

# Kashmir's Right to Self Determination: UNSC Resolutions, Human Rights Violations and Culpability under International Law

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*The United Nations has voted for the Kashmir dispute to be settled by a referendum in the territory since the inception of both India and Pakistan as independent states in 1947. The Security Council resolutions have mandatory effect since their passage and a plebiscite was overdue when India decided to annex the state in August 2019. In refusing to let the people decide their future the Indian government went against the cardinal principle of self-determination. By revoking its constitutional status as a state within the Indian Union the government revoked the Article 370 without consulting any other interested party including the political representatives of the Kashmiri people. The consequence was the declaration of Martial law in the Valley enforced by an unprecedented security operation whereby the special powers allotted to the military and the auxiliary Border Security forces and Central Reserve Police force have been used to assault the human rights of the people. The Indian government has not only refused to implement the mandate of the UNSC but also breached the International Convention of Civil and Political Rights and the Universal Declaration of Human Rights. The actions of the Indian forces have been under the spotlight of the UN Human Rights Council whose reports in 2018 and 2019 implicate the military of gross human rights abuses in Kashmir. The argument of this paper is that there should be rigorous application of international humanitarian law and war crimes tribunals invested to prosecute the Indian officials for breaches of the rules in Non-International Conflicts (NIC).*

**Keywords:** *Instrument of Accession; Article 370; cultural genocide; Uti possidetis; UN Chapter VI; International Covenant on Civil and Political Rights; AFSPA Public Safety; ct, OHCHR Report 2018; International Humanitarian Law (IHC); Non International Conflict (NIC)*

## Introduction

The Kashmir dispute relates to the land and its long suffering people who have experienced "human rights violations through militarised control"<sup>1</sup> from the Indian occupation.<sup>1</sup> The inhabitants of Kashmir have been denied a referendum under the UN Security Council auspices and their resentment has led to

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<sup>1</sup>Sharma (2022).

suppression by the Indian military authority acting with complete immunity under its special powers.<sup>2</sup> This has escalated since the Indian government revoked Article 370 on 8 August 2019, which protected Kashmir's status as a state within India's constitution, and imposed direct rule from New Delhi. The security operation that has followed includes human rights violations, including collective punishments, curfews, extra judicial killings and disappearances at the hands of Indian security forces. It requires an examination of the legal background, the issues involved, and the deprivation of human rights in this asymmetrical conflict that needs international attention as a Non international Conflict (NIC) governed by humanitarian law.

The origins of the dispute are in partition of the Indian sub-continent when Britain relinquished sovereignty over the Indian subcontinent by enacting the Indian Independence Act (IIA) 1947. The Last Viceroy of British India, Lord Mountbatten allowed dispensation to the 562 Princely States to accede to any one of the two dominions of India or Pakistan.<sup>3</sup> However, the British government's representative formulated two pre-conditions that had to be met which were, firstly, the requirement that the State to be contiguous, and, secondly, the general aspirations of the people had to be accounted for.<sup>4</sup>

The overwhelming Muslim population of Jammu and Kashmir (J&K) had wished to be aligned with Pakistan but the princely ruler wanted to accede to India and he dismissed his Prime Minister Ranchandra Kak, on 11 August 1947 who had wanted a referendum.<sup>5</sup> The Maharaja then signed the Instrument of Accession with India upon which the Indian government provided the military guarantee for the unilateral declaration by the Maharaja when its armed forces landed on 24 October 1947 in the capital of Srinagar. It was ostensibly to prevent the Pakistani forces who had infiltrated to lay claim to the state which had been transferred to them under the boundary commission. The Indian government invoked Section 10(1) of the IIA for its incorporation which states "*the provisions of this Act keeping in force provisions of the Government of India Act, 1935, shall not continue in force the provisions of that Act relating to appointments to the civil services of, and civil posts under, the Crown in India by the Secretary of State, or the provisions of that Act relating to the reservation of posts*".<sup>6</sup>

The intervention by Pakistan's sympathisers secured a rump state of Pakistani (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.<sup>7</sup> The division of Kashmir has remained and it

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<sup>2</sup>The population of Jammu and Kashmir was 14.5 million before its annexation. It was 68% Muslim. Indian Population 2019. //indiapopulation2019.com/population-of-jammu-kashmir-2019.html

<sup>3</sup>*Brown (1984).*

<sup>4</sup>*Ibid.*

<sup>5</sup>Ankit (2010). See also Abdullah & Chinar (2016).

<sup>6</sup>Lone (2018).

<sup>7</sup>UN Security Council, *Security Council resolution 47 (1948)*

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).

In 2019 the Indian government annexed Kashmir and imposed a lockdown and closed all communication with the outside world. It arrested the political leaders, disbanding the local parties and dissolved its national assembly. This form of censorship and news blackout continued for over one year and has only been partially lifted.<sup>8</sup> The policy of the Indian government under Prime Minister Narendra Modi, a fervent nationalist of the Bharatiya Janata Party (BNP), has been to implement extra constitutional measures that has usurped the status of Kashmir and led to two variables. Firstly, it is against the letter and spirit of the UN Security Council Resolutions for a plebiscite to determine its permanent status. Secondly, it has broken the Simla Agreement which was the first bilateral accord between the two countries on Kashmir by annexing the state without consultation with Pakistan. It states in Article 4(ii) "*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*".<sup>9</sup>

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. The Armed Forces (Special Powers) Act (AFSPA) 1958 provides the umbrella of immunity to military personnel in Kashmir and has been effective for the longest period than on any other state. This has led to the commission of atrocities and the first Human Rights Council report in 2018 was very damning of the Indian government's actions in Kashmir and stated that the "allegations of human rights violations include torture and custodial deaths, rape, enforced disappearances and extrajudicial executions".<sup>10</sup> The subsequent report also mentioned the "extrajudicial, summary or arbitrary executions especially since the 2016 unrest began".<sup>11</sup> Despite this the Indian government revoked Kashmir's autonomous status and incorporated it within the Indian union after further subdividing the state into two territories.<sup>12</sup> There was no acknowledgment of its alleged actions in the territory and it has refused UN Secretary General Antonio Guterres's offer of mediation.<sup>13</sup>

The breach of human rights is not only related to the measures the armed forces and the security services have taken against the civilian population but now also concerns the suppression of grassroots representation of the Kashmir people. The Indian Parliament (Lok Sabha) has passed the law by providing land grants

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<sup>8</sup>Gupta (2019).

<sup>9</sup>Ministry of External Affairs, Government of India, Simla Agreement.

<sup>10</sup>OHCHR (2018).

<sup>11</sup>OHCHR (2019).

<sup>12</sup>The Jammu and Kashmir Reorganisation Act, 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.

<sup>13</sup>UN Chief officer.

which have removed all obstacles to non-Kashmiris purchasing land in Kashmir.<sup>14</sup> The Indian government has enacted legislation that threatens to permanently change the demographic balance of the population. The Jammu and Kashmir Property Rights to Slum Dwellers Act 2012, as amended in 2020, deletes references to "permanent residents", facilitating the process for this category of migrants to attain property rights, which would allow them to apply for residency. This would lead to marginalisation of the original inhabitants who have resided since time immemorial on this territory, and along with the defunct status of Kashmir's political parties makes it a unique crises.

The violations of human rights extend to the cultural genocide of the indigenous Muslim population.<sup>15</sup> The BJP party has taken control of the Jammu and Kashmir Waqf Board which was a charitable trust exercising control over properties across the region which extends to the control of shrines.<sup>16</sup> These in Kashmir were an ancient repository of piety and assertion of Muslim identity which have been transferred to a party committed to Hindutva. The lingua franca of the Kashmiri people Urdu is being eroded with transplantation of Hindi, and Dogri being made official languages and with transfer of the native Kashmiri language from Nastaliq to the Devanagriscript.<sup>17</sup> The children in state schools are being made to "sing Hindu hymn Raghupati Raghav Raja Ram in classes as part of the preparation for the festival of Gandhi Jayanti" in the process of indoctrination.<sup>18</sup>

The imposition of the BJP ideology on the Kashmir population is alongside the repression that has been in motion since India annexed Kashmir. The majoritarian state's policy framework in India "dissipates the possibility of resolving the Kashmir question" and its ideological underpinning "eschews its responsibility of administering Kashmir through democratic engagement and of seeking negotiated settlement" under the present dispensation.<sup>19</sup> The oppression of the inhabitants and their Sankritisation is reminiscent of a "colonial agenda imposed by settler states on Indigenous peoples". The violation of international

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<sup>14</sup>The Jammu and Kashmir Grant of Domicile Certificate (Procedure) Rules (2020) enables residency and property rights for various categories of non-residents, who can now also apply for government jobs.

<sup>15</sup>Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide (1948) define genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group, and forcibly transferring children of the group to another group".

<sup>16</sup>Sharma (2022).

<sup>17</sup>Jammu and Kashmir Official Languages Act 2022 was introduced in Lok Sabha on September 22, 2020. The legislation declares Kashmiri, Dogri, Urdu, Hindi and English as the official languages to be used for the official purposes of the union territory, from such date as the Administrator of the union territory may notify.

<sup>18</sup>Muslim Students being forced to sing Hindu hymns draws ire in Kashmir. The Hindu.

<sup>19</sup>Rai (2019).

law by India in granting its forces immunity needs the chain of command to be indicted for crimes in a NIAC.<sup>20</sup>

This paper has 4 parts which can be navigated as follows. In Section A the issue of the legality of the Instrument of Accession to India of Kashmir in 1947 and the mandatory effect of the Security Council resolutions is extrapolated that have called for a referendum in the territory; Section B examines the application of and the right of self-determination under the international conventions and UN Declarations; Section C evaluates the human rights violations that are the consequence of immunity from prosecution of the armed forces and refers to the Human Rights Council reports and Non-Governmental Organisations (NGO)s; and Section D charts India's refusal to be bound by Additional Protocol (AP) I and II of the Geneva Convention that bind it to observe international humanitarian law in the Non-International Conflict (NIC) and prosecution for war crimes. The article draws a nexus between the international law principles, legal precedence and the liability of the state that has breached human rights.

## Legal Origins of the Dispute

### *Device of Incorporation*

The status of Jammu and Kashmir (J&K) under the British rule was to provide it with special autonomy throughout the duration of the Raj. The land and title were purchased by Gulab Singh from the East India Company in 1846 and he became the Maharaja under the auspices of the British Government (East India Company) under the Treaty of Amritsar. This is accepted as the 'Kashmir Sale Deed' signed on 16 March 1846<sup>21</sup> which conveyed the title in succession to the Maharaja, Sir Hari Singh, who inherited the seat as part of the House of Dogra when he ascended to power on August 15, 1947.<sup>22</sup>

The contentious issue in this dispute is the execution of the Instrument of Accession in favour of India that was the dispensation that the Last Viceroy of British India, Lord Mountbatten gave to the Princely States. This was after the Indian Independence Act (IIA) 1947 was promulgated by the UK Parliament that relinquished British sovereignty over the Indian subcontinent. Article 1 of the IIA partitioned British India into the two states of India and Pakistan, and 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. Subsequently, all treaties and agreements that were enforced before the enactment of this Act between rulers of the States and His Majesty's government lapsed.

The British gave the Princely States the choice to accede to any one of the two dominions of India or Pakistan.<sup>23</sup> However, there were two pre-conditions which were, firstly, the requirement of the contiguity of the State to the new nation

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<sup>20</sup>Korbell (2021).

<sup>21</sup>Lone (2009).

<sup>22</sup>Gull (2015).

<sup>23</sup>Teng, Bhatt & Kaul (2006).

states and, secondly, the aspirations of the people.<sup>24</sup> The overwhelming Muslim population of J&K wanted to be aligned with Pakistan and the act of its royal potentate to dismiss his Prime Minister, Ranchandra Kak,, on 11 August 1947, who favoured Kashmir's accession to Pakistan is an indication that the Maharaja wanted to align with India.<sup>25</sup>

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 law of treaties and furthermore they were not deposited at the UN headquarters in New York.<sup>26</sup> The Instrument protects against the illegal incorporation into another state and its terms affirm the sovereignty of Kashmir as a State.<sup>27</sup> Article 7 states: "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[...]"<sup>28</sup>

The Indian government granted 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.<sup>29</sup> This was complimented by Article 35A which excluded Indian citizens from becoming the *state subjects* or citizens of Kashmir and also prohibited them from acquiring property in J&K.<sup>30</sup>

### *Uti Possidetis*

The territory of Kashmir has separated the people who share ethnicity, religion and language and are divided by a Line of Control (LOC) which is heavily militarised. The argument that Britain as a colonial power governed an undivided India that gives the right to ownership in secession of Kashmir is not sustainable. The concept of *Uti possidetis* is for the continuation of previous

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<sup>24</sup>Ibid.

<sup>25</sup>Ankit & Kak (2010) at 36-39. See also Abdullah & Chinar (2016) at 291-292.

<sup>26</sup>Arts.2 (1) (b) and 15, Vienna Convention on the Law of Treaties 1969

<sup>27</sup>Kapur & Narang (2001).

<sup>28</sup>Instrument of Accession 1947.

[jklaw.nic.in/instrument\\_of\\_accession\\_of\\_jammu\\_and\\_kashmir\\_state.pdf](http://jklaw.nic.in/instrument_of_accession_of_jammu_and_kashmir_state.pdf)

<sup>29</sup>Part XXI of the constitution of India deals with the "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).

<sup>30</sup>Article 35 A was enacted under Article 370 (1) (d) in 1954 and gives the Jammu & 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.

colonial boundaries and is against the disintegration 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".<sup>31</sup>

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.<sup>32</sup> 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'. 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 one once secession has succeeded.<sup>33</sup> 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. 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 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.

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".*<sup>34</sup>

The Indian government proceeded to align the state with India by promulgating Article 370 in the Indian constitution of 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

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<sup>31</sup>Frontier Dispute (Burkina Faso/Republic of Mali), ICJ 1986, p 554. Para 23

<sup>32</sup>Rossi (2017) at 106.

<sup>33</sup>Walter, von Ungern-Sternberg & Abushov (2014)

<sup>34</sup>Report of Sir Owen Dixon.

that corresponded to the Instrument of Accession as required by the clause b(i) of the Article 370. 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. On 27 October 1950, the General Council of the National Conference adopted a resolution recommending the convening of a Constituent Assembly for the purpose of determining the 'future shape and affiliations of the State of Jammu and Kashmir.' The Constituent Assembly consisting of 75 members was elected in 1950 by a universal adult franchise and the constitution that was adopted declared the State of Jammu and Kashmir to be 'an integral part of India.' It may, however, be noted that all the nominations filed by the opposition in the election were rejected.<sup>35</sup>

Article 35 A preserved the territorial integrity by restricting the right of alienation of land to people who were not born or had residential status in Kashmir. This did not dissipate the issue of the aspirations of its population and their future inclination within the purview of international law. The UN Security Council considered this as usurping the will of the people by disparaging the Constituent Assembly where the JKNC "*might attempt to determine the future shape and affiliation of the entire state or any part thereof that would not constitute a disposition of the state in accordance with the above principle*".<sup>36</sup>

However, the Indian government refused to conduct a plebiscite and empowered the constituent assembly to establish a legislative assembly by forming a mechanism for an electoral process.<sup>37</sup> 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 most of Kashmir and it was a conveyance of land that transferred title to India by overriding the principle of *Uti possidetis*. The process of annexation of a non-contiguous territory was accomplished by the use of judicial fiat rather than by conducting a plebiscite to determine its future status.

## **Binding Effect of Resolutions**

### *Security Council Seised of Matter*

The UN bodies had called for a ceasefire after the Indian - Pakistani skirmish post-independence over Kashmir and the Security Council proposed a referendum in the territory to decide its future status. There has been a total of 6 UNSC resolutions calling for a plebiscite beginning in 5 January 1949(S11196) and ending on 24 January 1957 (S13779) ; and 21 February 1957 (S3793). The lack of

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<sup>35</sup>Ghosh (2007).

<sup>36</sup>UN Security Council, *Security Council resolution 91 (1951)*

<sup>37</sup>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.' Report of the Security Council, 16 July 1963-15 July 1964, at 88.



implementation by the Indian government may be a breach of international law as it falls under the UN Charter that specifically mandates the areas over which the issue arose when the decisions are made to pass a resolution.

Under Chapter 1 '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".

*The framework of the UN has three important instruments the first of which is the Chapter V, on the '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". Chapter VI is on the 'Pacific Settlement of Disputes' and Chapter VII is on 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".<sup>38</sup>*

The accession of Kashmir to India was raised in the UN after the de militarisation of the Indian and Pakistani forces when the UNSC called on 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 it 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".<sup>39</sup>*

There was no protocol to state whether it was adopted under Chapter V or Chapter VI by 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*

<sup>38</sup>Chapter VII emphasis ' :Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression Articles 39-51; and Chapter VIII: Regional Arrangements under Articles 52-54.

<sup>39</sup>Resolution 47 (1948) On the India-Pakistan question submitted jointly by the Representatives for Belgium, Canada, China, Colombia, the United Kingdom and United States of America and adopted by the Security Council at its 286th meeting held on 21 April, 1948. (Document No. 5/726, dated the 21st April, 1948).

*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".<sup>40</sup>*

The International Court of Justice (ICJ) has established the basis to ascertain whether the Security Council intended the resolution to have legal 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". There is 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".<sup>41</sup>*

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. The decisions are considered as binding by the ICJ. In *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), 'the Namibia case'*<sup>42</sup> the Court had to respond to the question by the Security Council of the United Nations, "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)".

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".<sup>43</sup>*

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:

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<sup>40</sup>Soofi (2019).

<sup>41</sup>Öberg (2005) at 885.

<sup>42</sup>Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) [1971] (hereinafter Namibia Case) ICJ Rep 16, para. 105. Request for Advisory Opinion (including the dossier of documents transmitted to the Court pursuant to article 65, paragraph 2 of the Statute)

<sup>43</sup>Namibia case, Para. 113.

*"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".<sup>44</sup>*

However, the Court was at pains to point out 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".*

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"*.<sup>45</sup> It can be summed up that the binding or non-binding nature of a resolution (decision or recommendation) also covers determinations made therein; *"a determination made in a recommendation is not binding, whereas a determination made in a decision is of mandatory effect"*.<sup>46</sup>

This ruling was confirmed in the *Legal Consequences of the Construction of a Wall in the Palestinian Territory*,<sup>47</sup> 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".<sup>48</sup> 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

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<sup>44</sup>Ibid, Para. 117.

<sup>45</sup>Öberg (2005) at 891.

<sup>46</sup>Ibid.

<sup>47</sup>Legal Consequences of the Construction of a Wall in the Palestinian Territory, Advisory Opinion ICJ Reports 2004, p 136

<sup>48</sup>Para. 120.

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".<sup>49</sup> This implies that the resolutions on Kashmir that have been passed under Chapter VI can still be binding and are enforceable despite the fact that they do not have mandatory implications such as action under Section 2 of the UN Charter.

*In USA v Nicaragua*<sup>50</sup> 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".<sup>51</sup>

The Court takes 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.<sup>52</sup> The contextually 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'.<sup>53</sup> It has been observed by the ICJ as dependent on the "clarity of the determinations" made and not on whether they were issued under any Chapter of the UN framework.<sup>54</sup>

The final UNSC resolution on Kashmir no 122 adopted on 24 January 24, 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."*

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<sup>49</sup>Higgins (1972) at 282.

<sup>50</sup>Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (hereinafter the Nicaragua case). Merits, Judgment. I.C.J. Reports 1986, p. 14 at 44.

<sup>51</sup>Para. 72.

<sup>52</sup>United Nations Chapter 5 the Security Council Functions and Powers Article 24 <https://www.un.org/en/sections/un-charter/chapter-v/index.html>

<sup>53</sup>Öberg (2005) at 885.

<sup>54</sup>In Case Concerning Legality of Use of Force (Serbia and Montenegro v Belgium) [2004] ICJ Rep, p. 279 General list no 105 at 27–29, paras 64–70.

This states expressly that the assembly proposed by the [Jammu and Kashmir National Conference](#) could not constitute a solution to the problem as defined in [United Nations Security Council Resolution 91](#) which had been adopted almost six years earlier. The resolution was also not presaged under any specific Chapter of the UN either the Chapter VI or VI and could suffice to validate and reaffirm the principles that were adopted in the first resolution in 1948. Therefore, the procedure under which it was adopted was not relevant but the substance of the resolution was significant.

### *Legal Impact of Resolutions*

The impact of a resolution does invite enforcement under Chapter VI and if ostensibly of persuasive effect does not preclude it from mandatory application. The UNSC Resolution 1325 on Women, Peace, and Security (Resolution 1325) passed unanimously on October 31, 2000<sup>55</sup> 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”.<sup>56</sup>

This was passed under Chapter VI which calls for a pacific solutions in resolving conflicts. However, it orders to determine the intent of a UNSC there are several factors that need to be assessed. 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".*<sup>57</sup>

The analogy can be extended to the UNSC resolutions on Kashmir which transcend the principles of both Chapter IV 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.<sup>58</sup>

Appiagyei-Atua, argues that this Resolution 1325 imposes 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. This he argues should have binding effect because it is objectively based on the 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*

<sup>55</sup>SC.Res.1325,UNDocS/Res/1325 (Oct. 31, 2000)

<sup>56</sup>Ibid.

<sup>57</sup>Ibid.

<sup>58</sup>Appiagyei-Atua (2011).

*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.<sup>7</sup> further, states have the duty not to interfere or act in any way that would compromise women and girls' enjoyment of fundamental rights".<sup>59</sup>*

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*".<sup>60</sup> 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*".<sup>61</sup>

This analysis finds support in Professor Stefan Talmon's observation that UNSC practice and the common understanding of the UN membership in essence 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*".<sup>62</sup> 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.

There is also another basis for the application of UNSC resolutions passed notionally under Chapter VI, such as the Kashmir dispute, which is that they conform to a 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*,<sup>63</sup> and the ICJ has settled this issue in favour of the latter.<sup>64</sup> The GA Res 2625 (XXV) in the Nicaragua case was adopted unanimously.<sup>65</sup> The General Assembly resolutions even if they are not binding may sometimes have normative value and they can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. The evidence can be found in the ICJ rulings that have identified the General Assembly resolutions to be a step in the

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<sup>59</sup>Ibid.

<sup>60</sup>Wood (1998). See also Orakhelashvili (2007).

<sup>61</sup>Ibid.

<sup>62</sup>Talmon (2005).

<sup>63</sup>[Cahin](#), Ranjeva & Simon (2001) at 95. See also Akehurst (1975) at 11.

<sup>64</sup>Nicaragua case, para 188.

<sup>65</sup>Ibid, at para 191

development of international law or encapsulating the rules of international law without specifying the content of these rules.<sup>66</sup>

This 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*<sup>67</sup> the ICJ held 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*'.<sup>68</sup> 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)*".<sup>69</sup>

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."<sup>70</sup> It emphasises the importance of the adoption "each year by the General Assembly resolutions calling for the use of nuclear weapons to be prohibited".<sup>71</sup> 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.<sup>72</sup> The ICJ has found repetition to be important because the voting and passing of resolutions could be interpreted as state practice.<sup>73</sup>

The UNSC resolutions on Kashmir meet the test of regularity and each one of them have affirmed the principle in Security Council resolution 47 (1948) [The India-Pakistan Question]. They all invoke the clause that calls for an administration of a plebiscite that would determine the aspirations of the Kashmiri people and their future status. The UNSC Resolutions on Kashmir do not preclude their 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 promote peace and which is to achieve a solution to end the conflict by a referendum is a determination 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.

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<sup>66</sup>Schwebel (1979) at 303. See also Schwebel (1994) at 503.

<sup>67</sup>Legality of the Threat or Use of nuclear weapons, Advisory Opinion, 1. C.J. Reports 1996, at 226.

<sup>68</sup>Para. 71.

<sup>69</sup>Para. 73.

<sup>70</sup>Para. 255

<sup>71</sup>Ibid.

<sup>72</sup>re Namibia case, dissenting opinion of Judge Tanaka, at 292; Barcelona Traction, Light And Power Company, Limited (Belgium v Spain) (Second Phase) [1970] ICJ Rep 3, Separate Opinion of Judge Ammoun, at 303.

<sup>73</sup>GA Res 2625 (XXV) (Nicaragua, at 101, para. 191).was adopted unanimously

## Right to Self-determination under International Law

### *De Colonialisation and Inalienable Rights*

Prior to the examination of the specific breaches of international human rights and humanitarian law by India in Kashmir it is necessary to consider the right of self-determination recognised in the UN Charter. This principle is embodied in Article I of the Charter of the [United Nations](#) which states: "**All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development**".<sup>74</sup>

There are two UN declarations, in addition to the UN Charter itself which have dealt with the issue of decolonisation and self-determination and these are the Declaration on the Granting of Independence to Colonial Countries 1960 and Friendly Relations Declaration 1970.<sup>75</sup> The underlying principles of both these declarations is that self-determination leading to severance from the state is the final option and exercisable only within the decolonisation 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 centuries.<sup>76</sup> While these declarations emphasised the principle of territorial integrity of existing states they were the precursor to the movements for the self-determination where 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".<sup>77</sup>*

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<sup>74</sup>Article 55 of the 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".

<sup>75</sup>Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (Dec. 14, 1960); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (Oct. 24, 1970)..

<sup>76</sup>Ibid, para. 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 United Nations' Charter); Friendly Relations Declaration, *supra* note 7 ("[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[ . . . ]").

<sup>77</sup>United Nations General Assembly Resolution 1514 (XV) Declaration on the Granting of Independence to Colonial Countries and Peoples (United Nations General Assembly [UNGA]), 14th December 1960 (UN Doc A/RES/1514(XV))



The Instrument of Accession stemmed from a colonial dispensation and the Indian union became the new sovereign over the Princely state of Kashmir and exercised its power to incorporate it into the union by invoking Article 70. While there is no universal definition of statehood in international law<sup>78</sup> this can be inferred by various means, such as international commissions of inquiry, and facts, such as the actual manifestation of a people to assert their identity;<sup>79</sup> 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.<sup>80</sup>

The Indian union's possession of J&K has to be contextualised as a process of colonialism because when the State enacted its new 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, even if its legal integration on the other hand is still in pending. 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".<sup>81</sup> 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".<sup>82</sup>*

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

<sup>78</sup>Western Sahara, Advisory Opinion, ICJ GL No 61, [1975] ICJ Rep 12, ICGJ 214 (ICJ 1975), 16th October 1975, United Nations [UN]; International Court of Justice [ICJ], 43-44

<sup>79</sup>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": Ibid at 33.

<sup>80</sup>General Assembly Resolution 1541 provided for three legitimate methods of decolonisation consistent with the principle of self-determination, independence, free association, and integration with an existing state. GA Res 1541, 15 UN GAOR Supp (no 16) at 29, UN Doc A/4684 (1960).

<sup>81</sup>Scharf (2003).

<sup>82</sup>Bogaerts & Remco (2012) at 23-39.

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".<sup>83</sup> The analogy applies to India because of the power of eminent domain that it used to annex Kashmir on 5 August 1952, 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.<sup>84</sup>

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.<sup>85</sup> 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.<sup>86</sup> This is a clear demonstration that India has no

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<sup>83</sup>Wilson (1988) at 38-59.

<sup>84</sup>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.

<sup>85</sup>Delimitation Commission Report 2022, Summary, 6 May 2022. <https://pdffile.co.in/delimitation-commission-jk-report-2022/>

<sup>86</sup>*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 }*

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.<sup>87</sup>

### *International Covenants and Right of Secession*

The principle of territorial integrity applies to an already sovereign state and it is 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 a colonial power. The International Covenant of Civil and Political Rights (ICCPR) 1966 and 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 Covenants share an identical Article 1 that states as follows:

*"All 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"*.

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".<sup>88</sup>

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*<sup>89</sup> 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

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<sup>87</sup>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 '22. <https://indianexpress.com/article/explained/rajnath-singh-gilgit-baltistan-history-explained-8234674/>

<sup>88</sup>Twining (1991) at 85.

<sup>89</sup>(2017) 2 SCC 538

is empowered to enact laws for the whole of India, including Jammu and Kashmir.<sup>90</sup>

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".<sup>91</sup> 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".<sup>92</sup>

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.<sup>93</sup> 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".<sup>94</sup> 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".<sup>95</sup>*

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.<sup>96</sup> The fact that it defeats the objective of the ICCPR/ICESCR and the United Nations General Assembly Resolution 1514 (1960) which established the right of self-determination that applied to the decolonialisation 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 framework.<sup>97</sup>

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<sup>90</sup>Para. 10.

<sup>91</sup>Castellino (2000) at 22-23.

<sup>92</sup>Ibid, at p 31

<sup>93</sup>Jennings (1956) at 56. See also Moore (1998) at 1-13.

<sup>94</sup>Castellino (2000) at 93.

<sup>95</sup>Centre for Human Rights (1987).

<sup>96</sup>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". Statement of the representative of India to the Human Rights Committee, UN Doc. CCFR/C/Sr 498 (1984) at 3.

<sup>97</sup>Hurst (1996) at 41-42.

## International Human Rights and armed Forces Immunity

### *Atrocities committed under Special Powers*

There are fundamental human rights such as the right to life, right to be free from torture, right 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 International Declaration of Human Rights<sup>98</sup> and the covenants that include binding human rights provisions.

It is necessary to understand that as an occupying force the Indian military operates in a legal vacuum in the Valley of Kashmir and their armed operations are governed by the Armed Forces Special Protection Act (AFSPA) 1958. The AFSPA 1958 was first introduced in states in the north-east region of India, including Assam and Manipur, in response to armed political activity 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. This was promulgated in 1990 in J&K and is still effective. There are two sections of this act that provide draconian powers to members of the armed forces and complete immunity which are 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 AFPSA provides extra ordinary powers that have been used extensively in the J&K to commit human rights abuses by Indian troops. The violence and its impact began before the arrival of Prime Minister Modi into power. According to one estimate in the period leading upto 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”.<sup>99</sup> This has continued after Modi's ascent to power in 2013 and in its current phase reached critical mass after the security forces killed a popular leader of an armed group, Burhan Wani, on 8 July ,

<sup>98</sup>International Declaration of Human Rights, 1948.

<sup>99</sup>Dobhal 2011) at 10.

2016, in southern Kashmir.<sup>100</sup> The killing led to a renewed uprising, which continued for the next six months and the Indian occupational forces launched "Operation All-Out" in 2017.<sup>101</sup> This has heralded 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 armed forces of areas designated for intervention.<sup>102</sup>

The Indian Interior Ministry has stated that there was a 167% increase in civilian killings in 2017 compared to 2015 and a 6.21% jump in the number of violent incidents compared to 2016. The number of insurgents killed went up by 42%. There was an increase by 166% rise in Civilian casualties in 2017-18.<sup>103</sup> The Jammu Kashmir Coalition of Civil Society (JKCCS), a local rights group, has estimated "that more than 586 people were killed in 2018, including militants, Indian security forces, and 160 civilians".<sup>104</sup>

The powers granted under AFPSA are supplemented by the Jammu and Kashmir Public Safety Act 1978 (PSA) which empowers security personnel to detain people and suspend the writ of habeas corpus. **The powers exercisable under the PSA have been defined as opaque and arbitrary.**<sup>105</sup> Action 13 (2) allows the detention of a person without giving them the reasons and can keep them in confinement indefinitely. Section 13 does not require the detaining authority to set out the reasons for detention and non-disclosure for the grounds of detention means the detainees cannot challenge the grounds for their incarceration. Section 16(5) prohibits a counsel of choice for the suspect. This is a breach of international law as the UN Human Rights Committee has clarified that to reserve the right "to arbitrarily arrest and detain persons" would be incompatible with the object and purpose of the ICCPR.<sup>106</sup> In 2008, the UN Working Group on Arbitrary Detention concluded that

*"10 individuals detained under the PSA in J&K had been detained in violation of articles 7, 9, 10 and 11(1) of the Universal Declaration of arbitrarily Human Rights and Articles 9 and 14 of the ICCPR".*<sup>107</sup>

The Amnesty International report has stated that the PSA violates the international human rights law because "According to 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

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<sup>100</sup>Kashmir violence:

<sup>101</sup>Andrabi (2021).

<sup>102</sup>Six monthly Review of Human Rights situation in Indian administered Jammu and Kashmir (January to June 2020) Jammu and Kashmir Coalition of Civil Society. p 10 <https://jkccs.net/wp-content/uploads/2020/07/Bi-Annual-HR-Report-2020-JKCCSAPDP.pdf>

<sup>103</sup>Home Ministry report. 18/3/18. <https://economictimes.indiatimes.com/news/politics-and-nation/jk-saw-166-rise-in-civilian-sasualties-in-2017-home-ministry-report/articleshow/63823735.cms>

<sup>104</sup>Connolly (2019).

<sup>105</sup>'Humiliated'.

<sup>106</sup>Human Rights Committee, General Comment No. 24.

<sup>107</sup>Opinion no. 45/2008 (India).

*"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".*<sup>108</sup>

The report also raised the issue that "under international law, India's reservations to the ICCPR, including its reservation to article 9, must not be "incompatible with the object and purpose of the treaty."<sup>109</sup> and "it is incompatible with the object and purpose of the ICCPR as it denies key article 9 protections from persons in administrative detention".<sup>110</sup>

It has been argued that the "*origins of the PSA 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*".<sup>111</sup> The PSA allows imposing of curfews, internet blackouts, and banning of political parties with grassroots support in Kashmir. This was enforced on 5 August **2019, after the military forces sealed off the territory and the Indian Government revoked the autonomous status of J&K under Article 370 of the Indian Constitution. 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 is a raft of legislation that has been employed in Kashmir to quash dissent and 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".*<sup>112</sup>

This Act is aimed at both individuals and associations and can also be used against the print media.

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 AFPSA. 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.<sup>113</sup> 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

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<sup>108</sup>Still a Lawless Law.

<sup>109</sup>Vienna Convention on the Law of Treaties, A/CONF.39/27 (1969), adopted 22 May 1969, entered into force 23 May 1980, para. 19(c).

<sup>110</sup>Still a Lawless Law, at 14.

<sup>111</sup>Kumar (2020).

<sup>112</sup>Raising the Stakes in Jammu and Kashmir.

<sup>113</sup>OHCHR (2018).

region.<sup>114</sup> 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".<sup>115</sup>

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".<sup>116</sup> 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."<sup>117</sup>

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'".*<sup>118</sup> 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 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".<sup>119</sup>

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".<sup>120</sup> 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".<sup>121</sup>

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<sup>114</sup>Executive Summary at 4.

<sup>115</sup>Executive Summary at 5.

<sup>116</sup>Ibid, at 7.

<sup>117</sup>Ibid, at 11.

<sup>118</sup>Page 6.

<sup>119</sup>OHCHR (2019).

<sup>120</sup>Guidance on the use of less lethal weapons in law enforcement.

<sup>121</sup>General Comment No.37, Human Rights Committee.



*Characterisation of the Conflict as NIC*

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”.<sup>122</sup>

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 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.<sup>123</sup>

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.<sup>124</sup> 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”.<sup>125</sup> 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”.<sup>126</sup>

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,

<sup>122</sup>de Chazournes & Condorelli (2000).

<sup>123</sup>Sandoz (1998).

<sup>124</sup>Jammu and Kashmir: The government of India grants the ICRC access to detainees. 22-6-95 ICRC.<https://www.icrc.org/en/doc/resources/documents/news-release/2009-and-earlier/57jm96.htm>

<sup>125</sup>Kashmiris suffer further as ICRC stops humanitarian work. 15/1/20 TRT World. TRT World. com/magazine/Kashmiris-suffer-further-as-ICRC-stops-humanitarian-work-32965

<sup>126</sup>Ibid

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.<sup>127</sup>

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.<sup>128</sup> Under customary international law the "use of lethal force must respect the legal principles of military necessity, distinction, (and) proportionality."<sup>129</sup> In executing a proactive, offensive and retributive doctrine the Indian forces have breached the rules not to cause "indiscriminate and disproportionate attacks"<sup>130</sup> and to "observe a series of precautionary rules in attack, aimed at avoiding or minimizing incidental harm to civilians and civilian objects."<sup>131</sup>

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".<sup>132</sup> 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".<sup>133</sup>

Part IV of the AP II on Civilian populations and General Protections of the Civilian Population states in Article 13 as follows:

1. *The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to the 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 of threats of violence the primary*

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<sup>127</sup>Commentary of 2016.

<sup>128</sup>OHCHR (2018) at 17.

<sup>129</sup>Henckaerts & Doswald-Beck (2005) at rules 1-24.

<sup>130</sup>Ibid, at rules 11-24.

<sup>131</sup>Ibid, at rules 15-24.

<sup>132</sup>Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

<sup>133</sup>Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non International Armed Conflicts (Protocol I), 8 June 1977

*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.*<sup>134</sup>

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".*<sup>135</sup>

There may be another concern which is that when the AP1/11 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".*<sup>136</sup>

The Indian state has no valid reason to not ratify the APs and the only grounds for noncompliance is that it wants to give its armed forces absolute immunity from prosecution. The sequence of the India 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 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 norms 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*,<sup>137</sup> 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*

<sup>134</sup>Protocol Additional II to the Geneva Conventions of 12 August 1949.

<sup>135</sup>Burra (2017).

<sup>136</sup>Ibid.

<sup>137</sup>Case No. IT-94-1-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995)

*development of the international law of armed conflict: . . . ] " <sup>138</sup> "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". <sup>139</sup>*

There is a need for armed forces to respect the principle of proportionality in conflict in the conduct of any military action in order to uphold IHL. This determines the legality or illegality of the act in terms of its duration and intensity and these principles were formulated in the *Request for Advisory Opinion on the Legality of the Threat of nuclear weapons*<sup>140</sup> where the ICJ held that the "entitlement to resort to self-defence under Article 51 is subject to the conditions of necessity and proportionality".<sup>141</sup>

The Court stated in *Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*<sup>142</sup> "there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law".<sup>143</sup>

The ICJ held the purpose of IHL was "aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets".<sup>144</sup> The Court also expounded on an essential ingredient in armed conflict which was the "the principle of neutrality, whatever its content, which is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used".<sup>145</sup> It was comparable to other humanitarian laws, where the laws of the conduct of war mandate its use within certain limits to restraint unnecessary suffering and destruction.

It seems that 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. There is also infringements of international humanitarian law which makes it liable for the crimes committed by the enforcement of AFSPA against the people of Kashmir. The operations carried out by its armed forces, such as extra judicial killings has caused the infliction of harm to the civilian population. 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.

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<sup>138</sup>At 111,127 At 111, 127 (citing U.N. General Assembly Resolution 2675).

<sup>139</sup>Ibid.

<sup>140</sup>ICJ 1994 General list no 95

<sup>141</sup>Paras. 37-50

<sup>142</sup>I.C.J. Reports 1986, p. 94, para. 176

<sup>143</sup>Ibid.

<sup>144</sup>Paras 74-87.

<sup>145</sup>Paras.88 and 89.

## Conclusion

The annexation of Kashmir by India in August 2019 was the final act of its strategy of creating a Greater India. The first stage was accomplished by the Instrument of Accession that served as a legal device for the state of Kashmir to be incorporated into the Indian union as a state with a constitutional mandate under Article 370. The UN did not recognise this and set out a mechanism for a referendum and the people of Kashmir did not accept this whose affiliations were with Pakistan as it was contiguous to the population. The Indian government have mapped out the policy of colonising the territory by opening it to migration, land alienation and gerrymandering to increase its vote bank.

The Indian decision to revoke Kashmir's status by annulling Article 370 of its constitution denies political representation to its populace. The process of cultural assimilation will continue apace with the changes in the school curriculum, appropriation of language and control of trusts that previously catered for the charities that preserved the Mosques and shrines. This is a policy that breaches the human rights of its people who will increasingly be denied their freedom of speech and expression.

The human rights abuses that have been carried out by the Indian forces are a consequence of denying the inhabitants a right to self-determination. The UNSC Resolutions invited a referendum under the Chapter VI procedures which are mandatory in application and the inalienable right of the people of Kashmir has not been respected. The imposition of military rule in the form of a Lieutenant-Governor from the New Delhi is a form of direct rule which implies that Kashmir is now occupied territory. By granting immunity to its armed forces the inhabitants are at their mercy and searches and destroy missions inevitably impacts on the civilian population. The gross human rights in the form casualties from both lethal and non-lethal weapons in the suppression of local dissent are a vivid testimony to the breaches of international human rights law.

The Indian government has not allowed International Committee of the Red Cross the ability to function in the territory as stipulated by the Geneva Conventions. It has also not signed the Additional Protocols I/II that is necessary to accept Common Article 3 as a high contracting party to this treaty. The abuses its forces have committed have not been the subject of redress in any war crimes tribunal. It is now pertinent that its officials are tried in international courts for war crimes in a conflict that is a NIC as it can now be defined after India's annexation of Kashmir.

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