KASHMIR’S STATEHOOD ABROGATED

Legal Fact Finding Report

August 4, 2020
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August 5, 2019 onwards

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Acknowledgment

“Legal Forum for Oppressed Voices of Kashmir would like to express deep gratitude to our legal team based in Indian Occupied Kashmir who provided us accurate and first-hand data, as well as our media and IT team Mohammad Umar and Zain Ul Abedeen.”

Date of Publication

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Kashmir’s Statehood Abrogated

Introduction

Before the partition of India in 1947, the State of Jammu and Kashmir (Kashmir) was one of more than 560 princely states within the British Indian colony and comprised 80% Muslim majority population. Geographically it consisted of five regions, namely Kashmir Valley and Poonch with 90% Muslim majority, Jammu with 59% Hindu majority, Gilgit region predominantly Muslim, Ladakh overwhelmingly Buddhist and Baltistan majority Muslim.1

Before the end of British colonial presence in India, the Cabinet Mission issued a statement in 1946, which in paragraph 14 declared that “paramountcy can neither be retained by the British Crown nor transferred to the new government”. Subsequently, the question of paramountcy was disposed of by the Indian Independence Act 1947 through its Article 7 which enunciates that “the suzerainty of His Majesty over the Indian States lapses”.2 On 15th August 1947, British India was partitioned under the same Act creating the present dominions of Pakistan and India. The princely states enjoyed semi-autonomy and were given a choice of accession to either Pakistan or India.3

Kashmir was one of the three princely states that did not accede to either dominion after the lapse of British suzerainty. The de facto Dogra ruler Hari Singh was Sikh and his subjects were majority Muslim who led oppressed lives during his reign. In the meantime, ‘trouble’ in Kashmir began when the Muslim population of Jammu and Poonch was ordered to leave their homes but before the directives could be implemented many people were cold-bloodedly massacred and their villages were set on fire. Reporting one such incident, Ian Stephens, former editor of prestigious newspaper The Statesman, wrote:

“... these half a million or so had almost totally disintegrated in the Autumn of 1947. About 200,000 simply vanished, being presumably butchered or killed by epidemics and exposure while seeking to get away; the rest had fled into Pakistani Punjab.”4

This turbulence culminated in a revolt sparked in the Poonch region by local Kashmiris against the ruler who were later assisted by Pakistani tribesmen from the North West Frontier. On 24th October 1947, the Maharaja (ruler) desperately appealed to India for military help as the capital Srinagar came under threat. In response, he was offered aid in exchange for an Instrument of

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Accession of Kashmir. The Maharaja acceded in exchange for a certain level of autonomy. The legal validity of the Instrument of Accession has been contested by numerous scholars and UN resolutions. What followed was a war which spilled over to the United Nations (UN) when India advanced the matter on 1st January 1948 under Chapter 6 of the UN Charter, namely Articles 34 and 35. The UN responded with the creation of United Nations Commission of India and Pakistan (UNCIP) and United Nations Security Council (UNSC) Resolution 47 which prescribed the two nations to firstly cease fire creating the modern de facto border between Pakistan and India called the Line of Control (LOC) which splits Kashmir into two disputed regions known as Azad Kashmir and Indian Administered Kashmir (J&K), secondly to demilitarise the region and thirdly to grant Kashmiri people the right of self-determination to choose accession through a UN administered plebiscite.

The cycle of violence has prevailed in Kashmir along the LOC for over 72 years including three wars between nuclear-armed countries, namely Pakistan and India as well as China making it a situation that comes under the ambit of an international armed conflict governed by the rules of International Humanitarian Law (IHL). India conducted elections in J&K which conceived the J&K Constituent Assembly in line with the Instrument of Accession and Delhi Agreement that granted J&K special autonomy under Article 370 and Article 35A of the Indian constitution. The former gave J&K autonomy except in the areas of defence, communications and foreign affairs while the latter gave the Kashmiri people of J&K the exclusive rights of ‘permanent residency’, buying and selling of property as well as eligibility for jobs within the region. This is despite the contravention of UNSC resolutions that clearly censure the elections as not true exercise of the right of self-determination by Kashmiris due to the inherent alienation of Kashmiri peoples in Azad Kashmir and Gilgit Baltistan.

Kashmiris in J&K, at the hands of the Indian government, are facing systematic violations of human rights, unrepresentative governance and discriminatory laws. The situation has worsened considering that on 5th August 2019 the revocation of Articles 370 and 35A has effectively stripped the region of its special autonomous status and permanent residence along with the J&K Reorganisation Act 2019 splitting J&K into further two union territories of India. This has been described by legal scholars around the world as unilateral annexation which stands in violation of international law as well as India’s own constitution making the central government’s presence in the region a military occupation. Following these actions, India took drastic measures to curb any resistance to the move by imposing a communications shutdown, deployment of further troops and detention of key political figures thus converting the area into the largest open air prison in the world. Such measures have been operational since last year.

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and have not been eased although the area is experiencing Covid-19 pandemic. Some scholars have pointed out that India’s introduction of the new domicile laws for the region during the pandemic has created covert implications of demographic change and delimitations that will redraw the parliamentary and assembly constituencies in favour of those regions more receptive to the Indian government such as Ladakh and Jammu thus tilting the balance of power from the historically majority Muslim Kashmir state to Jammu. Such assertions indicate blatant violations of International Humanitarian Law which forbids demographic change.

This report serves as a non-exhaustive legal fact-finding investigation of the developments in J&K during the yearlong lockdown between the periods of 5th August 2019 and 5th August 2020. Chapter 1 focuses on the Indian government’s pre-emptive planning and implementation of revocation of J&K’s autonomy followed by the legal developments till date. Chapter 2 describes the international response to the Indian government’s developments to absorb the region. Chapter 3 explains the international law dimensions notably regarding Indian military occupation, human rights violations under ICCPR and ICESCR, self-determination and other IHL violations. Chapter 4 provides an analysis of the discussed data to arrive at the conclusion and expand on the recommendations moving forward.

**J&K Statistics from 5th August 2019 to 30th June 2020**

<table>
<thead>
<tr>
<th>S. No.</th>
<th>HR Violations</th>
<th>Total Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Total killed</td>
<td>352</td>
</tr>
<tr>
<td></td>
<td>Freedom fighters killed</td>
<td>196</td>
</tr>
<tr>
<td></td>
<td>Civilians killed</td>
<td>75</td>
</tr>
<tr>
<td></td>
<td>Indian occupying forces killed</td>
<td>81</td>
</tr>
<tr>
<td>2</td>
<td>Total arrested</td>
<td>16,000-17,000</td>
</tr>
<tr>
<td>3</td>
<td>PSA detainees</td>
<td>662</td>
</tr>
<tr>
<td>4</td>
<td>Total cordon and search operations (CASO)</td>
<td>128</td>
</tr>
<tr>
<td>5</td>
<td>Houses damaged</td>
<td>800</td>
</tr>
<tr>
<td>6</td>
<td>Internet snapped</td>
<td>From 5th August, internet was completely suspended for 175 days, after which only 2G service was restored and after 15th February 2G internet was suspended at least 60 times</td>
</tr>
</tbody>
</table>

**Source:** LFOVK
Foreword

A year ago, the Kashmir saga saw another illegal digression from the commitments made by the Indian government before the UN and the whole world since partition of the subcontinent. This report is prepared by the researchers of the Legal Forum for Oppressed Voices of Kashmir. It provides the readers first-hand information about the situation in Kashmir since the illegal changes in Articles 35A and 370 of the Indian constitution revoked the special status of this disputed territory. It is now illegally annexed by the occupying force.

Since 5th August 2019 the people are locked up in their homes because of the curfew. The protesting Kashmiris are being subjected to the worst kind of crimes against humanity. The women are being raped, young men are being murdered and their households are being looted. There is acute shortage of food and medicines. The Kashmiris cannot move about freely. The Indian government is trying to change the demographic structure by bringing in people from outside the region and after changing the provisions for domicile Kashmiri land is being doled out for creating non-Kashmiri settlements. All this is in violation of international law. An occupying force cannot create any right for itself nor can it validate its actions. We should seek an interim remedy under the UN Responsibility to Protect (R2P) norm to stop further aggression of Indian forces in the occupied territory.

Justice (r) Ali Nawaz Chowhan
Formerly:
Chief Justice of the Gambia
International Judge of the UN at The Hague
Co-Chairman UNESCO Appeal Board Paris, France
Visiting Professor of Law at various universities
# Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>BJP</td>
<td>Bharatiya Janata Party</td>
</tr>
<tr>
<td>CRPC</td>
<td>Criminal Procedures Code</td>
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<tr>
<td>CRPF</td>
<td>Central Reserve Police Force</td>
</tr>
<tr>
<td>CIHL</td>
<td>Customary International Humanitarian Law</td>
</tr>
<tr>
<td>DC</td>
<td>Domicile Certificate</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>GC</td>
<td>Geneva Convention</td>
</tr>
<tr>
<td>IHL</td>
<td>International Humanitarian Law</td>
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<tr>
<td>ICRC</td>
<td>International Committee of the Red Cross</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
</tr>
<tr>
<td>ICC</td>
<td>International Criminal Court</td>
</tr>
<tr>
<td>J&amp;K</td>
<td>Jammu &amp; Kashmir</td>
</tr>
<tr>
<td>KCCI</td>
<td>Kashmir Chamber of Commerce and Industry</td>
</tr>
<tr>
<td>LOC</td>
<td>Line of Control</td>
</tr>
<tr>
<td>MEPs</td>
<td>Members of the European Parliament</td>
</tr>
<tr>
<td>NC</td>
<td>All Jammu and Kashmir National Conference</td>
</tr>
<tr>
<td>NDA</td>
<td>National Democratic Alliance</td>
</tr>
<tr>
<td>NSA</td>
<td>National Security Act</td>
</tr>
<tr>
<td>NIA</td>
<td>National Investigation Agency</td>
</tr>
<tr>
<td>OHCHR</td>
<td>United Nations Office of the High Commissioner for Human Rights</td>
</tr>
<tr>
<td>OCD</td>
<td>Obsessive Compulsive Disorder</td>
</tr>
<tr>
<td>PR</td>
<td>Permanent residence</td>
</tr>
<tr>
<td>Acronym</td>
<td>Full Form</td>
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<tr>
<td>---------</td>
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<tr>
<td>PSA</td>
<td>Public Safety Act</td>
</tr>
<tr>
<td>RTI</td>
<td>Right to Information</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UT</td>
<td>Union Territories</td>
</tr>
<tr>
<td>UNCIP</td>
<td>United Nations Commission of India and Pakistan</td>
</tr>
<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
</tr>
<tr>
<td>UNSC</td>
<td>United Nations Security Council</td>
</tr>
<tr>
<td>UAPA</td>
<td>Unlawful Activities Prevention Act</td>
</tr>
<tr>
<td>UNCAT</td>
<td>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</td>
</tr>
</tbody>
</table>
Chapter 1

Indian Measures in J&K

1.1 Situation Before 5th August 2019

J&K enjoyed semi-autonomy within India, a relationship built upon a historically disputed and contested Instrument of Accession in terms of legal validity. The autonomy of J&K was recognised by the Indian government due to the acknowledgement of the Delhi Agreement 1952 and Hereditary State Subject’s definition 1927, vide notification number 1-L/84 dated 20th April 1927, evidenced by the Indian government honouring them in the constitution through the insertion of Articles 370 and 35A.

1.1.1 Delhi Agreement 1952 and Hereditary State Subject’s Definition 1927

In 1927, the Dogra ruler of Kashmir introduced the Hereditary State Subject Order which defined the ‘Peoples of Kashmir’ as ‘State subjects’, a type of citizenship with the right to government office and land ownership.7 These rights were exclusively given to Kashmiri people and, thus, the differentiation was established between state subjects and non-state subjects, and the latter were excluded from such rights. After the accession to India in 1947, the law regarding the exclusivity of rights for state subjects was settled.8 It was even enshrined within the 1952 Delhi Agreement which was an amalgamation of the decision making of the J&K Constituent Assembly and the Indian government in 1951 which was later included in Articles 370 and 35A of the Indian constitution.9 Pursuant to this, J&K had its own constitution, flag, legislature, judiciary and executive.

1.1.2 Articles 370 and 35A

Article 370 and Article 35A were key constitutional provisions confirming the special autonomy of J&K and provided safeguards from demographic change. According to Article 370 (1)(b)(i) the Indian Parliament can only legislate in matters limited to the areas specified in the Instrument of Accession and any new laws would be subject to the concurrent consent of J&K Constituent Assembly.10 The terms of the Instrument of Accession stipulate three areas where the Indian legislature may create laws for J&K. Firstly, defence which include naval, military, air force works, administration of cantonment areas, arms, firearms, ammunition and

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explosives; secondly, external affairs that cover international treaties and agreements with other countries, extradition, including the surrender of criminals and accused persons to parts outside India, etc; and lastly communications, meaning post and telegraph, including telephones, wireless, broadcasting, and other like forms of communication, federal railways, maritime shipping and navigation. It is an arrangement comparable to the ‘special status’ enjoyed by Quebec in Canada, by Scotland, Wales and Northern Ireland in Britain and by Åland Islands with Finland.

Accordingly, Article 35A is contiguous with Article 370 enacted by the 3rd Presidential Order on 14th May 1954 which allowed J&K legislature to define their own ‘permanent residence’ an extension to the similar legal notion of ‘State subjects’ which now stood replaced. It made it forbidden for outsiders, except for Kashmiris, from permanently settling, buying land, holding local government jobs, as well as winning education scholarships in the region.

However, according to renowned Indian jurist A.G. Noorani and others, the Indian government has over the past 70 years played a part in the systematic covert erosion of J&K’s aforementioned protections with 47 presidential orders that extended the Indian constitution over the region without any concurrent consent of the State of J&K. This is affirmed by Sumantra Bose who describes the 1954 Presidential Order and the ones that followed as “the end for the Article 370” deeming it “effectively… dead in letter and in spirit since that time”.

1.1.3 J&K Constituent Assembly Dissolved

In October 1951, India conducted elections to create a Constituent Assembly tasked to formulate a constitution for J&K. However, the elections hold no merit whilst acknowledging

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13 Eve Hepburn, ”Forging autonomy in a unitary state: the Åland Islands in Finland,” May 5, 2015, https://www.researchgate.net/publication/263511707_Forging_autonomy_in_a_unitary_state_The_Aland_Islands_in_Finland
the rigged nature in the way they were conducted, especially, since the assembly seats were won “unopposed” by New Delhi’s proxy political party All Jammu and Kashmir National Conference (NC) while the nomination papers of all other candidates were rejected.\(^9\) India wanted to declare J&K an integral part of India by presupposing that the participation in the elections by the peoples of Kashmir would be their exercise of the right of self-determination. However, such assertions are in violation of the UNSC Resolutions 91 and 122, both address and reiterate that the Constituent Assembly is not evidence of the free and impartial plebiscite prescribed in Resolution 47 due to the alienation of Kashmiri people in Azad Kashmir and concluded that the right of self-determination of Kashmiri people remains unexhausted.\(^20\)

As Article 370 was titled a ‘temporary provision’, scholars and jurors still considered the aforesaid provision and Article 35A which emanates from it as official evidence of acknowledgment by the Indian central government of its status affording the region and its people constitutional protections as negotiated by Kashmiri peoples since the 1947 partition. It was even argued that since the Constituent Assembly was dissolved in 1957, it signified the permanence of Article 370 since according to Article 370 (3) the only way Article 370 may cease to exist is by a recommendation of the J&K Constituent Assembly and a concurrent presidential order from the Indian central government.\(^21\) However, upon reverse engineering of the provision it can be concluded that in absence of any recommendation to dissolve the Constituent Assembly there are no legal mechanisms available for its removal and any attempt at such would be illegal.\(^22\) Commentators summarise this view as “Article 370 recognises the sovereignty of J&K’s Constituent Assembly as the ultimate ratificatory authority”.\(^23\)

1.1.4 Pre-emptive Planning

The BJP government, prior to the revocation of the J&K special status, had such agenda as part of their mandate and election campaign before Prime Minister Narendra Modi came into office.\(^24\) However, there have been reports of pre-emptive planning to weaken any dissent from the decision that was to take place on 5th August 2019.\(^25\) For instance, on 1st August 2019


\(^{25}\) Ibid
Ministry of Home Affairs approved the deployment of 25,000 armed forces and 10,000 additional paramilitary troops in J&K under the pretext of maintaining law and order. On 2\textsuperscript{nd} August the Government of India notified students and tourists, both local and foreign, to leave Jammu and Kashmir. Tensions turned into more confusion when on 3\textsuperscript{rd} August former chief minister of J&K Omar Abdullah gave a conflicting statement that was allegedly confirmed by Governor Satya Pal Malik that Article 35A was not in progress of dilution and no initiative of delimitation was taking place. This turned out to be false as the events of 5\textsuperscript{th} August showed. On 4\textsuperscript{th} August total communication blackout began to be implemented in the region as mobile phone service was disrupted, including cable TV, landlines and internet. Curfews were imposed under Section 144 of CrPC via an order, which abolished public movement and announced closure of educational institutions, prohibited public meetings or rallies, and placed restrictions and night curfews in several districts closing down shops and clinics especially in the Kashmir Valley.

1.2 Day Zero: 5\textsuperscript{th} August 2019

On 5\textsuperscript{th} August the Indian government revoked Articles 370 and 35A without any recourse to the Kashmiri people making material breach of the Instrument of Accession, the negotiations conducted in the Delhi Agreement, the J&K Constituent Assembly, the UNSC Resolutions as well as its own constitution and judicial precedents.

1.2.1 Revocation of Articles 370 and 35A

The legal mechanisms employed for abrogation of Articles 370 and 35A were through the sub-provision contained in Article 370 (3) which, as mentioned previously, required concurrent consent by the State’s Constituent Assembly and Presidential Order from the central government for it to cease being operational. However, the State’s Constituent Assembly stood

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dissolved in 1957 and before that date it never recommended abolition of the provision or it’s amendment. Despite this, it was still made possible through Presidential Order C.O.272.\footnote{Laya Maheshwari, “How the Indian Government Changed the Legal Status of Jammu and Kashmir,” Lawfare, August 12, 2019, Research Society of International Law} How the Indian government achieved this is noteworthy. They interpreted ‘J&K Constituent Assembly’ to mean ‘J&K Legislative Assembly’, however the Legislative Assembly itself was dissolved in 2018 and no consent was obtained. Alternatively, J&K was under governor’s rule appointed by the Indian government to act as substitute for the dissolved assembly. Within this framework, the upper chamber of the Indian Parliament passed a resolution ‘recommending’ to use the power in Article 370(3) to revoke Article 370 in its entirety. The resolution progressed to the lower chamber on 6\textsuperscript{th} August followed by Presidential Order 273 which applied to the entire Indian constitution without any modifications or exemptions to Jammu & Kashmir. Subsequently, the Indian parliament passed the Jammu & Kashmir Reorganization Bill of 2019 which abolished the State of Jammu & Kashmir, further dividing the region into two ‘union territories’ of Ladakh and Jammu & Kashmir.\footnote{ibid} Since Article 35A emanates from Article 370 it also got revoked pursuant to the Jammu & Kashmir Reorganisation Bill.

1.2.2 Contempt of Indian Constitution and Judicial Precedents

The mechanisms employed have been criticised as unilateral annexation and in contravention of Article 3 of the Indian constitution which requires bills changing the name or area of any state in reference to the said state’s consent.\footnote{The Constitution of India, November 9, 2015, https://www.iitk.ac.in/wc/data/coi-4March2016.pdf} This is an open contempt of India’s own constitution and has been confirmed as such by the Indian Congress Party as ‘ultra vires’ and against constitutional procedure.\footnote{“Redrawn map may set off more change in Indian-ruled Kashmir,” The Washington Post, August 7, 2019, https://www.washingtonpost.com/world/asia_pacific/redrawn-map-may-set-off-more-change-in-indian-ruled-kashmir/2019/08/06/76df1290-b8b8-11e9-8e83-4e6687e99814_story.html}

This has been confirmed by the lawyers of the Indian Bar Association and petitions have been filed before the Supreme Court of India which challenge that this issue as to whether the president of India can make a new Article, so far as the State of J&K is concerned, a principal has already been established by the court in various decisions that the president cannot amend any provision in the application order and the word ‘modification’ has to be given, in the constitutional context, a wide interpretation.\footnote{“Petitions in SC on J&K move,” The Hindu, August 10, 2019, https://www.thehindu.com/news/national/petitions-in-sc-on-jk-move/article28977660.ece} \footnote{“Article 370 is permanent, rules J&K High Court,” The Hindu, May 23, 2016, https://www.thehindu.com/news/national/other-states/article370-is-permanent-rules-jk-high-court/article7749839.ece} There are at least five Indian Supreme Court

A Kashmiri lawyer says Kashmir’s transformation into a Union Territory reflected “a political holocaust inflicted on the people”. “It is the day of political betrayal and beginning of an era where violence as an argument will have justification and takers, which is very unfortunate.”

Hence, by repealing the special protections provided by Articles 35A and 370, India has clearly signalled its intention to abandon its decades long commitment to the Kashmiri people and defy the law and procedure laid down by their own constitution and case law as well as their international commitments via UNSC Resolutions on Kashmir.

### 1.3 Situation After 5th August 2019 to 5th August 2020

The Indian central government has introduced new laws and redefined dozens of rules like the latest amendment to Domicile Law, which are designed to bring demographic change in J&K without recourse to the peoples of Kashmir who have been living under a ‘double lockdown’, one imposed by the Indian government’s military occupation of the region and the other due to the Covid-19 pandemic.

#### 1.3.1 J&K Reorganisation (Adaption of State Laws) Bill 2019

The Act bifurcated the State of J&K into two union territories, namely Jammu & Kashmir and Ladakh (UT). Jammu & Ladakh would have its own legislative assembly and Article 293 of the Indian constitution will extend Indian central laws to the region. The Indian central government will introduce 106 new laws and repeal 153 domestic legislations of the erstwhile state. Moreover, the Indian Penal Code and Criminal Procedure Code (CrPC) will replace the former J&K’s Ranbir Penal Code and J&K CrPC. Furthermore, the central laws concerning Right to Information (RTI) would replace J&K RTI Act 2009. The alarming revelation highlighted by the human rights organizations such as the Commonwealth Human Rights

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38 1959 AIR 749, 1959 SCR Supl. (2) 270  
39 1970 AIR 1118, 1970 SCR (2) 365  
40 1972 AIR 963, 1972 SCR (2) 1014  
41 Civil appeal Nos. 12237-12238_OF 2016  
44 The Jammu and Kashmir Reorganisation Bill, No. XXIX 2019
Initiative[^45] and the United Nations Human Rights Commission is that UT does not have a human rights commission and information commission along with the commission for women and children which could create chances for human rights violations with impunity without proper monitoring mechanisms in place.[^46]

### 1.3.2 Domicile Certificate (Procedures) Rules 2020

Under Section 96 of the Jammu and Kashmir Reorganisation Act 2019, the Ministry of Home Affairs issued a new domicile rule, officially called Jammu and Kashmir Reorganisation (Adaptation of State Laws) Order, 2020 on 31 March.[^47] The new domicile laws introduced for the union territories will replace the powers vested for J&K by the abrogated Article 35A to define their own ‘Permanent Residence’ (PR). Citizenship definition will now flow by the direction of the Indian government under the new rules upon the issuance of a ‘Domicile Certificate’ (DC).[^48] The new law covers four key areas, namely who is eligible for DC and what rights entail, who will be competent authority to issue the DC, the time frame of its issuance, and the penalty awarded to the concerned official who fails to issue it within the time frame allotted.[^49] The new rules have been condemned by the international community; scholars and legal experts have stated that it is India’s attempt to demographically change the Muslim majority region amounting to a crime against humanity under Article 7, a crime of aggression under Article 8bis(2)(b) as well as a war crime under Article 8(2)(b)(viii) of Rome Statute.[^50] According to the new rules, anyone can apply for DC including migrants, central government employees, Indian armed forces personnel and their children allowing them to buy and sell property and apply for jobs.[^51] Initially, only level four jobs were reserved for the locals but the

[^45]: Venkatesh Nayak, “MHA confirms restrictions in J&K are only in the mind: RTI reveals it has no papers about shutdown orders even as Kerala High Court says internet access is a fundamental right,” CHRI, October 6, 2019, https://www.humanrightsinitiative.org/blog/mha-confirms-restrictions-in-jk-are-only-in-the-mind-rti-reveals-it-has-no-papers-about-shutdown-orders-even-as-kerala-high-court-says-internet-access-is-a-fundamental-right


[^50]: Rome Statute of the International Criminal Court 1998

Indian government faced backlash\textsuperscript{52} and hence such rule was removed by a second order.\textsuperscript{53} The locals must also apply in order to convert their now obsolete PR to DC but the steps for them are much tedious\textsuperscript{54} than the accelerated path provided to non-locals making it comparatively easier to gain citizenship in the union territories, as the only requirement is to prove residence for 15 years or education of 7 years and appearance in the examination of grades 10 or 12. Children of the central government officials may also apply if their parents have served in the region for 10 years.\textsuperscript{55} The tehsildar will be empowered to furnish a DC within 15 days to the applicant or else face a penalty of 50,000 rupees.\textsuperscript{56}

The urgency of such measures during a communications clampdown amidst the Covid-19 pandemic is telling of the on-ground draconian measures implemented by the Indian government in violation of international and municipal laws.

\subsection*{1.3.3 Other New, Amended and Repealed Laws Post 5\textsuperscript{th} August 2019}

Since 5\textsuperscript{th} August 2019, the BJP government has introduced new laws as well as amended 109 laws and repealed 29.\textsuperscript{57} Moreover, there are fears of implications of major delimitations via Delimitation Commission which will be convened to redraw parliamentary and assembly constituencies of J&K. In accordance with Section 60 of J&K Reorganisation Act 2020 the number of seats in legislative assembly of union territories will be increased from 107 to 114, while 24 are reserved for Azad Kashmir inhabitants. Previously J&K had 87 seats in the assembly and 6 in parliament, however after separation of Ladakh the seats will rise from 83 to 90 for J&K, an exercise of balance of power towards Jammu from a historically Muslim dominant Kashmir valley.\textsuperscript{58} This is another attempt at demographic change.

\textsuperscript{52} “Centre amends J&K’s new domicile order amid resentment, now reserves all jobs for residents,” \textit{The Print}, April 4, 2020, https://theprint.in/india/centre-amends-jks-new-domicile-order-amid-resentment-now-reserves-all-jobs-for-residents/395023

\textsuperscript{53} J&K Grant of Domicile Certificate Procedure Rules 2020


\textsuperscript{55} J&K Grant of Domicile Certificate Procedure Rules 2020

\textsuperscript{56} Ibid

\textsuperscript{57} Azaan Javaid, “Modi govt redefines J&K domicile rule, extends it to those who have lived in UT for 15 yrs,” \textit{The Print}, April 1, 2020, https://theprint.in/india/modi-govt-redefines-jk-domicile-rule-extends-it-to-those-who-have-lived-in-ut-for-15-yrs/392596

\textsuperscript{58} Ibid
Chapter 2

International Response

2.1 Reaction of the International Community

The actions taken by the Indian government sparked concerns among the international community about an upsurge in tensions between the two nuclear-armed powers of South Asia. United States stance on the status of the disputed area has been well established. They are of the opinion that India and Pakistan should settle the matter through negotiations taking into account the interests of Kashmiri people. The US stance has been a diplomatic one so far; they seek to stabilize the US-India strategic partnership while sustaining human rights protection, as well as continuing cooperative relations with Pakistan. The main objective of US policy in South Asia is to prevent the dispute between India-Pakistan from escalating to “interstate war”. Therefore, the US keeps a balanced approach, which doesn’t openly favor either party.59

However, several US Congress members supported human rights of Kashmiris.60 Resolution of House of Representatives 745 was introduced in December with 40 co-sponsors, urging the Indian government to end the limitations on communications and arbitrary detentions in J&K. On 5th August, the State Department said it was closely following events in Kashmir. “We are concerned about reports of detentions and urge respect for individual rights and discussion with those in affected communities,” the department’s spokeswoman said in a statement. “We call on all parties to maintain peace and stability along the Line of Control.”61

On his visit to India, Senator Chris Van Hollen was refused permission to visit J&K. Senator Mark Warner, a co-chair of the Senate India Caucus, tweeted, “While I understand India has legitimate security concerns, I am disturbed by its restrictions on communications and movement in Jammu and Kashmir.”62 In November 2019, the Tom Lantos Human Rights Commission held an event entitled “Jammu and Kashmir in Context”.63 During his election

campaign, Joe Biden said the Indian government should take necessary steps for restoring rights of the Kashmiris, and expressed concerns over the Citizenship (Amendment) Act.

Russia is of the opinion that Pakistan and India should handle the issue through bilateral means in accordance with the Simla Agreement 1972. When India abrogated Kashmir’s special status, Russia primarily called it an internal matter and has shown a biased approach in defending India at the UN Security Council since both countries have strong trade partnership, which is of significant business value.

Pakistan and China, on the other hand, have been anxious about the tensions in Kashmir and continue to condemn Indian actions in the region.

Furthermore, the reaction of the international community was polarizing. Afghanistan, Australia, Bangladesh, Bhutan, Israel, Maldives, Sri Lanka, Thailand, the UAE and Germany have been silent on the issue and have called abrogating Article 370 as an “internal matter of India”. However, concerns were expressed about the implications for Kashmiris but fell short of committing to interfere in the matter. On the other hand, France, Iran, Malaysia, Poland and Zambia have stated that the conflict is a bilateral issue between India and Pakistan, and hope their disagreements can be settled bilaterally through political and diplomatic means in accordance with the Simla Agreement 1972. They have called upon both countries to reduce escalation of tensions in Kashmir from spiraling out of control and to carry out changes in the region within their constitutional framework.

Moreover, the UK, Canada, Saudi Arabia and Turkey expressed concerns about risk in increase in infringements on civil rights of the Kashmiris and stressed for the rights of the Kashmiris to be respected and for reduction in the rising fears and tension in the region.

2.2 Reaction of the UN

The UN Secretary-General António Guterres expressed concern over restrictions in Indian-held Kashmir. He said this would aggravate the human rights situation in the region and that it was best if all parties involved stepped back from taking any action that would affect the status of J&K. He added: “The position of the United Nations on this region is governed by the Charter...

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65 PTI, “Hindu American upset with Biden’s views on Kashmir,” The Week, June 26, 2020
66 Emily Tamkim, “Why India and Russia are going to stay friends,” Foreign Policy, July 8, 2020, https://foreignpolicy.com/2020/07/08/russia-india-relations/
67 “Russia on Kashmir: Russia backs India, says J&K move ‘carried out within framework of Constitution,” The Times of India, August 10, 2019
68 “Aden clashes continue, risk making Yemen war ‘even more complex’,” AlJazeera, August 9, 2019
and applicable Security Council resolutions." UN spokesperson Rupert Colville restated the organization’s previous concerns over the human rights situation in Kashmir, mentioning reports that have been documented on blockade of communications network, arbitrary detentions and use of excessive force in dealing with protests leading to serious injuries and extrajudicial killings. The UN Commission for Human Rights has been debating on the solution of the Kashmir dispute over the past years but has not provided a concrete roadmap for the peaceful resolution of the conflict. Its stance has been diplomatic so far. It is time that the UN and other international organizations go beyond verbal communication. Moreover, it is important to improve bilateral relations with all possible partners in the international community.

2.3 Reaction of the European Union (EU)

The EU was supposed to pass a resolution regarding the 5th August 2019 action in Kashmir. However, ahead of a vote a group of EU delegates visited J&K on 29th October on the invitation of Indian Prime Minister Modi. The delegation comprised 27 members of the European Parliament (MEPs) from Italy, Britain, France, Germany, Czech Republic and Poland who travelled to Srinagar. The purpose of the visit, as stated by the delegation, was a fact-finding assessment of the situation in Kashmir. Maja Kocijancic, EU spokesperson for foreign affairs and security policy, said in a press briefing in Brussels that “a dialogue between India and Pakistan through diplomatic channels is crucial”. The official stated that a political solution is the only way to resolve the dispute over Kashmir. EU has been closely monitoring the situation and called for avoidance of increasing tensions in the region. The EU Parliament has frequently called for a more functional way to resolve the dispute. In two separate letters recently, a number of EU delegates highlighted the circumstances in Kashmir and the human rights situation in India. A letter dated 1st June was addressed to European Commission President Ursula von der Leyen and High Representative Josep Borrell. A group of MEPs, including Parliament Vice-President Fabio Castaldo, wrote that “there are cases where it feels

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like we [EU] are not doing everything we can: this is the case of Kashmir, probably the world’s longest running conflict”.74

2.4 Reaction of Other Organizations

The Organization of Islamic Cooperation,75 Amnesty International and Human Rights Watch expressed concerns over the matter and mentioned that the basic freedom of Kashmir was at risk and that the actions taken by the Indian troops do not comply with international human rights standards.76 Genocide Watch, member and current coordinator of the Alliance Against Genocide, issued a “genocide alert” informing the UN and its members to warn India not to commit genocide in Kashmir, claiming that the ‘ten stages of genocidal process’ identified by Gregory Stanton are “far advanced and early warnings of ‘massacres’ in the risk factors for genocide are fulfilled”.77

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77 “Countries at Risk,” Genocide Watch
Chapter 3

Dimensions of International Law

3.1 Kashmir Under Military Occupation

Under Article 42 of The Hague Regulations 1907, which defines occupation as a “territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised”, the purpose of the occupation law is protection of civilians based on IHL and not the occupying power. Under Hague Regulations and Geneva Convention IV Articles 47-48, there are certain obligations with reference to the peoples of the territory. IHL guarantees the fundamental rights particularly under Additional Protocol 1, Article 75. Civilians who live under the control of occupying power suffer serious abuses of their human rights. The acts of torture, murder, detentions are all violation of fundamental rights of international law, amounting to crimes against humanity. In the case of Kashmir, the occupation is neither temporary nor a military necessity. There is no legal justification for the prolonged occupation of J&K. The ongoing brutalities in the region are violations under the international laws of Geneva Convention 1949. Under the legal bodywork, India is not allowed to breach or challenge the peremptory norms of international law on the use of force and self-determination.

3.1.1 Illegal Annexation

On the evening of 4th August 2019, the BJP-led Indian government imposed a communications clampdown and sent thousands of occupying troops to the Kashmir valley ahead of the unilateral decision to abrogate Article 370 and split the State of J&K into two union territories.

Next morning the Indian government announced a bill in the upper and lower houses of parliament to abrogate Article 370 of Indian constitution.

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78 International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, October 18, 1907
80 “Kashmir: A case of prolonged occupation,” LFOVK, p. 24-26
81 Rebecca Ratcliffe, “Kashmir leaders placed under arrest amid security crackdown,” The Guardian, August 5, 2019
Annexation, regardless of war or not, amounts to a crime of aggression under Article 8 bis2(b) of the Rome Statute and has been deemed by the international legal community as a core crime. Henceforth, India is in violation of this provision pursuant the unilateral annexation of J&K.82

India’s action is similar to Israel’s in Jerusalem and Golan Heights. Israel seized Palestinian territory, namely the West Bank, including East Jerusalem and Gaza in the 1967 war. The Security Council Resolution 476 (1980) affirmed that “all legislative and administrative measures and actions taken by Israel, the occupying power, which purport to alter the character and the status of the holy city of Jerusalem have no legal validity and constitute a flagrant violation of the Fourth Geneva Convention related to the protection of civil persons in time of war and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East”.

Moreover, in an advisory opinion, the ICJ held that the construction of a wall and its associated regime created a “fait accompli” that could well become permanent, in which case it would be tantamount to a defective annexation.84

3.1.2 Kashmir Under Siege

Both international law and IHL do not provide a universally accepted definition of ‘siege’. A more expansive definition can be recognized as the “military encirclement of an area” with full control over the entry and exit points, with the purpose of forcing its surrender. Siege is not prohibited in the law of armed conflict, except in circumstances that comply with IHL. Any scheme or arrangement that limits civilian access to essential supplies necessary for their welfare such as food, water and medicine is prohibited.85 Article 59 of the Fourth Geneva Convention states “if the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.”86

The common Article 3 of the Geneva Convention entails humane treatment of all persons who are not participating in the conflict directly. Sieges non-exhaustively violate international human rights such as “right to life, prohibition on the infliction of cruel, inhuman and degrading treatment; right to freedom of movement, right to adequate standard of living including

82 Rome Statute 1998
84 Advisory opinion concerning legal consequence of the construction of a wall in the occupied Palestinian territory, International Court of Justice (ICJ), July 9, 2004, para 121
86 International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)
adequate food, clothing and housing, and to essential primary health care, including essential medicine”.

The Kashmir siege goes well beyond just a blockade of the entry and exit points; arrests, torture, imposition of communications blockade, food and medicine shortages, use of tear gas and pellet guns, and restriction of movement, had been the consequences while under the complete control of the occupying forces of India. The Kashmiris have been deprived of many things as a result of what has been done to them concurrently.

3.1.3 Militarized Zone

The region is the world’s most militarized zone with an estimated 700,000 troops, which makes the Indian troops to Kashmiri people the largest ever soldier to civilians ratio in the world. Moreover, since 5th August additional troops have been deployed bringing the number of military personal to over one million amidst a government clampdown after the state’s special status was revoked. A joint letter by 15 members of the European Parliament addressed to the President of the European Commission Ursula Von Der Leyen and the Vice President of the European Commission/High Representative Joseph Borrell said:

“It is extremely regrettable that a country like India, that made so many steps towards a more inclusive and democratic society, has been inverting this trend under the impact of an ever-increasing Hindu nationalist grip on society and politics.”

The letter further notes: “In recent years, it appears more evident that India has abandoned any political approach to the insurgency in Kashmir and is managing the crisis with almost exclusively military means.”

3.2 Human Rights Violations Under ICCPR and ICESCR

This section will explore violations under International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR).

3.2.1 Religious Rights

The Kashmiri people have been restrained from practicing their religious rights in J&K, which is a violation of Article 18 of ICCPR. These restrictions are a serious violation of applicable

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87 International Covenant on Economic Social and Cultural Rights (ICESCR)
89 https://www.indiatoday.in/news-analysis/story/-if-situation-has-improved-then-why-send-38-000-troops-to-j-k-1576436-2019-08-02
international human right law. The Indian authority banned Friday prayers for an infinite period.\(^2\) There are restrictions in the Muslim majority region on the Jamia Masjid for calling out Azan (call to prayers) five times a day. Mohammad Yasin Bangi, the 70-year-old who has called out Azan for the past 55 years, said:

“During earlier restrictions, we would be sometimes allowed to offer evening prayers. But not even once during this time around. The closure of the mosque has robbed me of my peace. I’ve been subjected to spiritual torture,”\(^3\)

Kashmiri people were stopped from offering Eid prayers, furthermore Indian forces increased their blatant oppression on Muharram procession\(^4\) from September 1\(^{st}\) till 10\(^{th}\) 2019. Indian occupational forces used lethal pellet shotguns and tear gas. In addition to this Muslim Kashmiris were restricted from attending the funerals of their loved ones.

On 19\(^{th}\) May 2020, religious places were attacked. Masjid Imam Ali and Astaan of Aga Syed were attacked with petrol bombs. On the night between 5\(^{th}\) and 6\(^{th}\) June a petrol bomb was thrown at Astaan Imam Musa Kazim at Sajadabad, Srinagar.

3.2.2 Economic Barriers

The lockdown and imposition of curfew on 5\(^{th}\) August 2019 led to drastic economic barriers in trade and commerce in J&K. This had a severe economic impact on the standard of living. Under the Essential Commodities Act, the State Government and UT Administration has to ensure easy accessibility of necessary commodities to consumers and to secure them from exploitation by unethical traders.\(^5\)

Article 11 of the ICESCR guarantees right to adequate food, clothing and housing and refinement of the living conditions of the people.\(^6\)

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Section 3, places a responsibility on the state to take charge in strengthening people’s access to the usage of resources and ensure their adequate living standards.\textsuperscript{97}

Local businesses such as bakeries, shops and goat herders were affected by the curfew, which led to closure of all businesses in the region. Kashmir Chamber of Commerce and Industry (KCCI) reported on 11\textsuperscript{th} August 2019, “an average loss of business per day in Kashmir today is to the tune of at least Rs175 crore as life has come to a standstill…”

The general secretary of Warehouse Traders Federation added that supplies are down to less than 50 per cent. Almost two months into the lockdown, an estimated loss of Rs700 crore was suffered because of the blockade.

There has been an immense impact on the daily wagers and exporters. Kashmir’s economy relies heavily on imports and exports. J&K produces 7% of the world’s saffron, it is the biggest producer of walnuts and the world’s largest apple growing region. The restriction on communications and movement had affected daily harvesting and hampered the sale of goods. In 2020, there has been an overall decline in the trading of crops, including apples and walnuts.\textsuperscript{98}

It is not just the crop industry that has been lurching; Kashmir’s tourism and handicrafts have also been affected.\textsuperscript{99}

J&K has an unemployment rate of 15.89\% in comparison to the national average of 6.87\% of which 25.2\% are graduates and 59.5\% are jobless women.\textsuperscript{100} The latest study shows that a quarter of the J&K population between 18 and 29 years of age is unemployed.\textsuperscript{101}

3.2.3 Internet, Telephone Lines and Other Communications Lockdowns

The Kashmiri people have been living under an unprecedented communications lockdown, which includes all mobile phone networks, landline telephone networks, broadband internet services and private internet services. The night of 5\textsuperscript{th} of August marked the 55\textsuperscript{th} time internet


was shut down in the valley and this has been the case till date. The Kashmiri people are living in confusion and fear due to the unavailability of services.

For the first six months, J&K experienced a complete internet ban which heavily curtailed the region’s right to access information. This was challenged in the courts through 65 different cases, however the petitions and pleas have been rejected. On 15th February 2020, internet services were only restored to ‘2G’ speed. These have also been suspended at least 60 times which has grossly affected the whole region’s businesses dependent on ‘4G’ internet services.102

Kashmiri economy, education and healthcare was “evolving and growing under 4G internet services, but the past year has been nothing less than nightmarish for Kashmiris”. The downgraded internet connectivity has put a lot of stress on the banking sector because people are unable to use banking apps, pay bills online and access other services. Moreover, the collateral damage has produced shockwaves in sectors like agricultural, power and law enforcement. Teachers and students are in disarray because of missed exam deadlines, online classes with bad connectivity, slow and mostly inaccessible study materials online, etc. The world is moving towards 5G with work and study from home arrangements but the internet ban is creating more impediments than ever during a ‘double lockdown’, one of which is due to the Covid-19 pandemic.103

Additionally, in a controversial move on 11th May 2020, the Supreme Court rejected a petition seeking to restore 4G services, however, the court instead tasked a ‘special committee’ to decide the constitutional validity of internet suspension.104 Analysts quote the apex court’s own orders in Anuradha Bhasin vs Union of India for safeguards to be ensured before cutting off high-speed connectivity. Four orders have been issued by the government under Telecom Suspension Rules 2017 to extend internet restrictions in J&K. The most recent was on 8th July, which allowed internet but downgraded it to 2G as previously mentioned.105

International human rights organizations106 have also pleaded with the Indian authorities to restore internet, telephone and mobile services but nothing could change India’s attitude

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towards the Kashmiri people. The severe clampdown in the valley persists, fear and terror is widespread among the population due to restrictions on students from contacting their families and the inability to return to their homes. More than 30,000 students have reportedly requested the easing of such restrictions but to no avail. The J&K authorities have set up 300 phone booths across the region, however due to road blockades and long queues people have to wait for hours for their turn to make a call, which are time limited and supervised by the authorities.\(^\text{107}\)

This is direct violation of right to freedom of expression, as guaranteed in Article 19\(^\text{108}\) and Article 21 (right to life and liberty) of the ICCPR. India is not only a signatory to ICCPR but has also ratified it and is liable to follow the rules. An ICCPR report, from 1999, states: “The Special Rapporteur expresses again his view, and emphasizes, that everyone has the right to seek, receive and impart information and that this imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems – including film, microfiche, electronic capacities, video and photographs – subject only to such restrictions as referred to in Article 19, paragraph 3, of the International Covenant on Civil and Political Rights”\(^\text{109}\)

3.2.4 Journalism

Intimidation, physical abuse and arrest of media personals has intensified since 5\(^\text{th}\) August 2019. Journalists face hurdles in publishing their news. They have been forced to comply with state given press briefs, once or twice a week, without any verification and validity of the stories. Journalists also retaliated for reporting Kashmir’s constant clampdown and mass arrests. The right to freedom of expression and opinion as well as the freedom of press has been under constant threat in Indian occupied Kashmir. On 14\(^\text{th}\) August, police arbitrarily detained Irfan Malik, a journalist working with the English-language newspaper Greater Kashmir, from his home in Tral. He was consequently released after spending one night in detention. The government did not disclose the charges against him and the reason for his detention.\(^\text{110}\)

On the intervening night of 31\(^\text{st}\) August and 1\(^\text{st}\) September 2019, another Kashmiri journalist and author Gowhar Geelani was stopped by immigration officials at New Delhi International Airport and not allowed to travel to Germany for an editors’ conference of the Deutsche Welle.


\(^{109}\) UN Doc. E/CN.4/1999/64, para. 12

Officials cited “a request by the [Central] Intelligence Bureau” as the reason for not allowing Geelani to travel.\textsuperscript{111} In early September, three local journalists working for Indian and international press were verbally asked by the authorities to vacate their government issued properties in Srinagar.\textsuperscript{112} According to a statement issued by the Srinagar-based Kashmir Press Club on 3\textsuperscript{rd} September, police summoned a local journalist working for an English-language daily newspaper and ordered him to reveal his sources.\textsuperscript{113} Apparently the journalist had filed a story on the number of arrests recorded in the Kashmir valley.

As the communications blackout in Kashmir had been highlighted internationally, the administration set up a media center at a private hotel in Srinagar where journalists can work. The media center has five computers with an internet connection and just one landline phone for hundreds of journalists based in Kashmir as well as the ones who came from outside the region to report.

The government’s retaliation against anyone denouncing the constant clampdown in Kashmir was visible on 6\textsuperscript{th} September, when Amnesty International India was issued a show-cause notice\textsuperscript{114} by the Ministry of Finance’s Enforcement Directorate for allegedly violating the Foreign Exchange Management Act.

A day earlier, Amnesty International India had launched a global campaign on Kashmir against the ongoing communication blockade called “#LetKashmirSpeak”.\textsuperscript{115}

In April 2020, cyber police filed criminal charges against three professional journalists namely Peerzada Ashiq, Gowhar Geelani and Masrat Zahra under draconian Unlawful Activities Prevention Act (UAPA). Another journalist, Azan Javaid, was killed by the Indian occupational forces for highlighting the atrocities of the Indian army. These journalists have been deprived of their right of expression and opinion, which is their fundamental right.

\textsuperscript{111} “Stopped from flying to Germany, says Kashmir journalist-author,” Indian Express, September 1, 2019, https://indianexpress.com/article/india/stopped-from-flying-to-germany-says-kashmir-journalist-author-gowhar-geelani5954852/


3.2.5 Education

Immediately following the presidential orders of illegal annexation, all private and public schools were closed leaving 1.5 million students without education which is their fundamental right. However, authorities officially opened as many as 774 schools out of 3,000, but the attendance reported was only 3%. The increase in human rights violations, protests, military occupation, and failure to communicate had intensified fear among parents of sending their children to school once they reopened.

International Humanitarian Law (IHL) recognizes the protection of children, protected persons, and schools under its general provision on the protection of civilians and civilian objects. Rule 135 of customary IHL gives children special protection during armed conflict and Universal Declaration of Human Rights (UDHR) Article 26 gives ‘right to education’. India is party to UDHR, which is a beacon for the promotion of human rights and disclosures of mass human rights violations in Kashmir.

Most students returned to classes after a long time on 24th February 2020 following three months of winter break and four months of unprecedented curfew. A slight ease in communications gave parents the courage to send their children to schools. The break in learning has had a ruinous effect on students, particularly those who were near completion of their secondary education. After reopening of schools, students were suffering from anxiety and depression, which made it difficult for them to involve themselves with school tasks.

In March 2020, a few weeks after reopening of schools, educational facilities were barred again due to the isolation policy related to Covid-19. When 2G became available in Kashmir after the internet clampdown, the government fortified distance learning, streaming of lessons and downloading of curriculum documents, but these tasks are not possible at this internet speed.

3.2.6 Curfews

Kashmir has been facing oppression by the Indian government for more than seven decades and has suffered infinite curfews. The recent curfew, which was imposed on 5th August 2019, is the most brutal and unprecedented. The entire population of Kashmir has been caged in the occupied valley. This curfew has provoked escalation in human right violations in Indian occupied Kashmir. Where Indian occupational forces restrained the mobilization of people in the valley, people have seen unbridled use of force, torture, pellet injuries, illegal arrests and

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arbitrary detentions. The number of people arrested till date is estimated between 16,000 and 17,000. Furthermore, every basic human right has been taken away, including right to life, right to movement, freedom of speech and expression, religious rites and proper medical treatment. Food supplies have been sealed. Lifesaving medicines and baby food are running short in the valley. As far as freedom of speech is concerned, the right to stage peaceful protests against Indian aggression has also been taken away. Indian occupational forces used pellet guns and tear gas to disperse unarmed protestors. Many Indian media reporters have been arrested and no curfew passes have been issued, according to the Committee to Protect Journalists (CPJ). This clearly shows that the Indian government is blatantly violating fundamental human rights.

3.2.7 Torture

India is yet to ratify the UN Convention against Torture (UNCAT). Article 7 of the ICCPR states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The purpose of the convention is to necessitate the state parties to take essential legislative, judicial and administrative measures to halt acts of torture in any territory under this jurisdiction. India has no domestic anti-torture law in place, which provides impunity and reduces accountability for acts of torture.

At least 4,000 people were arrested in J&K at the beginning of the lockdown and there are claims of torture by the Indian security forces. In southern Kashmir, a 22-year-old male was picked up in a night raid and tortured along with other Kashmiri men. They were beaten with sticks, rifle butts and cables, and continuously questioned why they were part of a protest march and to give them names of the “stone-throwers”. Although the man denied being involved in the protests, they continuously beat him and electrocuted him to revive him when he fainted. Some men were afraid to even speak about the torture they underwent; they were hesitant to share details and expose their identity.

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122 “Exceptional Democracy, Kashmir; A Paradise Turned Graveyard By Indian Right-wing Politics,” October 2019, LFOVK
A BBC reporter who visited half a dozen villages in the southern districts mentions in an article that many people had similar stories to share about night raids, torture and beatings. A man also showed injuries that he suffered after being severely beaten by 15 to 16 soldiers with cables, guns, sticks and most likely iron rods. A boy shared his torture incident saying, “they tied my hands and legs and hung me upside down…”

In another incident, 25-year-old Bhat was stripped in the middle of the road and abused by a number of soldiers who whipped his back and legs using thick cables. The soldiers also attached electric wires to his chest and genitals to electrocute him. The Washington Post evaluated the photos and hospital records describing the injuries. When confronted by The Post, the spokesperson for the Defense Ministry denied the claims as being false.

The allegations of physical abuse are not new in the region; a report by Kashmiri human rights groups revealed more than 400 torture victims between 1990 and 2018.

United Nations Special Rapporteurs have sent their third report to New Delhi, expressing concern over “excessive use of force, ill-treatment during arrests and detentions”. The joint communication was from four rapporteurs – Nels Melzer, Fernand de Varennes, Ahmed Shaheed and Agnes Callamard. This was sent to the Government of India on 4th May 2020. It has been made public recently, after 60 days of response time. The first communication was sent on 16th August 2019 on “restrictions on freedom of expression and freedom of peaceful assembly”. The second communication was sent on 27th February mainly regarding the arrest of Advocate Mian Abdul Qayoom. The third communication was sent on 4th May. The rapporteurs expressed concerns about human rights violations and regret for no response to their communications.

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128 Special Rapporteur on Extrajudicial, Summary or Arbitrary; The Working Group on Arbitrary Detention; Special Rapporteur on the Right to Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health; The Special Rapporteur on the Situation of Human Rights Defenders and the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, February 27, 2020, Reference UA IND 4/2020
3.2.8 Arbitrary Detentions

Public Safety Act (PSA) was enacted in Kashmir to repress the Kashmiris. The Act allows the government to declare any area as ‘protected’ and regulate the entry of any citizen in the protected area. Under Section 8 of the PSA, any person can be arrested and imprisoned without a trial up to one year on the grounds of mere suspicion.

A total of 662 people have been detained under the PSA, and as per a report on 17th March 2020, 450 people are still in detention in jails all over India. The detainees have been taken into custody without any documentation, access to lawyers or hope of justice. However, due to the problems created by the pandemic and calls from humanitarian and civil society groups, release of the prisoners started in March. On 29th March, the Supreme Court of India in a *suo moto* writ petition called “Contagion Covid-19 Virus in Prisons” authorizing the release of prisoners. According to reports, 106 prisoners who were detained under PSA were released at the start of the pandemic. However, political prisoners are being kept in prisons amid the global health calamity. The families of detainees have requested to shift those in custody to jails within J&K. Several pleas made on health grounds by the relatives of those arrested have been turned down. Moreover, the government rejected the plea made by United Nations Office of the High Commissioner for Human Rights (OHCHR) to release the J&K High Court Association member Mian Abdul Qayyum, who is 70 years old and suffering from underlying diseases. The detention could not be justified under any bodywork of legal or constitutional reasoning.

Other Kashmiri political leaders who were arrested included: New Delhi’s own proxy political leaders, Farooq Abdullah, Omar Abdullah and Mehbooba Mufti, the last chief minister of J&K, Shah Faesal, a former bureaucrat, and leaders from the liberation movement including nonagenarian resistance leader Syed Ali Geelani and Mirwaiz Umar Farooq, a religious scholar, Bar president Mian Abdul Qayyum and other senior resistance leaders. Hina Bashir along with her husband was held in the special cell of Delhi Police; she tested positive for Covid-19 while in detention. Aasiya Andrabi, chief of DeM, Nahida Nasreen, the general secretary of the women’s organization, and Fahmeeda Sofi were jailed for their political beliefs.

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131 “Exceptional Democracy, Kashmir; A Paradise Turned Graveyard,” Indian Right-Wing Politics, October 2019, LFOVK
According to Human Rights Watch, 144 children have been detained. There were also reports of boys as young as nine who were in police custody. This is a clear violation of juvenile laws. Aftab, a 14-year-old, is believed to be in jail under the PSA. Abrar Ahmad Ganai was a minor who was taken into custody and released after two months in October 2019. In an interview, his father told Al-Jazeera that Abrar was “kept in a 6 x 7 cell, he had lost seven kilograms and looked pale. He was depressed and frightened. There were scars on his back”. These are just a few examples of the mass arrests that took place in J&K over a period of one year. Rahul Gandhi criticized the Indian government for arresting the Kashmiri political leaders and called the detentions “unconstitutional and undemocratic”. All those people who have been illegally detained are deprived of all fundamental human rights, which are guaranteed under the Indian constitution and International conventions including UDHR and ICCPR.

Section 10 of the PSA has now been omitted. It provided that detainees who were permanent residents of J&K could not be lodged in jails outside the territorial union. Now the authorities can send the detainees outside J&K without any justification. India had ratified the ICCPR in 1979, and various provisions of the PSA are contrary to the Indian government’s obligations under this treaty. PSA provisions are ambiguous and incompatible with principle of legality.

The government’s over-reliance on National Security Act (NSA), 1980 preventive detention seems to misinterpret the fundamental aspects of the Act. The NSA has some vague terms, which are flawed and may lead to misinterpretation. The detainee under this law had no right to be represented by any lawyer, while on the contrary counsel can represent the detaining authority. On this basis, the chance of the detainee being set free is exceptionally low. Under Section 13, the maximum period for detention is up to 12 months but it can be modified if the

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authority wishes to, even if the detainee is held on invalid reasons. Hence, it shows the arbitrary nature of the law.\textsuperscript{140} Due to this reason, the international community has been critical of the NSA and its usage.\textsuperscript{141}

International law consists of a prohibition against arbitrary detention; Article 9 of the ICCPR specifies the right to liberty and security of a person. No one shall be subjected to arbitrary arrest or detention.\textsuperscript{142}

3.3 Self-Determination

The right of self-determination has been identified by ICJ as ‘one of the essential principles of contemporary international law’ and its scope and applicability is more settled in colonial contexts between oppressed peoples and a colonial power evidenced by Resolutions 1514 and 1541. However, the principal has attained universal recognition even in post-colonial contexts due to Resolution 2625 and the inclusion of the right under the twin human rights covenants of 1966.\textsuperscript{143}

For instance, the two human rights covenants of 1966 – ICCPR and ICESCR – were created after the decolonisation era and make no explicit mention of decolonisation. The two common Articles 1(1) state:

“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”\textsuperscript{144}

Furthermore, paragraph 1(3) adds:

“State parties to the present covenant, including those having responsibility for the administration of non-self-governing and trust territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the charter of the United Nations.”

The provisions highlight three things, firstly that ‘all peoples’ have the right to self-determination. Secondly, it does not explicitly restrict it to decolonisation because it is addressed to ‘state parties’ to the present ‘covenant’ which means that the right can be enjoyed

\textsuperscript{142} UN General Assembly, International Covenant on Civil and Political Rights, December 16, 1966, United Nations
by peoples in post-colonial context. Thirdly, it adds that all member states, implicitly non-colonial or former colonies, have a duty to promote the right of self-determination within the internal affairs of the state. The implication is that self-determination is a right which extends in the post-colonial sense and relates to internal self-determination because it does not necessarily mean violation of territorial integrity of a state, while external self-determination means separation or secession which is more confined to the colonial context.

India made a reservation to Article 1(1) by stating that the right to self-determination as outlined in the ICCPR and the ICESCR is only applicable to peoples under foreign domination and not independent states which emerged from colonies. However, the objections by France, Sweden, Germany, the Netherlands and Pakistan are noteworthy. For instance, according to the Netherlands:

“Any attempt to limit the scope of this right or to attach conditions not provided for in the relevant instruments would undermine the concept of self-determination itself and would thereby seriously weaken its universally acceptable character.”^145

This illustrates that many countries consider the right of self-determination as a universal human right which is applicable in post-colonial contexts as well. Similarly, the African charter of human rights of 1981 created after the decolonisation era includes in Article 20 the wording “colonized or oppressed people”,^146 which means that oppressive governance may provide the scope for exercising the right of self-determination in post-colonial contexts, but also there is potential of external self-determination which in post-colonial context means to separate from the oppressive parent state by a group. This highlights an interplay of internal self-determination with external self-determination and recognised by some that this might mean a validation to a possibility of remedial secession.^147

It was observed above that the Indian government has subjected Kashmiri peoples to institutional injustices,^148 namely gross violations of human rights governed by discriminatory laws and wide discretionary military powers that allow perpetrators to commit crimes with impunity, unrepresentative governance by election riggings and non-participation as well as curtailment of freedom of expression, and the revocation of the autonomy granted under Article 370. As in Kashmir, the people of East Timor and Kosovo fought for self-determination amidst conflicts between two nations, the peoples were fighting for the right of self-determination but

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^145 Prince Charles Zimuto, “An Analysis Of The Concept Of ‘Self-Determination’ In International Law: The Case Of South Sudan,” (Postgraduate, University of Fort Hare, Republic of South Africa)


also for protection of human rights.\textsuperscript{149} Hence, the Kashmiri people of Jammu & Kashmir have the right to external self-determination through remedial secession because of the inadequate opportunities for internal self-determination.\textsuperscript{150} The conditions in Kashmir, in reference to East Timor, meet the modern qualification of the right. First, the uncertainty of Kashmir’s international legal status is similar to East Timor and it did not serve to undermine the exercise of the right to self-determination. Rather, Kashmir’s uncertain status, gross human rights violations, unrepresentative governance and revocation of its autonomy justifies the right as a last resort.\textsuperscript{151} The right of self-determination has a \textit{jus cogens} and \textit{erga omnes} character and hence in order to fulfil the mandate of the UN Charter the international community should demand that India must improve the avenues of internal self-determination by providing justice to the human rights victims, revoke the discriminatory laws, provide mechanisms for representative governance and restore the autonomy of the region.\textsuperscript{152} Otherwise, India cannot call itself sovereign over Kashmir and cannot preserve its territorial integrity and Kashmiri people can be eligible for remedial secession.

3.4 International Humanitarian Law

3.4.1 Lethal Weapons

Indian forces have been suppressing the voices of Kashmir by using brutal policies since 1947. From 2010 Indian forces started using internationally banned weapons under Additional Protocol 1 to Geneva Convention. Since July 2016, Indian occupied Kashmir has faced the use of pellet guns on mass protests favoring self-determination and freedom from India. In the protests more than 98 people had been killed, over 11,000 wounded, and more than 800 injured in the eyes or blinded by Indian occupying forces using pellet guns,\textsuperscript{153} on unarmed protestors. Since 5\textsuperscript{th} August 2019, the use of pellet guns has further intensified, with 153 cases of pellet guns and tear gas reported.

\begin{itemize}
\item \textsuperscript{149} Karen Heymann, “Earned Sovereignty For Kashmir: The Legal Methodology To Avoiding A Nuclear Holocaust,” (2003) 19, American University International Law Review
\item \textsuperscript{150} Neera Chandhoke, “When Is Secession Justified? The Context Of Kashmir’ (2010) 45 Economic and Political Weekly
\item \textsuperscript{152} Aijaz Ashraf Wani, “Ethnic Identities and The Dynamics Of Regional And Sub-Regional Assertions In Jammu And Kashmir,” (2013) 14, Asian Ethnicity
\end{itemize}
16 years old student Asrar Khan\textsuperscript{154} suffered injuries on his head from tear gas shell and pellets that were inflicted on 6\textsuperscript{th} August 2019. On 31\textsuperscript{st} August, innocent boys who were playing in a playground were attacked by the Special Operation Group (SOG). They fired tear gas shells and later pellets and bullets, resulting in injuries to two civilians, including a 50-year-old woman who was crossing the area. The other victim was a 20-year-old youth, who was injured by a pellet and lost 70\% of his eyesight. He was taken on a bike to Sub-District Hospital at Chattargam due to inaccessibility of ambulance services as a result of the communications blockade. Due to the serious nature of his injuries, on the recommendation of the doctor he was taken by ambulance to SKIMS in Srinagar, where he underwent treatment.\textsuperscript{155}

Pellets hit a boy during a night raid on 16\textsuperscript{th} September 2019 led by police in a village in Baramulla. According to him, he witnessed a large police force in the streets. A man knocked at their door and 15 policemen rushed in along with the SHO. They started climbing the wall to go into the next house in search for another young boy.

### 3.4.2 Cluster Bombing

Before the lockdown, Indian occupational forces on the night of 30\textsuperscript{th} and 31\textsuperscript{st} July 2019 targeted innocent civilians including women and children with cluster munitions, killing two civilians including a four years’ old boy and wounding 11. Use of cluster ammunition targeting civilian population across the \textit{de facto} border is violation of Geneva Convention and international laws.\textsuperscript{156}

The 2008 Convention on Cluster Munitions “prohibits the use, production, stockpiling and transfer of cluster munitions and requires States to ensure that they claim no further victims”.\textsuperscript{157} Pakistan’s military has urged the international community to take notice of India’s actions in


committing serious violations of the international laws on cluster ammunition attacking innocent civilians.158

3.4.3 Illegal Demographic Change and Delimitation

Under Rule 130 of International Humanitarian Law the occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies.159 This is confirmed by its implementation in international conventions, namely the 1949 Geneva IV Convention under Article 49 paragraph 6 and Additional Protocol I of 1977 under 85(4)(a) which provides: “The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”160 The Indian government’s domicile laws are in violation of these provisions on multiple counts. Firstly, they allow an accelerated path to non-locals to get citizenship in the union territory, the rights enshrined in the Hereditary State Subject 1927 and Delhi Agreement 1952 have been completely violated by the illegal abrogation of 5th August. Secondly, the Kashmiri locals already possessing ‘permanent residence certificates’ are treated like aliens and need to reapply for the domicile certificate in order to avail jobs, ownership and selling of property which is slower in comparison to the fast-track furnishing provided to non-locals. Thirdly, central government employees and army personnel who have served 10 years in the region makes them and their children eligible for citizenship and this has been reported to be part of a larger design towards demographic change.161

Such laws introduced without the recourse to peoples of Kashmir can be defined as covert moves towards demographic change constituting a war crime in an international armed conflict, if reference is made to Article 8(2) (b)(viii) of Rome Statute which provides: “[T]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies.”

The distinction of both directly or indirectly is fulfilled in this manner. The former, due to the abrogation of Articles 370 and 35A, while the latter due to the pretext of the domicile laws being introduced to provide fair and equal rights when no consent was obtained in the introduction of the laws.

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159 Rule 130. Transfer of Own Civilian Population into Occupied Territory, ICRC.
161 Domicile Certificate (Procedure Rules) 2020
Moreover, Article 7 (1)(d) defines deportation or forcible transfer of population as a “crime against humanity”.  

ILC Draft Code of Crimes against the Peace and Security of Mankind (1991) and (1996) address the issue of “the establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory” as an “exceptionally serious war crime”.

Moreover, there are multiple UN General Assembly resolutions that address the prohibition of demographic change perpetuated by Israel’s military occupation in Resolutions 36/147c, 37/88c, 38/79D, 39/95D and 40/161D. In Resolutions 33/15 (1978), 24/30 (1979), 37/253 (1983) et. al. the United Nations General Assembly deplored “all unilateral actions that change the demographic structure of Cyprus” by Turkish military presence.

The domicile laws and the delimitation strategies implemented in the newly formed union territories are an effort to change the demographic identity of the state to suppress dissent by further militarizing the region as previously noted, and inserting within the region pro-India nationals and deporting self-determination sentiments outside the region, thus undermining the population of Kashmir which have no faith in the state for their protection after the abrogation. This is already the case as it has been reported that on 26th June 2020 the first domicile certificate was issued to Shri Navin Choudhary, an Indian Administrative Service officer from Bihar, as the first non-local bureaucrat to hold the domicile of Kashmir. More than 32,000 domicile certificates have already been issued and majority of the applicants, standing at 90%, are from Jammu division. Similarly, retired Gorkha soldiers were among the 6,600 who got domicile although they themselves have been perpetuating atrocities during their deployment, according to a 1993 report by HRW. Moreover, the deportation of local Kashmiris has also

162 Rome Statute 1998, Article 7(1)(d)
now become more flexible and detainees may also be transferred outside the region due to the omission of Section 10 of the PSA.\textsuperscript{168}

3.4.4 Covid-19 Situation

The coronavirus pandemic has resulted in an unparalleled social and economic challenge that has shaken the entire human race. At a time like this one should not lose sight of the daily sufferings of the Kashmiris. Covid-19 has forced the Kashmiris to live in a ‘double lockdown’, the first due to the most oppressive lockdown for nearly a year and now the second due to the pandemic. The Kashmiri people are living in distress, anxiety and despair every moment of their lives. Children are suffering from anxiety and depression; the pandemic has further taken a mental toll on them.\textsuperscript{169} There are 300 mental health cases amongst children that have been reported. Sahil, a 14-year-old whose real name is kept anonymous, suffers from Obsessive-Compulsive Disorder (OCD). He has been having distressing thoughts of catching the infection, which has resulted in severe anxiety. There are many children like Sahil in the region who are in need of professional medical help. There are growing numbers of child mental health issues, reported at the child guidance and well-being center run by UNICEF at the Maharaja Hari Hospital (SMHS).\textsuperscript{170}

According to Kashmir Media Service, IOK has an inadequate public healthcare system. The healthcare sector is unprepared and understaffed to deal with Covid-19. The doctor-to-patient ratio is one doctor for 3,866 patients. According to sources, there are only 215 ventilators for a population of roughly 13 million. So far some 13,899 coronavirus positive cases have been reported in J&K taking the fatality count to 285.\textsuperscript{171} The brutalities of the occupying troops have led to violations of Kashmiris’ fundamental rights, one of them being denial of proper healthcare. Many doctors in the region have been harassed and beaten by government forces while performing their duties,\textsuperscript{172} which is alarming especially at a time of the global pandemic.

On 23\textsuperscript{rd} May 2020, Dr Syed Maqbool, a cardiologist from Srinagar, was brutally harassed and beaten up by police and taken to Zabidal police station. In another incident, Central Reserve Police Force (CRPF) in Chadoora beat up Dr Muzaffar Ahmed while he was on his way to the


hospital. Moreover, police in Pulwama district of southern Kashmir beat an ambulance driver, Tariq Ahmed.\textsuperscript{173}

Article 56 of the Fourth Geneva Convention applies specifically to this pandemic. It asserts that the occupying power has the responsibility to maintain and ensure a stable public health system and hygiene in occupied territory, and to battle the spread of the virus.\textsuperscript{174} In the middle of this humanitarian crisis, the Indian authorities need to be pushed to focus on the health of the Kashmiris instead of isolating them for political and military reasons.\textsuperscript{175}

Section 144 CrPC was imposed in Shopian, which is the most affected region due to violence. The lockdown came overnight without letting people buy necessary essentials. The lockdown was implemented in a “highly militaristic manner” rather than handling the situation as a health emergency. Several Kashmiris have been detained during the Covid-19 lockdown based on violation of lockdown orders set by the administration. Around 1,691 people have been arrested in Kashmir and 612 in Jammu region. UN Secretary-General António Guterres called for a global ceasefire on March 23, 2020. Regardless of this, LOC remained as violent as ever which resulted in 15 civilians being injured and five killed in “cross-LOC shelling after the announcement of the lockdown on 19\textsuperscript{th} March, 2020”.\textsuperscript{176}

Due to the worsening situation of the pandemic, the administration prohibited all social and religious gatherings for the people of J&K, but at the same time allowed a Hindu pilgrimage to the Amarnath Cave Temple in the Pahalgam area of south Kashmir. However, because of the rising coronavirus cases (that have topped 15,000) the authorities decided to call off the pilgrimage after a few days at the end of July 2020.

3.4.5 Sexual Violence Against Women

The J&K government reported to the High Court about 16 cases of rape and 64 incidents of molestation during the lockdown period. This record has been submitted under the Social Welfare Department stating that “as many as 1,314 calls have been received from the affected persons on the emergency number 181 from 24th March 2020 to 24th April 2020, out of which 65 are related to violence against women”. The court has directed the Social Welfare Division and State Legal Services Authority to take necessary steps to alleviate the complaints and hardship of victims.

Chief Justice, Justice Geeta Mittal and Justice Rajnesh Oswal had recently issued notices to the J&K government to issue reports taking into consideration domestic or any other forms of violence being faced by women. According to an Al-Jazeera report, some inappropriate comments had been made by CM of Haryana, Manohar Lal Khattar, who was quoted as saying: “Some people are now saying that as Kashmir is open, brides will be brought from there. But jokes apart, if [the gender] ratio is improved, then there will be a right balance in society.”

BJP’s Vikram Saini, a member of the Legislative Assembly, said: “Muslim party workers should rejoice in the new provisions. They can now marry the white-skinned women of Kashmir.” There are also reports that “how to marry Kashmir women” was progressively Goggled after 5th August. There is rising fear in the minds of women and girls due to increased military presence. They fear being harassed during raids or even if they leave their homes to buy daily essentials. This is also because of earlier reports of Indian forces being accused of sexual assaults in Kashmir and women who survived the assaults are still fighting for justice.

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Rape also violates the ICCPR and Article 3 Prohibition on Torture. The Convention defines torture as “any act by which severe pain or suffering… is intentionally inflicted on a person… punishing him for an act he or third person has committed”. Where anyone who is a party to an armed conflict, whether its internal or international, uses rape as a tool to inflict pain or suffering on grounds of punishing, or intimidating, or to obtain information or a confession, constitutes as torture.\(^\text{183}\)

### 3.4.6 Destruction of Civilian Property

The Indian government’s occupying forces have caused destruction of civilian properties during nights raids and search operations which have led to at least 800 homes being destroyed over the period of one year. In addition, a survey of JKCSS and APDP has reported 22 cases from August to December regarding destruction of civilian property.

In 2019, reports of vandalism and destruction of civilian properties at the hands of occupying forces were common and repetitive. In addition to destruction of properties, people also reported cases of torture, use of excessive forces and sexual violence. Other than human lives, houses, vehicles and animal shelters have emerged as collateral damage in Indian Occupied Kashmir. Due to the communications blockade and media restrictions these cases have not been officially reported.

From 1\(^{st}\) January to 30\(^{th}\) July 2020, 54 cases of destruction of civilian properties were recounted in Jammu and Kashmir. The destruction of properties by occupying forces during the first six months of 2020 were escalating, especially during Covid-19 lockdown, which left many families without shelter and homeless.\(^\text{184}\)

Moreover, the cases remain under reported, and those reported are not precise. On 19\(^{th}\) May 2020, Nawakadal encounter was reported where 22 houses were destroyed according to the Mohalla Committee. In another case, 11 houses and at least a dozen animals were destroyed in Poonch. The excessive use of force by Indian occupational forces has left many families without shelter. The lack of clean operations by the authorities resulted in violent encounters that also resulted in the death of a 12-year-old boy Basim Aijaz, who succumbed to burn injuries during the Nawakadal encounter. In April, the region witnessed vast destruction of civilian properties by the Indian occupying forces who looted houses in the name of CASO.

During occupation private properties are protected under IHL. This rule is part of Customary International Humanitarian Law (CIHL), binding on all states.\(^\text{185}\) Rule 9 of CIHL defines

\(^{183}\) Human Rights Watch, volume 5, issue 9, https://www.hrw.org/sites/default/files/reports/INDIA935.PDF
\(^{184}\) Six Monthly Review of Human Rights Situation in Indian Occupied Jammu and Kashmir (January to June 2020)
\(^{185}\) International Committee of the Red Cross (ICRC) Customary IHL Database, Rule 50
civilian objects as “all objects that are not military objectives”. However, Rule 7 produces an obligation upon the parties to the conflict to distinguish between civilian objects (protected objects) and military objectives. Rule 10 elaborates that civilian objects are protected against attack unless and for such time as they are military objectives. IHL forbids attacks, reprisals or other acts of violence against such objects.

The Hague Convention of 1907 first delivered financial obligation against states whose armed forces intentionally destroy civilian property in war. Additionally, similar obligation to widespread destruction and seizure of property that is not justified by military necessity is considered a grave breach of an article common to all Geneva Conventions of 1949 as well as two Additional Protocols (AP) of 1977. Attacks on civilians and their properties are prohibited by Articles 33 and 53 of the IVGC and by Article 52 of Protocol I regardless of who owns them.

Furthermore, the Fourth Geneva Convention was designed to protect property in order to spare civilian populations the sufferings that might result from the destruction of their houses, clothes, foodstuffs and the means of earning their living. Article 18 prohibits attack at any time against civilian hospitals or medical care facilities.

In adding the element of the “military necessity”, it has been recognized by ICC in Prosecutor v Jean-Pierre Bemba Gombo that it consists of those measures that are crucial for securing ends of war. But in the case of Indian Occupied Kashmir, the forces try to ensure sanitized operations. The techniques used to expedite operations involve throwing unpremeditated explosive devices inside houses. The army uses flamethrowers and no caution is given to militants. The excessive use of force itself explains the misuse of principle of “military necessity”.

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186 Article 47 of The Hague Convention of 1907: pillaging, imposing collective punishment and destruction of public and private property of protected persons is prohibited.
187 An article GCI Art. 50, GCII Art. 51, GCIII Art. 130, and GCIV Art. 147 common to all four Geneva Conventions of 1949 notes that “High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding article [on grave breaches]”.
188 Article 91, Additional Protocol II “A belligerent party which violates the provisions of the said regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces”.

Trial Chamber II endorsed the definition of military necessity set out in Article 14 of the Lieber Code, which provides that “[m]ilitary necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war”.

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The wide destruction and seizure of property in Indian Occupied Kashmir is not acceptable by military necessity and is carried out unlawfully and shamelessly. This vandalism of property is breach of 4th GC and CIHL. According to Article 8(2)(b)(ii) of the Rome Statute 1998, intentional attacks on civilians and civilian objects are prohibited and amounts to war crimes.
Chapter 4

Conclusion and Recommendations

4.1 Conclusion

The Kashmiris in J&K have been struggling for the right of self-determination since the partition of British India and have been denied such right till date. Firstly, the Maharaja did not take Kashmiris’ will into consideration when accession was signed to India. This has been recognised by the UNSC Resolution 47. Secondly, even if the Maharaja did accede, the accession was conditional upon the will of the peoples of Kashmir. Thirdly, when the Indian government proposed convening the J&K Constituent Assembly, the UNSC declared the elections as not reflective of the exercise of the right of self-determination in Resolutions 97 and 122. Despite this, the elections, which were reported to be rigged, created an avenue for negotiations of the Kashmiri peoples with the Indian government based on the conditions set out in the Instrument of Accession, Delhi Agreement 1957 and Hereditary State Subjects definition 1927 which gave birth to the so-called ‘temporary provision’ within the Indian constitution under Article 370 which crystallised the special autonomous status of the region. Moreover, Article 35A, which emanates from Article 370, provided an additional unequivocal protection from demographic change. However, on 5th August 2019, the Indian government revoked Articles 370 and 35A without any recourse to the Kashmiri people making material breach of the Instrument of Accession, the negotiations conducted in the Delhi Agreement, the J&K Constituent Assembly, the UNSC Resolutions as well as their own constitution and judicial precedents.

The Indian government’s siege of the region can be classified as a military occupation by the Indian occupying forces via unilateral annexation which stand in violation of International Humanitarian Law in armed conflict. Firstly, India fulfils the definition of occupation under Article 42 of The Hague Regulations 1907. Secondly, India stands in violation of the fundamental rights of civilians under The Hague Regulations and Geneva Convention IV Articles 47-48, Additional Protocol 1, Article 75 because of the infliction of serious abuses of human rights – torture, murder and detentions are all violations of fundamental rights of international law, amounting to crimes against humanity. Thirdly, India stands liable for committing the crime of aggression via unilateral annexation in contravention of Article 8 bis2(b) of the Rome Statute. Fourthly, India has violated all four Geneva Conventions. The twin human rights covenants of ICCPR and ICESCR also showcase the human rights abuses perpetuated by the Indian occupying forces in terms of curtailment of religious rights, economic development, freedom of communications via the internet and telephone lines, journalism, education, freedom of movement, along with the imposition of curfews, infliction of torture and arbitrary detentions. In addition, India’s denial of the right of self-determination is against both the colonial understanding of the right and the post-colonial interpretation which places India...
in violation of peremptory norm which also has an *erga omnes* nature. Moreover, India stands in violation of International Humanitarian Law and perpetuation of atrocities that come under crimes against humanity, crimes of aggression and war crimes due to the use of lethal weapons through usage of pellet guns and cluster bombs, sexual violence against women, illegal transfer of civilians bringing about demographic change, inadequate response to the Covid-19 pandemic and destruction of civilian property.

4.2 Recommendations

- India has consistently resisted third party mediation in the Kashmir conflict, which is categorized as an international armed conflict between two High Contracting Parties. The international community should send a clear message to India about its blatant disregard of international law and remind it of its international obligations to ensure adherence to international human rights law, self-determination and International Humanitarian Law.

- The international community should start dialogue with India so that it mitigates the discriminatory laws and freedom curtailment that persists within the region in order to provide a meaningful platform for Kashmiri peoples to exercise their right of internal self-determination.

- Set up an independent war crimes tribunal for Jammu & Kashmir for investigation of the war crimes committed by the Indian forces. Moreover, ensure intervention of the International Criminal Court via the Prosecutor’s Office to initiate proceedings against the perpetrators on three accounts; crimes against humanity, crimes of aggression and war crimes.

- Government of India should comply with its international obligations in Occupied Kashmir pursuant to UNSC Resolutions and other bilateral treaties and international covenants.

- Member states of the UN Security Council should refer this case of illegal annexation and demographic change in disputed Jammu & Kashmir for advisory opinion to the ICJ.

- The international community should ensure Government of India respects and protects the fundamental rights of the people of Occupied Jammu & Kashmir, including freedom of speech and expression.
4.3 Gallery
Kashmir’s Statehood Abrogated
Kashmir's Statehood Abrogated