

Genocide in Kashmir: Right of Self-Determination, UNSC Resolutions and Holding India To Account Under International Humanitarian Law

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Abstract

Kashmir has been a flashpoint of conflict since independence from British rule in 1947 and the partition of India into two states. These two countries, India, and Pakistan, have both claimed the land on the northern most sector of the Subcontinent the focal point of which is the Valley of Kashmir. The conflict is not a domestic dispute or a regional issue between the two protagonists but engages international law because of the human rights violations and the atrocities committed that has engaged international humanitarian law. The occupation by India of Kashmir was controversial from the start as it went against the aspirations of the population who had close affinity and kinship with Pakistan. The United Nations Security Council mandated a referendum to decide the future of the territory divided by a Line of Control, a military boundary, but India has refused to implement the resolutions. The Indian army has cracked down on the population under the Special Powers Act 1958 and various other opaque ordinances that oppress the population. The final act in this *de facto* occupation was transformed into *de jure* control by the Indian Parliament when it revoked Article 370 and Article 35 of the Constitution and annexed Kashmir. The Valley has been placed under lockdown and the population disfranchised with all political activity banned and demographic changes underway by a government appointed by India. The pogroms committed by the Security forces and the gross abuses of human rights have been catalogued in two UN Human Rights Council reports that implicate the Indian forces. The argument of this paper is that there should be rigorous application of international law and war crimes tribunals should be invested to prosecute the Indian officials for breaches of human rights established in the conduct of non-international conflicts (NIC).

I. Introduction

The international law dimension of the Kashmir dispute concerns the occupation and the subjection of a population by an alien power that has committed “human rights violations through militarised control” and the immunity of its forces from prosecution.¹ The organisation of force that has been used over the inhabitants of the Kashmir commenced

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¹ Sarbani Sharma, ‘Epistemes of Human Rights in Kashmir: Paradoxes of Universality and Particularity’ (2022) 21(2) Journal of Human Rights 158, 158-173.

when the princely ruler of Kashmir signed the Instrument of Accession to India in 1947 after the dispensation granted by the Last Viceroy of British India, Lord Mountbatten to the Princely States to select either inclusion in either India or Pakistan.² This led to the conveyance of the state to India which despite the Kashmir's peoples rejection of Indian rule has refused a plebiscite and instead has imposed a military solution. It has incorporated Kashmir into the Indian union in 2019 by revoking its autonomous status without consent of its people and imposed a crackdown that has led to serious breaches of human rights norms and its needs to be considered under the international Conventions and international tribunals have to be activated for war crimes.

The Instrument of Accession that declared Kashmir as a state within the Indian union was executed when the Maharaja signed the proclamation on 27 October 1947. The title deeds were not registered in the UN Secretariat which is required under the international law of treaties and the deeds were not deposited at the UN headquarters in New York.³ The Instrument protects against the illegal occupation by another state and its terms affirm the sovereignty of Kashmir as an independent state.⁴ Article 7 affirms: "Nothing in this instrument shall be deemed to commit me (Maharaja) in any way to acceptance of any future constitution of India ..." Article 8 states: "Nothing in this Instrument affects the continuation of sovereignty in and over this state....."⁵

The Maharaja then signed the Instrument of Accession with India upon which the Indian government provided the military force when its armed forces invaded on 24 October 1947 in the capital of Srinagar.⁶ It was ostensibly to prevent the Pakistani irregular units who had infiltrated to lay claim to the state with an overwhelming Muslim population of Jammu and Kashmir (J&K) had wished to be aligned with Pakistan.

The intervention by Pakistan's sympathisers secured a rump state of (Azad) Kashmir and this is an autonomous region within the nation state of Pakistan. The UN Security Council adopted a resolution after the ceasefire for a plebiscite to be conducted in the whole territory for the Kashmir's people to self-determine their future status.⁷ The division of Kashmir has remained and it includes 66 % of its designated area in India and the rest is in Pakistan with a border which is divided by a line of control (LOC), which is a boundary that is a temporary settlement of the disputed territory.⁸

² The Indian Independence Act 1947 (Ch. 30, 10 & 11. Geo. 6) (IIA). The IIA was a UK Parliamentary Act that relinquished British sovereignty over the Indian subcontinent. Article 7 made provision for the devolution of 'His Majesty' powers over the 562 Indian Princely States and conveyed them to the new states on 15 August 1947.

³ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 Arts 2(1)(b) and 15.

⁴ Vikas Kapur and Vipin Narang, 'The Fate of Kashmir: International Law or Lawlessness?' (2006) 3(1) *Stanford Journal of International Relations*.

⁵ Instrument of Accession of Jammu and Kashmir State to the Union of India (signed 26 October 1947, entered into force 27 October 1947).

⁶ Rajesh Ankit and Ram Chandra Kak, 'Forgotten Premier of Kashmir' (2010) 4(4) *Epilogue JK Magazine* 36-39; See also Sheikh Mohammad Abdullah, *Blazing Chinar Autobiography* (Gulshan Books 2016) 291-292.

⁷ UNSC Res 47 (21 April 1948) UN Doc S_RES_47(1948).

⁸ Agreement on Bilateral Relations between the Government of India and the Government of Pakistan (2 July 1972) (Simla Agreement). The Simla Agreement signed by India and Pakistan after the 1971 war established this as a border between the States. Article 4 (ii) states 'In Jammu and Kashmir, the line of control resulting from the cease-fire of December 17, 1971 shall be respected by both sides without prejudice to the recognized position of either side. Neither side shall seek to alter it unilaterally, irrespective of mutual differences and legal interpretations.

The UN Security Council has adopted six resolutions from (1947 – 1958) on Kashmir and in each has mandated for both countries to organise a vote of the indigenous population to decide their own future. This has been accepted by Pakistan but refused by India and this has led to the festering dispute which has remained unsettled while the population are denied the right their future status. The Indian government has instead used military force by promulgating the Armed Forces (Special Powers) Act (AFSPA) 1958 and allowing its forces to stay permanently in the region and to put down any dissent with a draconian response.

However, the human rights dimension of the conflict has caused the most concern because of the immunity with which the Indian forces have carried out their operations. Its consequences have been drastic violations of civil right and the overdue first report of the Human Rights Council in 2018 was damning of the Indian government's actions and stated that the “allegations of human rights violations include torture and custodial deaths, rape, enforced disappearances and extrajudicial executions”.⁹ The subsequent report in 2019 also mentioned the “extrajudicial, summary or arbitrary executions especially since the 2016 unrest began”.¹⁰

The international human rights law is applicable “legal doctrine that because of its *lex generalis* nature, human rights law is applicable at all times, both in peacetime and in time of war”. It underpins that human rights has influence in a contemporary framework of rules, which aims to be “general and universal and has an important specific characteristic, namely the ‘vertical’ nature of the legal relationships, with the state on the one hand and the people under its jurisdiction on the other”. This charts the unique framework of “an international system governed by rules that are quintessentially intergovernmental (and therefore ‘horizontal’)”. It is argued that since “a human rights norm generally cannot take precedence over a special rule aiming at regulating the same situation, as for instance in the case of the treatment of civilians in armed conflicts”.¹¹

In the Advisory Opinion on the Construction of the Wall¹² the ICJ stated that there was a breach of human rights when it “impeded the liberty of movement of the inhabitants of the Occupied Palestinian Territory as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights” and it further obstructed the “the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child”.¹³

The scope of international human rights is broad in scope and international humanitarian law is also of application by its norms in this conflict. The e Indian

⁹ OHCHR, ‘Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan’ (*United Nations Office of the High Commissioner for Human Rights*, 14 June 2018) 11.

¹⁰ OHCHR, ‘Update of the Situation of Human Rights in Indian-Administered Kashmir and Pakistan-Administered Kashmir from May 2018 to April 2019’ (*United Nations Office of the High Commissioner for Human Rights*, 1 July 2019) 13.

¹¹ Danio Campanelli, *The Law of Military Occupation put to the test of Human Rights*, *International Review of the Red Cross*, Vol 90, No 871, Sept 2008, p 653-668 at 655

¹² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports 2004, p. 136

¹³ Para 134

government has not held a referendum as was stipulated by the UN in the duration since 1948 and in 2019 annexed Kashmir. The action was taken by the government of Narendra Modi revoked Kashmir's autonomous status by revoking Article 370 and incorporating the state within the Indian union after sub dividing it into two territories.¹⁴ The Indian government arrested the political leaders, disbanding the local parties and dissolved the state assembly and the repression through censorship and news blackout continued for over one year and has only been partially lifted.¹⁵ There was no acknowledgment of its alleged actions in the territory and it has refused UN Secretary General Antonio Guterres's offer of mediation.¹⁶

The denial of a referendum under the UN Security Council auspices is deemed by India as *fait accompli* and the resentment of the inhabitants of Kashmir has led to suppression by the Indian military authority acting with its special powers.¹⁷ The abuse has escalated since the Indian government and the security operation that has followed includes human rights violations, including collective punishments, curfews, extra judicial killings, rapes and disappearances at the hands of Indian security forces. It requires an examination of the legal status of the Indian occupation, the international law of self-determination, and the deprivation of human rights in this asymmetrical conflict that needs legal analysis as a non-international Conflict (NIC) governed by humanitarian law.

This paper has four sections which can be divided as follows. In Section A examines the application of *uti possidetis*; the right of external and internal self-determination under international law and the need for India to conduct a referendum in Kashmir; Section B considers the mandatory effect of the Security Council resolutions and distinguishes between a binding and a non-binding resolution with reference to the practice of the UN; Section C examines the human rights violations by the Indian armed forces and the operational immunity and refers to the findings of the Human Rights Council reports in 2018 and 2019; and Section D sets out India's refusal to sign the Additional Protocol (AP) I and II of the Geneva Conventions that bind nation states to observe international humanitarian law in an non-international conflict (NIC) and the prosecution of officials for war crimes. The article draws a nexus between the international law principles, legal precedence under international humanitarian law and the liability of the state that has breached human rights.

II. Right to self-determination of Kashmir

1. *Uti possidetis*

¹⁴ The Jammu and Kashmir Reorganisation Act No 34 of 2019 abolished Kashmir's autonomy and created two union territories, Jammu and Kashmir (J&K) and Ladakh. The J&K will have its own legislative assembly while Ladakh will be governed by a Lieutenant-General appointed by New Delhi. Both territories have been annexed under Article 229 of the Indian Constitution that was framed for new territories beginning with Pondicherry, the former French colony.

¹⁵ Swati Gupta, 'Kashmir Remains Paralyzed by Lockdown as Resentment Simmers' (*CNN*, 16 August 2019) <<https://edition.cnn.com/2019/08/16/asia/kashmir-11-days-of-lockdown-intl/index.html>> accessed 10 June 2020.

¹⁶ "Deeply Concerned": UN Chief Officer Offers Mediation in Kashmir Dispute' (*Al Jazeera*, 17 February 2020) <<https://www.aljazeera.com/news/2020/2/17/deeply-concerned-un-chief-offers-mediation-on-kashmir-dispute>> accessed 17 February 2020.

¹⁷ The population of Jammu and Kashmir was 14.5 million before its annexation and 68% Muslim.

The concept of *Uti possidetis* is a rule of customary international law that is applied to constrain the borders of newly formed states and wherever a previously unified territory is to give way to two or more states, this rule prescribes that the “*international frontiers of such states cannot be drawn de novo. Instead, their borders must be selected from pre-existing administrative boundaries that extend through the territory*”.¹⁸ The concept was originally crafted to enable certain, predictable transitions to statehood for former colonies, and the rule is now “*an intrinsic, constitutive feature of the modern nation-state system*”.¹⁹

The territory of Kashmir is divided land and the inhabitants share ethnicity, religion and language and the argument that the colonial power governed an undivided India that gives the right to ownership of Kashmir is not sustainable. The concept of *Uti possidetis* is for the continuation of previous colonial boundaries and is against the reformulation of boundaries of former colonised territories. It has been declared by the ICJ that the “*essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign*”.²⁰

The application of *uti possidetis* provides that as far as international law is concerned the independence of a former colonial territory freezes the colonial borders and is binding on a sovereign state after independence.²¹ This is because the principle originated when the process of de colonialisation began and the UN anticipated that when former colonies which were not ethnically homogenous became independent they were to include all the inhabitants of the colony unless they were separated by a barrier of 'salt water'. Thus the “*transformation of uti possidetis from a norm of private law to one of international character, it lost the provisional status it held under Roman law: it was no longer a temporary measure that preceded further deliberation, but a final, binding disposition of territorial title*”.²²

The border governed by *uti possidetis* can potentially be any type of internal territorial demarcation that has been established in domestic law prior to secession into an international border once independence is accomplished.²³ In the dispute over Kashmir two new states had come into existence with each claiming a right over the territory. The solution to the dispute has been unambiguously stated by the United Nations Security Council (UNSC) that there should be a plebiscite to allow the inhabitants to determine their future according to their own aspirations.

However, the Indian government made no effort to organise the plebiscite that was mandated by the UNSC to decide the status of Kashmir. It had predetermined that if such a referendum was held that the people of Kashmir would either vote for independence or for alignment with Pakistan, with whom the people share cultural and family ties. This

¹⁸ Malcolm Shaw, ‘The Heritage of States: the Principle of “Uti Possidetis Juris” Today’ [1996] British Yearbook of International Law 67, 75.

¹⁹ *ibid.*

²⁰ *Frontier Dispute (Burkina Faso/Mali)* [1986] ICJ Rep 554 [23].

²¹ Christopher R Rossi, *The Temptation of Uti Possidetis, Sovereignty and Territorial Temptation: The Grotian Tendency* (Cambridge University Press 2017) 106.

²² Steven R Ratner, ‘Drawing a Better Line: Uti Possidetis and the Borders of New States’ (1996) 90(4) American Journal of International Law 590.

²³ Christian Walter, Antje von Ungern-Sternberg and Kavus Abushov, *Self-Determination and Secession in International Law* (Oxford University Press 2014)

information has been corroborated by UN officials who were working on the project of demilitarisation and for conducting a referendum in the two parts of the disputed territory.

After the first border conflict in 1947 leading to the line of control between India and Pakistan the United Nations Representative for India and Pakistan (UNRIP) Owen Dixon reported to the Security Council as follows: “*In the end, I became persuaded that India’s agreement would never be obtained to demilitarization in any such form, or to provisions governing the period of plebiscite, conducted in conditions sufficiently guarding against intimidation, and other form of abuse by which the freedom and fairness of the plebiscite might be endangered*”.²⁴

The UN Security Council considered this as usurping the will of the people of Kashmir when the Indian government proceeded to transfer the state within the Indian constitution by promulgating Article 370 in 1951 which created the scope for a political party system that accepted the status quo in Kashmir. The Presidential order of 1950, officially The Constitution (Application to Jammu and Kashmir) Order, 1950, came into force on 26 January 1950 contemporaneously with the Constitution of India. It specified the subjects and articles of the Indian Constitution that corresponded to the Instrument of Accession as required by the clause b(i) of the Article 370²⁵ The largest party that emerged was the Jammu and Kashmir National Conference (JKNC) that accepted the patronage of India and deferred to the union government in matters of defence and foreign affairs.

Article 35 A preserved the territorial range and borders of India by including Kashmir in its framework which preserved the autonomy of the state, but it did not dissipate the issue of the aspirations of its population and their future inclination within the purview of international law.²⁶ The result was that the Indian-controlled part of Kashmir had a government which was restricted by the powers granted under the Indian constitution. The Instrument of Accession led to the Indian sovereignty over Kashmir was a conveyance of land that transferred title to India by overriding the principle of *uti possidetis*.

The principle of *uti possidetis* does not apply by the provisions because the argument that South Asian “*communities can be protected though legal guarantees following partition internally, within successor states, proves to be insufficient; the border itself refashions the identity of communities even before they can exercise such guarantees*”.²⁷ Even if the argument that “*self-determination as a right that only operates after the formation of states is accurate, the Punjabi experience demonstrates that the lasting impact of uti possidetis and its boundaries continues to shape peoples’ future long after the state-formation process has been completed*”. There is an analogy with Kashmir which demonstrates “*that the constitutive effect of uti possidetis on identity is as divisive as the ‘contextualised’ boundaries, justifying the need for alternative approaches to border-formation which mitigate the possibility of forced migration*”.²⁸

This is a precise argument that the Kashmir conflict cannot be solved by maintaining the colonial boundaries and that the people have to be given the determine their own

²⁴ Report of Sir Owen Dixon, ‘United Nations Representative for India and Pakistan to the Security Council: annex’ (27 September 1950) UN Doc S_1791_Add.1.

²⁵ The Gazette of India No 111 (14 May 1954).

²⁶ ‘Report of the Security Council’ (16 July 1963-15 July 1964) UN DOC A_5802 88. The government of India expressed the view that as the democratic process followed for the election of the legislative assembly of the state proved that the people had accepted to remain within the Union of India the UN resolutions on plebiscite ‘had become obsolete and were no longer binding on India’.

²⁷ Vanshaj Ravi Jain, ‘Frozen Frontier: Uti Possidetis and the Decolonialization of South Asia’ (2019) 130 Refugee Studies Centre Working Paper Series 22.

²⁸ *ibid.*

future. The principle of *uti possidetis* is not applicable because colonial boundaries drawn by the British in India had been entirely suited for its own administrative convenience and was not part of any fit for purpose solution. The contention is that these should be not deemed as a permanent solution because in the context of petition it is not tenable and there has to be a different course of action that leads to self-determination.

2. Colonial inheritance and internal self-determination

The international legal principle of the right to self-determination flows from the dis possession by colonialism of the indigenous peoples.²⁹ This is applicable in the context of the European powers that had acquired empires in the regions of the southern hemisphere and the right of the subject peoples were denied and they were disenfranchised. The argument can be made that the colonial mantle can be passed to the successor state who inherit the realm of the departing state, such as Britain if there has been no proper disengagement including the exercise of the right to self-determination to regional minorities as Kashmir.

The UN General Assembly has issued two declarations on decolonisation that impacts on self -determination which are the Declaration on the Granting of Independence to Colonial Countries 1960 and Friendly Relations Declaration 1970.³⁰ The underlying principle of both is that self-determination leading to severance from the state is the final option and exercisable only within the decolonization context. The qualification for meeting the conditions for such a right is based on the notion that colonised peoples were living under imperial subservience and the colonial governments had exercised their dominion over them for centuries.³¹ While these declarations emphasised the principle of state sovereignty and territorial integrity of existing states they were the pretext for the movements for self-determination and liberation when there was a transfer of power to a state that was *prima facie* decolonised.

The concept of self-determination originates in de colonisation and is supported by the United Nations General Assembly Resolution 1514 that states: "*All peoples have the right to self-determination; by virtue of that right they may freely determine their political status and freely pursue their economic, social and cultural development*".

While there is no universal definition of statehood in international law³² this can be inferred by various means, such as international commissions of inquiry, and facts, such as

²⁹ Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) (UN Charter). Article 1(2) of the UN Charter mentions the principle of self-determination. Article 55 of the UN Charter reinforces this principle by affirming that 'conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'.

³⁰ UNGA Res 1514 (14 December 1960) UN Doc A/RES/1514(XV); UNGA Res 2625 (24 October 1970) UN Doc A/RES/2625(XXV).

³¹ UNGA Res 1514 (n 27) [6] (declaring '[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country' as incompatible with the purposes and principles of the UN Charter); UNGA Res 2625 (n 27) ('[n]othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States').

³² *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 1243-1244.

the actual manifestation of a people to assert their identity;³³ and (iii) while self-determination may take various forms, including continued association with an existing state, a strong preference is placed on the grant of statehood on the people in question.³⁴

The Indian union's possession of J&K has to be contextualised as a process of colonialism because when the State enacted its regional Constitution in 1956 it affirmed its inclusion within the Indian Union (article 3). The object clause of this Constitution states the "*pursuance of the accession of this State [J&K] to India ... , to further define the existing relationship of the State with the Union of India as an integral part thereof*". This implies that J&K was considered territorially apart of India. The essence of this clause is that the inclusion of Kashmir in the Indian union was by conveyance of the *Instrument of Accession*, and finally incorporation into the Indian Constitutional framework.

The international law principles can designate the minority groups as "peoples" who have the right to self-determination to provide the ability to freely determine their political fate and form their own representative government. Michael P. Scharf argues that "*Although no international treaty defines the term 'people' for the purposes of self-determination, it is generally accepted that this classification entails a subjective element, such as a common belief by members of the group that they share the same characteristics and beliefs and thus form a common unit, as well as an objective element, such as common racial background, culture, ethnicity, religion, language, and history*".³⁵ Els Bogaerts argues that "*like many globally embracing terms, such as imperialism and post colonialism de colonialisation was seldom restricted in application to a particular political activity or a neatly defined era. Moreover, as a binary activity decolonisation was interpreted to be both a calculated process of military engagement and diplomatic negotiation between the two contending parties colonial and non colonial*".³⁶

The application of the right to self-determination does not only apply to the former colonial countries but is also relevant to states that are heterogeneous and may have emanated from post colonialism. Wilson observes that the UN Charter does not refer to the right of self-determination and "does not clarify 'who is self' which is a principle" that it seeks to protect. However, while its development into "a rule of law in international public law is indisputable" and the "foreign domination and alien form of governance" and oppression that "initially referred to colonialism" has now evolved to apply to contemporary forms of "alien governance and subjugation" which has been conveyed to present forms of "alien governance". The consequence is that the manner in which the UN Charter "creates the right of self-determination" does not form a binding norm but is an "expression of political principle".³⁷

³³ *ibid* 33. The International Court of Justice has recognised the validity of a flexible approach in determining the 'freely expressed wishes of the territory's peoples', holding that an actual consultation with the population may not always be necessary'.

³⁴ UNGA Res 1541 (15 December 1960) UN Doc A/RES/1541(XV). This resolution provided for three legitimate methods of decolonisation consistent with the principle of self-determination: independence, free association, and integration with an existing state.

³⁵ Michael P Scharf, 'Earned Sovereignty: Judicial Underpinnings' (2003) 31 *Denver Journal of International Law and Policy* 373, 373–379.

³⁶ Els Bogaerts and Remco Raben, *Beyond Empire and Nation: The Decolonisation of African and Asian Societies, 1930-1970s* (Brill 2012) 23-39.

³⁷ Heather Wilson, *International Law and the Use of Force by National Liberation Movements* (Oxford University Press 1988) 58-59.

The analogy applies to India because of the power of eminent domain that it used to annex Kashmir on 5 August 2019, and the fact that it has revoked Articles 370 and 35A which were the device used to give legal effect to the accession. This process annulled the territorial integrity of Kashmir and denied the aspirations of its people by not conducting a referendum. The demographic changes are likely to follow leading to an encroachment of non-Kashmiri people on its soil. Section 3A of the Jammu and Kashmir Reorganisation-Adaptation of State Laws Order 2020 enables Indian government to enact laws to reconfigure the demographic balance. Under this ordinance the J&K Civil Services (Decentralisation and Recruitment) Act 2020 has been enacted to settle non-Kashmiri on Kashmir.³⁸

Sections 59 and 60 of Jammu and Kashmir Reorganisation Act 2019 has led to the redrawing of gerrymander of electoral constituencies under Section 3 of the Delimitation Act 2002. The Delimitation Commission (DC) that has powers under the Act has increased assembly and parliamentary constituencies to give Jammu greater representation to reduce Muslim representation and shift the political balance to Hindus in the region. In May 2022 the Commission awarded Jammu six more seats in the 90-member J&K Assembly while Kashmir is to be given one more which will take Jammu's total seats to 43 leaving Kashmir with 47.³⁹

The most astonishing aspect of the DC report is that it has extended its jurisdiction to Pakistani Kashmir (Azad Kashmir) by including the districts over the border (LOC) in its remit. The J&K state assembly has 114 seats for its union territory, of which 24 are reserved for Pakistan-administered Kashmir, until such time it becomes part of India.⁴⁰ This is a clear demonstration that India has no plans to hold a referendum and let the people self determine their future and instead has designs on incorporating it by force in a future war with that country.⁴¹

3. International covenants and right of secession

The principle of territorial integrity applies to an already sovereign state and it of continuing effect even after it has gained independence from a colonial power. This is because of the guiding principle that a state must not disintegrate after it has attained independence from an imperial power. The International Covenant of Civil and Political Rights (ICCPR)1966 and

³⁸ Section 5(a) defines a domiciled person as the one who has resided for a period of 15 years in the union territory of Jammu and Kashmir or has studied for a period of seven years and appeared in class 10 or 12 examination in an educational institution located in the territory.

³⁹ 'Delimitation Commission Report' (Jammu and Kashmir Official Gazette, 6 May 2022) <<https://ceojk.nic.in/pdf/Delimitation/Draft%20English.pdf>> accessed 12 April 2023.

⁴⁰ Section 14(4): 'Notwithstanding anything contained in sub-Section (3), until the area of the Union territory of Jammu and Kashmir under the occupation of Pakistan ceases to be so occupied and the people residing in that area elect their representatives— (a) twenty four seats in the Legislative Assembly of Union territory of Jammu and Kashmir shall remain vacant and shall not be taken into account for reckoning the total membership of the Assembly; and (b) the said area and seats shall be excluded in delimiting the territorial constituencies as provided under PART V of this Act.'

⁴¹ This can be confirmed by Indian Defence Minister Rajnath Singh's speech that the Azad Kashmir is part of India. 'Rajnath Vows to Reach Gilgit-Baltistan: Where is This Place That is Illegally Occupied by Pakistan?' (*Indian Express*, 30 October 2022) <<https://indianexpress.com/article/explained/rajnath-singh-gilgit-baltistan-history-explained-8234674/>> accessed 11 April 2023.

the International Covenant of Social, Economic and Cultural Rights 1966 have both stipulated the rights that can be construed as leading to self-determination. The Declaration of the Granting of Independence to Colonial Countries and Peoples, and the two international human rights covenants, the ICCPR and the ICSECR resonate the same ideal that “[a]ll peoples have the right to self-determination. *By virtue of that right they freely determine their political status and freely pursue their economic, cultural and social development*”.⁴²

The issue is whether these covenants prescribe a legal right that overrides the territorial integrity of a state and if they grant a human right that can be interpreted as the exercise of self-determination. It is documented that in the process of formulating the above Covenants some delegates opposed to the common Article 1 and argued that the "UN Charter referred to the principle of self-determination but that was not to a right". The advocates of the right to self-determination argued that "the right was essential for the enjoyment of human rights and should appear in the forefront of covenants".⁴³

The Covenants were adopted by inclusion of the right to self-determination. This was the most significant development which evolved from a political principle to a legal norm, and it is associated with human rights. Self-determination is the key right in ICCPR/ICESCR, and the adoption provides it with an elevated place in the hierarchy of legal norms. The state of J&K has not been granted self-determination and Kashmir remained a de facto part of India prior to annexation in 2019.

In *State Bank Of India vs Santosh Gupta And Anr. Etc*⁴⁴ the Supreme Court of India ruled that the state of Jammu and Kashmir had no "absolute sovereign power" on account of Article 370. The Supreme Court held that it has "no vestige" of sovereignty outside the Constitution of India and its own Constitution is subordinate to the Indian Constitution. The Court upheld the applicability of the union Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI) Act Sections 13 (1) and (4) to Jammu and Kashmir as it was under the Union list of subjects for which the Indian Parliament is empowered to enact laws for the whole of India, including Jammu and Kashmir.⁴⁵

Joshua Costellino traces the development of principles enshrined in the Resolution 1514 which connects "self-determination to better standards of life and larger freedom". He points to the resolution's concept of self-determination stating that "one of the important results of decolonisation is that it is a fundamental human right bringing it within the scope of the United Nations Declaration of Human Rights 1948".⁴⁶ The adoption of the ICCPR/ICESCR meant that this was a culmination of self-determination emerging as a human right and underpinned the principle in the multi lateral treaties by extending to not just "civil and political rights but facilitating passage to the economic, social and cultural rights".⁴⁷

⁴² UNGA Res 1514 (n 28); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UN Doc A/6316; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UN Doc A/6316.

⁴³ William Twining, *Issues of Self-Determination* (Aberdeen University Press 1991) 85.

⁴⁴ *State Bank Of India vs Santosh Gupta And Anr. Etc* (2017) 2 SCC 538.

⁴⁵ *ibid* [10].

⁴⁶ Joshua Costellino, *International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulation of Post-Colonial National Identity* (Martinus Nijhoff Publishers 2000) 22-23.

⁴⁷ *ibid* [31].

There is another important aspect of these covenants which is that they do not restrict the right of self-determination to colonial or oppressed peoples but includes all peoples.⁴⁸ It is apparent that the Article 1 has a uniform approach by its emphasis on the free determination of "political status" and "economic and social and cultural development" of states and that should lead to them being able to "freely dispose of their national wealth".⁴⁹ The ratification by countries of these covenants can be with exclusions and reservations which implies a more restricted application. This is also the approach of India which upon endorsing entered a reservation to Article 1 in the following terms: "*The right to self-determination appearing in those articles apply only to the peoples under the foreign domination and that these words do not apply to sovereign independent states*".⁵⁰

This caveat provides India with a waiver and discharges any responsibility it may have to offer self-determination from its annexation of the state of J&K, and its inclusion within the Indian union.⁵¹ The fact that it reverses the purpose of the ICCPR/ICESCR and the United Nations General Assembly Resolution 1514 which established the right of self-determination that applied to the de colonialisation process and created a multi lateral framework to which India became a signatory. The development of legal norms by the process of these covenants, political principle of self-determination and its fusion within human right is consistent with the respect for international law and its framework⁵²

The Indian government revoked Kashmir autonomy under Article 370 of its Constitution which permitted a state constitution that derogated powers of defence and foreign affairs to the central government in New Delhi. While this arrangement was meant to be a temporary provision the Article 370 become entrenched in the Indian constitutional framework.⁵³ This was complimented by Article 35 A which excluded Indian citizens from becoming the "state subjects" or citizens of Kashmir and also prohibited them from acquiring property in J&K.⁵⁴

The ethnic identity of a regional group is its based on the subjective perception of its own identity as distinct from the rest of the population and is critical in the categorization of

⁴⁸ Ivor Jennings, *The Approach to Self-Government* (Cambridge University Press 1956) 56; See also Margaret Moore, *National Self-Discrimination and Succession* (Oxford University Press 1998) 1-13.

⁴⁹ Costellino (n 43) 93.

⁵⁰ 'Human Rights Committee (ICCPR)' (*Permanent Mission of India to the UN in Geneva*) <<https://pmindiaun.gov.in/pageinfo/ODY3>> accessed 11 April 2023.

⁵¹ Statement of the representative of India to the Human Rights Committee (3 July 1984) UN Doc CCFR/C/Sr 498 3. In a subsequent appearance before the Human Rights Committee, India stated more explicitly that the UN Charter applies 'the right of self-determination in the international context only to disputed territories and peoples'.

⁵² Hannom Hurst, *Anatomy Sovereignty and Self-Determination: The Accumulation of Conflicting Rights* (University of Pennsylvania Press 1996) 41-42.

⁵³ Part XXI of the Constitution of India deals with 'Temporary, Transitional and Special Provisions'. It describes Article 370 as a temporary provision and addresses three key points. First, it notifies that Article 238, dealing with the administration of states, is not applicable to the State of Jammu and Kashmir. Second, the power of the parliament to make laws for the state is limited. Third, concurrence and consultation with the state is necessary on matters specified in the Instrument of Accession (Constitution of India, part XXI).

⁵⁴ Article 35A was enacted under Article 370(1)(d) in 1954 and gives the Jammu and Kashmir legislature full power to decide who is a 'permanent resident' of the state. The Article gives 'permanent residents' privileges regarding employment in the state, acquisition of immovable property and settlement, the right to scholarships and other forms of aid that the state government provides.

a “people,”⁵⁵ and the identity of the Kashmiris. This is evidenced from a significant ration of the population’s determined and long-standing claims for independence separate from its prospective settlers. Despite the fact that there is a geographical proximity between the Kashmiri people and the mainstream Indian population the legal principle is not “the degree of differences that exist today, but the fact of the differences in culture, history, and tradition over the years”.⁵⁶

There is no possibility of autonomy by an internal self-determination to satisfy claims of the Kashmir population because that process has been exhausted. The Indian government has by its revocation of Article 370 and Article 35 eliminated the future status of Kashmir within a confederation. There is only one route that can be achieved and that is by achieving an external self-determination. This is because India was the beneficiary of the British withdrawal after partition of the colonial dispensation. The international boundary is not subject to the *uti possidetis* and the right of self-determination takes precedence. Moreover, there is no impediment in the Declaration of Declaration of the Granting of Independence to Colonial Countries and Peoples, ICCPR and ICESCR that precludes the right to independent statehood of the Kashmir people and the process and obedience to the UN Security Council resolutions to oversee a referendum is mandatory.

III. Binding effect of UN resolutions

1. Mandatory requirement of a plebiscite

The UN bodies that had called for a ceasefire after the Indian - Pakistani war post-independence over Kashmir were seised of the issue of finding a solution based on the aspirations of the people. The Security Council had in calling for a ceasefire in the territory in 1947 proposed a referendum in its resolution of 5 January 1949(S11196). The non-compliance by the Indian government needs evaluation to authenticate whether that is a breach of international and that it has acted outside the spirit and letter of the UN Charter in refusing to conduct a referendum on the territory that its military has occupied since the annexation in 1947.

Under Chapter 1 of the UN Charter 'Purposes and Principles the member states of the UN are bound under Section 2 (1) to respect the "sovereign equality of all its Members"; 2(3) "All Members shall settle their disputes by peaceful means in such a manner that international peace and security, and justice are not endangered" and 2 (5) "All Members shall give the UN every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action".

There are three important instruments that frame the mandatory effect of the resolution. These are Chapter V, Chapter VI and Chapter VII. Under Chapter V, on 'Functions of the Security Council' Article 25 states: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter". This is a statement of principle which the member states of the UN are bound to implement in their transactions with other states.

⁵⁵ Erica-Irene A Daes, *Some Considerations on the Right of Indigenous Peoples to Self-Determination* (1993) 3 *Transnational Law and Contemporary Problems* 5.

⁵⁶ Erica-Irene A Daes, *Native Peoples' Rights* (1986) 27 *Cahiers De Droit* 123, 126-27.

Chapter VI is on the 'Pacific Settlement of Disputes' and Article 33 of the Charter states "that any dispute that is likely to endanger the maintenance of international peace and security should first be addressed through negotiation, mediation or other peaceful means, and states that the Council can call on the parties to use such means to settle their dispute". The inference can be drawn to such resolutions as inviting a plebiscite to be held on the territory of a member state. Article 34 also takes into "consideration fact-finding missions" which have been instructed by the UN Secretary-General and in this instance the UN Observer force in Kashmir is an established fact.⁵⁷

Chapter VII concerns the 'Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression'. Article 39 states "*The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security*".

The accession of Kashmir to India was after ceasefire and then the Line of Control border was established between Indian and Pakistani forces.⁵⁸ The UNSC instructed both sides to conduct a plebiscite to allow Kashmir's people decide its future status. Resolution 48 reaffirmed the first resolution that had called for an armistice between the two countries and stated as follows : "*Noting with satisfaction that both India and Pakistan desire that the question of the accession of Jammu and Kashmir to India or Pakistan should be decided through the democratic method of a free and impartial plebiscite, Considering that the continuation of the dispute is likely to endanger international peace and security, Reaffirms its resolution 38 (1948) of 17 January 1948*".⁵⁹

The UN records do not state whether it was adopted under Chapter V or Chapter VI of the Security Council. However, during the period of the UNSC resolutions on Kashmir (1947-57) it was not the practice to "*mention the title of the chapter, whereas the majority of resolutions that were acted upon by the member states did not mention any reference to a chapter of the UN Charter*". Instead, "*it was the content and the substance of the resolution that would determine the nature of implementation. If one looks at the UNSC's practice in its first decade of existence, only a handful of resolutions mention the title of the chapter, whereas the majority of resolutions that were acted upon by the member states did not mention any reference to a chapter of the UN Charter*". It is apparent that "*there is no reference to either Chapter VI or Chapter VII in any of the 17 resolutions*".⁶⁰

The International Court of Justice (ICJ) has established the basis to ascertain whether the Security Council intended the resolution to have binding effect. These factors are: "*the language used in the resolution; prior reference establishing the importance of the subject matter through discussions, resolutions, or documents; and the binding charter provisions in the resolution*".⁶¹ There is

⁵⁷ Owen Dixon (n 21) 23.

⁵⁸ 'UN Peacekeeping UNOGIP Factsheet' (*United Nations Peacekeeping*, 31 March 2023) <<https://peacekeeping.un.org/en/unmogip-mission-fact-sheet>> accessed 12 April 2023. The Military Observer Group in India and Pakistan (UNMOGIP) was given UN peacekeeping mission on 24 January 1949 and since then been stationed there.

⁵⁹ UNSC Res 47 (21 April 1948) UN Doc S_RES_47(1948).

⁶⁰ Ahmer Bilal Soofi, 'Binding resolutions' (*Dawn*, 14 September 2019) <<https://www.dawn.com/news/1505094>> accessed 11 April 2023.

⁶¹ Marko Divac Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2005) 16(5) *European Journal of International Law* 879, 885.

also the additional requirement of "*international law, which includes reference to, or reliance of the resolution on, treaties, jus cogens norms, customary law, and other sources of international law*".⁶²

The impact depends upon whether those resolutions can be interpreted as 'decisions' or those that are 'recommendations' and while the former are expressed in specific terms as giving rise to a remedy the latter has a persuasive effect only. In *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), 'the Namibia case'*⁶³ the ICJ had to respond to a question by the Security Council: "What are the legal consequences for States of the continued presence! of South Africa in Namibia notwithstanding Security Council resolution 276 (1970)?" The Court offered its advisory opinion that "there was a UNSC Resolution 276 that sought to terminate the mandate of South Africa in South West Africa (Namibia)".⁶⁴

The Court held that "[a] binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence ... there is an obligation, especially upon Members of the United Nations, to bring that situation to an end".⁶⁵

The determination was that South Africa's actions were illegal and that the Security Council resolutions were obligatory and that in taking this into consideration the following factors were relevant: "*It has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. Article 25 is not confined to decisions in regard to enforcement action but applies to "the decisions of the Security Council" adopted in accordance with the Charter. Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter, which deals with the functions and powers of the Security Council*".⁶⁶

However, the Court emphasised that all UNSC resolutions have a mandatory effect, and that Member States are bound to accept them to uphold the principles of international law. "*The decisions made by the Security Council . . . were adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25. The decisions are consequently binding on all [Member States] of the United Nations which are thus under obligation to accept and carry them out. Accordingly, Article 25 may apply to resolutions passed under Chapters VI, VII, VIII, and XII*".⁶⁷

The commentary on the case states that the "*Court offered no explanation, the legal determination was presumably binding because it was included in a decision contained in SC Resolution 276. The causative effect is binding upon the states that apply the norm*".⁶⁸ It can be summed up that the binding or non-binding nature of a resolution (decision or recommendation) also includes determinations made therein; "*a determination made in a recommendation is not binding, whereas a determination made in a decision is of mandatory effect*".⁶⁹

⁶² *ibid.*

⁶³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (Advisory Opinion) (Namibia case) [1971] ICJ Rep 16[105].

⁶⁴ Ainsi Jean-Paul Jacqué, 'L'avis de la Cour Internationale de Justice du 21 juin 1971' (1972) 4 *Revue Générale de Droit International Public* 1046, 1083.

⁶⁵ *Namibia case* (n 60) [113].

⁶⁶ *ibid* [117].

⁶⁷ *ibid* [50].

⁶⁸ Marko Divac Öberg (n 58) 891.

⁶⁹ *ibid.*

This ruling was confirmed in the *Legal Consequences of the Construction of a Wall in the Palestinian Territory*,⁷⁰ in which the General Assembly requested an Advisory Opinion on the construction of the Israeli wall based on the UNSC Resolutions 452, 465 and 446 on the following question :“*What are the legal consequences arising from the construction of the wall being built by Israel, the Occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the Report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions ?*”

The ICJ held that the resolutions had "binding effect and the actions of Israel had no legal validity in the process of constructing the wall".⁷¹ These Resolutions were adopted under Chapter VI which made them non-enforceable because it is concerned with 'Pacific Settlement of Disputes' and not adopted under Chapter VII of the UN Charter which invites 'Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression'.

However, a former Chief judge of the ICJ has stated that "resolutions under Chapter VI are not necessarily non-binding and resolutions passed under the auspices of Chapter VII are not always binding".⁷² This implies that the resolutions on Kashmir that have been passed under Chapter VI can still be mandatory and enforceable despite the fact that they are not deemed compulsory such as action under Section 2 of the UN Charter.

In *USA v Nicaragua*⁷³ the ICJ ruled that in order to determine the relevant facts ‘*in its quest for the truth, it may also take note of ... the resolutions adopted or discussed by [international] organizations, in so far as factually relevant*’. This goes to the evidential value of the cases that should be interpreted to imply that factual basis of GA and SC resolutions and the decisions are not by themselves exhaustive for the Court".⁷⁴

The Court undertakes an objective approach and Chapter V, Article 24 grants the Security Council permission to act on behalf of UN member states to maintain international peace and security through the powers available under Chapters VI, VII, VIII and XII.⁷⁵ The context-based approach in interpreting the Article 25 in the background of Article 24 demonstrates “*that Security Council resolutions can also be binding under Chapter VI decisions. The Security Council] decision[s] may bind all UN Member States, including ‘those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council’*”.⁷⁶

It has been observed by the ICJ that binding effect is dependent on the "clarity of the determinations" made and not on whether they were issued under any Chapter of the UN framework.⁷⁷ The final UNSC resolution on Kashmir no 122 adopted on 24 January 24,

⁷⁰ *Legal Consequences of the Construction of a Wall in the Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136.

⁷¹ *ibid* [120].

⁷² Rosalyn Higgins, ‘The Advisory Opinion on Namibia: Which UN Resolutions are Binding Under Article 25 of the Charter?’ (1976) 21(2) *The International and Comparative Law Quarterly* 270, 282.

⁷³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, 44.

⁷⁴ *ibid* [72].

⁷⁵ UN Charter (n 26) Art 24.

⁷⁶ Marko Divac Öberg (n 58) 885.

⁷⁷ *Case Concerning Legality of Use of Force (Serbia and Montenegro v Belgium)* [2004] ICJ Rep 279 [64]–[70].

1957 declared the outcome in J&K had to be in accordance with the will of the people expressed through a free and impartial plebiscite and that the “*convening of a Constituent Assembly as recommended by the General Council of the ‘All Jammu and Kashmir National Conference’ and any action that assembly may have taken or might attempt to take to determine the future shape and affiliation of the entire State or any part thereof, or action by the parties concerned in support of any such action by the Assembly, would not constitute a disposition of the State in accordance with the above principle; 2. Decide to continue its consideration of the dispute*”.

The text expressly disparages the internal arrangements that India may have arrived at when it enacted Article 370 into its constitution. Resolution 122 was not presaged under any specific Chapter of the UN and should validate and reaffirm the principles that were adopted in the first resolution in 1948. Therefore, the procedure under which it was adopted is not relevant, but the substance of the resolution is significant and has the binding force of international law.

2. Reinforcing the impact of SC resolutions

The claim by the Indian government that the UN resolutions have no prescriptive effect in international law is void given the comparative effect of resolutions that have been passed at the UN. The resolution under Chapter VI even if it is of persuasive effect only does not preclude it from mandatory application. The UNSC Resolution 1325 on Women, Peace, and Security (Resolution 1325) passed unanimously on October 31, 2000⁷⁸ states in its preamble the disproportionate impact of armed conflict on gender in vulnerable circumstances. It affirms the need for “*effective institutional arrangements to guarantee their protection and full participation in the peace process [which] can significantly contribute to the maintenance and promotion of international peace and security*”.⁷⁹

This was passed under Chapter VI and it has been deemed to have a binding effect. In order for to ascertain the intent of a UNSC there are several factors that need to be assessed to determine if they are compelling for the party. Kwadwo Appiagyei-Atua contends that in order to determine the intent of the Security Council “*the language used in the resolution, the discussions leading to it, and the Charter provisions invoked. Article 25 includes a fourth factor by addressing the international laws, including the application of treaties, customary law and jus cogens norms*”.⁸⁰

Resolution 1325 has mandatory obligations on states in the international domain in an effort to promote and protect the rights and dignity of women and children during conflict. The text, Appiagyei-Atua argues, has binding effect because it is based on three principles which are, firstly, the Resolution seeks to “*ensure greater representation, participation, and involvement of women in peace-making processes, and to include a gender perspective in peacekeeping operations. Secondly, the Resolution calls for respect for humanitarian law with a special emphasis on ensuring better protection of women and girls, such as excluding impunity clauses, in order to better promote justice for female victims of conflict. The state must also take affirmative action to prevent third parties from abusing the rights of women and girls during armed conflict. Thirdly, it calls for the promotion of the rights of women and girls and their special needs during the process of repatriation, resettlement, reintegration, and reconstruction.*”⁷ Further, states have the duty not to

⁷⁸ UNSC Res 1325 (31 October 2000) UN Doc S/Res/1325.

⁷⁹ *ibid.*

⁸⁰ Kwadwo Appiagyei-Atua, ‘United Nations Security Council Resolution 1325 on Women, Peace, and Security — Is it Binding?’ (2011) 18(3) Human Rights Brief 2-6.

*interfere or act in any way that would compromise women and girls' enjoyment of fundamental rights".*⁸¹

The analogy can be extended to the UNSC resolutions on Kashmir which transcend the principles of both Chapter VI and Chapter VII in enforcing the mechanisms for a plebiscite. There is also the text because under Chapter VI the term 'resolution' is not used, and UN practice emphasises a generic meaning of the word whether conveying a decision or a recommendation.

Sir Michael Wood, a member of the International Law Commission accepts that in order to determine the binding or non-binding effect of a UNSC resolution there needs to be "*an evaluation of its intent by reference to its travaux préparatoires, which does not diverge from a contextual, or an object and purposeful approach to interpretation*".⁸² The travaux préparatoires are found in the previous deliberations made in connection with the resolution prior to its formulation and passage. Its impact is that "*a decision or a recommendation can change depending on context. Therefore, a rigid application of these distinctions leads to confusion, as some decisions are non-binding and some recommendations have the force of law*".⁸³

Professor Stefan Talmon corroborates by observing that UNSC practice and the common understanding of the UN membership establishes "*that 'threat to the peace' is a constantly evolving concept and from the 1990s, the understanding of what constitutes a 'threat to the peace' has broadened considerably from the narrow concept of absence of the use of armed force, to the wider concept of situations that may lead to the use of armed force*".⁸⁴ This implies that the separation between Chapters VI and VII is not arbitrary and enables a broad based interpretation of Article 25 of the UN Charter as applied to resolutions created under non-enforcement measures.

The UNSC resolutions on Kashmir under Chapter VI conform to the rule of international customary law and reflect the *opinio juris* of the General Assembly. There is a debate between those who recognise UN resolutions as constitutive of state practice or *opinio juris*⁸⁵ and therefore "specifically determined obligations that states have towards the international community as a whole".⁸⁶ The ICJ has settled this issue in favour of them as rules of international customary law.⁸⁷ The GA Res 2625 (XXV) in the Nicaragua case was adopted unanimously by the nations represented in the General Assembly.⁸⁸ These resolutions even if they are "*not binding may sometimes have normative value and they can, in*

⁸¹ Kwadwo Appiagyei-Atua, 'United Nations Security Council Resolution 1325 on Women, Peace, and Security — Is it Binding?' (2011) 18(3) Human Rights Brief 2-6.

⁸² Michael Wood, 'The Interpretation of UN Security Council Resolutions' (1998) 2 Max Planck Yearbook of United Nations Law 73; See also Alexander Orakhelashvili, 'The Acts of the Security Council: Meaning and Standards of Review' (2007) 11 Max Planck Yearbook of United Nations Law 143.

⁸³ *ibid.*

⁸⁴ Stefan Talmon, 'The Security Council as World Legislature' (2005) 99(1) American Journal of International Law 175, 180.

⁸⁵ Gérard Cahin, *La Coutume Internationale et les Organisations Internationales: L'incidence de la Dimension Institutionnelle sur le Processus Coutumier* (Thèse de doctorat en Droit public, 2001) 95; See also Michael Akehurst, 'Custom as a Source of International Law' (1975) 47(1) British Yearbook of International Law 1, 11.

⁸⁶ Ardit Memeti, and Nuhija Bekim, 'The Concept of *Erga Omnes* Obligations in International Law' (2013) 14 New Balkan Politics 31.

⁸⁷ *Nicaragua v United States of America* (n 72) [188].

⁸⁸ *ibid* [191].

certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*".⁸⁹ The evidence can be found in the ICJ rulings that have identified the "General Assembly resolutions to be a process in the development of international law or indicative of the "rules of international law without specifying the content of these rules".

This same principle can also be applied to Security Council resolutions adopted under Chapter VI that are considered to be non-binding. In the *Nuclear Weapons Case*⁹⁰ the ICJ held that that the relevant resolutions "fall short of establishing the existence of an *opinio juris*", because 'several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions'.⁹¹ There might still be an emerging "customary rule specifically prohibiting the use of nuclear weapons", based on factors such as "the adoption each year by the General Assembly, by a large majority, of resolutions recalling the content of resolution 1653 (XVI)".⁹²

The Court noted that "a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule."⁹³ It emphasise the importance of the adoption "each year by the General Assembly resolutions calling for the use of nuclear weapons to be prohibited".⁹⁴ The significance of a series of resolutions is to create an *opinio juris* because of their persuasive affect that emanates from being adopted with greater frequency.⁹⁵ The ICJ has found repetition to be important because the voting and passing of resolutions could be interpreted as state practice.⁹⁶

The UNSC resolutions on Kashmir meet the test of regularity and each one of them have affirmed the principle of self-determination of the people. Resolution 47 [The India-Pakistan Question] 1948 invoke this right and calls for an "administration of a plebiscite". Resolution 91 of 1951 also compels for the plebiscite to adjudge the aspirations of the Kashmiri people and their future status. The UNSC Resolutions have binding effect because the adoption of a resolution does not distinguish between the effect of a decision and a recommendation but is based on a 'determination' which even if made in a decision is of mandatory effect. The resolution that is to achieve an end to occupation to propose a referendum is a 'determination' per se and is therefore compulsory, and India which is a party to the dispute has breached international law by not establishing a mechanism for a plebiscite.

IV. Special Powers Act and human rights violations

1. Armed forces immunity and collective punishments

The international human rights law recognises the following to be cardinal principles of substantive and procedural justice. There is a right to life, right to be free from torture, right

⁸⁹ Stephen M Schwebel, "The Effect of Resolutions of the U.N. General Assembly on Customary International Law" (1979) 73 ASIL Proceedings 301-303; See also Stephen M Schwebel "The Legal Effect of Resolutions and Codes of Conduct of the United Nations" (Cambridge University Press 1994) 503.

⁹⁰ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.

⁹¹ *ibid* [71].

⁹² *ibid* [73].

⁹³ *ibid* [255].

⁹⁴ *ibid*.

⁹⁵ *Barcelona Traction, Light And Power Company, Limited (Belgium v Spain)* (Separate Opinion of Judge Ammoun) [1970] ICJ Rep 286, 303.

⁹⁶ *Nicaragua v United States of America* (n 72) [191]; UNGA Res 2625 (n 28) was adopted unanimously.

not be imprisoned without due process; right to a fair trial; right to privacy etc. These are non-derogable and apply in all circumstances in the treatment of persons under the jurisdiction of the state or its agencies. There is also an international dimension that transfers liability to the state based on the Universal Declaration of Human Rights;⁹⁷ International Covenant for Civil and Political Rights and International Covenant for Economic and Social Rights; and the International Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.

It is necessary to understand that as an occupying force the Indian military operates in a legal void in the Valley of Kashmir and their armed operations are governed by the Armed Forces Special Protection Act (AFSPA) 1958. The AFSPA was first effective in the north-east region of India, including Assam and Manipur, in response to armed insurgency arising from demands for self-determination. A version of the Act was implemented in the state of Punjab in 1983, but later repealed in 1997. In Kashmir the AFSA has been effective since it was passed and is the instrument through which the Indian forces have used repression as a tactic and carried out draconian measures in quelling any dissent by overwhelming force of arms and personnel. There are two sections of the AFSPA which provide the armed forces with complete immunity as follows: "*Section 4. Special powers of the armed forces.—Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area,— (a) if he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances; Section 6. Protection to persons acting under Act.—No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act*".

The AFSPA provides extra ordinary powers of intrusion and physical force and has been used extensively in the J&K to commit intense human rights abuses by Indian troops. The violence and its impact began before the arrival of Prime Minister Modi accession to power. According to an estimate in the period leading up to 2011 "over 60,000 people had been killed, thousands have gone missing and hundreds had been brutally tortured, and a staggering 50,000 or more have been orphaned".⁹⁸ This has continued after Modi's government came to power in 2013 and in its current phase reached critical mass after the security forces killed a popular leader of an rebel group, Burhan Wani, on July 8, 2016, in southern Kashmir.⁹⁹ The assassination led to an uprising which continued for the next six months and the Indian military launched "Operation All-Out" in 2017.¹⁰⁰ This has heralded

⁹⁷ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)).

⁹⁸ Harsh Dobhal, *Writings on Human Rights, Law, and Society in India: A Combat Law Anthology: Selections from Combat Law* (Socio-Legal Information Centre 2011) 10.

⁹⁹ 'Kashmir Violence: 16 Die After Key Militant Killed' (*BBC*, 10 July 2016) <<https://www.bbc.com/news/world-asia-36758319>> accessed 11 April 2023.

¹⁰⁰ Mehak Andrabi, 'Human Rights Crises in Kashmir: An overview' (*Legal Service India*, 16 April) <<https://www.legalserviceindia.com/legal/article-5340-human-rights-crises-in-kashmir-an-overview.html>> accessed 12 April 2023.

the relaunch of the Cordon and Search Operations (CASO) which are conducted on regular basis and in the "first six months of 2020 there were 107 of them in the Valley" causing a shutdown by the military of areas designated for intervention.¹⁰¹

The Indian Interior Ministry in its record has confirmed that there was "a 167% increase in civilian killings in 2017 compared to 2015" and a 6.21% uptick in the number of violent incidents compared to 2016. The number of insurgents killed went up "by 42% an increase by 166% in civilian casualties in 2017-18".¹⁰² The Jammu Kashmir Coalition of Civil Society (JKCCS), a local civil rights group, has estimated "that more than 586 people were killed in 2018, including militants, Indian security forces, and 160 civilians".¹⁰³

The AFPSA has been supplemented by the Public Safety Act 1978 (PSA) which empowers security personnel to detain people indefinitely and suspend the writ of habeas corpus. The powers exercisable under the PSA have been defined as opaque, brutal, and arbitrary.¹⁰⁴ Section 13 (2) allows the "detention of a person without giving them the reasons and can keep them in confinement indefinitely". Section 16(5) prohibits legal representation for the suspect which is an infringement of the right not "to arbitrarily arrest and detain persons" that is incompatible with the object and purpose of the ICCPR.¹⁰⁵ In 2008, the UN Working Group on Arbitrary Detention concluded that "10 individuals detained under the PSA in J&K had been arbitrarily detained in violation of articles 7, 9, 10 and 11(1) of the Universal Declaration of Human Rights and Articles 9 and 14 of the ICCPR".¹⁰⁶

The Amnesty International in its report 'Still a Lawless Law' has stated that the PSA violates the international human rights law because "under Article 9(1) of the ICCPR "[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law". In its view the "PSA does not define 'security of the state', and provides a vague and over-broad understanding of what 'public order' is. Thus the PSA violates the principle of legality, and seriously compromises the ability of detained persons to contest their detentions".¹⁰⁷ The report also raised the issue that "under international law, India's reservations to the ICCPR, including its reservation to Article 9 is incompatible with the object and purpose of the ICCPR as it denies key article 9 protections from persons in administrative detention".¹⁰⁸

¹⁰¹ Jammu and Kashmir Coalition of Civil Society, Six monthly Review of Human Rights situation in Indian administered Jammu and Kashmir (January to June 2020) (*Kashmir Law and Justice Project*, 2020) 10.

¹⁰² 'J&K saw 166% rise in civilian casualties in 2017: Home Ministry' (*The Economic Times India*, 19 April 2018) <<https://economictimes.indiatimes.com/news/politics-and-nation/jk-saw-166-rise-in-civilian-sasualties-in-2017-home-ministry-report/articleshow/63823735.cms>> accessed 12 April 2023.

¹⁰³ Andrew Connolly, 'Kashmir's Decade: A High Death Toll is Warning Sign' (*The New Humanitarian*, 11 June 2019) <<https://www.thenewhumanitarian.org/news/2019/06/11/kashmir-s-decade-high-death-toll-warning-sign>> accessed 12 April 2023.

¹⁰⁴ "'Humiliated": Top Kashmiri Leaders Charged under "Draconian Law"' (*Al Jazeera*, 7 February 2020) <<https://www.aljazeera.com/news/2020/2/7/humiliated-top-kashmir-leaders-charged-under-draconian-law>> accessed 12 April 2023.

¹⁰⁵ Human Rights Committee, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant (4 November 1994) UN Doc. CCPR/C/21/Rev.1/Add.6[8].

¹⁰⁶ Opinion No 45/2008 (India) (26 November 2008) UN Doc. A/HRC/13/30/Add.1 [51].

¹⁰⁷ 'Still a Lawless Law: Detention under the J&K Public Safety Act, 1978' (*Amnesty International*, 13 October 2012) 12-13.

¹⁰⁸ 'Still a Lawless Law: Detention under the J&K Public Safety Act, 1978' (*Amnesty International*, 13 October 2012) 14.

The repressive law of the PSA that the Indian state has imposed *prima facie* on Kashmir has its "*origins of the PSA that can be traced in the Defence of India Act which was passed under Colonial Rule in 1915. The purpose of the Act was to stifle political dissent. The PSA, likewise, permits the state government to take a person into preventive detention without trial for up to two years*".¹⁰⁹ The PSA applies collective punishments by imposing curfews, internet blackouts, and banning of political parties with grassroots support in Kashmir. This was in evidence on 5 August 2019, when Article 370 was revoked and the military forces enforced their writ on Kashmir and made it part of the union territory. There were 389 people detained under the PSA including former Chief Ministers of the State, Mehbooba Mufti and Omar Abdullah and many other political leaders under the PSA.

There are plank of statutes that impose collective punishment on the people of Kashmir and made political representation defunct. The International Crises Group has reported that "*Beyond political actors, the government has stifled dissent among civil society, including by arresting civilians for expressing opinions on social media platforms. Security forces have also harassed, beaten and arrested journalists, including under the Unlawful Activities Prevention Act 1967, a draconian anti-terror law*".¹¹⁰ This statute is aimed at both individuals and associations and can also be used against anyone deemed to facilitating an act against the state.¹¹¹

It has been catalogued that human rights violations such as rape has become "a frequent, widespread, and persistent practice across Kashmir."¹¹² The "victims of rape in Kashmir have been as old as 80 and as young as 13. It is also apparent that rape has been conducted systematically against the Kashmiri Muslim population".¹¹³ The use of pellet guns is another strategic punishment against the civilian population and used to crowd control the people in demonstrations. The launch was in Operation Calm when in 2016 "Army and police instituted a state of siege by using 12-gauge shotguns against funeral processions, street protests and public gatherings. The cartridges of these pellet guns contain 450-600 lead pellets with piercing edges which are made of lead and metal".¹¹⁴ The standard operating

¹⁰⁹ Ayush Verma and Pratik Kumar, 'Jammu and Kashmir Public Safety Act, 1978: India's Use of Preventive Detention Violates Human Rights' (*Oxford Human Rights Hub Blog*, 17 March 2020), <<http://ohrh.law.ox.ac.uk/jammu-and-kashmir-public-safety-act-1978-indias-use-of-preventive-detention-violates-human-rights/>> accessed 12 April 2023.

¹¹⁰ 'Report no 310/Asia: Raising the Stakes in Jammu and Kashmir' (*International Crises Group*, 5 August 2020) <<https://www.crisisgroup.org/asia/south-asia/kashmir/310-raising-stakes-jammu-and-kashmir>> accessed 12 April 2023.

¹¹¹ Section 18. Punishment for conspiracy: Whoever conspires or attempts to commit, or advocates, abets, advises or [incites, directly or knowingly facilitates] the commission of, a terrorist act or any act preparatory to the commission of a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.

¹¹² Seema Kazi, 'Sexual Crimes and the Struggle for Justice in Kashmir' in Haley Duschinski and others (eds), *Resisting Occupation in Kashmir* (University of Pennsylvania Press 2018) 113.

¹¹³ Rituparna Bhattacharyya, 'Living with Armed Forces Special Powers Act (AFSPA) as Everyday Life' (2018) 83) 1 *Geo Journal* 31-48

¹¹⁴ Ananya Sharma, 'Spectacular Violence: Pellet Guns and the Sovereign Right to Maim in Kashmir' (*E-International Relations*, 11 February 2022) <<https://www.e-ir.info/2022/02/11/spectacular-violence-pellet-guns-and-the-sovereign-right-to-maim-in-kashmir/>> accessed 12 April 2023.

procedures instruct the forces to use pellet guns below the waist, however the vast number of visual impairments were indicative of indiscriminate firing.¹¹⁵

2. Reports of the UN Human Rights Council

There have been two successive reports by the Human Rights Council (OHCHR) in Geneva that have catalogued the Indian forces disregard for human rights and their immunity from prosecution under the AFSPA. The first report of the OHCHR in 2018 consisted of 49 pages which was the first ever issued by the UN on the human rights situation in the Indian-Administered and the (Azad) Pakistan-Administered Kashmir.¹¹⁶ It details abuses on the Indian side of the border and while acknowledging the rise of a "variety of armed groups" conveys the "widespread and serious human rights violations" perpetrated by the Indian forces on the suspected guerrilla fighters and civilian population in the Kashmir region.¹¹⁷ The report also states that Pakistan provided access to the investigators in Azad Kashmir but India refused to grant the UN any right to collect evidence. The report states that within the timeframe of the report in Pakistan "the human rights violations in this area are of a different calibre or magnitude and of a more structural nature".¹¹⁸

The report states that the "Indian security forces used excessive force that led to unlawful killings and a very high number of injuries" citing civil society estimates that approximately "145 civilians were killed by the security forces between mid-July 2016 and the end of March 2018, with up to 20 other civilians killed by armed groups in the same period".¹¹⁹ The report also confirms that the "Impunity for human rights violations and lack of access to justice are key human rights challenges in the state of Jammu and Kashmir" and the "AFSPA and the Jammu and Kashmir Public Safety Act 1978 (PSA) have created structures that obstruct the normal course of law, impede accountability and jeopardize the right to remedy for victims of human rights violations."¹²⁰

The HRC report states that the powers granted under AFSPA "contravenes several international standards on the use of force and related principles of proportionality and necessity including the UN Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, which requires law enforcement officials to use firearms only as a last resort, and to use them with lethal intent only when 'strictly unavoidable in order to protect life'".¹²¹ The follow-up OHCHR report issued a year later catalogues the use of pellet shot guns "used against protesters in 2016 – and which is still being employed by security forces". The official statistics provided showed "17 people were

¹¹⁵ Ravi Nair, 'Pellet Guns in Kashmir: The Lethal Use of "Non-Lethal" Weapons' (*The Wire*, 21 July 2016) <<https://thewire.in/rights/kashmir-lethal-pellet-guna>> accessed 12 April 2023; See also 'Losing Sight in Kashmir: The Impact of Pellet-Firing Shotguns' (*Amnesty International*, 13 September 2017) <<https://www.amnestyusa.org/reports/losing-sight-in-kashmir-the-impact-of-pellet-firing-shotguns/>> accessed 12 April 2023

¹¹⁶ OHCHR, 'Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan' (*Office of the United Nations High Commissioner for Human Rights*, 01 June 2018) <https://www.ohchr.org/en/documents/reports/report-situation-human-rights-kashmir-developments-indian-state-jammu-and-kashmir> accessed 12 April 2023.

¹¹⁷ *ibid* 4.

¹¹⁸ *ibid* 5.

¹¹⁹ *ibid* 7.

¹²⁰ *ibid* 11.

¹²¹ *ibid* 6.

*killed by shotgun pellets between July 2016 and August 2017, and 6,221 people were injured by the metal pellets between 2016 and March 2017. Civil society organizations believe that many of them have been partially or completely blinded".*¹²²

The debilitating injuries caused by shooting of pellet guns into unarmed demonstrators has led to many of them being permanently blinded. The UNHCR Guidance on the use of non-lethal weapons, such "as tear gas shells should not be used indiscriminately or put innocent bystanders or peaceful members of an assembly at risk".¹²³ However, if law enforcement agencies resort to "any use of violent means to police or disperse an assembly, such use must be promptly and transparently recorded to enable an ex post facto review of the proportionality, necessity and impact of the usage".¹²⁴

The United Nations human rights forums have continued to take an interest in the human rights crises in Kashmir. The Special Rapporteur on the situation of human rights defenders Mary Lawlor has raised the issue of the repression in Kashmir citing the detention of the human rights defenders by the Indian government under the Unlawful Activities Prevention Act 1967. This is with regards to the incarceration of Khuram Parvez, already detained since November 2021 on accusations of terrorism, who was arrested on 22 March 2023, in a second case after two days of interrogation by the National Investigation Agency. The UN rights expert called for the release and the closing of the investigations against Kashmiri human rights defenders.¹²⁵

V. Characterization of the conflict as NIC

1. Indictment for war crimes and crimes against humanity

The conflict in Kashmir cannot be solved by India by the use of force because its occupation of Kashmir has no validity in international law. It has refused to apply the principle of self-determination and it has imposed an alien rule over the people of Kashmir. This apparatus of Indian laws are not acceptable to the inhabitants and as it is disputed territory the laws have to be imposed by a colonial administration. This implies that the application of Indian constitution and its laws has no force in Kashmir and the referendum should be held to bring it within the jurisdiction of international law.

Generally, international law recognises two kinds of armed conflicts: "international armed conflict" and "non-international armed conflict." Each has its own rules, although many of the

¹²² OHCHR, 'Update of the Situation of Human Rights in Indian-Administered Kashmir and Pakistan' (*Office of the High Commissioner for Human Rights*, 8 July 2019) 22, <https://www.ohchr.org/sites/default/files/Documents/Countries/PK/KashmirUpdateReport_8July2019.pdf> accessed 12 April 2023.

¹²³ OHCHR, United Nations Human Rights Guidance on Less-Lethal Weapons in Law Enforcement (*Office of the High Commissioner for Human Rights*, 1 June 2020) <<https://www.ohchr.org/en/publications/policy-and-methodological-publications/united-nations-human-rights-guidance-less>> accessed 12 April 2023; See also Human Rights Committee, General Comment No 37, (17 September 2020 UN Doc CCPR/C/GC/37).

¹²⁴ General Comment No 37 (n 120).

¹²⁵ 'Rights expert urges India to stop crackdown on Kashmir activists' (*UN News*, 24 March 2023) <<https://news.un.org/en/story/2023/03/1135017>> accessed 12 April 2023. Mary Lawlor's full statement reads 'Indian authorities appear to be intensifying the long-standing repression of Kashmiri civil society'. 'The arrest and detention of persons for exercising their human rights are arbitrary. There must be accountability and remedy where such abusive actions are taken. The State must respect its human rights obligations and be held accountable where it violates them'.

basic provisions are common to both. It needs to be defined as to when the regime applies to military confrontations between a sovereign State and a non-State armed group operating from within its own territory. In reality the classification of the armed conflict whether it is international or non-international in the context of asymmetrical wars is of theoretical concern, as many similar norms and principles govern both types of conflicts. These have been recognised by the “avoidance of harm to the civilian population” under the treaty rules “the great majority of which had already become customary, and which reflected the most universally recognized humanitarian principles”.¹²⁶

The enforcement mechanism of the international law can be considered to be weak because of the lack of effective enforcement and the lack of consensus of the main powers of the Security Council to legitimise any action to prevent genocide. The reason for this is “*due to its vagueness and lack of applicability to certain crimes, or because it cannot intervene in matters that are within the domestic jurisdiction of the Indian state. Nonetheless, it seems there is an interdependency between international law and domestic law, and this reduces the power of international law, thus increasing the power of domestic law*”.¹²⁷

This makes it an imperative to apply the rules of the non-international conflict to India in its approach to the resistance to its rule in Kashmir. This requires the evaluation of India’s commitment to international law in the form of ratification of international treaties, in particular the Geneva Convention. It is already confirmed that India’s opt out of Article 9 of the ICCPR effectively renders its approach to dissent in Kashmir as outside the realms of international humanitarian law because of its denial of effective liberty to the population.

There is a basis for prosecution against the Indian government and military officials who have committed crimes in Kashmir through their occupation and in the course of the immunity provided to under the Special Powers Act to the military. This has led to the gross human rights violations that have been catalogued by the Human Right Council. The monitoring of the situation by the Human rights Special Rapporteur is also a factor whose statements serve as a basis for the moral condemnation that can serve as a preamble to act instruments that are invoked to bring Indian officials to justice.

The government has beached *jus cogens* expresses the idea of the existence of an international *lex superior* and it has been formulated in texts of UN documents.¹²⁸ The assumption is that *jus cogens* norms have an authority which exceeds that of ordinary international law and that it is in the very nature of such a hierarchically superior law that it is applicable without any limits as to either subject or circumstances. Thus, the prohibition of torture or other breaches of international human rights law applies to all subjects of international law, whether they are states, international organisations, insurrectional or national liberation movements, corporations or individuals.¹²⁹

The presence of *jus cogens* has also been felt in the proceedings before international judicial tribunals including the International Criminal Tribunals for the Former Yugoslavia

¹²⁶ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996, p. 226, Paras 74-87

¹²⁷ Leoni Connah, ‘International Law vs. Domestic Law in Kashmir’ (2021) 33(4) Peace Review 488-494.

¹²⁸ ILC Special Rapporteur, ‘Report on the Work of the Sixty-Eight Session’ (2 May – 10 June 2016, 4 July – 12 August 2016) UN Doc A/71/10, 299.

¹²⁹ Antonio Cassese, *International Law* (Oxford University Press 2005) 205.

and Rwanda,¹³⁰ the Special Tribunal for Lebanon,¹³¹ the Special Court for Sierra Leone,¹³² the Inter-American and European Courts for Human Rights,¹³³ the Court of Justice of the European Union,¹³⁴ and numerous arbitration tribunals.¹³⁵ This has permeated the rulings of the International Court of Justice, which had not received this concept in its jurisprudence has now adopted its reasoning with arguments of *jus cogens*, and has expressly accepted the relevance of the concept.¹³⁶

2. India's opting out of the Additional Protocol

The disputed status of Kashmir involves the population of Kashmir and the armed forces of India employed in overwhelming numbers. The Indian State is one of the High Contracting Parties to the 1949 Geneva Convention and its actions have to be evaluated under the principles of the international humanitarian law (IHL). The Indian state party has ratified all four Geneva Conventions and has also adopted the Geneva Convention Act 1960 into its domestic legislation. The state parties under Common Article 1 of the Geneva Convention are obliged to "respect and to ensure respect in all circumstances" toward the convention and obliges "a duty on the part of all States to use all available means to ensure respect for all provisions of the Conventions by all other States during all armed conflicts, even those to which the State in question is not a party".¹³⁷

The Geneva Conventions, together with the laws of the Hague Convention form the basis of contemporary IHL which comes into effect during an armed conflict. The IHL aims to regulate the conduct of belligerents; all combatants and to those no longer taking part in hostilities, including POWS. The application of IHL is based on the framework of the

¹³⁰ For the jurisprudence of the ICTY, see e.g. *Prosecutor v Kupreškić* (Judgment) IT-95-16 (14 January 2000) [519]–[520]; *Prosecutor v Kunarac and others* (Judgment) IT-96-23 & 23/1 (22 February 2001) [466]; *Prosecutor v Furundzija* (Judgment) IT-95-17/1 (10 December 1998) [153]–[154]. For the jurisprudence of the ICTR, see e.g. *Prosecutor v Kayishema and Ruzindana* (Judgment) ICTR-95-1 (21 May 1999) [88].

¹³¹ See e.g. *Prosecutor v El Sayed* (Order of 15 April 2009) [29]; *Prosecutor v Ayyash* (Decision of the Defence Appeals) STL-11-01 (20 October 2012) [68].

¹³² See e.g. *Prosecutor v Gbao* (Appeals Chamber, Decision on Preliminary Motion) SCSL-04-15-T (25 May 2004) [9]–[10]; *Prosecutor v Morris Kallon and Brimma Bazzy Kamara* (Decision on Challenge to Jurisdiction) SCSL-2004-15-AR72(E) (13 March 2004) [60], [66]–[71].

¹³³ For the jurisprudence of the European Court of Human Rights, see e.g. *Al-Adsani v UK* (2001) App No 35763/97 [60]–[67]; *Othman (Abu Qatada) v UK* (2012) App No 8139/09 [266]; *Jones and Others v UK* (2014) App No 34356/06 and 40528/06 [198]; *Naït-Liman v Switzerland* (2018) App No 51357/07 [129].

¹³⁴ See e.g. *Joined Cases C-402/05 P and C-415-05 P Kadi and Al-Barakaat International Foundation v Council and Commission of the European Union* [2008] 3 CMLR 41 [280], [287].

¹³⁵ See e.g. *Delimitation of Maritime Boundary between Guinea-Bissau and Senegal* (1989) UNRIAA 20 [44]; *Methanex v United States* (2005) ILM 44 [24]; *EDF v Argentina* (2012) ICSID No Arb/03/23 [909].

¹³⁶ See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Merits) [2015] ICJ Rep 3 [87]–[88]; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Merits) [2012] ICJ Rep 422 [99]; *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* (Judgment) ICJ Rep 99 [2012] [92]–[97]; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403 [81]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43[161]; *Armed Activities on the Territory of the Congo, New Application (Democratic Republic of Congo v Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 6 [64].

¹³⁷ Laurence Boisson de Chazournes and Luigi Condorelli, 'Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests' (2000) 82 *International Review of the Red Cross* 67.

Geneva Conventions for the protection of civilian persons in times of war. The International Committee of the Red Cross (ICRC) is the main international agency that oversees its implementation whose "basic principle underlying that law -humanity, impartiality, and neutrality that are as valid as ever and of utmost relevance" in its work.¹³⁸

The Indian government had signed a Memorandum of Understanding (MoU) in 1995 which permitted the ICRC to visit persons arrested, detained and imprisoned in relation to the situation in J&K.¹³⁹ However, it has been gradually withdrawing this support since 2016 when initially it "only stopped ICRC officials from visiting jails and working for inmates, which was the Geneva-based organisation's key mission".¹⁴⁰ After the revocation of Article 370 the ICRC has not "been able to work in India-held Kashmir since it was stripped of its political autonomy on August 5, foreign aid workers are not being issued visas and Kashmiris are being left without support". This has led to the ICRC stopping "its humanitarian works in the erstwhile state of Jammu and Kashmir" and the Indian government "enforced a security and communications clampdown that continues to this day in some form or other".¹⁴¹

The Indian government has an obligation under the Common Article 3 that is generic to all four Geneva Conventions and which states "(1) Persons taking no active part in the hostilities, ---shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria;" and '(2) An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict". The Common Article 3 is based on a negative description: it is applicable in the case of armed conflicts 'not of an international character'. Armed conflicts 'not of an international character' are armed conflicts where at least one Party is not a State.¹⁴²

This provision has application to non-international conflicts (NIC) and the Kashmir dispute must now be assigned as an NIC and the compliance by the Indian government of its obligations need examination. The Indian government has implemented counterinsurgency measures in the Kashmir Valley with its 1 million-strong occupation forces that have used "excessive force" against the lightly armed rebel forces.¹⁴³ Under customary international law the "use of lethal force must respect the legal principles of military necessity, distinction, (and) proportionality."¹⁴⁴ In executing a proactive, offensive and retributive doctrine the Indian forces have breached the rules not to cause "indiscriminate

¹³⁸ Yves Sandoz, 'The International Committee of the Red Cross as Guardian of International Humanitarian Law' (*International Committee of the Red Cross*, 21 December 1998) <<https://www.icrc.org/en/doc/resources/documents/misc/about-the-icrc-311298.htm>> accessed 12 April 2023.

¹³⁹ 'Jammu and Kashmir: the Government of India Grants the ICRC Access to Detainees' (*International Committee of the Red Cross*, 22 June 1995) <<https://www.icrc.org/en/doc/resources/documents/news-release/2009-and-earlier/57jm96.htm>> accessed 12 April 2023.

¹⁴⁰ Hilal Mir, 'Kashmiris Suffer Further as ICRC Stops Humanitarian Work' (*TRT News*, 15 January 2020) <<https://www.trtworld.com/magazine/kashmiris-suffer-further-as-icrc-stops-humanitarian-work-32965>> accessed 12 April 2023.

¹⁴¹ *ibid.*

¹⁴² 'Article 3 - Conflicts not of an international character' (*International Committee of the Red Cross*) <<https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-3>> accessed 12 April 2023.

¹⁴³ OHCHR, 'Report on the Situation of Human Rights in Kashmir' (n 113) 17.

¹⁴⁴ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge University Press 2005) 3-76, Rules 1-24.

and disproportionate attacks"¹⁴⁵ and to "observe a series of precautionary rules in attack, aimed at avoiding or minimizing incidental harm to civilians and civilian objects."¹⁴⁶

The breach of IHL is a structural problem with the Indian state because the government has not signed the two additional protocols that been added to the Geneva Conventions in 1977 which cover armed conflict which is a non-international conflict (NIC). These are the Additional Protocol (AP) I and II and while the former defines armed movements involving the "right to self-determination of colonised people as international armed conflicts, bringing, in some respects, guerrilla warfare and state responses to it within the protection ambit of IHL".¹⁴⁷ The latter was "specifically adopted to cover situations of NIC, thereby bringing a situation of armed conflict occurring on the territory of a country within the framework of international humanitarian law".¹⁴⁸

Part IV of the AP II on Civilian populations and General Protections of the Civilian Population states in Article 13: 1. *"The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances. 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. 3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities"*.¹⁴⁹

By not signing the AP I/II India has excluded any responsibility for the atrocities that are being committed in Kashmir and which have been attested by the OHCHR in its reports. The reasons have been speculated upon by Srinivas Burra, Assistant Professor at the Faculty of Legal Studies at the South Asia University, New Delhi who argues that it *"could be mainly because these protocols have expanded the scope of international humanitarian law as provided in the four Geneva Conventions, which may have certain implications at the domestic level. Such a hesitation – mainly in the form of domestic political contingencies"*.¹⁵⁰ There may be another concern which is that when the AP I/II were effective *"India was not in favour of accepting the category of non-international armed conflict itself. This position no longer remains valid as India has become a party to other international treaties which govern non-international armed conflict situations. An example of this is the Convention on Certain Conventional Weapons of 1980"*.¹⁵¹

The Indian state has no valid reason to not ratify the APs and the only ground for non-compliance is that it wants to give its armed forces absolute immunity from prosecution. The sequence of the India's actions in Kashmir prior to 2019 was to operate under the martial law and upon the annexation it imposed a lockdown on the civilian population. The

¹⁴⁵ *ibid* Rules 11-24.

¹⁴⁶ *ibid* Rules 15-24.

¹⁴⁷ Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3.

¹⁴⁸ Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3.

¹⁴⁹ Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, 94.

¹⁵⁰ Srinivas Burra 'Why India Should Consider Signing the Additional Protocols of the Geneva Conventions' (*Wire*, 8 June 2017) <<https://thewire.in/uncategorised/india-humanitarian-law-additional-protocols>> accessed 12 April 2023.

¹⁵¹ *ibid*.

breach of the Geneva Conventions' Common Article 3 and the AP II which is crucial to the protection of civilians in a NIC does expose India to allegation of war crimes and from departing from a norm of IHL and it can be accused of crimes against humanity.

The collective punishments imposed on the people resident in J&K is a breach of IHL and the principles of culpability were defined in *Prosecutor v. Tadic*,¹⁵² where an international tribunal was constituted to determine the crimes committed by former Yugoslavian military personnel. The decision states : "*Bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types, [. . . the General Assembly] Affirms the following basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict: . . .* ".¹⁵³ "*In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations*".¹⁵⁴

The scope of the Geneva and Hague Conventions in international armed conflicts can be extended to 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them', and also as 'all cases of partial or total occupation of the territory of a High Contracting Party, even if the occupation meets with no armed resistance'; thus, including, such long-running situations as the Israeli occupation of Palestinian territories. The UN Human Rights Council-mandated Commission of Inquiry (CoI) on the Occupied Territories, including East Jerusalem, reached similar conclusions in September 2022, reporting that the Israeli government's policies and actions have led to the permanent occupation and de facto annexation of Palestinian territory, likely constituting crimes under international law, including war crimes.¹⁵⁵

The Indian state by its abuse of human rights as documented by the OHCHR reports has been responsible for the breach of international human rights law, which makes it liable for the crimes committed by the enforcement of AFSPA against the people of Kashmir. The infringement of international humanitarian law is substantive given the operations carried out by its armed forces, such as extra judicial killings, and other atrocities against the civilians that has led to condemnation by the Human Rights Council and India's barring of the International Red Cross in Kashmir. . The standards that the actions of the armed forces will be judged are of NIC which governs conflict between state and the non-state actors and the fact that India has not signed the API/II militates heavily in the direction of being guilty of the offences.

VI. Conclusion

¹⁵² *Prosecutor v Tadić* (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-T (2 October 1995).

¹⁵³ *Prosecutor v Tadić* (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-T (2 October 1995) 111, 127.

¹⁵⁴ *ibid.*

¹⁵⁵ Inquiry on the Occupied Palestinian Territory including East Jerusalem and in Israel UN HR Council, 2022. [Ochr.org/en.hr-.borders/hrc/co-israel.index](https://www.ohchr.org/en/hr-borders/hrc/co-israel.index)

The calamity that has befallen the people of Kashmir is on such a scale and of such proportions that it needs to be viewed by the prism of international human rights, international humanitarian and international criminal law. The behaviour of India as the occupying power, since the independence of the country in 1947 and its partition, is illegal by its denial of the right of self-determination which is a cardinal principal of international law. There is no basis of a claim for internal self-determination because the Indian government has never accorded Kashmir the status of a separate polity and its people have never accepted the Instrument of Accession to India. The Maharaja's act of treachery was against the aspirations of the inhabitants which makes the transfer to India null and void. The internal right of self-determination can only be exercised if there is no contiguous claim of another state in this case of Pakistan. There is only an external basis for self-determination for Kashmir and that is to secede from India, which is the only natural and probable consequence of India's actions ever since its military occupation, that led to the division of Kashmir.

The international legal principle of a supervised mandated referendum has been denied to the people of Kashmir under the UN's auspices. The stipulation of the UN Security Council in its resolutions 1947- 1958 under the Chapter VI procedures maintain that a plebiscite is the only course of action that could settle the future course of Kashmir. This has not been facilitated by India and the refusal is a manifest breach of international law because the resolutions are effective from the first ceasefire when the line of control was established in 1948 and UN Observer Mission was installed to oversee its implementation. There is no prospect of the Indian government accepting this mechanism to take effect because of its belief that force is the only basis of finding a solution.

The Indian government's actions since 2019 when it revoked Article 370 which gave Kashmir special status and rule by decree from a Lieutenant- Governor a plenipotentiary appointed by New Delhi is direct rule which implies that Kashmir is now occupied territory. The demographic changes subsequent to the annexation of Kashmir are acts of a neo colonial state and the denial of representative government are severe breaches of international norms of civilised conduct. The infringements of human rights that flow from the Armed Forces Special Powers Act and the security dragnet imposed on its people has caused breaches of International human rights and international humanitarian law. This has been catalogued by the UN Human Rights Council reports of 2018 and 2019 that corroborate the information of the NGOs on the ground. These reports catalogue the use of lethal force against civilians, extra judicial murders, rape, maiming, denial of habeas corpus and crushing of all dissent.

The necessity is for the application of international criminal law to bring to justice the officials of the Indian government and army who have committed the crimes against humanity and war crimes against the people of Kashmir. They need to be apprehended, charged and transferred to the War Crimes tribunal. The precedence for this is the trial of the former Yugoslavian Generals and politicians who were brought to trial at the Hague tribunals and the indictments were framed as breaches of international human rights law in a non-international conflict. This should serve the cause of justice and the fact that the Indian government has refused access to the International Red Cross has to be taken into consideration for its mala fides to be proven in the matter.

The immunity of the armed forces and the military to crackdown on demonstrations and to use repression as a weapon is because the Indian government has not signed nor ratified the Additional Protocols I/II and the Common Article 3 as a high contracting party to the Geneva Conventions treaty. This in itself leads to an inference of guilt on its part that it will not apply the rules of international law in its domestic conflicts. This can be included in the framing of the charges because it is *prima facie* evidence of it not abiding by the norms of international conduct and of granting its military complete freedom of action in the occupied territory.

The issue of Kashmir must not be allowed to fester on the backburner of the cases that have fallen into abeyance and no longer being given any attention by jurists. The consistent deaf ear to the protestations of UN human rights observers and the Rapporteurs of Human Rights by India is against the norms of conduct that is required for the international law to function and be respected. The Indian approach in Kashmir is outside the realms of human rights and the framework of humanitarian law needs an active judicial framework to prosecute those responsible through the international criminal tribunals.

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