

International Humanitarian Law and Laws of War: Kashmir

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Introduction

International humanitarian law plays a vital role in conflicts across the world. As such, the Kashmir conflict provides a rich history plagued by war, destruction, armed conflict, and violations of IHL in both Pakistan and India. In order to place and properly analyze the violations of IHL, the history of the region, conflict and relevant parties must first be presented. The extensive and complicated background of the conflict provides information on the dedication of various groups working to document and curb the violations of IHL in the region. A shift to the current situation and the past ten years allows an inspection

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of the conflict as one with an international or non-international nature. The results are debated based on the actions and statements of the nations, their involvement and cooperation with the ICRC and the precedent of international cases help to clear some of the confusion. The twisted history of the conflict with international wars and Indian declaration of the Kashmir issue as an internal terrorism situation do not help matters. Either way, a brief look into the most basic protections of Common Article 3 of the four Geneva Conventions and qualification of armed groups as combatants provides ample evidence of violations. In the end, only with a renewal of commitment to IHL and international accountability may the parties attempt to replace tension with a just solution to the age-old conflict.

The History

Understanding the long history of this territory is vital in order to fully comprehend what is at stake for India, Pakistan, the region, and the world. Historical, religious, strategic and emotional attachments to the region exist for all involved parties. This only makes the ongoing conflict, violations of international humanitarian law and the need for a comprehensive and just end to the conflict all the more urgent. The story of Jammu and Kashmir (interchangeably referred to as Kashmir) includes Mogul occupation, British colonial rule, religious pluralism, and political contention all in the foreground of a mountainous land of

bountiful resources, tradition, and rich culture. Unfortunately, though, for hundreds of years, and most notably the past 70 years, Kashmir has been mired with a troubled past, an uneasy present, and a tense future.

The strategic importance of Kashmir, no doubt, plays a central role in the conflict. Kashmir location serves as a gateway between South East and Central Asia guarding the Himalayas and the source of numerous glaciers which feed the rivers and waterways flowing throughout Pakistan and India. The area rivals the Golan Heights of Syria, presently occupied by Israel, in its strategic and geographical importance. Parts of Jammu and Kashmir in its former entirety also extend into China, but remain a separate issue from the Indo-Pakistani conflict.¹ Economically, Kashmir is sustained by traditional agriculture and made famous by the expensive and highly demanded namesake: cashmere. Other resources include fruits, vegetables, minerals, timber, and the delicate and expensive saffron used in cooking across Asia and the world.

Throughout history and prior to further escalation of the conflict in 1989, Kashmir was renowned for its attraction to tourists with its natural beauties. The water feeding the lush region provided for canals paralleling it as the "Venice of South Central Asia." A predominantly Muslim population, with large Hindu and Buddhist minorities, traditionally shared the bounties of the region with quasi-autonomy under British colonial rule. The ensuing conflict, however, has displaced minority Hindus into India (due to both Indian encouragement and

fear of reprisal from armed groups), and despite a continuous Muslim majority, their relative numbers have increased. The chart below may provide some insight into the demographics of the portions of Kashmir currently under Indian and Pakistani control.²

Control	Territory	Population	% Muslim	% Hindu	% Buddhist	% Other
India	Jammu		30	66	-	4
	Ladakh		46	-	50	3
	Kashmir Valley	~7 million	95	4	-	-
Pakistan	Northern Areas		99	-	-	-
	Azad Kashmir	~3 million	99	-	-	-

Source: BBC

Jammu and Kashmir under British Rule

British colonialism of the Indian subcontinent extended to the Kashmir region. Jammu and Kashmir was one of over 500 "princely states" under British rule, but was awarded quasi-autonomy. Combined with the Indian independence movement, the Kashmiris began their own "Free Kashmir" movement in the 1930's seeking separation from the British. Upon the closure of World War II and the eve of decolonialization, the British government passed the Indian Independence Act. While both the British and the Indian National Congress, envisioned a "unified, secular, multi-ethnic democracy," the All-India Muslim League forwarded a two-nation theory based on social and geographical

religious lines.³ Attempts of leader Jawharlal Nehru, in the tradition of Mahatma Gandhi, to retain the unity of India, though, went unfulfilled as Muslim leader Mohammed Ali Jinnah feared the future of Muslims in a predominantly Hindu state. British India was partitioned on August 15, 1947 creating the Dominion of India and the Dominion of Pakistan splitting the subcontinent on territorial religious lines. Putting aside the shock and violence that overtook the newly created boundary, the Independence Act did not specify the future of the princely states.

Officially, British rule was revoked and reverted back to the leader of each state. Unofficially, each was to choose their own future with accession to either India or Pakistan depending on geography. The unofficial stance was repeated and encouraged by Viceroy Lord Mountbatten for the states to accede to either Pakistan or India. The leader of Kashmir at the time, Maharaja Hari Singh, held out and refused to join either country. This upset Pakistan, who viewed the move with suspicion due to the Hindu Maharaja ruling over a population with 80% Muslim and assumed based on religious and geographical ties Kashmir should join Pakistan and follow rank with other princely states by acceding one way or another. India also went forward cautiously with hope for attaining the strategically important region as a buffer between newly formed and hostile Pakistan, particularly in the Hindu dominated sections of southern Jammu and Kashmir. Either way both wanted Kashmir for strategic, geopolitical and religious ties and felt uneasy

about an independent Kashmir. Out of fear of losing his political power, the Maharaja signed a Standstill Agreement with Pakistan to allow them to administer communication and railroad services in Kashmir without interruption. India chose not to sign any such agreement. The Maharaja unsurprisingly maintained aspirations of an independent Jammu and Kashmir.

Accession with India

In October of 1947, Pathan tribesmen from Pakistan entered Kashmir to help fellow Muslims in the Poonch region of northern Kashmir and occupied the area. Desperate to hold on to power and retain the integrity of Kashmir, the Maharaja looked to India for help in pushing back the Pakistanis. In return for protecting Kashmir, Maharaja signed the Instrument of Accession on October 26, 1947 as well as a letter of his intentions to then Governor-General of India Lord Mountbatten. Debate over the Maharaja's intention in asking for temporary support stems partly from Lord Mountbatten's reply in which he states:

"My Government has decided to accept the accession of Kashmir State to the Dominion of India. Consistently 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. It is my Government's wish that as soon as law and order have been restored in Kashmir and its soil cleared

of the invader, the question of the State's accession should be settled by a reference to the people."⁴ (Emphasis added.)

The Conflict Begins

The first of many armed conflicts between India and Pakistan in the region begins just months after each is awarded independence: October 1947. Upon receiving the Maharaja's plea, India sends troops and regains control over much of the area but not before they engage Pakistani troops in battle in their first Indo-Pakistani war over Kashmir. Responding to requests from both parties to mediate the dispute, the Security Council of the newly formed United Nations mandates a cease-fire on January 1, 1949 establishing the "line of control" (LOC) with India possessing much control over the territory. The newly formed UN tries to bring an end to the conflict with the Security Council producing several non-binding, relatively weak resolutions. It does manage, however, to establish a somewhat permanent role in the conflict by monitoring the cease-fire line and recognizing need for a plebiscite among Kashmiris to determine which country they will join as recommended by former British Viceroy Lord Mountbatten.⁵ To this day, the UN maintains its role in Kashmir with the United Nations Military Observer Group in India and Pakistan (UNMOGIP). With its support for a plebiscite in the disputed territory, the UN did bow to Indian and Pakistani pressure by ruling out Kashmiri independence and establishing a de facto reversal

of the Maharaja's accession treaty of joining India; a move India resents to this day and Pakistan reiterates.

In 1956, the entirety of Kashmir is incorporated into the Indian Constitution with Article 370, affirming the Maharaja's accession and denouncing Pakistani "occupation", and unofficially awarded the similar autonomy it enjoyed under British rule. (This status has long been revoked by the Indian government due to ensuing armed conflicts, troop presence, and the rise of resistance groups.) Surprisingly, in that same year, the pacifist Prime Minister Jawharlal Nehru of India offers Pakistani leader Mohammed Ali Bogra a plebiscite in all of Kashmir. Political turmoil and pressure from militant and aspiring leader Ayub Khan of Pakistan leads to a rejection and perhaps the biggest failure in the entire conflict. Consequent alignment of Pakistan with the U.S. in a Cold War alliance, American suspicions of India's neutral Cold War stance and close relationship with the U.S.S.R. further degenerates relations between the two countries. This leads only to military build-up and armed conflict resulting in massive international and humanitarian law violations into the present day.

The next war in 1965 begins with the invasion of Pakistani-supported freedom fighters (Mujahideen) into Indian-controlled Kashmir. This war lasts only 17 days and ends with a stalemate. The resulting talks led the UN Security Council to emphasize the need for negotiation and meditation rather than its traditional push for self-

determination via a plebiscite. This move is seen as an appeasement toward India who refuses to consider a vote in Kashmir as an option. The Tashkent Declaration of that year, while leading to no improvement of the conflict, affirms the 1949 cease-fire line as a quasi-border between Indian and Pakistani-controlled portions of Kashmir.

Just six years later, India's 1971 invasion of East Pakistan distracts Pakistan and leads to the secession of the area and the creation of Bangladesh as a nation. India takes advantage of a pre-occupied neighbor to gain territory in Kashmir and declares a victory. The Simla Agreement of July 2, 1972 replaces the 1949 line with the current LOC and prohibits either country from unilaterally changing the situation on the ground. The LOC remains in place to this day, under UNMOGIP administration, giving Pakistan approximately one-third of control over "Azad" Kashmir and the remaining two-thirds, including Kashmir's ancient capital of Srinagar, to India.⁶ While the LOC is meant as temporary rather than a permanent border and is not internationally recognized as such, it remained during the stalemate of the past 34 years and has created a de-facto division of Kashmir.

The nuclear build-up between the two countries in the last decade only adds more hostility and mis-trust to the situation. India's initial nuclear test in 1974 was followed by both Pakistan and India testing nukes in 1998. The rise of insurgents, guerilla warfare, and bombings in India and Indian-Kashmir since 1989 heightened tensions in 2001 and

2002 with near-war. The post-September 11, 2001 U.S. declared "War on Terrorism" significantly alters U.S. and Indo-Pakistani relations. As a prize for their cooperation and alliance, America's removal of sanctions placed on the two countries as a punishment for their nuclear ambitions created warm ties with Pakistan as they fought to defeat Al-Qaeda and the Taliban. Moral and military support for India in their terrorist "situation" in Kashmir peaked with President George W. Bush's recent visit to the country.

The post-September 11th Indian Prevention of Terrorism Act of 2002 aims to quell insurgent, guerilla, and separatist movements in Indian Kashmir. With America's blessing, India uses this act to arrest and detain thousands of suspected terrorists in jails across India often denying them speedy trials or access to health, hygiene, and sanitation needs, but threatening them with the punishment of guilt: death. Although lacking hard evidence, Pakistan continues to financially support armed groups, many of which have been accused of terrorist and separatist activities in Kashmir and India. Despite close to 60 years of on-going conflict, the past 10 years has shown the vast amount of international humanitarian law violations combined with the most improvements thanks to the work of the International Committee of the Red Cross and their documentation of events, registration of detainees, and attempts to protect civilians caught in the conflict.

The Parties

Numerous parties ranging from non-governmental organizations, governments, and armed groups must be recognized when studying this complicated issue. Most of the work of international and non-governmental organizations is concentrated in the Indian portions of Kashmir due to the more pressing and widespread allegations of humanitarian and international law violations. First and foremost, the ICRC as the keepers of IHL works tirelessly to register detainees, provide basic training to soldiers and protect and repatriate civilians. NGO's such as Human Rights Watch and Amnesty International take great risks in collecting and publishing information, since the Indian government's stance does not allow for openly conducting human rights or IHL monitoring. A lot of the information these groups obtain is done so secretly for fear of the lives of those who cooperate to provide information, details, and interviews. The United Nations with the UNMOGIP has worked to least prevent, mediate, and control the spread of hostilities with their maintenance of the LOC since 1949. Currently the UNMOGIP force includes 42 military observers, 21 international civilian personnel from countries acceptable by India and Pakistan as well as 47 local civilian staff.⁷ Throughout their mission, UNMOGIP fatalities include a total of ten people from the various positions.⁸ Aside from its military involvement, UN bodies also submit reports and findings of violations within the countries and directly relating to the

Kashmir conflict.

The Governments of India and Pakistan compose the official parties of the conflict and possible solution. Their armies and soldiers and their actions are accountable to international and humanitarian law. Various sections of India's armed forces active in Kashmir include the Army, Border Security Forces, Rashtriya Rifles, Special Operation Groups and state police. These groups amount to more than 600,000 individuals in Indian controlled Kashmir during heightened tensions.⁹ While official numbers of troops for either side is a rarity, estimates mark Pakistani troops in Kashmir anywhere between 5,000 and 10,000 while it is likely to be much higher. The bulk of these troops are along the Kashmir-Afghan border to protect and prevent infiltration of Taliban runaways and foreign fighters.

The existence of multiple religious, ethnic, and separatist groups in the Kashmir region creates a dilemma when determining the role and impact of IHL in the conflict. Just some of the known and active armed groups include: Harakat-ul Ansar, Lashkar-i-Taiba (Army of the Pure), and Hizb-ul Mujahideen. The first two groups are believed to include non-Kashmiri's while all allegedly receive arms and training from Pakistan.¹⁰ Hizb-ul-Mujahideen is an Islamist group and Kashmir's largest armed guerilla group.¹¹ Jammu and Kashmir Liberation Front (JKLF), the most popular among these groups, abandoned their struggle in 1994 with a self-declared cease-fire.¹² The local state government in

Indian Kashmir has established several local Village Defense Committees (VDC) composed primarily of Hindus to guarantee the safety of the inhabitants and seen as militants supported by the state.¹³

The Status Quo

Unfortunately, a comparison of the current situation in relation to the history of the conflict does not reveal much change. The status of Kashmir remains on hold as India and Pakistan possess control over much of the territory as well as smaller portions under Chinese control. While Pakistan's concession of some Kashmiri territory to China is hotly contested by India, that issue remains separate from the IHL concerns pertaining to the conflict between India and Pakistan. The line of control (LOC) remains in a virtual freeze since 1971 alongside unstable relations. Every few years, the nations near the brink of war, as in the summer of 2002, due to continuous attacks and counter-attacks between Indian government forces and the various armed groups they allege Pakistan arms.

While the Simla Agreement committing to a bilateral solution was reaffirmed by both parties in 1997, civilians continue to suffer the most with an estimated 70,000 civilian fatalities between 1990 and 2000.¹⁴ Recent improvements in relations allow for resumption of some normal activities between the two countries but life continues to be a struggle for civilians within Kashmir as the situation on the ground remains tense.

President Bush's recent call for resolving the Kashmir issue may provide some light, but is most likely to be lost amid more pressing security and weapons agreements within the region. Reviewing the situation under the umbrella of international humanitarian law may further darken the image of this twisted conflict.

International Humanitarian Law and the Kashmir Conflict

Now that one is able to reference the long and gruesome history of the conflict, it is not hard to guess that it is accompanied with similar breaches of IHL. Extensive treaties, conventions, and protocols exist regarding IHL and the laws of war, however the main concern for this conflict is of the four Geneva Conventions and, where relevant, their Protocols. In order to determine the scope of violations, the applicable and relevant aspects of IHL must be identified and determined based on several factors:

1. The action and statements of the relevant governments (India and Pakistan);
2. The involvement of and cooperation with the ICRC;
3. Precedent of previous cases and similar situations on how and when to apply appropriate IHL.

In considering the applicability of IHL, one must note that both Pakistan and India have signed and ratified the four Geneva Conventions of 1949 along with 190 other countries.¹⁵ India ratified the

Conventions on November 11, 1950 while Pakistan held reservations on their ratification of June 12, 1951.¹⁶ While 160 nations have ratified either one or both of the Protocols to the Conventions of 1977, neither country has signed nor ratified either of the two Protocols.¹⁷ Indian law incorporated the Geneva Conventions into its domestic law with the Indian Geneva Conventions Act of 1960 while Pakistan has no such comparable domestic statutes.¹⁸ This incorporation of IHL into domestic law is important in presenting the dedication of each party to their international obligations but not entirely necessary since most elements of the four Geneva Conventions are considered as customary international law which all states are bound to follow. While it is easy to argue that rape, terrorism, and the killing of civilians are violations of all IHL, it becomes more difficult to determine when or if the armed conflict in Kashmir is of an international or non-international nature.

The Character of the Conflict

The history of the conflict appears to categorize Kashmir as an international armed conflict involving India, Pakistan, the United Kingdom, and even the United Nations. To this date, no final settlement has been reached in bilateral or multilateral agreements other than the maintenance of the LOC as monitored by UNMOGIP. On the other hand, the ICRC's work and reports of the conflict see much of the IHL concerns relating to India's actions and policies towards the disputed

territory. Legal scholars writing on the issue look at India's claims of a non-international armed conflict but find it hard to reconcile that with some of their actions.

India itself considers the matter as an internal issue and backs that with its 2002 Prevention of Terrorism Act, used conveniently to jail dissidents and critics of their policies in Kashmir as well as for legitimate terrorist concerns. To go even further in history, India has incorporated Kashmir (the entire disputed territory of Jammu and Kashmir) into its Constitution effectively rendering all Indian domestic law (including anti-terrorism laws) applicable in the territory. Based on India's Geneva Convention Act, Indian law empowers the Union Secretary of India to determine whether a conflict is international or internal. With this law, even in the case of non-international conflict, IHL becomes applicable and the government is required to allow the ICRC to access detainees. Judging by India's cooperation with the ICRC there is a commitment to IHL in the Kashmir case, even if only in the non-international sense.

Each year, the ICRC publishes a report on its work, progress and findings in each country. The organization's work in India includes training of IHL for soldiers, students and professors by translating their Code of Conduct and other important documents into Hindi and other local languages. It also documents visits to detainees of the Kashmir conflict as well as Red Cross Messages (RCMs) sent between the detainees and their families. The ICRC Annual Reports from 1996-

2003 reveal the commitment of India and the ICRC to visit and insure the safety, health, and protection of detainees and their rights to notify family of their status. The chart below shows the work of the ICRC over eight years.¹⁹

Jammu and Kashmir	1996	1997	1998	1999	2000	2001	2002	2003	Totals
Detainees	3,210	1,153	752	1,407	803	610	868	626	9,429
RCMs	-	-	432	703	768	205	143	130	2,381

The ICRC notes in its reports that the registration of detainees is exclusively of those held within Indian Kashmir. It has never been allowed access to places of detention outside the territory despite repeated requests and maintains that detainees should not be held beyond the area of conflict. Indian cooperation, while not complete, has been substantial in allowing IHL to be upheld and revealing violations. Considering most of the IHL concerns and violations concentrate on India, Pakistan plays the role of a silent partner supporting a bilateral agreement while hoping for international support and mediation due to its position. Its lack of domestic law incorporating the IHL of the Geneva Conventions remains a concern, although Indian incorporation proves domestic law does not necessitate compliance. Controlling just one-third of the Kashmir territory places Pakistan in an uncomfortable position, prompting it to provide arms and troops to various groups to destabilize Indian Kashmir in its favor. While these accusations, despite their strong likelihood, cannot be proven, either the incorporation of all of Kashmir

into Pakistan or the independence of the region would prove much more advantageous to Pakistan due to Kashmir's religious and historical ties to the nation. Pakistan continues to back Mountbatten's and the UN's plebiscite request within the purview of an internationally mediated yet bilateral agreement. Continued support for anything against Indian "occupation" of Kashmir and at times the self-determination of the Kashmiri people, Pakistan with its weaker position in relation to India and their work with the ICRC lean towards support for recognition of the conflict as international. Much of ICRC's work regarding Kashmir conflict and Pakistan relates to Indian prisoners of war and monitoring the LOC. There have been occasions where Pakistan refused access to detainees, but later supported the transfer and exchange of POW's. The ICRC works closely with the Pakistani Red Crescent society to help civilians internally displaced by the conflict as well as providing them with medical care. Training troops on the basics of IHL remains in ICRC's programs in Pakistan as in India.

Just a brief look at the actions of each state is quickly overshadowed by their long-standing involvement and overall cooperation with the ICRC. These actions qualify as acceptance of the ICRC's role and responsibilities to upholding IHL as well as de-facto recognition of the conflict as an international one. Also of significance is the precedence of previous cases of contention. Where there is doubt regarding applicability of IHL, Yugoslavian and Colombian cases may provide

some light.

Cases for Consideration

In a Colombian case on the applicability of Protocol I in their domestic situation, the judges bring about very important issues.²⁰ In emphasizing the lack of reciprocity in IHL, the court goes on to say that all armed individuals, whether from irregular groups or national forces, are under the obligation of following the laws and basic rules of IHL, whether or not they are a party to the agreement and regardless of the adherence of the opposing side. For the armed groups of Kashmir, this is a vital aspect to consider. They go on that by following IHL, the legal status of armed groups does not change and they are still subject to the laws of the state in which they reside. Considering that most of the armed groups ignore this and continue to target civilian populations, it appears that they do not heed such calls for obedience of IHL. Despite the controversy over interpretation, the court also affirms the Martens Clause of 1899 stating that in cases not addressed by codified law, all peoples in a conflict shall be under the protection of principles of humanity as based on the conscience of the public and international community. Since neither Pakistan nor India has ratified either of the two Protocols, which would include much of the applicable law, it appears the Martens Clause calls upon them to treat all individuals in accordance with standard practice.

The International Criminal Tribunal for the former Yugoslavia provides further clarification on identifying conflicts as internal or international.²¹ It emphasizes looking to the practices and statements of states, as shown above, in determining when and how to apply law to internal conflicts. Where the time and place of a conflict begins, the tribunal held that the application of the relevant laws extends "beyond the cessation of fighting." Considering the Kashmir conflict began as an international war between Pakistan and India and has not yet reached peaceful conclusion, this would indicate that the laws pertaining to international armed conflict never ceased to apply. It also goes through the aspects of Common Article 3 of all the Geneva Conventions protecting civilians and reiterates the International Court of Justice's affirmations of the Article as basic and customary element of IHL. Interestingly, though, they state that individuals who are actively involved in armed conflict as part of a resistance movement against the state can qualify as victims of crimes against humanity where they are targeted as part of an attack against a civilian population. The vast work of the ICTY provides ample information and detail as well as the extensive dilemmas involved in attempting to reconcile the basic rules and customs of law with the identification of international and internal armed conflicts.

The dual nature of this conflict forces one to remember the intention and purpose of IHL:

- To make fighting armed conflicts difficult partly by protecting

civilians and awarding guarantees to captured, killed, and surrendering combatants;

- To protect of life and human dignity of people who do not get involved in armed conflict or hors de combat;
- To limit the means and methods of warfare.

Both parties involved are bound by the Geneva Conventions which has formed the basis of resolving the conflict, protecting civilians and the work of the ICRC. Pakistan is not without fault, at least in relation to exacerbating the conflict with various forms of support for armed groups responsible for attacks in Kashmir and within India. India, however, while incorporating IHL in its domestic law, continues to violate at minimum its domestic IHL obligations and its international obligations by attempting to forge the conflict as an internal terrorism issue thus ruling out more immediate and pressing IHL requirements. Considering this and the arguments above, one may at minimum look at Common Article 3 to the Geneva Conventions to isolate, just some of the violations.

Character as a Non-International Armed Conflict: Common Article 3

Considering that both states have not signed or ratified the additional Protocols to the Geneva Conventions and that the Protocols are not yet considered to be customary international law binding upon all states, exclusive attention is placed on the Geneva Conventions.²² When

addressing non-international armed conflicts, only Article 3 common to all four conventions addresses such conflict and emphasizes the basic protections and requirements of conducting hostilities in relation to civilians, the wounded and sick. An excerpt for reference follows below: 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, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

India has continuously refuses to allow human rights and IHL actors (both internationally and domestically based) to conduct open research in the country. This unfortunately forces many of the organizations to work undercover to find and disclose what may be just a fraction of the reality. The reports and levels of violations range from summary execution of suspected militants to torture, rape, and arbitrary arrest against Kashmiri citizens culminating.²³ This culminated to

produce 1000 complaints against the conduct of Indian Army soldiers in Jammu and Kashmir in 1999 alone.²⁴ Going back to 1990, reports flourish on the killing of unarmed protesters, burning of villages as “collective punishment” for attacks, and the holding of detainees in unofficial detention centers outside of Kashmir.²⁵ Despite the notable efforts and success of the ICRC in registering and interviewing many Indian held detainees, their main complaint has been the refused access to detainees in unofficial centers outside the area of conflict. Many people have also been assassinated, kidnapped, harassed, and assaulted as part of joint ventures between Indian security forces and local supporters where the victims often never returned.²⁶ United Nations reports also site numerous reports of torture, rape, arbitrary arrest, and detention of Kashmiris interviewed, the majority of which include torture while in detention.²⁷ The violations are not exclusive to India.

Human Rights Watch features detailed reports including similar allegations against the Indian government, but also cites the massive IHL concerns over the activities of the militant groups. Every conflict has at minimum two sides. The Kashmir situation is no different and includes numerous armed groups at battle with what often seems like the Indian public. Reports of IHL violations by the groups set their foundations in training and support (financial and arms) from the Pakistani government. The UN discredits Pakistani admission for providing such support to mercenary groups engaged in terrorism in Indian Kashmir

due to their failure to acknowledge the training, arming, and sanctuary provided to them.²⁸ The groups show no discrimination in their attacks as their victims include all ethnic and religious backgrounds in attacks ranging from bus and train bombs to explosives placed in crowded areas during religious festivals.

The violations listed above are just some of the many violations of the most basic guarantees awarded by Common Article 3's protection. Obviously for India with the bulk of the grave breaches, characterizing the conflict as an internal one provides much more of an open hand to deal with it. No doubt the extension of Kashmiri struggle into attacks and terrorizing the Indian public should be addressed with proper domestic terrorism laws. The Kashmiri groups fighting and attacking Indian soldiers brings in the question of whether or not such individuals count as combatants or civilians and what laws of protection they are entitled to under the umbrella of international armed conflict.

Character as an International Armed Conflict: The Status of Combatants

Looking to laws relevant of international armed-conflict, similar violations are found with the dilemma of distinguishing combatants from civilians. The UN Special Rapporteur on Terrorism and Human Rights points to the protection of occupied people striving for self-determination as combatants under IHL and the operations carried

out on both sides should be judged based on IHL.²⁹ Many of the armed groups do not seem to fit even the most basic requirements of having a responsible chain of command, wearing something distinguishable from the population or carrying arms openly as Article 4 (2) of Convention 3 sets forth. The groups definitely do not abide by IHL as their attacks on civilians throughout India and Kashmir show, and all these aspects appears to disqualify them from obtaining prisoner-of-war status when they are captured. Even where one or more minor groups may meet the qualifications, they are overshadowed by the violators.

Perhaps most importantly, though, is that they do not represent a state. Their lack of a nation destroys almost any chance of obtaining legitimacy. Often the situation of Palestinians is looked to for guidance, but more often than not it diverts attention away from reaching any kind of conclusion for the status of Kashmiri fighters. In instances of combat between Indian and Pakistani forces, combatants are clearly distinguishable for (hopefully) obvious purposes. Despite the fact that even national forces may not always abide by IHL, the fact remains that their allegiance to a state awards them all the necessary legitimacy needed in any conflict. No decisions on the Kashmir issue exist in the International Court of Justice, but the cases referenced above and their basic requirement of such armed groups to meet the standards of Article 4(2) of Convention 3 does not bode well for their status. The major armed groups such as Lashkar-i-Taiba and Harakat-ul Ansar frequently take

responsibility for violent attacks on civilians and other Indian targets. Their lack of respect of IHL does nothing more than erode their cause and leave them susceptible to the corrupt Indian judicial system and their laws on terrorism. Considering the overwhelming amount of violations just under the most basic protections of Common Article 3, it can easily be assumed that the extent and level of violations would only increase with the proper expansion of the applicable laws to that of an international armed conflict. The full attention necessary for that aspect of the conflict, however, may be reserved for another time. As the identification of the individuals, groups, and conflict as a whole continues on a path of confusion and destruction, the possibility for hope and resolution diminishes.

Hope for the Future?

All parties must restate and reinforce their commitment to IHL by taking necessary steps for ending the violations and moving towards a just and final settlement in the conflict. Beginning with the states, both Pakistan and India should look to fulfilling their initial commitments to IHL. India's incorporation of IHL into domestic law must be followed with active commitment and upholding of those laws, including the prosecution of individuals responsible for violations and providing due process to suspected militants involved in attacks against civilians. Similarly, in respect to the ICRC, the parties must allow detainees held

outside of Kashmir to be registered, visited, and allow groups to monitor their progress towards their international commitments. Pakistan's cessation of support for the armed groups will lead to a significant decrease in tensions as the decrease in attacking capability of the groups would create an environment suitable for negotiation. More importantly, taking prompt steps to incorporate the Geneva Conventions into its current domestic law would signify their commitment to IHL. Of course the ratification of both Protocols to the Geneva Conventions by India and Pakistan would provide clarification to the laws applicable to the Kashmir conflict. This combined with demands from the international community for accountability of IHL would help towards achieving a final solution of the conflict. According to Common Article 1 of the Geneva Conventions, all states party to them are obliged to "respect and to ensure respect" towards the Conventions. This means that not only do they have to respect the Conventions themselves, but they also have to make other parties respect them and react against the violations. Thus all the parties to the Conventions, (the states all over the world), have an obligation to take steps to made India and Pakistan respect IHL.

Positive steps to resolving the conflict would include UN brokered talks preferably in the disputed territory or any location where the two sides can negotiate bilaterally based on the Simla Agreement. Reaffirmation of previous calls for a plebiscite in Kashmir as part of the final solution, with the option of independence, would cement the

spirit of democracy and self-determination. As one of the few positive results of the British involvement in the regional conflict, a plebiscite and productive role in solving the issue could significantly improve their standing with all parties. President Bush's recent visit to India and Pakistan intended to bring up the issue of Kashmir, but the extent of these talks was overshadowed by the military and arms agreement with India. It seems that a conclusion of the Kashmir issue may be complicated by the new War on Terrorism and the post-9/11 world.

The lack of an international definition of terrorism complicates matters for non-state groups like those in Kashmir, Chechnya, and Palestine. The current identification of many acts of self-determination and internal struggles as terrorism implies a dangerously loose acceptance of the word. The weakening of IHL with Guantanamo, Iraq, and Afghanistan cases poses serious risks to the future respect for and upholding of IHL. Furthermore, the threat of Al-Qaeda and Taliban runaways looking to join, help, or fund Kashmiri groups could seriously alter the future of the region and change the face of the conflict. Despite the many difficulties, the actions of the states combined with the dedication of the ICRC provides great hope for the future of IHL in context of international relations and the Kashmir conflict. □

Notes:

1. The portions of Kashmir annexed by China are disputed by India as illegally occupied, but are minimal in concern for our discussion pertaining to the Indo-Pakistani conflict over Jammu and Kashmir and the IHL violations there.
2. "The Future of Kashmir." BBC Source: Indian/Pakistani Government Censuses. <http://news.bbc.co.uk/1/shared/spl/hi/south_asia/03/kashmir_future/html/default.stm>. 7 March 2005.
3. Farrell, Brian. "The Role of International Law in the Kashmir Conflict." Penn State International Law Review, Volume 21:2 (2002-2003): 295.
4. Ibid, p. 298.
5. See UNSC Resolution 47 (1948), outlining the structure for a permanent solution including demilitarization and a plebiscite.
6. Azad means "free" in the Urdu language spoken in Pakistan and parts of India. The territory under Pakistani control is often referred to as "Azad Kashmir".
7. "UNMOGIP Facts and Figures." United Nations Department of Peacekeeping Operations. <<http://www.un.org/Depts/dpko/misison/unmogip/facts.html>> 26 January 2005. Contributors of military personnel include Belgium, Chile, Croatia, Denmark, Finland, Italy, Republic of Korea, Sweden, and Uruguay.
8. Ibid.
9. "Kashmir." Armed Conflict in the World Today, Document Centre. <<http://www.webcom.com/hrin/parker/2000reports.html>>. 26 January 2006.
10. Human Rights Watch 1999 Report on Kashmir. <<http://www.hrw.org/reports/1999/Kashmir>>. 25 January 2006.
11. "Rights Forum Calls for Probe into Kashmir Killings." The Hindu. 24 August 2000. Accessed via Lexis-Nexis. 22 February 2006.
12. Human Rights Watch 1999 Report on Kashmir.
13. "Rights Forum Calls for Probe into Kashmir Killings."
14. "Kashmir." Armed Conflict in the World Today, Document Centre.
15. "ICRC Database on International Humanitarian Law." International Committee of the Red Cross. <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList2/Info_resources:IHL_databases>. 26 January 2006.
16. Ibid. Pakistan held reservations on the fourth Convention in Article 44 (concerning enemies of the state) and Article 68, Paragraph 2 (to allow the death penalty).
17. Ibid.
18. "Pakistan not Implementing Geneva Conventions," The Nation. 25 June 2005. Accessed via Lexis-Nexis. 22 February 2006.
19. "New Delhi, Regional Delegation (Bangladesh, Bhutan, India, Maldives, Myanmar, Nepal)." Annual Reports 1996-2003. International Committee of the Red Cross. ICRC website <<http://www.icrc.org>> 26 January 2006. Those in

bold denote number of detainees visited and registered for the first time ever by the ICRC. There is no data for the years 1996 and 1997 on the RCMs dealing specifically with detainees in Jammu and Kashmir.

20. "Colombia: Case No. 176, Colombia, Constitutional Conformity of Protocol II." Handout Source: RULING No. C-225/95, Re: File No. L.A.T.21 "Decisions by the ICTY: Case No. 160, ICTY, Prosecutor v. Tadic." Handout Source: United Nations. "International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. Case No. IT-94-1-AR72. 2 October 1995.

22. Although 163 nations have ratified Protocol 1 and 159 nations have ratified Protocol 2, the absence of major powers such as the United States to these does not yet render the additional laws and protections called for as binding upon the international community.

23. Kashmir." Armed Conflict in the World Today, Document Centre.

24. Ibid.

25. Gossman, Patricia. "Kashmir and International Law: How War Crimes Fuel the Conflict. Crimes of War Project. 17 July 2002. <<http://www.crimesofwar.org/print/onnews/kashmir-print.html>> 25 January 2006.

26. Ibid.

27. United Nations Documents: (E/CN.4/1993/25; E/CN.4/1993/26) Reports of the UN Economic and Social Council (ECOSOC).

28. United Nations Document E/CN.4/1995/29

29. Parker, Karen. "Statement of Karen Parker." International Kashmir Peace Conference. Association of Humanitarian Lawyers. 24 September 2004. <<http://www.humanlaw.org/KPstatement.html>> 26 January 2006.