanded that both India and Pakistan immediately put down their arms and withdraw their troops to the positions they were in before the war began.⁵⁰ Both sides followed through with these orders and the war ended; since neither side was able to make a significant advance, it is considered a stalemate. India claims that Pakistan's inability to defeat India through traditional warfare encouraged it to resort to less traditional methods and alleges that by the late 1980's it began sending militants over the border into Jammu and Kashmir to conduct acts of terrorism.⁵¹ Pakistan, however, denies any responsibility in regards to the attacks and claims that the militants were acting on their own accord, and there is no hard evidence that Pakistan was indeed aiding the rebels.⁵² Either way, many Kashmiris, the majority of whom are Muslim and long for the state to join Pakistan, began to join the militancy movement around this time. These Kashmiris were frustrated that the conflict had still not been solved and that they were never given the plebiscite they had been promised.⁵³

⁵⁰ *United Nations Security Council Resolution 210.*

[http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/210\(1965\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/210(1965))

⁵¹ Institute of Kashmir Studies, *Counter-Insurgency in Kashmir*. Delhi: Azad Offset Press, 1996. 12-13. The Institute of Kashmir Studies is based in London and focuses on publishing research that highlights life in Kashmir in regards to human rights abuses and lack of freedom.

⁵² *Ibid*, pg. 13

⁵³ *Ibid*, pg. 14

Overall, the resistance movement, with the combined forces of rebels from Pakistan and Jammu and Kashmir, became quite powerful by 1990.

By this point in time, the terrorist attacks conducted by the militants were becoming quite frequent and typically occurring on a monthly basis; therefore, India felt that it needed to take action to defeat these forces and restore order.⁵⁴ It did so by militarizing the state in July 1989 and the militarization has continued through the present day. By militarization it is meant that there has been an infiltration of Indian troops, strict curfews have been enforced and special laws have been put into place in order to control the state that was now considered “disturbed” by the Indian government as a result of the ongoing attacks committed by the rebel forces.⁵⁵ There are currently around 700,000 soldiers⁵⁶ in Jammu and Kashmir “with roughly one soldier for every 10 civilians, making the state the most heavily militarized place in the world”.⁵⁷ The presence of such a high number of troops in the state has directly impacted the lives of the Kashmiris. It is impossible to cross from one street to another without passing by at least one armed soldier. The military has also enforced evening curfews on the community, usually from the hours of 10 p.m. until 6 a.m..⁵⁸ This has impacted the society as well, especially the young adult population, that longs to be able to hold nighttime gatherings and celebrations.⁵⁹ Additionally, India passed the Armed Forces Special Powers Act (AFSPA), a form of martial law, in Jammu and Kashmir in July 1989 in order to crack

⁵⁴ Ibid, pg. 14-15

⁵⁵ Kazi, Seema. *In Kashmir: Gender, Militarization & the Modern Nation-State*. 96-100.

⁵⁶ Ibid, pg. 97

⁵⁷ Ibid, pg. 97

⁵⁸ Ibid, pg. 98

⁵⁹ Ibid, pg. 98

down on the resistance movement. The AFSPA grants, “the armed forces wide powers to shoot to kill, arrest on flimsy pretext, conduct warrantless searches, and demolish structures in the name of aiding civil power”.⁶⁰ Additionally, the act provides immunity to those enforcing it; authorities can only be prosecuted for actions they have taken while on duty by a military court as opposed to a civilian one.⁶¹ The only exception is if a commander gives permission for a soldier to be prosecuted in a civilian court, but that has never happened since the act has been initiated.⁶² Also, it is important to mention that the military courts rarely prosecute cases in regards to soldiers’ treatment of civilians and when they do, the proceedings are not released to the public.⁶³

While the purpose of the militarization of the state was to rid it of insurgents and discourage more from crossing the border from Pakistan, it did not prove to be successful. This is evident through the most recent war fought over Jammu and Kashmir, which is referred to as the Kargil War and occurred between May and July of 1999. During this time, Pakistani troops crossed the line of control and attacked Indian military bases. Rebel forces also contributed to the war by simultaneously attacking Indian troops.⁶⁴ Overall, Pakistan was able to gain some land; however, the Indian Army and Air Force were able to regain the territory and force the troops to retreat back to Pakistan.

Since the end of the Kargil War, tension over Jammu and Kashmir has continued to rise and a significant amount of violence, referred to as the Burhan aftermath, erupted

⁶⁰ “Getting Away with Murder: 50 Years of the Armed Forces (Special Powers) Act.” *Human Rights Watch*, 2008. 5.

⁶¹ Kazi, Seema. *In Kashmir: Gender, Militarization & the Modern Nation-State*. 100-101.

⁶² *Ibid*, pg. 101

⁶³ *Ibid*, pg. 101

⁶⁴ Mathur, Shubh. *The Human Toll of the Kashmir Conflict: Grief and Courage in a South Asian Borderland*. 19.

once again this past summer. The violence began when Burhan Wani, a Kashmiri militant who was a commander of the Hizbul Mujahideen, one of the leading Kashmiri-based resistance groups, was shot and killed by the Indian military on July 8, 2016.⁶⁵ Following the murder, attacks conducted by the rebels against Indian security forces became more frequent; in fact, a search of recent insurgency attacks in the state on the website of NDTV, one of India's top news sources, show that ever since Wani's death, there has been at least one attack every couple of weeks.⁶⁶ In addition to attacks, protests have also been carried out in each of the ten districts of the state.⁶⁷ Many of these protests have turned violent and resulted in the death of eighty-seven civilians, along with the injuring of thousands of civilians, militants, and soldiers.⁶⁸ Overall, it is clear that the conflict in Jammu and Kashmir is ongoing and that there has been a recent rise in the intensity of violence in the state.

Chapter 3: Rape Committed by Members of the Armed Forces

The presence of such a high number of troops in Jammu and Kashmir, along with the enforcement of the AFSPA, has led to a number of human rights violations in the state, such as “arbitrary detention, torture, custodial killings, disappearances, arson, firing on unarmed demonstrators, destruction of standing crops, mining fields and pastures, and desecration of sacred sites.”⁶⁹ In addition to these abuses, there are many other violations

⁶⁵ Dasgupta, Piysasree. “Who was Burhan Wani and Why is Kashmir Mourning Him?” *Huffington Post*, 2016.

⁶⁶ NDTV. <http://www.ndtv.com/topic/terrorist-attack-kashmir>

⁶⁷ Bengali, Shashank. “Militants Sneak into Indian Army Base and Mow Down Sleeping Soldiers in Kashmir, Killing 18.” *Los Angeles Times*, 2016.

⁶⁸ Ibid

⁶⁹ Mathur, Shubh. 2013. “The Perfect Enemy: Maps, Laws and Sacrifice in the Making of Borders.” *Critique of Anthropology*, 33(4): 437. Mathur is an Indian anthropologist who focuses on human rights and

that have occurred as a result of the act and the infiltration of soldiers. For example, the AFSPA has violated Kashmiri's right to form a peaceful assembly as it prohibits people from gathering in groups above a certain size.⁷⁰ However, in order to provide an in depth discussion as opposed to a broad description outlining every type of infringement that has taken place, this paper will specifically focus on the sexual violence conducted against Kashmiri women and girls by Indian armed forces; the reason that this violation was chosen is that rape is often described as the most personal form of abuse⁷¹ and the reason the female population was chosen is that while both males and females have been sexually abused by Indian troops, females have been attacked in this manner at a much higher rate⁷².

Not only have females been targeted at a much higher rate than men, but they have also been targeted at a high rate in general. This is apparent through the fact that trustworthy sources, such as international human rights organizations, including Amnesty International, Human Rights Watch and Asia Watch, and the UN have all written multiple reports documenting such abuse. These organizations have sources on the ground that have taken measures to verify accounts of rape by security forces by talking to victims, their physicians who examined them after the infringement had occurred and local nonprofits, and by monitoring violations themselves when possible. Additionally, KashmirWatch, “a Europe based news portal of Kashmir International Research Center, an independent non-profit research organization”,⁷³ has found that there has been at least

violence in South Asia. She has worked with victims of human rights infringements in Jammu and Kashmir to help them in their fight for justice.

⁷⁰ Kazi, Seema. *In Kashmir: Gender, Militarization & the Modern Nation-State*. 104.

⁷¹ Ibid, pg. 135

⁷² Ibid, pg. 136

⁷³ “About Us.” *KashmirWatch*, <http://kashmirwatch.com/about/>

10, 176 cases of rape committed by Indian security personnel against Kashmiri women between 1989, when Jammu and Kashmir was first placed under militarization, and March 31, 2016.⁷⁴ As alarming as this number might appear, the number of incidents of rape may actually be much higher; the reason behind this is that women often hide the fact that they have been raped due to the stigma attached to the violation in Kashmiri culture.⁷⁵ In general, Kashmiri culture is patriarchal, conservative, and based off of Islam since the majority of the state's population is Muslim. The women are expected to remain virgins until they are married. Once a woman has had sexual intercourse with a man who is not her husband, despite whether or not it was forced, she is considered impure by the community.⁷⁶ This is evident in the fact that after the incident in the villages of Kunan and Poshpora, in which the Indian army raped somewhere between twenty-three and sixty women in 1991, men searching for potential wives purposefully avoided the village for quite some time to ensure that they did not marry a woman who would not be considered pure; there were no marriage proposals in the village until five years after the rapes had occurred.⁷⁷ There have also been many instances in which husbands have divorced their wives after they have been sexually violated and the blood relatives of these women have cut ties with them as well.⁷⁸ Researchers who have conducted fieldwork in the state on these types of situations have found that the husbands of rape victims often refer to their wives as "unclean" and state that they would never consider

⁷⁴ "Investigate India for Human Rights Violations in Kashmir." *KashmirWatch*, 2016. The organization determined the number of cases of rape in the state by reading through all the documented reports of such abuse obtained by human rights organizations since 1989.

⁷⁵ Kazi, Seema. *In Kashmir: Gender, Militarization & the Modern Nation-State*. 163.

⁷⁶ *Ibid*, pg. 163-164

⁷⁷ *Ibid*, pg. 165

⁷⁸ *Ibid*, pg. 164

continuing their relationship with them after they had been sexually violated.⁷⁹ The reactions from the women's family members have not been much different; after their husbands abandon them, their parents and grown children often do the same.⁸⁰ Thus, these rape victims are often left in a predicament in which they do not have a safe place to turn to for shelter and support. Researcher Seema Kazi further explains this by stating, "they are left to fend for themselves...Such victims are unacceptable to society and they are treated more or less as prostitutes. Society never forgives them".⁸¹ Overall, considering all of this information in regards to the treatment of rape victims in Jammu and Kashmir, it is reasonable to assume that some victims may prefer to keep the crime a secret instead of facing ostracism. Therefore, there is a very high probability that the number of rapes that have occurred in the state is much higher than the number currently known by KashmirWatch. However, even if one just considers the lowest possible number that could have occurred, 10,176, it is quite apparent that this form of abuse is widespread.

In response to the high number of cases of rape conducted by army personnel in Jammu and Kashmir, a few women, some of whom are victims of rape by the security forces, have formed support groups for victims. An example of such a group is the Muslim Khawateen-e-Markaz (MKM), which helps guide victims in regards to managing their strained relationships with their husbands and family members and finding a way to financially support themselves.⁸² In addition to helping victims, the MKM also visits

⁷⁹ Butalia, Urvashi. *Speaking Peace: Women's Voices from Kashmir*. 83-84.

⁸⁰ Ibid, pg. 85

⁸¹ Kazi, Seema. *In Kashmir: Gender, Militarization & the Modern Nation-State*. 163.

⁸² Ibid, pg. 164

villages and cities after a raid has been conducted by the army and a number of women have been violated, and tries to meet with members of the male community to educate them about sexual violence and convince them to support the victims instead of abandoning them. Even though the group does not always receive a positive response from the men, it is still raising awareness and in some cases able to prevent victims from being ostracized by their families.⁸³

It is important to study the sexual violence conducted by members of the Indian army not only because this form of abuse is widespread in the state and has led to the ostracism of many Kashmiri women, but also because sexual violence can negatively affect multiple areas of victims' lives. For instance, it can impact victims' mental health; this is because rape is often times considered to be the most personal form of violation and the most traumatizing on a psychological level.⁸⁴ The effects of such harm are not only the immediate physical and mental pain that follow it, but also the development of long-term psychological disorders. Ever since the number of Indian soldiers stationed in the state drastically increased and the AFSPA was enforced in 1989, and therefore troops began raping Kashmiri women, there has been an extreme increase in the number of cases of depression, anxiety, and suicide amongst the female population.⁸⁵ This is evident through the fact that the number of female hospital patients in need of psychological treatment in the state increased from 1,700 in 1989 to 32,000 in 2000.⁸⁶ Overall, a study conducted by researcher Butalia Urvashi, has indicated that approximately two-thirds of

⁸³ Ibid, pg. 164

⁸⁴ Butalia, Urvashi. *Speaking Peace: Women's Voices from Kashmir*. 246.

⁸⁵ Ibid, pg. 246-248

⁸⁶ Ibid, pg. 246

Kashmiri women have developed a chronic psychological disorder since 1989.⁸⁷ It is important to recognize that this escalation in psychological disorders is not solely due to the rise in the number of rapes. Women are also experiencing extreme stress due to other human rights abuses that are occurring in the state, such as the enforced disappearances of their husbands and sons, and extrajudicial killings that have occurred during protests.⁸⁸ However, there is also no denying the fact that the fear of being raped, due to the physical and mental pain that accompanies such a crime, along with the fear of being ostracized by their loved ones afterwards, has certainly significantly contributed to the escalation.⁸⁹

The surge in the number of cases of sexual violence in the state has also had an effect on Kashmiri women's education; many women are choosing to get married as opposed to continuing their post-secondary education. Although some researchers have claimed that women are choosing this path for religious reasons, since the culture in the state is very conservative and the majority of the citizens keep a strict Muslim faith, anthropologist Haley Duschinski has disputed this argument and attributed the decline in women attending university to the widespread sexual violation of the female population in Jammu and Kashmir by Indian security personnel.⁹⁰ Duschinski conducted fieldwork in the state and surveyed Kashmiri women in regards to why they discontinued their education. She found that the vast majority of women responded that they did not feel safe traveling to school because the army has infiltrated all of the main roads.⁹¹ The

⁸⁷ Ibid, pg. 248

⁸⁸ Ibid, pg. 248

⁸⁹ Ibid, pg. 248

⁹⁰ Duschinski, Haley. 2009. "Destiny Effects: Militarization, State Power, and Punitive Containment in Kashmir Valley." *Anthropological Quarterly*, 82(3): 704-714. Duschinski is a professor and director of the Center for Law, Justice & Culture at Ohio University. She is also a researcher who focuses on human rights and violence in South Asia.

⁹¹ Ibid, pg. 707

women claimed that commuting to school is now too risky; they worry that they will be raped by armed forces that are stationed on their daily transportation routes.⁹² Overall, the women believe that getting married significantly lowers their chances of facing such abuse since they spend the majority of their time in the home and can rely on their husbands for protection.⁹³ Taking into consideration the fact that many Kashmiri women have been abandoned by their entire families after being sexually violated, it makes even more sense that women in the state would avoid coming into contact with members of the army at any cost, even that of their priceless education. In conclusion, all of this further shows how the sexual violence Kashmiri women have been facing from the Indian armed forces has had a negative impact on multiple aspects of their lives from their mental health to their education. Because the sexual violence has negatively affected their lives in so many ways, it is clear that it is an important topic that deserves attention from the human rights arena.

When discussing the rape of Kashmiri women by members of the Indian army, it is also important to examine the motives of these soldiers in order to determine why the number of rapes is as high as it is. To understand the motives of the armed forces, it is necessary to discuss the situations in which the rapes tend to occur. Many researchers, such as Seema Kazi⁹⁴, Charu WaliKanna⁹⁵, and Urvashi Butalia⁹⁶. have noted that the rapes often take place when women are traveling alone into town or the city. Usually

⁹² Ibid, pg. 707

⁹³ Ibid, pg. 710

⁹⁴ Kazi, Seema. *In Kashmir: Gender, Militarization & the Modern Nation-State*. 166-168.

⁹⁵ WaliKanna, Charu. *Women Silent Victims in Armed Conflict: An Area of Study of Jammu & Kashmir, India*. Delhi: Serials Publications, 2004. 2-4. WaliKanna is a researcher based in India who focuses on women's rights and violence in India. She has written multiple books on these topics.

⁹⁶ Butalia, Urvashi. *Speaking Peace: Women's Voices from Kashmir*. 86-90.

these women are stopped by soldiers for a random search on their daily commutes and told that they need to be taken into custody for questioning.⁹⁷ When taken to army headquarters, or another enclosed location, they are often raped by multiple soldiers before being released.⁹⁸ Women are also frequently raped when soldiers raid their homes in search of militants in hiding, along with weapons and supplies that they believe are being distributed to the rebel forces.⁹⁹ In these instances, the men of the household are usually brought outside the home into the yard while the troops ask the women to show them around the house and then rape them.¹⁰⁰ There are also cases in which the men remain in the home and are forced to watch while their mothers, wives, and daughters are sexually violated.¹⁰¹

The fact that men are sometimes forced to watch their womenfolk get raped indicates that the soldiers may be sexually violating the women in order to instill fear in the community and collectively punish it for rebelling;¹⁰² this is a tactic that has been used by armies in multiple armed conflicts, such as the Rwandan genocide and the Yugoslav wars.¹⁰³ Essentially, because the soldiers are aware that the culture in Jammu and Kashmir is based off of Islam and women are expected to only have sexual intercourse with their husbands, they may think that by violating the women, and therefore disrupting the Kashmiri culture, they might be able to discourage Kashmiri men

⁹⁷ Ibid, pg. 87

⁹⁸ Ibid, pg. 88

⁹⁹ WaliKanna, Charu. *Women Silent Victims in Armed Conflict: An Area Study of Jammu & Kashmir, India*. 103.

¹⁰⁰ Ibid, pg. 104

¹⁰¹ Kazi, Seema. *In Kashmir: Gender, Militarization & the Modern Nation-State*. 167.

¹⁰² Ibid, pg. 155

¹⁰³ Eriksson, Maria. *Defining Rape: Emerging Obligations for States under International Law*. 139-140.

from joining the militancy or supporting the rebels.¹⁰⁴ However, as of now, this is just speculation that has been mentioned as a possible motive by a few researchers in the state; there is no evidence that this is the reasoning behind the rapes or that there is any sort of policy the soldiers are following that requires them to sexually violate Kashmiri women.

Another possibility is that the frequency of rape is a result of the instability in the state that has risen due to the ongoing conflict; essentially, the theory is that soldiers feel as if they have an open opportunity to take advantage of women and assert their power over Kashmiris in general without being held responsible.¹⁰⁵ Since 1989, which is when the majority of the troops stationed in Jammu and Kashmir were moved to the state and the AFSPA was initiated, the Kargil War has taken place, along with a series of terrorist attacks and violent protests. In times like these, in which the Indian government is focused on trying to maintain its control over Jammu and Kashmir, it is very possible that the soldiers may feel as if they can violate these women without facing punishment. Furthermore, considering the fact that the AFSPA permits the troops to take certain actions that would not normally be allowed, such as shooting an individual with the purpose of killing him or her, and prevents them from being prosecuted in a civilian court for any act they committed while on duty, it makes sense that they would feel as if they can get away with committing other forms of abuse as well. Lastly, it is important to mention that being stationed in a conflict zone can be extremely stressful for soldiers as they are always at risk of getting attacked¹⁰⁶ and because they are living on a military

¹⁰⁴ WaliKanna, Charu. *Women Silent Victims in Armed Conflict: An Area Study of Jammu & Kashmir, India*. 104-105.

¹⁰⁵ Butalia, Urvashi. *Speaking Peace: Women's Voices from Kashmir*. 93-94.

¹⁰⁶ Eriksson, Maria. *Defining Rape: Emerging Obligations for States under International Law?* 137.

base in a foreign state, they probably do not have opportunities to interact with many women¹⁰⁷ outside of the Kashmiri ones they meet while on patrol. Since many psychologists have stated that sex is often used as a stress reliever, and these men do not have many opportunities to participate in intercourse, considering the limited interaction they have with women, it is possible that they feel the need to force themselves on the women they do come into contact with and think they can violate without getting punished in order to manage the high amount of stress they are dealing with.¹⁰⁸ Overall, this is the kind of reasoning that has been behind rapes that have occurred in almost every armed conflict that has taken place from World War 2 to the Vietnam War to the Soviet invasion of Afghanistan¹⁰⁹, and therefore it is not surprising that it may also be the reasoning behind many of the rapes that have been conducted by members of the Indian army in Jammu and Kashmir.

In addition to the motives behind the sexual violence faced by Kashmiri women, it is also important to examine why the Indian army has been able to get away with such abuse in a legal sense. India's criminal law prohibits torture, which includes rape, and lists punishments for members of its security forces who have raped civilians.¹¹⁰ An Asia Watch and Physicians for Human Rights report, which documents the sexual violence faced by women in Jammu and Kashmir, further explains this by stating,

“Under section 376(1) of the Indian Penal Code (IPC), a minimum term of seven years' imprisonment may be imposed for rape. In addition, the Criminal Law (Amendment) Act of 1983, which for the first time provided for the offense of custodial rape, prescribes a mandatory 10 years' imprisonment for police officers who rape a woman in their custody. Custody is customarily understood to include situations where the victim is effectively

¹⁰⁷ Ibid, pg. 138

¹⁰⁸ Ibid, pg. 138

¹⁰⁹ Ibid, pg. 137-138

¹¹⁰ *The Indian Penal Code*. <http://lawcommissionofindia.nic.in/1-50/report42.pdf>

under the control of the police or security forces and is not limited to conditions of detention in a prison or lock-up. The sentence may be extended to life, and may also include a fine. Commissioned officers of the paramilitary and military forces are included under Section 376(2)(b) of the IPC and are thus subject to this mandatory sentence. The Criminal Law (Amendment) Act (1983) also shifts the burden of proof regarding consent to the accused.”¹¹¹

The Criminal Law Act was amended once again in 2013. The most significant change in the amendment was the in regards to the definition of rape. While the definition used to only apply to the penetration of a penis, it was expanded to apply to the penetration of any object into a victim’s vagina, mouth, anus, or urethra.¹¹² This change is important because it means that more cases can now qualify for prosecution of rape. Although other changes were made in the Criminal Law (Amendment) Act (2013), they refer to sex trafficking and are not relevant to this discussion on the rape of Kashmiri women by members of the Indian armed forces. Overall, all of this information indicates that according to Indian criminal law, the actions of the soldiers are illegal and subject to prosecution and punishment.

When discussing the legal issues in regards to the rapes committed by members of the Indian armed forces in Jammu and Kashmir, it is important to point out that although the state was granted special autonomous status, which was previously explained, and therefore India only has control over laws in the state in regards to issues of “defense, foreign affairs, finance and communications”¹¹³, the Indian army falls under the category of defense and because of this, the state of Jammu and Kashmir cannot create laws that apply to it.¹¹⁴ This explains why, even though Jammu and Kashmir has its own

¹¹¹ “Rape In Kashmir: A Crime of War.” *Asia Watch & Physicians for Human Rights*. 5.

¹¹² *The Criminal Law (Amendment) Act, 2013*. <https://www.iitk.ac.in/wc/data/TheCriminalLaw.pdf>

¹¹³ *The Constitution of India*. <http://lawmin.nic.in/olwing/coi/coi-english/coi-4March2016.pdf>

¹¹⁴ Bhatt, Ram Krishen Kaul. *Political and Constitutional Development of the Jammu and Kashmir State*. Delhi: Seema Publications, 1984. 193-194. Bhatt is a professor of Kashmir history at the University of

constitution and set of laws, it cannot make the AFSPA illegal or subject Indian armed forces to its criminal regulations. Furthermore, in 1954, the jurisdiction of the Supreme Court of India was expanded to include Jammu and Kashmir.¹¹⁵ This means that the rulings in the courts in the state, which are the High Court of Jammu and Kashmir and the local courts, can be overruled by the Supreme Court of India. This is significant as it further shows how the power Kashmiris have over their own state is limited and subject to India's wishes.

Although Jammu and Kashmir does have its own High Court, it has never been able to prosecute a case in regards to rape by the armed forces. One of the reasons behind this is that the AFSPA, as was previously explained, only allows security forces to be prosecuted outside of military courts if cases are given permission by a commander of the army, which has never happened.¹¹⁶ However, researchers in the state, such as Shubh Mathur¹¹⁷ and Anuradha Bhasin Jamwal¹¹⁸, have stated that cases of rape committed by Indian military personnel also rarely make it to trial in military courts because those soldiers accused of rape are “being shielded through methods like hushing up cases at the medical examination level, tampering evidence, delaying the basic documentation of cases, refusing to register cases, and sending in state-sponsored teams or the highly

Jammu and Kashmir. He is written several books on the history of Jammu and Kashmir, along with the politics of the state.

¹¹⁵ “History (Brief History About High Court of J&K).” *High Court of Jammu & Kashmir*. <http://jkhighcourt.nic.in/history.php>

¹¹⁶ Kazi, Seema. *In Kashmir: Gender, Militarization & the Modern Nation-State*. 100-101.

¹¹⁷ Mathur, Shubh. *The Human Toll of the Kashmir Conflict: Grief and Courage in a South Asian Borderland*. 104-108.

¹¹⁸ Jamwal, Anuradha Bhasin. 2013. “A Moon of Many Shades.” *Economic and Political Weekly*. 48(17): 8-17. Bhasin is the executive editor of Kashmir Times, a leading newspaper in the state. She is also an activist for victims of human rights violations in Jammu and Kashmir.

influenced Central Bureau of Investigation (CBI)¹¹⁹ to probe such cases.”¹²⁰ Although the police system is technically run by Jammu and Kashmir, researchers Shubh Mathur and Anuradha Bhasin Jamwal have stated that it is corrupt and has close ties to the Indian armed forces, and that is why it prevents proper investigations of the cases from being held.¹²¹ The actions taken by the police to prevent proper investigations from being held are evident in two of the most well-known cases of rape by security forces in Jammu and Kashmir. The first case, which was previously mentioned, is that of Kunan and Poshpora, two villages that border each other in the Kupwara district. On the evening of February 23, 1991, Indian armed forces from the “elite 4th Rajputana Rifles surrounded the village for a cordon-and-search operation.”¹²² As the soldiers went from home to home, they gang-raped somewhere between twenty-three and sixty women and girls, who ranged from age twelve to eighty.¹²³ The physicians who helped care for the victims found evidence that they had been both raped and physically injured.¹²⁴ Because the armed forces had shut down transportation and closed off roads leading outside of the villages while conducting its cordon, news of this case did not reach the media until a couple of weeks later, but once it did, it was reported internationally and therefore the Indian government felt pressure to address it.¹²⁵ However, “instead of a judicial inquiry or criminal investigation, the Indian government chose to send a two-member team from the

¹¹⁹ The Central Bureau of Investigation (CBI) is India’s domestic intelligence and security service.

¹²⁰ Ibid, pg. 11

¹²¹ Mathur, Shubh. *The Human Toll of the Kashmir Conflict*. 104-108.

¹²² Ibid, pg. 107

¹²³ Ibid, pg. 107

¹²⁴ Ibid, pg. 107

¹²⁵ Ibid, pg. 107

Press Council of India to investigate the crime.”¹²⁶ This two-person team did not visit the villages in which the case took place or interview the victims.¹²⁷ It only visited the Border Security Force, “an Indian paramilitary checkpoint controlling access to the village”, and after having a word with its commanding officer, wrote the Verghese Commission report.¹²⁸ The report claimed that

“the Kunan and Poshpora rape story on close examination turns out to be a massive hoax, orchestrated by militant groups and their sympathizers and mentors in Kashmir and abroad as part of a sustained and clearly contrived strategy of psychological warfare and as an entry point for re-inscribing Kashmir on the international agenda as a human rights issue. The loose ends and contradictions in the story expose a tissue of lies by many persons at many levels.”¹²⁹

The conclusion of this report indicates that the Press Council of India simply constructed an argument that would benefit the government of India. The reasoning behind this is that it would be impossible for the investigation team to be positive that the case was a hoax with having only spoken to one person, and not any of the victims, or without having visited the crime scene. Furthermore, the fact that the investigation team only consisted of two people also indicates that the report cannot be taken too seriously; for such a serious crime, it only makes sense that a large group of professionals investigate in order to help guarantee that there are no biases or mishaps in the findings.

The second incident that will be closely examined is the Shopian rape case. On May 29, 2009, two Muslim women, Asiya Jan, who was seventeen years old, and her sister-in-law, Nilofar Jan, who was twenty-two years old, were kidnapped, raped and killed in Shopian. The two women disappeared while on their evening route home after

¹²⁶ Ibid, pg. 107

¹²⁷ Ibid, pg. 107

¹²⁸ Ibid, pg. 107

¹²⁹ Ibid, pg. 107-108

working at their family orchard in Nagbal-Shopian. When their relatives realized they hadn't arrived home at the time they usually do, they began to search the village for them. When they were unable to find them by later that evening, they reported the disappearance to the local police. Even with the help of the police officers working the night shift, the Jan family was not able to locate Asiya and Nilofar. The following morning both of the women were found dead in a river located near three Indian military camps.¹³⁰ After examining their bodies, the doctors stated that there were indications that the women had been physically and sexually abused; however, the police refused to file a report and no action was taken to seek justice on behalf of these women until large-scale protests were held all over the state and the Indian government realized that the people would not calm down until an investigation was conducted.¹³¹ A judicial commission was created and the report that resulted from the commission affirmed that the two women had been raped and murdered through lab results provided by a forensic science lab.¹³² However, the report was denied by the military court, which stated that the lab had not provided enough evidence, and the case was then given to the CBI.¹³³ The CBI report found that the death of the two women was accidental and therefore no crime had occurred; it indicated that they had drowned and that Indian security personnel had nothing to do with the incident.¹³⁴ The findings seem to be a cover-up; the main reasoning behind this being that the water in which the women's bodies were found in

¹³⁰ Ibid, pg. 108

¹³¹ Ibid, pg. 108-109

¹³² Ibid, pg. 109

¹³³ Ibid, pg. 109

¹³⁴ Ibid, pg. 109

was between ankle and knee-deep¹³⁵, meaning it seemed very unlikely, if not impossible, for the girls to have accidentally drowned. Furthermore, the specific location in which the bodies were discovered had been carefully searched the evening before with flashlights and therefore they would have been found unless they were placed there in the early hours of the morning long after the women had gone missing.¹³⁶ Overall, this information suggests that the CBI manipulated the situation; the purpose of such an action being to place the blame on the victims so that there would be no way for the armed forces to be held responsible.

When discussing the Shopian case, it is important to point out the fact that the CBI did not stop at declaring that the women had simply drowned in its report. It later went on to “file supplementary charge-sheets against the state prosecutors, doctors, advocates for the complainant, advocates demanding justice and the family members of the women.”¹³⁷ Additionally, Shakeel Ahangar, the brother and husband of the two murdered women, who has been demanding justice in regards to the case ever since it occurred, has claimed that “his phone is tapped, his home is under surveillance and his efforts to communicate with media and supporters are blocked by security personnel, who have also arrested him for trying to hold a press conference.”¹³⁸ Also, those who belong to the Majilis-e-Mashawarat Shopian, a group dedicated to improving community life in the village that organized a large number of the protests that were held all over the state, have been placed on a watch list by security personnel and unable to apply for

¹³⁵ Ibid, pg. 109

¹³⁶ Ibid, pg. 109

¹³⁷ Ibid, pg. 109-110

¹³⁸ Ibid, pg. 110

passports.¹³⁹ All of this is significant because it demonstrates why it has been so difficult for justice to be served in the state of Jammu and Kashmir in regards to violations committed by Indian security personnel and for Kashmiris to be able to seek the changes they desire in their society in regards to respect for human rights and accountability measures for those who do not respect their rights. Those who have stood up against these abuses and injustices have often either been shut down or attacked in one way or another by the Indian government, or one of its services, which is clearly reluctant to admit the faults of its soldiers and punish them.

Throughout this section of the paper, it has become evident that rape conducted by members of the Indian armed forces is widespread in the state of Jammu and Kashmir. This form of violation is significant not only because it has been conducted so frequently, but also because it negatively impacts Kashmiri women in multiple ways; for instance, it has led to an increase in psychological disorders and discouraged women from venturing out of the house to pursue a higher education. Lastly, it has become clear that although rape is prohibited and punishable by Indian law, those soldiers who have raped women in Jammu and Kashmir are yet to be prosecuted and held responsible for their actions due to the enforcement of the AFPSA and corruption in the investigation of cases. In order to provide alternative ways to seek justice for these women, it is necessary to explain how international law applies to the situation in the state, which is the topic of the following chapter.

¹³⁹ Ibid, pg. 110

Chapter 4: An International Law Perspective on the Kashmir Conflict and the Rapes Committed

When discussing the human rights violations endured by Kashmiri women, it is important to determine who is responsible for ensuring the realization of their rights. The answer to this question depends on the legal status of Jammu and Kashmir, which is disputed. This is clear through the fact that a number of states¹⁴⁰, such as the U.S.¹⁴¹, along with highly respected international organizations, such as the UN¹⁴², have referred to the territory as disputed. Furthermore, it becomes even more apparent that the state's status is disputed after conducting a legal analysis of the conflict. Although India has claimed legal authority over the state through the Instrument of Accession, which was previously discussed, there are multiple reasons to question the validity of this agreement.

To begin, India has asserted that the Maharaja of Jammu and Kashmir, Hari Singh, was the only person with the legal authority to sign Jammu and Kashmir over to India.¹⁴³ This argument makes sense considering international law claims that the leaders of states have the right to adopt binding international treaties.¹⁴⁴ This is apparent through the concept of *jus representationis omnimoda*, which states that “international law imputes to a state all the manifestations of will and the acts which the head of the State

¹⁴⁰ “Kashmir – The History.” *Pakistan Mission to the United Nations*, <http://www.pakun.org/kashmir/history.php>

¹⁴¹ “Bureau of Consular Affairs.” *U.S. Department of State*, https://travel.state.gov/content/travel/en/search.html?search_input=kashmir+disputed&search_btn.x=0&search_btn.y=0&search_btn=search

¹⁴² *United Nations Resolution 47*. [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/47\(1948\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/47(1948)). Resolution 47, as was previously explained in Chapter 2 of this paper, was created by the UN in 1948 during the First Kashmir War. In this resolution, the UN refers to the territory as disputed.

¹⁴³ Rao, Gururaj. *The Legal Aspects of the Kashmir Problem*. Delhi: Minerva Press, 1997. 35. Rao is a researcher and lawyer based in India who focuses on international law in Southeast Asia.

¹⁴⁴ *Ibid*, pg. 35

acting in that capacity accomplishes in the domain of international relations.”¹⁴⁵

Therefore, because Singh had personally signed the Instrument of Accession, and the accession had then been confirmed by Lord Mountbatten, who as was previously stated was the Governor-General of India at the time, and Jawaharlal Nehru, the Prime Minister of India at the time, India has asserted that the transfer of power is acceptable according to international law.

Although at first it seems fair to say that India’s reasoning in regards to its legal authority over Jammu and Kashmir is valid, a deeper analysis proves otherwise. This is because it is uncertain whether Singh would be permitted to sign the Instrument of Accession on behalf of the state according to other principles of international law. Even though it is true that he was the Maharaja, which translates to “great king” or “high ruler” and was the highest authority in Jammu and Kashmir at the time, there are other factors that must be considered. International law indicates that in order for the government of a state to be recognized at the international level, it must have “actual control of the country, enjoy the habitual obedience of the bulk of the population and stake a claim of a reasonable expectancy of permanence”¹⁴⁶; this is known as the “principle of effectiveness.”¹⁴⁷ In regards to control of the territory, Singh had very little power during the time in which the accession took place. The reason behind this is that militants, followed by Pakistani troops, had invaded the state, as was previously discussed in this paper, and taken control over the vast majority of it. In fact, it was the lack of control that

¹⁴⁵ Ibid, pg. 340

¹⁴⁶ Hussain, Ijaz. *Kashmir Dispute: An International Law Perspective*. Islamabad: National Institute of Pakistan Studies, 1998. 76. Hussain is a lawyer located in Pakistan who has written a number of books focusing on international law and foreign policy in Pakistan and Jammu and Kashmir.

¹⁴⁷ Ibid, pg. 75-76

Singh was experiencing that caused him to initially request help from India and subsequently agree to sign his power over to India in exchange for protection from the rebels and Pakistani soldiers.¹⁴⁸ Furthermore, in addition to the Pakistani troops and rebels, a significant portion of Kashmiri citizens, who feared that Singh would sign the state over to India, joined in on the rebellion¹⁴⁹; therefore, Singh did not enjoy “habitual obedience of the bulk of the population.”¹⁵⁰ Lastly, Singh’s armed forces had significantly shrunk in size as a result of the attacks by Pakistan and the militants, and had been defeated by the time the signing of the Instrument of Accession occurred.¹⁵¹ Because of this, it is fair to claim that Singh, along with his government, would not have been able to maintain power in the state without India’s military aid. This is also evident through the wording of Singh’s letter to Lord Mountbatten requesting India’s help, in which he wrote “if my state is to be saved, immediate assistance must be made available at Srinagar.”¹⁵² Taking all of these factors into consideration, it is unlikely that the principle of effectiveness was fulfilled at the time of the accession and therefore, according to international law, Singh was not eligible to sign the state over to India.

It can also be argued that the Instrument of Accession is not valid since it was signed by Singh while he was under duress and coercion. As was previously explained, Jammu and Kashmir had been attacked by a high number of rebels, along with Pakistani troops, and therefore Singh felt that he needed aid from India, and India was not willing

¹⁴⁸ Ibid, pg. 76

¹⁴⁹ Misra, K.K. *Kashmir and India’s Foreign Policy*. 54.

¹⁵⁰ Hussain, Ijaz. *Kashmir Dispute: An International Law Perspective*. 76.

¹⁵¹ Misra, K.K. *Kashmir and India’s Foreign Policy*. 54-55.

¹⁵² Misra, K.K. “Letter of 26th October 1947, From Maharaja Sir Hari Singh to Lord Mountbatten, Requesting the Accession of the State to India” in K.K. Misra’s *Kashmir and India’s Foreign Policy*. 453.

to provide aid unless Singh signed over the state through the Instrument of Accession. It is reasonable to claim that because India knew what kind of pressure Singh was under and how much he needed its help, by only offering its military support if Singh would sign the Instrument of Accession, India was subjecting the leader to duress and coercion. According to Article 52 of the Vienna Convention on the Law of Treaties, “a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.”¹⁵³ The meaning behind this article, according to Elihu Lauterpacht, an international lawyer and scholar, is that any treaty signed under duress is invalid due to the absence of consent¹⁵⁴; “such a treaty is considered a nullity.”¹⁵⁵ Taking all of this into consideration, it is fair to assert that the Instrument of Accession is not credible on the international level considering it was signed by Singh while he was under duress and coercion.

Lastly, when addressing the legality of the Instrument of Accession, it is important to raise the point that it is unclear if the agreement was actually ever signed. This is because upon being asked to show the treaty to the UN and Pakistan, India has failed to do so and claimed that the original version had either been misplaced or stolen since 1995.¹⁵⁶ This raises an issue because if the treaty was never signed it cannot be considered valid, and because India is either unable or unwilling to present the original version to the UN and Pakistan, there is no way to confirm whether or not Hari Singh

¹⁵³ *Vienna Convention on the Law of Treaties*.

<http://www.oas.org/legal/english/docs/vienna%20convention%20treaties.htm>

¹⁵⁴ (1953) INTERNATIONAL COMMENTARY 90,147, U.N. Doc. NCN.4I63/1953

¹⁵⁵ Zaccaro, Thomas. 1984. “The Prohibition of the use of Duress in Treaty Negotiations: Study of the Iranian Hostage Crisis.” *Boston College International and Comparative Law Review*, 7(1): 144. Zaccaro is an attorney who has written numerous law reviews. He has served as the Chief Trial Counsel of the Securities and Exchange Commission’s Pacific Regional Office.

¹⁵⁶ Hussain, Ijaz. *Kashmir Dispute: An International Law Perspective*. 78.

signed it. While the fact that it has not been presented to the UN and Pakistan does not make it invalid, it certainly raises doubts in regards to its authenticity.

After having analyzed the perspectives and claims of both India and Pakistan, it becomes more and more obvious that the situation is extremely complex and it is unclear whether the Instrument of Accession was ever actually signed and whether it is valid according to international law. However, what is clear is that due to this uncertainty, India cannot be considered the de jure government¹⁵⁷ of Jammu and Kashmir, and because of this, Jammu and Kashmir is rightfully categorized as a disputed territory by the UN and the majority of the international community. While establishing the fact that the state is indeed a disputed territory is helpful in regards to determining its legal status, it also complicates the application of human rights law and therefore makes it difficult to ensure the protection of Kashmiri women from rape. The reason behind this is that the responsibility to enforce human rights law in a state typically falls on the de jure government. In the case of a disputed territory, it is unknown which nation, if any, has legal authority over the state, and this leads to the creation of a protection gap in regards to who can be held accountable for enforcing human rights.¹⁵⁸ The answer to this accountability question can be found in the fact that “since human rights norms contained in the UDHR are customary international law, they need to be guaranteed by the authority having effective control of the territory, regardless of its political status internationally”¹⁵⁹; essentially, this reflects “the notion that power comes with

¹⁵⁷ A de jure government is the legal government of a state that has received recognition from other nations.

¹⁵⁸ Bansal, Avani. “Human Rights in Disputed Territories- Affixing Responsibility.” *Oxford Human Rights Hub*, 2014. Bansal is a lawyer in India who received her masters in law from the University of Oxford.

¹⁵⁹ Ibid

responsibility.”¹⁶⁰ Taking this into consideration, it is clear that responsibility for ensuring the rights of Kashmiris falls on India. India’s control of Jammu and Kashmir is obvious through its widespread military presence in the state, and the fact that according to the Indian constitution, the state has been adopted by India since 1947 and India can make decisions in regards to the state’s laws involving “defense, foreign affairs, finance and communications”¹⁶¹ without permission from the Kashmiri elected government. Although the legal status of Jammu and Kashmir is disputed, the fact that India acts as the de facto government¹⁶² of the state, is not disputed by any party involved in the matter or the international community. Therefore, there is no doubt that the responsibility to protect Kashmiri women from sexual violence conducted by members of the Indian military falls on India.

The implementation of all of the rights in the UDHR would be helpful for Kashmiri women since Article 5 of the declaration claims that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”¹⁶³ and rape constitutes both torture and cruel and degrading treatment¹⁶⁴. Additionally, not only is India expected to enforce the human rights found in the UDHR in Jammu and Kashmir, but it is also required to enforce the ICCPR and the CEDAW in the state. This is because India has ratified both the ICCPR and the CEDAW; through ratification India is expected to enforce the rights found in the treaties in its whole territory, and since it considers Jammu and Kashmir to be a part of its territory, and technically it is in control of the

¹⁶⁰ Ibid

¹⁶¹ *The Constitution of India*. <http://lawmin.nic.in/olwing/coi/coi-english/coi-4March2016.pdf>

¹⁶² A de facto government is the government exercising effective control over a state.

¹⁶³ *The Universal Declaration of Human Rights*. <http://www.un.org/en/universal-declaration-human-rights/>

¹⁶⁴ Eriksson, Maria. *Defining Rape: Emerging Obligations for States Under International Law*. 209.

state, it is expected to enforce the rights there as well. Rape is an example of an infringement on the right to live free of gender-based violence granted by General Recommendation 19 of CEDAW.¹⁶⁵ Additionally, similarly to the UDHR, the ICCPR also prohibits rape¹⁶⁶ through Article 7, which states that “torture...[and] cruel, inhuman or degrading treatment or punishment”¹⁶⁷. Furthermore, Article 4 of the ICCPR states that no derogation from Article 7 is permitted, even during “times of public emergency.”¹⁶⁸ Taking all of this into consideration, it is evident that India has a duty to uphold the right of Kashmiri women to not be subjected to rape despite the fact that there is an insurgency in the state. When discussing the prohibition of rape in international treaties, it is important to raise the point that the Convention Against Torture (CAT) has also classified rape as torture and claimed in General Comment 2 that its convention prohibits it as well.¹⁶⁹ However, while India did sign the CAT in 1997, it is one of the few countries that still has not ratified it. Although India expressed its intent to comply with the provisions in the treaty by signing it, it is not legally obligated to do so unless it ratifies it.

Not only is India, as the de facto government of Jammu and Kashmir, expected to adhere to its obligations in regards to international human rights law in the state, but it is also obligated to adhere to its obligations in regards to international humanitarian law in

¹⁶⁵ *General Recommendations Made by the Committee on the Elimination of Discrimination Against Women*. <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>

¹⁶⁶ Eriksson, Maria. *Defining Rape: Emerging Obligations for States Under International Law*. 211.

¹⁶⁷ *International Covenant on Civil and Political Rights*.
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

¹⁶⁸ Ibid

¹⁶⁹ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: General Comment No. 2*.
<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhskvE%2BTuw1mw%2FKU18dCyrYrZhDDP8yaSRi%2Fv43pYTgmQ5n7dAGFdDalzfYTJnWNYOXxeLRAIVgbwcSm2ZXH%2BcD%2B%2F6IT0pc7BkgqlATQUZPVhi>

the state. The application of international humanitarian law is triggered by the existence of an armed conflict and obligates all parties to a conflict to adhere to relevant articles in the Geneva Conventions, which constitute “intransgressible principles of international customary law.”¹⁷⁰ Not only is India expected to adhere to the Geneva Conventions because the majority of the articles in them are considered customary international law, including, Common Article 3, the one that is likely to apply to the situation in Jammu and Kashmir, but also because it is required to since it has ratified the conventions.

The majority of the articles in the Geneva Conventions only apply to international armed conflicts, and therefore cannot currently be enforced in Jammu and Kashmir. It is true that at some points over the course of the conflict Pakistan was involved, and at those points the situation was considered an international armed conflict, but the last time there was proof that Pakistan was involved was during the Kargil War back in 1999. It is important to point out, however, that the Indian military has recently claimed that Pakistan is currently involved in the conflict; this was apparent when Lieutenant General DS Hooda stated, “Pakistan is interfering in Kashmir...in what we call a proxy war in Kashmir”¹⁷¹ in July 2016. However, although the military has made this accusation, there is yet to be any evidence to confirm that Pakistan is involved. This may be due to the fact that Pakistan is not actually involved or it could be because it can be difficult to prove that a state is involved in a proxy war. The reason it is difficult to prove is that a proxy war would mean that Pakistan is involved in an indirect manner. Essentially, India’s claim is that Pakistan has been offering both moral and physical support to the

¹⁷⁰ Eriksson, Maria. *Defining Rape: Emerging Obligations for States Under International Law*. 348.

¹⁷¹ “Pak Interfering in J-K, has Role in Kashmir Proxy War: Army.” *Hindustan Times*.
<http://www.hindustantimes.com/india-news/pak-interfering-in-j-k-has-direct-role-in-kashmir-proxy-war-army/story-ZptFsbNCe0FYUcw5B4JjQP.html>

militants¹⁷², and support, as opposed to a direct involvement in which the Pakistani army would be invading the state, is not easy to verify. While it is true that a lack of hard evidence does not mean that Pakistan isn't involved, it cannot be assumed that Pakistan is involved without such evidence. Since there is no proof, none of the recent reports written by trustworthy international organizations, such as the UN and Human Rights Watch, in regards to Jammu and Kashmir have mentioned that Pakistan is currently involved in the situation or referred to it as an international conflict. Overall, unless hard evidence in regards to Pakistan's involvement surfaces, the situation in Jammu and Kashmir simply cannot be considered an international conflict. Although this makes it clear that the majority of articles in the Geneva Conventions do not currently apply to the situation, it is arguable that Common Article 3 does. The reason behind this is that this provision specifically applies to non-international armed conflicts.

Common Article 3 states that,

“in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the follow provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court,

¹⁷² Ibid

affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.”¹⁷³

The International Committee of the Red Cross has stated that through international customary law, rape is understood to constitute (a) violence to life and person, in particular cruel treatment and torture and (c) outrages upon personal dignity, in particular humiliating and degrading treatment.”¹⁷⁴ It is also apparent that rape is proscribed by Common Article 3 because Additional Protocol II, which also applies to non-international armed conflicts, prohibits “outrages upon personal dignity, in particular humiliating treatment, rape, enforced prostitution and any form of indecent assault”¹⁷⁵, and through this explanation makes it clear rape that falls under the headings of “outrages upon personal dignity.”¹⁷⁶ Although it is true that Common Article 3 and Additional Protocol II are separate, Additional Protocol II, according to Human Rights Watch¹⁷⁷ and researcher Maria Eriksson¹⁷⁸, serves as authoritative guidance for deciphering Common Article 3. This is also evident through comments made by the International Committee of the Red Cross stating that Additional Protocol II “reaffirms and supplements Common Article 3...because it became clear that it was necessary to strengthen...the protection of women...who may also be victims of rape, enforced prostitution or indecent assault.”¹⁷⁹

¹⁷³ *Geneva Conventions: Common Article 3*. <https://ihl-databases.icrc.org/ihl/WebART/375-590006>

¹⁷⁴ Eriksson, Maria. *Defining Rape: Emerging Obligations for States Under International Law*. 352.

¹⁷⁵ *Geneva Conventions: Additional Protocol II*. <https://ihl-databases.icrc.org/ihl/INTRO/475?OpenDocument>

¹⁷⁶ *Geneva Conventions: Common Article 3*. <https://ihl-databases.icrc.org/ihl/WebART/375-590006>

¹⁷⁷ “Rape In Kashmir: A Crime of War.” *Asia Watch & Physicians for Human Rights*, 1993. 4.

¹⁷⁸ Eriksson, Maria. *Defining Rape: Emerging Obligations for States Under International Law*. 352.

¹⁷⁹ Sandoz, Yves and Christophe Swinarski, eds. *ICRC Commentary on the Additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Geneva: Martinus Nijhoff Publishers, 1987. 1375. Sandoz is a professor of international humanitarian law at the University of Fribourg and Geneva Academy of International Humanitarian Law and Human Rights. Swinarski is a researcher who focuses on international humanitarian law; he has written multiple articles and books on this subject.

Furthermore, it was determined in the ICTY trial of Miroslav Kvočka, a Bosnian Serb policeman, that rape is a violation of Common Article 3.¹⁸⁰ While the proceedings do not explain which heading in Common Article 3 the court interpreted as applying to rape, it does make it clear that such abuse is forbidden by the article. Overall, all of this information indicates that if the situation in Jammu and Kashmir is determined to be a non-international armed conflict, and therefore Common Article 3 can be applied, India is guilty of violating the article because of the rapes committed by Indian armed forces against Kashmiri women.

To begin the debate in regards to whether or not Common Article 3 applies to the situation in Jammu and Kashmir, it is important to raise the point that the Indian political state, which refers to the state's government and politicians, does not consider the situation in the state to be any type of conflict. Instead, the officials and politicians have "at both international platforms and the Indian parliament- frequently described the Kashmir dispute as a purely internal matter, a domestic law and order situation."¹⁸¹ While it is clear that the situation can only be described as non-international matter at the moment due to the fact that there is no evidence that Pakistan is involved in the militant movement, and therefore the government is correct in calling it internal, it is questionable whether it labels the situation as a "law and order situation"¹⁸² due to its actual characteristics or because framing it as an internal armed conflict would make it easier for the international community to accuse it of violating Common Article 3. One of the

¹⁸⁰ "Prosecutor V. Miroslav Kvočka." *Trial Judgment: ICTY*. 2001. Footnote 409, pg. 63.
<http://www.icty.org/x/cases/kvočka/tjug/en/kvo-tj011002e.pdf>

¹⁸¹ Ghosh, Shrimoyee Nandini. "Kashmir: Let's Call a War by its Rightful Name." *The Wire*, 2016. Ghosh is a Kashmiri-based human rights lawyer and researcher.

¹⁸² Ibid

main reasons that India's labeling of the conflict may not be correct is that it severely differs from the label that the Indian military has used. As was previously explained, the military views the situation as a proxy war by Pakistan.¹⁸³ Although Pakistan's involvement has not been confirmed, and because of this the situation must be referred to as internal, there is reason to believe that the military is right in calling the situation a war. This is because the situation has multiple characteristics of a non-international armed conflict, which will be explained in detail, and also because of the opinion of the Supreme Court of India.

The Supreme Court of India has also implied that the state of Jammu and Kashmir is a conflict zone. This is evident in its judgment of the Lakhwinder Singh case in which Singh, a member of the Border Security Forces in Jammu and Kashmir, was off duty and walking home from a doctor's appointment when he shot and killed 16-year-old Zahid Farooq.¹⁸⁴ The prosecution in the case fought for Singh to be tried in a civilian court, as opposed to a military one. Due to the AFSPA enforced in Jammu and Kashmir, which was previously explained, members of the Indian armed forces on duty in the state can only be prosecuted in a military court unless permission is given by a commander of the army to try them in a civilian court, which has never happened.¹⁸⁵ However, since Singh was off duty when he shot Farooq, the prosecution hoped that it could convince the Supreme Court to have him tried in a civilian court, where the chances of him being convicted and punished were much higher. In the end, the Supreme Court ruled that Singh could not be tried in a civilian court because those members of the Indian forces

¹⁸³ Ibid

¹⁸⁴ Ibid

¹⁸⁵ Kazi, Seema. *In Kashmir: Gender, Militarization & the Modern Nation-State*. 100-101.

stationed in Jammu and Kashmir who are working under the Border Security Forces Act (BSF Act) are always on “active service.”¹⁸⁶ The BSF Act states that one of its forces is considered to be on active service when he or she

“(a) is attached to, or forms part of, a force which is engaged in operations against an enemy, or
 (b) is engaged in military operations in, or is on the line or march to, a country or place wholly or partly occupied by an enemy, or
 (c) is attached to or forms part of a force which is in military occupation of a foreign country.”¹⁸⁷

When analyzing the way in which the BSF Act defines active service, it becomes apparent that both (a) and (b) use the words “operations” and “enemy”. Additionally, it is important to point out that while the third option, (c), does not use the words “operations” or “enemy”, it does use the phrase “military occupation”. Although the Supreme Court did not indicate which of the three categories applied to Singh’s case, some reasonable assumptions in regards to how the court views the Kashmir Conflict can still be made. To begin, it is clear that if the category used by the court was either (a) or (b), then it must view the work that the BSF conducts as operations, which is a term that is used to describe projects that military forces take on during times of armed conflict. Furthermore, if the category used was (a) or (b), it is also apparent that the court sees the conflict as one in which India is fighting off an enemy. Taking this into consideration, it would be difficult to claim that the situation in Jammu and Kashmir is strictly a law and order issue if either category (a) or (b) was used. If that were the case, it would be implied that the Kashmiris and Pakistani rebels who are fighting for the separation of Jammu and Kashmir from India are enemies that need to be combated. If these groups are considered

¹⁸⁶ “State of J & K vs Lakhwinder Kumar & Ors.” *Supreme Court of India*. 2013.

<https://indiankanoon.org/doc/85628420/>

¹⁸⁷ *BSF Act and Rules*. http://mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/bsfAct&Rules.pdf

enemies and operations must be conducted in order to ensure their defeat, as opposed to simply arresting any dissidents who appear to be disturbing public order, it makes sense to consider the situation a war as opposed to a “law and order” issue, as the Indian political state has been doing. Lastly, while it is impossible to rule out choice (c) as the one used by the court without any proof, it is extremely unlikely that it was the option picked. This is because option (c) would imply that the Supreme Court views the situation as one in which the military is occupying a foreign nation, and that would not make sense considering the court recently stated in another ruling that Jammu and Kashmir is “an integral part of the Union of India”¹⁸⁸; the court cannot see Jammu and Kashmir as both a foreign nation and a part of India. Overall, through this analysis it has become clear that considering the Supreme Court’s reasoning in the Lakhwinder case, the court must believe that the situation in Jammu and Kashmir is characteristic of an armed conflict, and therefore it must disagree with the political state’s opinion that the situation is a “law and order” issue.

Not only is it now clear that both the Supreme Court of India and the state’s military view the situation in Jammu and Kashmir quite differently from the Indian political state, but it is also clear that the Supreme Court and the military are most likely correct in identifying the situation as an armed conflict. The reason behind this is that the facts on the ground in Jammu and Kashmir match the factors needed for a situation to qualify as a non-international armed conflict according to Common Article 3. An internal conflict can be defined as, “protracted armed violence between governmental authorities

¹⁸⁸ “State Bank of India V. Santosh Gupta and ANR. Etc.” *Supreme Court of India*. 2016. <http://www.greaterkashmir.com/news/kashmir/full-text-of-supreme-court-judgement-on-sarfaesi-act/236472.html>

and organized armed groups or between such groups.”¹⁸⁹ This definition was developed during the ICTY trial for the case of Dusko Tadic, a former soldier in the paramilitary forces in the former state of Yugoslavia, who was found guilty of infringements of the Geneva Conventions, war crimes and crimes against humanity.¹⁹⁰ It is now used by the ICC, along with additional international criminal courts, including the Special Court for Sierra Leone, to determine whether situations meet the threshold of an internal armed conflict in Common Article 3. From the Tadic case, it was also determined that there are two factors used to determine whether a situation meets the threshold; “the intensity of the conflict and the organization of the parties”¹⁹¹ and they “differentiate a non-international armed conflict from internal tensions and disturbances”¹⁹², which is what the Indian political state has claimed Jammu and Kashmir is suffering from.

Before discussing the factors used to figure out whether or not a situation can be considered intense enough and the parties involved organized enough for Common Article 3 to apply, it is important to point out that this matter can only be officially determined on a case-by-case basis. The reason for this is that every situation is unique and therefore the ins and outs of it must be considered individually instead of simply compared to other situations and conflicts. This is evident through the fact that there are many different indicators and not every situation that falls under the scope of the article has all of them; in fact, most do not exhibit all indicators and although that does not

¹⁸⁹ “Prosecutor V. Tadic.” *Decision on the Defence Motion for Interlocutory Appeal of Jurisdiction: ICTY*. 1995. Para 70. <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>

¹⁹⁰ Sivakumaran, Sandesh. *The Law of Non-International Armed Conflict*. 155.

¹⁹¹ “Prosecutor V. Tadic.” *Decision on the Defence Motion for Interlocutory Appeal of Jurisdiction: ICTY*. Para 562.

¹⁹² Sivakumaran, Sandesh. *The Law of Non-International Armed Conflict*. Oxford: Oxford University Press, 2012. 165.

prevent them from qualifying, it means that they need to be examined in detail by members of a court specialized in armed conflicts, such as the International Criminal Court (ICC), in order to see if they definitely do. However, that does not mean that one cannot take a look at the indicators that are used to determine whether the factors needed to identify a conflict as one that will qualify for the use of Common Article 3, along with previous decisions made by tribunals and the ICC in regards to other strife, and make an educated guess as to whether or not the situation in Jammu and Kashmir would meet the threshold.

As was previously explained, the first factor used to find out if a situation can be defined as a non-international armed conflict according to Common Article 3 is the intensity of the violence. There are many indicators that have been used by tribunals and the ICC to determine if a conflict is intense enough to apply the provision. For instance, since the definition of a non-international armed conflict applied by the ICC uses the word “protracted”, the duration of the fighting is often taken into consideration.¹⁹³ As was explained in the introduction to this paper, the insurgency began in the late 1980’s and has continued through the present day. However, although the insurgency was never put on pause at any point over the last thirty years, it would be false to say that violence was always occurring on a consistent basis. This is important to note considering the fact that the presence of “large-scale” violence is another indicator of intensity.¹⁹⁴ The level of violence in the state has varied over the years; the most recent significant attack occurred on September 15th in the town of Uri when insurgents lobbed grenades onto an

¹⁹³ Ibid, pg. 167

¹⁹⁴ Ibid, pg. 168

army base and seventeen soldiers, along with four militants, were killed and thirty other soldiers were injured.¹⁹⁵ The attack was in response to the Indian army's killing of militant Burhan Wani in July. Ever since Wani's death, the state has been experiencing unrest, as was previously explained in the introduction of this paper; many violent protests have occurred all over Jammu and Kashmir to show support for the militant and led to confrontations with security forces resulting in the death of eighty-seven civilians and the injuring of thousands of people, including both civilians and members of the armed forces.¹⁹⁶ When taking the two factors of duration and large-scale violence into account, it is important to point out that large-scale violence does not need to have occurred on a regular basis for the past thirty years in order for the conflict in Jammu and Kashmir to meet the threshold of Common Article 3. This is evident in the fact that in the *Tablada* case, which concerned the actions of rebels and Argentine military personnel in a Buenos Aires province in 1989, the Inter-American Commission on Human Rights¹⁹⁷ determined that the approximate thirty hours of fighting that had taken place was long enough to trigger the application of Common Article 3.¹⁹⁸ Considering the results of this case, it is quite plausible that if combat that was considered to be large-scale took place in Jammu and Kashmir for over a day's worth of time, it may qualify for application of the article. The *Tablada* incident was similar to the one in *Uri* in that they both involved

¹⁹⁵ Kumar, Hari. "17 Indian Soldiers Killed by Militants in Kashmir." *New York Times*, 2016.

¹⁹⁶ Bengali, Shashank. "Militants Sneak into Indian Army Base and Mow Down Sleeping Soldiers in Kashmir, Killing 18." *Los Angeles Times*, 2016.

¹⁹⁷ The Inter-American Commission on Human Rights is an independent unit of the Organization of American States (OAS). Its purpose is to ensure that human rights are upheld in the American hemisphere. Its decision is relevant for the purposes of this paper because it is often used to determine whether current situations can be considered a non-international armed conflict. Furthermore, its decision is also relevant since the Commission is autonomous and highly respected by the international community, similar to the UN and the ICC.

¹⁹⁸ "Juan Carlos Abella V. Argentina." *The Inter-American Commission on Human Rights*. 1997. <http://hrlibrary.umn.edu/cases/1997/argentina55-97a.html>

armed militants attacking a state military base. Although the attack in Uri only lasted six hours¹⁹⁹, it has been accompanied by multiple smaller attacks ever since, along with protests that turned violent. Furthermore, it is important to point out that “violence of a moderate intensity may amount to an armed conflict if it takes place over an extended duration.”²⁰⁰ Because the hours of violence since this past summer added together surpass the thirty hours that the Tablada incident lasted for, and the insurgency in Jammu and Kashmir has been ongoing for about thirty years now and therefore there has been way over a total of thirty hours of violence in the state, it is possible that Common Article 3 could apply in the state.

In addition to the presence of large-scale violence and the duration of the insurgency, there are many other indicators that a situation meets the threshold for the level of intensity needed for the application of Common Article 3 according to case law; they include “the geographical spread of the violence, the death and injuries caused by the violence, the weapons used by the parties, the involvement of third parties, whether the UNSC or other outside entities, and the granting of amnesties.”²⁰¹ Another indicator, which is recognized as being “of particular significance, is the use of armed forces on the part of the state rather than the use of its police force.”²⁰² Although the police force in Jammu and Kashmir has been active throughout the course of the insurgency, there are also currently 700,000 members of the Indian armed forces stationed in the state.²⁰³ Included in these forces are approximately thirty-five percent of the soldiers enrolled in

¹⁹⁹ Bengali, Shashank. “Militants Sneak into Indian Army Base and Mow Down Sleeping Soldiers in Kashmir, Killing 18.” *Los Angeles Times*, 2016.

²⁰⁰ Sivakumaran, Sandesh. *The Law of Non-International Armed Conflict*. 168.

²⁰¹ *Ibid*, pg. 168

²⁰² *Ibid*, pg. 169

²⁰³ Ghosh, Shrimoyee Nandini. “Kashmir: Let’s Call a War by its Rightful Name.” *The Wire*, 2016.

the Indian army, which has the fourth highest number of troops in the world.²⁰⁴ Taking these numbers into consideration, it is impossible to claim that this indicator has not been reached in the state.

In regards to the other indicators, attacks and violence have taken place in different areas of Jammu and Kashmir, as opposed to just one section of the state. This is evident through the fact that protests that have turned violent have occurred in each district of the state since the death of Burhan Wani.²⁰⁵ Additionally, it is evident through a search of recent insurgency attacks in the state on the website of NDTV, one of India's top news sources, that over the past seven months since the increase in protests began, there have been attacks at least every couple of weeks and in different areas of the state.²⁰⁶ For example, in addition to the attack in Uri, another one occurred on February 23rd when militants attacked an army convoy in the city of Shopian and killed three troops and injured five others.²⁰⁷ Another recent attack, in which another army base was attacked by militants and resulted in the death of seven soldiers on November 30th, took place in the city of Nagrota.²⁰⁸ These three cities are approximately 150 km apart from each other in the eastern part the state. The entire state of Jammu and Kashmir is approximately 40,000 km; therefore, although recent attacks have been spread out, it is clear they have still overall only been occurring in a small part of the state. There does not seem to be mention of attacks in the Western part of the state which is a less

²⁰⁴ Ibid

²⁰⁵ Bengali, Shashank. "Militants Sneak into Indian Army Base and Mow Down Sleeping Soldiers in Kashmir, Killing 18." *Los Angeles Times*, 2016.

²⁰⁶ NDTV. <http://www.ndtv.com/topic/terrorist-attack-kashmir>

²⁰⁷ Masoodi, Nazir. "3 Soldiers Dead in Terror Attack in Jammu and Kashmir's Shopian." NDTV, 2017.

²⁰⁸ "Nagrota Terror Attack: Police Probing Jaish-e-Mohammed Links." NDTV, 2016.

populated area consisting mostly of mountain ranges and lacking city-like features. Considering this information, it is questionable whether the recent attacks have been spread out enough to qualify for the geographic indicator. Although it is certainly questionable, it is important to once again point out the fact that the Tablada incident alone triggered the application of Common Article 3 and in that situation, fighting only took place at one military base, as opposed to in different cities across Argentina.²⁰⁹ Furthermore, it is important to raise the point that in the Boskoski Appeals Judgment, in which Ljube Boskoski had been accused of violating the customs of war by the ICTY, one of the indicators used to show that the situation qualified as an internal armed conflict was the “geographic spread of violence”²¹⁰; however, instead of concentrating on the distance between the cities in which violence was occurring, the ICTY simply noted that the violence had spread to additional cities as opposed to staying localized.²¹¹ Such information indicates that it is not as important how much land is being encompassed by attacks, but rather that the attacks are starting to spread instead of repeatedly occurring in the same area. Through the information provided above in regards to Jammu and Kashmir, it is certainly clear that the attacks are spread out; taking this into consideration, along with the fact that in the Tablada case the attack only occurred in one location, it seems likely that the situation in Jammu and Kashmir can qualify as a non-international armed conflict according to Common Article 3.

In regards to the deaths and injuries indicator, the most relevant recent attack in Jammu and Kashmir is the one that occurred in Uri on September 15th since it resulted in

²⁰⁹ “Juan Carlos Abella V. Argentina.” *The Inter-American Commission on Human Rights*.

²¹⁰ “Prosecutor V. Ljube Boskoski.” *Appeals Judgment: ICTY*. 2010. Par. 22, pg. 9.
http://www.icty.org/x/cases/boskoski_tarculovski/acjug/en/100519_ajudg.pdf

²¹¹ *Ibid*, par. 22, pg. 9

the greatest number of deaths and injuries during one incident than any other attacks in the past two years. As previously mentioned, the attack in Uri left seventeen soldiers, along with four militants, dead and thirty other soldiers injured.²¹² In the Tablada case, twenty-nine soldiers were killed, along with several state agents.²¹³ However, it is also clear that since the death of Wani this past summer, the protests that have resulted have led to the deaths of eighty-seven civilians and militants, and the injuring of thousands of civilians, militants, and soldiers.²¹⁴ Furthermore, if one calculates the number of deaths that have been reported as a result of the smaller attacks the militants have conducted between Wani's death and now, the number adds up to twenty-six soldiers, twenty militants, and seven civilians.²¹⁵ Additionally, the smaller attacks have resulted in the injuring of fifty-one soldiers and sixteen civilians²¹⁶; the number of militants injured does not appear to be listed in news articles, which makes sense considering the fact that it would be impossible to calculate an exact number due to the possibility that some of the attackers may have escaped and therefore their status in regards to being injured would not be known. Overall, this means that since July 8th, 2016, the total number of deaths that have occurred due to violence between armed forces and those who long for the state to secede from India is 163 and the number of injuries that have occurred is in the thousands range. This information, along with the fact that over the past thirty years since

²¹² Kumar, Hari. "17 Indian Soldiers Killed by Militants in Kashmir." *New York Times*, 2016.

²¹³ "Juan Carlos Abella V. Argentina." *The Inter-American Commission on Human Rights*.

²¹⁴ Bengali, Shashank. "Militants Sneak into Indian Army Base and Mow Down Sleeping Soldiers in Kashmir, Killing 18." *Los Angeles Times*, 2016.

²¹⁵ These totals were calculated by adding up all of the reports of deaths due to militant attacks between July 8, 2016 and March 2017. The articles used were from NDTV.com, a leading news source in India that reports on all militant attacks in Jammu and Kashmir.

²¹⁶ These totals were calculated by adding up all of the reports of injuries due to militant attacks between July 8, 2016 and March 2017. The articles used were from NDTV.com, a leading news source in India that reports on all militant attacks in Jammu and Kashmir.

the insurgency began in Jammu and Kashmir, the number of deaths is in the thousands range²¹⁷, indicates that it is very likely that the situation in the state meets the threshold of the death and injuries indicator for intensity.

The next indicator for the level of intensity needed to trigger the application of Common Article 3 is the type of weapons used by the parties. Not only are there a very high number of Indian soldiers stationed in Jammu and Kashmir, but these soldiers are also using,

“military and surveillance weaponry (including for instance unmanned aerial vehicles, or drones), military command and control structures, and military vocabulary (‘command area’, ‘kills’, ‘sanitization’ and ‘neutralization operations’, ‘actionable intelligence’ operational names etc.).”²¹⁸

The use of drones by the Indian military is significant; drones have been used by multiple armies in recent armed conflicts, such as the U.S. in the War on Terror in Pakistan²¹⁹ and Israel in Egypt’s Sinai Peninsula in 2014²²⁰. Furthermore, due to their success in killing targets without putting those soldiers manning them at risk, militaries around the world have invested in their domestic development for the purposes of warfare.²²¹ Taking into consideration the fact that drones are a tool that have been used by armies during recent warfare, and are being developed by other armies incase of future warfare, it is reasonable to assume that there use by the Indian military indicates that the conflict in Jammu and Kashmir is not one of low intensity. Additionally, several weapons were used to determine the application of Common Article 3 in the Mrksic trial, in which the ICTY

²¹⁷ Mathur, Shubh. *The Human Toll of the Kashmir Conflict: Grief and Courage in a South Asian Borderland*. 135.

²¹⁸ Ghosh, Shrimoyee Nandini. “Kashmir: Let’s Call a War by its Rightful Name.” *The Wire*, 2016.

²¹⁹ “US Retires Predator Drones After 15 Years that Changed the ‘War on Terror’.” *The Guardian*, 2017.

²²⁰ “Islamic State Claims Five Members Killed in Israeli Drone Strike.” *The Times of Israel*, 2014.

²²¹ Dillow, Clay. “All of these Countries Now have Armed Drones.” *Fortune*, 2016.

convicted Mile Mrksic, a Colonel of the Yugoslav People’s Army, of violations of the laws of war, along with crimes against humanity. The trial judgment listed the use of “artillery, mortars, armored vehicles, including tanks, weapons such as multiple rocket launchers and anti aircraft batteries.”²²² While there is no mention of the use of mortars, tanks, and anti aircraft batteries in recent articles written about the situation in Jammu and Kashmir, there have been reports of the use of armored vehicles²²³, multiple rocket launchers²²⁴, and artillery²²⁵ since the start of the rise of attacks this past summer. It is also important to point out that reports state that multiple rocket launchers and artillery have not only been used by the Indian military, but also by the militants.²²⁶ Such information suggests that both sides of the conflict have been using weapons that indicate that a situation is violent enough to trigger the application of Common Article 3. Overall, considering all of this information, it is clear that although the Indian army and the militancy in Jammu and Kashmir may not have recently used all of the weapons that triggered the qualification of Common Article 3 in the case of Mrksic, it has certainly used some, along with drones and military vocabulary, and therefore it is possible that this situation may also qualify for the instatement of Common Article 3.

The following indicator of intensity is the involvement of third parties, such as the UNSC. As previously explained in this paper, the UN and the UNCIP have dealt with the conflict multiple times in the late 1940’s and came to the same conclusion that both

²²² “Prosecutor V. Ramush Haradinaj.” *Trial Judgment: ICTY*. 2008. Par. 48, pg. 27.
<http://www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf>

²²³ Das, Bijaya Kumar. “Operation Calm Down: Army Introduces Bullet-Proof Vehicles to Counter Kashmir Stone Pelters.” *India Today*, 2016.

²²⁴ “Indian Kashmir Army Camp Comes Under Fire From Suspected Militants.” *The Japan Times*, 2016.

²²⁵ Bukhari, Fayaz. “Exchange of Artillery Fire After Militants Attacked an Indian Army Base.” *Business Insider*, 2016.

²²⁶ “J&K: Two Terrorists Arrested in Sopore with Rocket Launcher Grenades.” *Indian Express*, 2016.

Pakistani troops and militants, along with the vast majority of Indian troops, needed to be withdrawn from the state so that a plebiscite could be held.²²⁷ Additionally, the UNSC was once involved in the situation back in 1965 during the second Indo-Pakistani war, which was previously explained in this paper as well. It passed a resolution demanding that both sides to the conflict submit to a ceasefire and then negotiate bilaterally in regards to a solution to the ongoing disagreement.²²⁸ In the Tadic case, however, which was previously discussed, the ICTY, when determining whether the situation had met the threshold of a non-international armed conflict, used the fact that the UNSC had been continuously involved in the former Yugoslavia since the fighting first started in the state in 1991 to indicate that it did meet the threshold.²²⁹ While it is true that the UN has not been consistently involved in the situation in Jammu and Kashmir, this does not mean that the conflict has not reached the level of intensity needed to apply Common Article 3. The reason behind this is that even though the UN gets involved when international peace and security are threatened, the lack of their involvement does not mean that international peace and security are not threatened; the organization cannot be involved in every armed conflict all of the time. If it had been consistently involved in Jammu and Kashmir, this would of course be a strong indication that the conflict has met the threshold needed to be considered intense enough to qualify for the application of Common Article 3. However, it cannot be claimed that the lack of the organization's involvement prevents it from being qualified to trigger the application of the article.

²²⁷ Misra. K.K. *Kashmir and India's Foreign Policy*. 106-109.

²²⁸ *United Nations Security Council Resolution 210*.

[http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/210\(1965\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/210(1965))

²²⁹ "Prosecutor V. Tadic." *Trial Judgment: ICTY*. 1997. Par. 567, pg. 196.

<http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>

The final indication of intensity is the granting of amnesties. India has yet to grant its soldiers in Jammu and Kashmir amnesty; however, it is important to note that amnesty is usually granted after a conflict has come to an end, as is evident in the case of the former Yugoslavia, and clearly the conflict in Jammu and Kashmir is still ongoing through the present day. Although amnesties have not been granted in Jammu and Kashmir, the fact that immunity has been is quite significant. India has enforced special provisions such as the AFSPA, which as was previously explained, can be viewed as a form of martial law and allows its troops to take actions that would not be permitted during times of peace.²³⁰ It would be extreme for India to take such measures to deal with a “law and order issue”; such powers are often granted during international and non-international armed conflict as their enforcement indicates that the state’s national security is at risk.²³¹ The reasoning behind this is that granting immunity is essentially granting pre-amnesty before abuses have even occurred to ensure that soldiers do not have to question taking action in order to restore public order; it is implying that those abuses often seen during war will occur and the soldiers need not worry about receiving amnesty since they have already received immunity. Even though it appears that the cases that used the granting of amnesties as an indication that Common Article 3 applies only looked at what was granted at the end of the conflict, as was evident in the trial of Boskoski²³² at the ICTY, the granting of immunity in the case of Jammu and Kashmir could be viewed as an indication that abuses will be completely forgiven at the end of the

²³⁰ “Getting Away with Murder: 50 Years of the Armed Forces (Special Powers) Act.” *Human Rights Watch*. 5.

²³¹ “Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers.” *United Nations Human Rights Office of the High Commissioner*. 822.

²³² “Prosecutor V. Ljube Boskoski.” *Appeals Judgment: ICTY*. 2010. Par. 22, pg. 9.

conflict and therefore there is reason to consider applying the use of Common Article 3 to the situation now.

The second factor used to find out if a situation can be defined as a non-international armed conflict according to Common Article 3 is the organization of the armed group. Figuring out whether or not an armed group is organized enough to trigger the application of the article is quite difficult as there does not seem to be a clear line deciphering between which cases qualify and which do not. Researcher Sandesh Sivakumaran further explains this by stating,

“The precise degree of organization required of the armed group is rather opaque. For example, the Akayesu Trial Chamber referred to armed forces ‘organized to a greater or lesser extent’²³³, while the Limaj Trial Chamber noted that ‘some degree or organization by the parties will suffice’²³⁴. Commentators similarly refer to ‘a modicum of organization’²³⁵, a ‘minimum’²³⁶ level of organization, and a level of organization that ‘must not be exaggerated’²³⁷. Thus, the threshold is not all that high’.²³⁸

Taking this information into consideration, it becomes apparent that although it is difficult to determine exactly how much organization is needed, overall it is understood that only some degree of organization is needed as opposed to complete organization; essentially, it needs to be clear that the group is organized to the point that it can function and plan well-thought-out attacks.

²³³ “Prosecutor V. Jean-Paul Akayesu.” *Trial Judgment: ICTR*. 1998. Par. 620.

<http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf>

²³⁴ “Prosecutor V. Fatmir Limaj.” *Trial Judgment: ICTY*. 2005. Par. 89, pg. 36-37.

<http://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf>

²³⁵ Draper, Giad. *The Red Cross Conventions*. London: Stevens and Sons, 1958. 90. Draper is a researcher who has written several books and articles on international law and the Geneva Conventions.

²³⁶ Cassese, Antonio. *The New Humanitarian Law of Armed Conflict*. Napoli: Editoriale Scientifica, 1979. 163. Cassese was a jurist who concentrated on public international law. He was also the first president of the ICTY.

²³⁷ Kress, Claus. 2009. “War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice.” *Journal of International Criminal Justice*, 20(1): 416. Kress is a professor of international law and criminal law at the University of Cologne in Germany. He is also the author of scholarly work on armed conflicts and international criminal law.

²³⁸ Sivakumaran, Sandesh. *The Law of Non-International Armed Conflict*. 170.

Before explaining the indicia used to determine whether or not armed groups meet the organization threshold, it is important to describe the militant situation in Jammu and Kashmir. The conflict is not one in which the state forces are fighting just one armed group; instead there are many different groups of insurgents fighting in Jammu and Kashmir for the same purpose of diminishing India's control over the state.²³⁹ Although all of them are not organized to a minimum degree, a number of them certainly are, and it is these organizations that are responsible for the majority of the attacks in the state, along with the most violent ones. For the purposes of this paper, the focus will be on the Jaish-e-Mohammed (JEM) in Jammu and Kashmir. The reason behind this is that out of all the militant groups in Jammu and Kashmir, the JEM is considered to be the biggest threat to Indian forces.²⁴⁰ Because of this, it makes sense that this group would be the one, or one of the ones, that could be considered organized enough to trigger the application of Common Article 3 in the state.

There are three main indicia that have been used in case law by the tribunals and the ICC to determine whether or not an armed group is organized enough for Common Article 3 to apply; the courts have looked to see whether an organization has internal structure, whether it has responsible command, and whether it is capable of enforcing rules. When discussing the first indicator, the structure of the organization, it is important to note that more often than not armed groups are secret underground organizations that do not reveal the names of their members or their respective titles. This was the case in the Limaj trial, in which the ICTY charged Fatmir Limaj, a commander of

²³⁹ Laskar, Rezaul H. "For India, Jaish Chief Masood Azhar Bigger Threat than Hafiz Saeed." *Hindustan Times*, 2017.

²⁴⁰ *Ibid*

the Kosovo Liberation Army, with war crimes.²⁴¹ However, although it is usually the case that these organizations hide their information in regards to their structure, it is sometimes uncovered by researchers.

Researchers have been able to uncover that the JEM has a decentralized structure²⁴²; this means that the group is structured horizontally and that power is divided among the different units that it is composed of²⁴³. Even though this type of structure is a lot less clearly defined than the pyramidal structure, the type that is often used by groups that are not underground and by state armies, and in which power is distributed amongst members in the shape of a pyramid with one individual with the most power at top and many lower ranked soldiers at the bottom with the least amount of power, it is still able to meet the requirement for the use of Common Article 3.²⁴⁴ Researcher Sandesh Sivakumaran explains the reasoning behind this by stating, “even decentralized armed groups may be organized, for an armed group will find it difficult to function- carry out hostilities, enforce orders, mete out internal discipline, and the like- without some semblance of a structure.”²⁴⁵ While there are “no reports of any formal governing bodies or councils”²⁴⁶ within the group, there are reports of there being different units dedicated to performing different tasks and an individual who is put in charge of each unit. For example, in addition to militant units dedicated to the planning and carrying out of

²⁴¹ “Prosecutor V. Fatmir Limaj.” *Trial Judgment: ICTY*. Par. 171, pg. 62-63.

²⁴² Cronin, Audrey Kurth and Huda Aden. 2004. “Foreign Terrorist Organizations.” *CRS Report for Congress*, 40-42. Cronin is a professor of International Relations at American University. Previously, she was the Director of the Center for Security Policy Studies. Aden is the Chief of Staff at the University of Virginia’s College at Wise. She is also a researcher who focuses on terrorism and has written multiple articles and books on the subject.

²⁴³ Oberleitner, Gerd. *Human Rights in Armed Conflict*. 215.

²⁴⁴ *Ibid*, pg. 215-216

²⁴⁵ Sivakumaran, Sandesh. *The Law of Non-International Armed Conflict*. 173.

²⁴⁶ Phadnis, Aditi. “What is Jaish-e-Mohammed? All you need to know.” *Business-Standard*, 2016.

attacks, there are reports of propaganda, military affairs, recruitment, and finance units and each of these units has a leader designated to its specific focus who oversees its operations.²⁴⁷ Furthermore, there are reports that the organization even has a pension plan and gives money to the families of members who died during attacks or will be away from home for an extended period of time due to a long mission or imprisonment in India.²⁴⁸ There are also reports of a “lavish new 16-acre headquarters”.²⁴⁹ Such facts indicate that the JEM is indeed a structured organization; it has divided its different functions into units and found a way to manage them with proper leadership, has even begun to organize a benefits program for its members, as is evident by the reports of pension plans, and has a large headquarters in which it is able to conduct its planning. This type of structure, although it is horizontal instead of pyramidal, is similar to what one would see in a state army in that it is well-thought-out and organized enough to deal with the main obstacles that arise for armed groups in conflict. It is also important to point out that these indicators that show that an organization is structured were also used by the ICC and tribunals to determine whether or not an organization could be considered an internal armed conflict in regards to the application of Common Article 3. For instance, in Milosevic’s trial, the ICTY claimed that one of the reasons why the Kosovo Liberation Army could be considered organized was the fact that it had a headquarters.²⁵⁰ Additionally, in the Limaj trial previously discussed, the ICTY mentioned the importance of “discrete roles and responsibilities of differing entities”²⁵¹ as a criteria for an organized

²⁴⁷ Ibid

²⁴⁸ Swami, Praveen. “Jaish-e-Mohammed Rises like a Phoenix.” *Indian Express*, 2016.

²⁴⁹ Ibid

²⁵⁰ “Prosecutor V. Slobodan Milosevic.” *Decision on Motion for Judgment of Acquittal: ICTY*. 2004. Par. 23, pg. 9. http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/040616.pdf

²⁵¹ “Prosecutor V. Fatmir Limaj.” *Trial Judgment: ICTY*. Par. 123, pg. 48.

group. The trial judgment explained how the KLA was divided into different units with each having different jobs to complete in order to contribute to the overall functioning of the organization.²⁵² For example, there was an individual in charge of development, one in charge of making appointments, one in charge of the supply of weapons, etc.²⁵³ Through this type of information provided by the ICTY, it is easy to see how the structure of the JEM is similar to that of the KLA in regards to the divvying up of different tasks into different departments and assigning a head to each department. Overall, this similarity, along with the fact that both organizations have a headquarters, indicates that it is possible that the JEM could be considered organized enough to be recognized as an armed group in a non-international armed conflict according to Common Article 3.

The second indicia often used to determine whether a group is organized enough to instate the use of Common Article 3 is responsible command. Researcher Sandesh Sivakumaran further explains the reasoning behind this phrase by stating, “an early ICRC draft of Additional Protocol II, which was intended to have the same scope of application as Common Article 3 and not the higher threshold which was subsequently adopted, made explicit reference to the idea of ‘organized armed forces under the command of a responsible authority’²⁵⁴ ”.²⁵⁵ This idea of responsible command, however, does not require the organization to have a pyramidal structure with one person at the top of the

²⁵² Ibid, par. 123, pg. 48

²⁵³ Ibid, par. 123, pg. 48

²⁵⁴ “Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts.” *International Committee of the Red Cross*. Par. 2.9 . www.loc.gov/r/r/frd/Military_Law/pdf/RC-conference_Vol-1.pdf

²⁵⁵ Sivakumaran, Sandesh. *The Law of Non-International Armed Conflict*. 174.

chain dictating all of the orders; instead, according to Article 28 of the Rome Statute²⁵⁶, it simply refers to notions of “effective authority and control”²⁵⁷ or a “person effectively acting as a military commander”²⁵⁸. The idea of responsible command was also used by the tribunals to determine whether an organization was organized enough to trigger the application of Common Article 3. For example, it was used to do this in the case of Zdravko Mucic, the Commandant of the Celibici prison camp, who was charged and found guilty of violations of the laws of war and grave breaches of the Geneva Conventions.²⁵⁹ In Mucic’s case, the court looked for evidence that there was some sort of authority in place that had control.²⁶⁰ In the case of the JEM, even though it is overall a decentralized group, there is in fact a single leader of the entire organization; that individual is Maulana Masood Azhar and he is also the organization’s founder and spokesperson.²⁶¹ Furthermore, the JEM also has a military chief, who happens to be Maulana Masood Azhar’s brother, Abdul Rauf Azhar.²⁶² Taking this information into consideration, it is apparent that the JEM does indeed have responsible command and therefore could be organized enough to be recognized as an armed group in a non-international armed conflict according to Common Article 3.

The last indicia of whether an armed group is organized enough to trigger the application of Common Article 3 is the organization’s ability to enforce rules. This

²⁵⁶ The Rome Statute is the treaty that created the International Criminal Court.

²⁵⁷ *Rome Statute of the International Criminal Court*. www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

²⁵⁸ *Ibid*

²⁵⁹ “Prosecutor V. Zdravko Mucic.” *Judgment: ICTY*. 2001. Par. 378, pg. 128. <http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>

²⁶⁰ *Ibid*, par. 378, pg. 128

²⁶¹ “Jaish-e-Mohammed.” *Mapping Militant Organizations: Stanford University*, 2015. <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/95>

²⁶² Swami, Praveen. “Jaish-e-Mohammed Rises like a Phoenix.” *Indian Express*, 2016.

indicator is especially important because an armed group needs to be capable of enforcing rules if it is to be held responsible for enforcing Common Article 3; as previously explained, the Geneva Conventions require all parties to a conflict, including militant groups, to adhere to its provisions.²⁶³ If the militancy's leaders cannot convince its members to follow the rules of the organization, it would be difficult to claim that it would be able to convince them to follow the laws of war. In case law, a group's ability to enforce rules has often been determined by looking into whether it has a disciplinary system and training program.²⁶⁴ The reasoning behind this is that through discipline and training, an organization exerts its ability to implement rules. In the case of the JEM, it is quite clear that an intense training program is provided for members. Leaked information indicates that the training programs take place in the new sixteen-acre headquarters that were recently built for the group; inside the headquarters there is a pool for water training and an arena for horseback riding lessons.²⁶⁵ Recruits usually spend their days completing "physical drills and operational training."²⁶⁶ They are also typically "given lessons on how to handle small arms such as AK-47s and PK machine guns as well as rocket-propelled grenades, tactics for attacking military convoys, and instructions for planting mines...Students found to be quicker learners are given more specialized training in skills such as bomb-making or operational security."²⁶⁷ Taking all of this information into consideration, it is quite clear that the JEM has an extensive training program and is therefore able to exercise effective control over its members.

²⁶³ Oberleitner, Gerd. *Human Rights in Armed Conflict*. 210.

²⁶⁴ Sivakumaran, Sandesh. *The Law of Non-International Armed Conflict*. 170-171.

²⁶⁵ Swami, Praveen. "Jaish-e-Mohammed Rises like a Phoenix." *Indian Express*, 2016.

²⁶⁶ Keating, Joshua E. "Foreign Policy: Lessons at a Terrorist Training Camp." *National Public Radio*, 2010.

²⁶⁷ *Ibid*

Additionally, it is important to point out that in the ICTY trial of Ramush Haradinaj, a leader of the KLA, the military training that was provided to members of the KLA was considered evidence in regards to the organization of the group.²⁶⁸ The trial chamber noted that recruits were taught military tactics and how to use weapons²⁶⁹, which is similar to the training of the members of the JEM previously discussed. In regards to a disciplinary system, there does not seem to be any leaked information available. However, this is not to say that the JEM does not have a disciplinary system; as was explained beforehand, information in regards to these armed groups is usually hidden from the public eye since their operations are covert. Furthermore, because it is evident that the JEM has an extensive training program, along with an organized structure and a leader and military chief, it is very possible that it also has some sort of discipline system. Considering the group even has a pension plan, it would be difficult to imagine that it did not have a discipline system to prevent those militants who do not follow the rules learned in the training program from collecting as much money as those who do follow the rules and excel in the organization. Overall, due to the fact the JEM does have a training program, and one similar to the one discussed in the Haradinaj Trial, and very well could have a disciplinary system that information is yet to be leaked about, it is certainly possible that it could qualify as organized enough to instate the use of Common Article 3 in Jammu and Kashmir.

Throughout this section of the paper, it has become evident that the situation in Jammu and Kashmir is likely able to trigger the application of Common Article 3. The

²⁶⁸ “Prosecutor V. Ramush Haradinaj.” *Trial Judgment: ICTY*. Par. 60, pg. 32-33.

²⁶⁹ *Ibid*, par. 86, pg. 47

reason behind this is that it is clear that there are several factors indicating that the violence has reached the level of intensity needed and that at least one, if not more, of the armed groups fighting the Indian state forces are organized enough. When discussing the indicia used to determine the intensity of the violence and organization of the group, it is important to point out the fact that not all of them need to be present for the use of the article to be triggered.²⁷⁰ This was explained in the Haradinaj trial previously discussed; the Trial Chamber at the ICTY noted that “Trial Chambers have relied on several indicative factors, none of which are, in themselves, essential to establish whether the criterion is fulfilled.”²⁷¹ Taking this into consideration, it becomes evident that a combination of some of the indicators is what makes a situation suitable for the application of Common Article 3; this is exactly what has been found in regards to the situation in Jammu and Kashmir. It is apparent that not all of the indicators are relevant in the situation. The one in regards to third parties, such as the UNSC, most likely does not apply given the fact that any department of the UN has not been involved in the conflict in over fifty years. Furthermore, it is questionable whether the geographic expansion, deaths and injuries, and large-scale violence indicators will apply to the situation. Lastly, in regards to organization, it is unknown if the JEM has a disciplinary system. Overall, however, considering it is clear that a number of other indicators could be viewed as fulfilled, such as the use of armed forces by the state, the use of weapons typically reserved for armed conflict, and the use of a headquarters and training system by the JEM, and because it is not required for all of the indicators to be satisfied, the situation in

²⁷⁰ Sivakumaran, Sandesh. *The Law of Non-International Armed Conflict*. 166-167.

²⁷¹ *Ibid*, par. 60, pg. 62-63

Jammu and Kashmir is likely to qualify for the instatement of Common Article 3. In order to determine whether it definitely does or does not qualify, however, it would be necessary to have the situation in the state properly analyzed by an international court, such as the ICC. The reason this is necessary is that this is a very grey area in international law; there is no set number of indicia needed to trigger the application of the article and there is no way to quantify whether there have been enough deaths, injuries, large-scale attacks, etc. to satisfy an indicator since the application of the article is only determined on a case-by-case basis. Without a complete set of standards clearly listed that explain what exactly is needed to implement the article and without the help of a qualified international court that specializes in armed conflict and has the authority to make the call, all one can do is compare the situation to others that have qualified for the use of Common Article 3 and compare the indicators in the situation to those that are commonly used by the courts to make such decisions as has been done in this section of the paper.

While discussing the application of Common Article 3 to the situation in Jammu and Kashmir, it is also important to point out that Additional Protocol II is another provision in the Geneva Conventions that deals with non-international armed conflicts and prohibits rape. The application of Additional Protocol II would be useful considering it directly prohibits rape, as opposed to indirectly prohibiting it through the prohibition of violence to life and person, outrages upon personal dignity, and torture as Common Article 3 does. It is perceived by some researchers to be more effective for protecting women since it lists rape as its own offense.²⁷² However, the threshold for using the

²⁷² Eriksson, Maria. *Defining Rape: Emerging Obligations for States Under International Law.* 353.

protocol is much higher than that of Common Article 3. A report written by Asia Watch and Physicians for Human Rights further explains this by stating, “the objective conditions which must be satisfied to trigger Protocol II’s application contemplate a situation of classic civil war, essentially comparable to a state of belligerency under customary international law.”²⁷³ At this point in the conflict, there does not seem to be any evidence that there is a civil war underway in Jammu and Kashmir and Human Rights Watch has confirmed this observation by stating that although it is possible that the conflict may qualify for the application of Common Article 3, the violence in the state would have to intensify before it could qualify for the application of Protocol II.²⁷⁴ Additionally, it is arguable that for Protocol II to apply, the armed groups must have conquered some territory in the state that is being fought over²⁷⁵ and that is currently not the case in Jammu and Kashmir. Overall, all of this information indicates that while Protocol II can be used as authoritative guidance for depicting Common Article 3, it itself cannot currently be applied to the situation in Jammu and Kashmir.

Although it is impossible to guarantee that the situation in Jammu and Kashmir qualifies as a non-international armed conflict according to Common Article 3 without confirmation by a court, it is important to show that it is likely that it would qualify because the “two United Nations tribunals established to prosecute persons responsible for serious humanitarian violations in the former Yugoslavia and Rwanda have demonstrated and affirmed that serious violations of Common Article 3 and Additional

²⁷³ “Rape In Kashmir: A Crime of War.” *Asia Watch & Physicians for Human Rights*, 4.

²⁷⁴ “Behind the Kashmir Conflict: The Applicable International Law.” *Human Rights Watch*, 2009.

²⁷⁵ Oberleitner, Gerd. *Human Rights in Armed Conflict*. 218.

Protocol II are acts carrying individual criminal responsibility.”²⁷⁶ While both Common Article 3 and Additional Protocol II do not “contain any implementation or enforcement provisions”²⁷⁷, “the promulgation of the ICTR Statute in 1994 may serve as evidence of the *opinio juris*, which is the legal obligation, of states in respect of individual criminal responsibility for serious violations of Common Article 3 or Additional Protocol II”²⁷⁸. The fact that the Rome Statute of the ICC has included the violation of the article and protocol as crimes that require criminalization, and the jurisprudence of the ICTR and the ICTY also criminalize such violations, indicates that “serious violations of Common Article 3 and Additional Protocol II committed in internal conflicts are now regarded as crimes by the international community.”²⁷⁹

Not only are serious violations of Common Article 3 now perceived as crimes by the international community, but case law of the tribunals and literature written by researchers of international law also indicate that members of the armed forces in Jammu and Kashmir who have raped women may qualify to be held accountable for violating the article. In order to determine if a case qualifies, international courts conduct an analysis

“examining the nature of the conflict, the application of the instruments *ratione loci* and *ratione personae*, and the existence, if any, of a nexus between the alleged acts and the armed conflict. The final step in the analysis is determining whether the alleged violation was serious.”²⁸⁰

²⁷⁶ Boed, Roman. 2003. “Individual Criminal Responsibility for Violations of Article 3 Common to the Geneva Conventions of 1949 and of Additional Protocol II Thereto in the Case Law of the International Criminal Tribunal for Rwanda.” 294.

²⁷⁷ *Ibid*, pg. 293

²⁷⁸ *Ibid*, pg. 300

²⁷⁹ *Ibid*, pg. 302

²⁸⁰ *Ibid*, pg. 306

By “examining the nature of the conflict”, courts determine whether the crime occurred during a non-international armed conflict according to Common Article 3.²⁸¹ In the case of Alfred Musema, the director of the Gisovu Tea Factory who was found guilty of crimes against humanity, the ICTR showed that the crimes Musema committed happened during a non-international armed conflict capable of triggering the application of Common Article 3.²⁸² Considering the discussion above in regards to the situation in Jammu and Kashmir, it is fair to say that it too likely qualifies as a non-international armed conflict according to Common Article 3.

The following indicators that an individual can be punished for violating Common Article 3 are *ratione loci* and *ratione personae*. *Ratione loci* translates to “because of the relevant place or territory” and in the context of the tribunals means that the crime must have occurred on the same territory as the non-international armed conflict.²⁸³ In the case of Musema previously mentioned, the ICTR showed that the abuse he committed happened in Rwanda and therefore he could be held accountable.²⁸⁴ In the case of the rapes committed by members of the Indian armed forces, there is no doubt that they are occurring in the state of Jammu and Kashmir and it is likely that the situation in the state can be considered a non-international armed conflict. *Ratione personae*, on the other hand, translates to “by reason of the person concerned” and in the context of the tribunals means that the victim of the crime must be protected by Common

²⁸¹ Ibid, pg. 306

²⁸² “Prosecutor V. Alfred Musema.” *Judgment and Sentence: ICTR*. 2000. Par. 971.

<http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-96-13/trial-judgements/en/000127.pdf>

²⁸³ Boed, Roman. “Individual Criminal Responsibility for Violations of Article 3 Common to the Geneva Conventions of 1949 and of Additional Protocol II Thereto in the Case Law of the International Criminal Tribunal for Rwanda.” 310.

²⁸⁴ “Prosecutor V. Alfred Musema.” *Judgment and Sentence: ICTR*. Par. 283-284.

Article 3 in order to hold an individual accountable for violating the article.²⁸⁵ For example, in the Mucic case previously discussed, the ICTY indicated that Common Article 3 could apply because the victims were civilians.²⁸⁶ Considering the fact that Common Article 3 protects all civilians who are not participating in hostilities, it certainly protects the women who have been raped by Indian forces in Jammu and Kashmir. This is because there is no indication that the women who have been targeted by the Indian soldiers are participating in the armed conflict and therefore they must be considered civilians.

The next requirement for punishing an individual for violating Common Article 3 is that there is an existence of “a nexus between the alleged acts and the armed conflict”.²⁸⁷ This means that there must be some sort of connection between the crime and the armed conflict. In the case of Jean-Paul Akayesu, a mayor during the Rwandan Genocide who was found guilty of genocide and crimes against humanity, the Appeals Chamber claimed that the “nexus between violations and the armed conflict implies that, in most cases, the perpetrator of the crime will probably have a special relationship with one party to the conflict.”²⁸⁸ In the case of Jammu and Kashmir, the armed forces have a direct relationship to India, one of the parties to the conflict, considering they are working for the state. Therefore, it is certainly possible that a nexus exists between the rapes

²⁸⁵ Boed, Roman. “Individual Criminal Responsibility for Violations of Article 3 Common to the Geneva Conventions of 1949 and of Additional Protocol II Thereto in the Case Law of the International Criminal Tribunal for Rwanda.” 311.

²⁸⁶ “Prosecutor V. Zdravko Mucic.” *Judgment: ICTY*. Supra note 14, pg. 234

²⁸⁷ Boed, Roman. “Individual Criminal Responsibility for Violations of Article 3 Common to the Geneva Conventions of 1949 and of Additional Protocol II Thereto in the Case Law of the International Criminal Tribunal for Rwanda.” 317.

²⁸⁸ “Prosecutor V. Jean-Paul Akayesu.” *Appeals Chamber Judgment: ICTR*. 2001. Par. 444. <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-96-4/appeals-chamber-judgements/en/010601.pdf>

committed by the armed forces and the conflict occurring in Jammu and Kashmir that may trigger the application of criminal accountability.

The final indicator that a person can be held accountable for violating Common Article 3 is if the violation is considered serious. The ICTR has asserted that a serious violation is the infringement of a rule “protecting important values with grave consequences for the victim.”²⁸⁹ Based on this definition, the ICTR determined in the case of Musema previously mentioned, that those acts found in Article 4 of its statute are considered serious violations of Common Article 3²⁹⁰; rape is one of the acts found in Article 4 of the ICTR statute²⁹¹ and is therefore considered a serious violation. Taking this into consideration, the rapes conducted by members of the Indian armed forces in Jammu and Kashmir must be considered serious violations as well.

After analyzing the criteria needed to penalize an individual for violating Common Article 3, and the situation in Jammu and Kashmir, it becomes evident that it is likely that members of the Indian military can be held responsible for the rapes they have committed against Kashmiri women. It is unlikely that the ICC will be able to take their cases, considering India is not a member of the ICC, and the UNSC does not refer cases often. However, the fact that “the promulgation of the ICTR Statute in 1994 may serve as evidence of the *opinio juris*...of states in respect of individual criminal responsibility for serious violations of Common Article 3”²⁹², as was previously mentioned, means that India is expected to prosecute and penalize those accused of rape in its own court system,

²⁸⁹ “Prosecutor V. Alfred Musema.” *Judgment and Sentence: ICTR*. Par. 286.

²⁹⁰ *Ibid*, par. 288

²⁹¹ *Statute of the ICTR*. http://www.icls.de/dokumente/ictr_statute.pdf

²⁹² Boed, Roman. “Individual Criminal Responsibility for Violations of Article 3 Common to the Geneva Conventions of 1949 and of Additional Protocol II Thereto in the Case Law of the International Criminal Tribunal for Rwanda.” 300.

and this expectation will only continue to intensify as the ICC and the tribunals continue to further stimulate international practice, “confirming that perpetrators of violations of international humanitarian law applicable in internal conflicts may be held criminally liable for their acts under customary law.”²⁹³

Chapter 5: Conclusion

Throughout the course of this analysis, it has become apparent that Kashmiri women have been subjected to rape by Indian security personnel since 1989 and continue to be subjected to such abuse by these personnel through the present day. While it is true that no actions have been taken to hold the perpetrators responsible for the crimes they have committed, this paper has indicated that this should no longer be the case. The reason behind this is that international human rights law, and most likely international humanitarian law, specifically Common Article 3, prohibits the rapes that have been conducted by the soldiers in the state. Furthermore, it is possible that the rapes committed by the armed forces can also trigger the requirement of criminal accountability according to the international court statutes of the ICTY and the ICTR. Because of this, India is obligated to prosecute the troops accused of committing rapes in its national courts and penalize the ones found guilty.

The conclusion to this paper is huge in that it offers a possible way to seek justice for Kashmiri women who have been suffering for almost thirty years due to the

²⁹³ Ibid, pg. 300

actions of Indian soldiers. While the fact that it is clear that India is required to hold its armed forces accountable for rape does not mean that it will do so, the findings of this analysis are still huge. This is because even if India does not follow through on its obligations and prosecute those accused of rape, international organizations and states around the world can use the fact that it is required to do so to encourage it to do so. International organizations, especially those focusing on human rights, are always looking for new and creative ways to call states out on the abuses they are either committing or allowing to continue under their watch, and these findings provide just that. The technique of naming and shaming has been used by multiple human rights organizations to successfully persuade states into taking action to protect human rights, and it is possible that it can now be used to persuade India to hold its armed forces accountable for the rapes they have committed in Jammu and Kashmir over the past twenty-eight years.

Lastly, it is important to point out that while this paper specifically focused on rape, there are reports of many other human rights abuses committed by Indian soldiers in Jammu and Kashmir, such as extrajudicial killings and torture that is not of a sexual nature. Since it has been shown that the situation in Jammu and Kashmir is likely to qualify for the application of Common Article 3, if these other forms of abuse fall under the threshold of the article, and are considered serious offenses by the statutes of the ICTR and the ICTY, India would be required to hold the soldiers criminally responsible for committing them as well. The reasoning behind this is that it has already been shown that the other criteria for triggering the requirement of criminal accountability have probably been fulfilled, and this status would not differ between different forms of abuse

committed by troops. Overall, it is fair to say that this paper has arrived at conclusions that are certainly a positive step for seeking accountability for human rights abuses committed by Indian armed forces in Jammu and Kashmir in general, and rape in particular.