

KASHMIR'S RIGHT TO SELF DETERMINATION, UNSC RESOLUTIONS AND CULPABILITY UNDER INTERNATIONAL HUMANITARIAN LAW

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ABSTRACT

In the Valley of Kashmir there is a conflict that has broad ramifications for international human rights law and it has involved the Indian armed forces occupation of the state and then its annexation by India. The origins of the dispute began when the Maharaja conducted the Instrument of Accession in 1947 and the principality became incorporated with in India. The legality of this act was disputed by the UN Security Council which decreed that there should be a plebiscite in the territory to determine the will of the population. There have issues that concern international human rights law and these are (i) whether the UNSC resolutions have binding effect? (ii) Are rights of the inhabitants of successor states to colonial powers governed by international law that prescribes the right of self determination? (iii) Are States bound to observe the International Convention of Civil and Political Rights that has the force of customary law? The presence of Border Security forces and Central Reserve force which operate under the Armed Forces (Special Powers) Act (AFSPA) 1958 provides immunity to the Indian military personnel from judicial redress. Their abuses have been catalogued in the UN Human Rights Council's report in 2018 and 2019. The argument of this paper is that the resolutions on Kashmir are mandatory; that India has acted as an imperial state and that it is bound by international law; and that there should be rigorous application of international humanitarian law and war crimes tribunals constituted to try officials on the precedent of Non International Conflicts.

Keywords

Instrument of Accession, Article 370, Chapter VI, International Covenant on Civil and Political Rights; AFSPA, Public Safety Act; OHCHR Report 2018; International Humanitarian Law (IHC); Non International Conflict (NIC).

1. INTRODUCTION

The Kashmir dispute relates to the land and its long suffering people and it is considered one of the gravest human rights crises in the world. This has a history that goes back to the independence of India and Pakistan as two separate nation states in 1947 and is a bone of contention between them. The inhabitants of Kashmir have been denied a referendum under the UN Security Council auspices and their resentment has led to suppression by the Indian military acting with immunity under special powers.¹ This has escalated ever since the Indian government revoked Article 370 on 8 August 2019, which protected Kashmir's status in India's constitution, and imposed direct rule from New Delhi. The severe human rights violations include collective punishments, curfews, extra judicial killings and disappearances at the hands of Indian security forces. It requires an examination of the legal background, the issues involved, and the application of international human rights law in this asymmetrical conflict that needs world attention as a Non international Conflict governed by humanitarian law.

The British colonial administration under the Indian Independence Act (IIA) 1947 relinquished sovereignty over the Indian subcontinent. The Last Viceroy of British India,

Lord Mountbatten allowed dispensation to the 562 Princely States to accede to any one of the two dominions of India or Pakistan.² However, the British government's representative formulated two pre-conditions that had to be met which were, firstly, the requirement that the State to be contiguous, and, secondly, the general aspirations of the people had to be accounted for.³

The overwhelming Muslim population of Jammu and Kashmir (J&K) had wished to be aligned with Pakistan but the princely ruler wanted to accede to India and he dismissed his Prime Minister Ranchandra Kak, on 11 August 1947 who had wanted a referendum.⁴ The Maharaja then signed the Instrument of Accession with India upon which the Indian government provided the military guarantee for the unilateral declaration by the Maharaja when its armed forces landed on 24 October 1947 in the capital of Srinagar. It was ostensibly to prevent the Pakistani forces who had infiltrated to lay claim to the state against the Kashmir state authorities. The Indian government invoked Section 10(1) of the IIA for its incorporation which states "*the provisions of this Act keeping in force provisions of the Government of India Act, 1935, shall not continue in force the provisions of that Act relating to appointments to the civil services of, and civil posts under, the Crown in India by the Secretary of State, or the provisions of that Act relating to the reservation of posts*".⁵

The intervention by Pakistan's sympathisers secured a rump state of Pakistani (Azad) Kashmir and it has become an autonomous region within the nation state of Pakistan. The UN Security Council adopted a resolution for a plebiscite to be conducted in the whole territory to objectively verify its future course as a state.⁶ The separation of Kashmir has remained and it includes 66 % of its designated area in India and the rest is in Pakistan with a border which is divided by a line of control (LOC).

In 2019 the Indian government annexed Kashmir and imposed a human lockdown and closed all communication with the outside world. It arrested the political leaders, disbanding the local parties and dissolved its national assembly. This form of censorship and news blackout continued for over one year and has only been partially lifted.⁷ The policy of the Indian government under Prime Minister Narendra Modi, a fervent nationalist

of the Bharatiya Janata Party (BNP), has been to implement extra constitutional measures that has usurped the status of Kashmir and led to two variables. Firstly, it is against the letter and spirit of the UN Security Council Resolutions for a plebiscite to determine its permanent status. Secondly, it has broken the Simla Agreement which was the first bilateral accord between the two countries on Kashmir by annexing the state without consultation with Pakistan. It states in Article 4 (ii) "*In Jammu and Kashmir, the line of control resulting from the cease-fire of December 17, 1971 shall be respected by both sides without prejudice to the recognized position of either side. Neither side shall seek to alter it unilaterally, irrespective of mutual differences and legal interpretations*".⁸

However, the human rights dimension of the conflict has caused the most concern because of the immunity with which the Indian forces have carried out their operations. The Armed Forces (Special Powers) Act (AFSPA) 1958 provides the umbrella of immunity to military personnel in Kashmir and has been effective for the longest period than on any other state.⁹ This has led to the commission of atrocities and the first Human Rights Council report in 2018 was very damning of the Indian government's actions in Kashmir and stated that the "*allegations of human rights violations include torture and custodial deaths, rape, enforced disappearances and extrajudicial executions*".¹⁰ The subsequent report also mentioned the "*extrajudicial, summary or arbitrary executions especially since the 2016 unrest began*".¹¹ Despite this the Indian government revoked Kashmir's autonomous status and incorporated it within the Indian union after further sub dividing the state into two territories.¹² There was no acknowledgment of its alleged actions in the territory and it has refused UN Secretary General Antonio Guterres's offer of mediation.¹³

The breach of human rights is not only related to the measures the armed forces and the security services have taken against the civilian population but now also concerns the suppression of the political parties after the annexation of Kashmir by India. The Indian Parliament (Lok Sabha) has passed the law by providing land grants which have removed all obstacles to non Kashmiris purchasing land in Kashmir.¹⁴ The Indian government has enacted legislation that threatens to permanently change

of its Constitution which permitted a state constitution that derogated powers of defence and foreign affairs to the central government in New Delhi. While this arrangement was meant to be a temporary provision the Article 370 become entrenched in the Indian constitutional framework.²³ This was complimented by Article 35 A which excluded Indian citizens from becoming the “state subjects” or citizens of Kashmir and also prohibited them from acquiring property in J&K.²⁴

ii) *Uti possidetis*

The territory of Kashmir has separated the people who share ethnicity, religion and language and are divided by a Line of Control (LOC) which is heavily militarised. The argument that Britain as a colonial power governed an undivided India that gives the right to ownership in secession of Kashmir is not sustainable. The concept of *Uti possidetis* is for the continuation of previous colonial boundaries and is against the disintegration of former colonised territories. It has been declared by the ICJ that the “essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign”.²⁵

The application of *Uti possidetis* provides that as far as international law is concerned the independence of a former colonial territory freezes the colonial borders and is binding on a sovereign state after independence.²⁶ This is because the principle originated when the process of de colonialization began and the UN anticipated that when former colonies which were not ethnically homogenous became independent they were to include all the inhabitants of the colony unless they were separated by a barrier of ‘salt water’. The border governed by *Uti possidetis* can potentially be any type of internal territorial demarcation that has been established in domestic law prior to secession into an international one once secession has succeeded.²⁷ In the dispute over Kashmir two new states had come into existence with each claiming a right over the territory. The solution to the dispute has been un ambiguously stated by the United Nations Security Council (UNSC) that there should be a plebiscite to allow the

inhabitants to determine their future according to their own aspirations.

However, the Indian government made no effort to organise the plebiscite that was mandated by the UNSC. It had predetermined that if such a referendum was held that the people of Kashmir would either vote for independence or for alignment with Pakistan with whom the people share cultural and family ties. This information has been corroborated by UN officials who were working on the project of demilitarisation and for conducting a referendum in the two parts of the disputed territory.

The United Nations Representative for India and Pakistan (UNRIP) Owen Dixon reported to the Security Council as follows:

In the end, I became persuaded that India’s agreement would never be obtained to demilitarization in any such form, or to provisions governing the period of plebiscite, conducted in conditions sufficiently guarding against intimidation, and other form of abuse by which the freedom and fairness of the plebiscite might be endangered.²⁸

The Indian government proceeded to align the state with India by promulgating Article 370 in the Indian constitution of 1951 which created the scope for a political party system that accepted the status quo in Kashmir. The Presidential order of 1950, officially The Constitution (Application to Jammu and Kashmir) Order, 1950, came into force on 26 January 1950 contemporaneously with the Constitution of India. It specified the subjects and articles of the Indian Constitution that corresponded to the Instrument of Accession as required by the clause b(i) of the Article 370.²⁹ The largest party that emerged was the Jammu and Kashmir National Conference (JKNC) that accepted the patronage of India and deferred to the union government in matters of defence and foreign affairs. On 27 October 1950, the General Council of the National Conference adopted a resolution recommending the convening of a Constituent Assembly for the purpose of determining the ‘future shape and affiliations of the State of Jammu and Kashmir.’ The Constituent Assembly consisting of 75 members was elected in 1950 by a universal adult franchise and the constitution that was adopted declared the State of Jammu and Kashmir to be ‘an integral part of India.’ It may,

however, be noted that all the nominations filed by the opposition in the election were rejected.³⁰

Article 35 A preserved the territorial integrity by restricting the right of alienation of land to people who were not born or had residential status in Kashmir. This did not dissipate the issue of the aspirations of its population and their future inclination within the purview of international law. The UN Security Council considered this as usurping the will of the people by disparaging the Constituent Assembly where the JKNC *"might attempt to determine the future shape and affiliation of the entire state or any part thereof that would not constitute a disposition of the state in accordance with the above principle"*.³¹

However, the Indian government refused to conduct a plebiscite and empowered the constituent assembly to establish a legislative assembly by forming a mechanism for an electoral process.³² The result was that the Indian-controlled part of Kashmir had a government which was restricted by the powers granted under the Indian constitution. The Instrument of Accession led to the Indian sovereignty over most of Kashmir and it was a conveyance of land that transferred title to India by overriding the principle of *Uti possidetis*. The process of annexation of a non contiguous territory was accomplished by the use of judicial fiat rather than by conducting a plebiscite to determine its future status.

3. BINDING EFFECT OF RESOLUTIONS

i) Security Council seized of matter

The UN bodies had called for a ceasefire after the Indian - Pakistani skirmish post independence over Kashmir and the Security Council proposed a referendum in the territory to decide its future status. There have been a total of 6 UNSC resolutions calling for a plebiscite beginning in 5 January 1949(S11196) and ending on 24 JANUARY 1957 (S13779); and 21 February 1957 (S3793). The lack of implementation by the Indian government may be a breach of international law as it falls under the UN Charter that specifically mandates the areas over which the issue arose when the decisions are made to pass a resolution.

Under Chapter 1 'Purposes and Principles' the member states of the UN are bound under

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

The framework of the UN has three important instruments the first of which is the Chapter V, on the 'Functions of the Security Council. Article 25 states "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter". Chapter VI is on the 'Pacific Settlement of Disputes' and Chapter VII is on the 'Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression'. Article 39 states *"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security"*.³³

The accession of Kashmir to India was raised in the UN after the de militarisation of the Indian and Pakistani forces when the UNSC called on both sides to conduct a plebiscite to allow Kashmir's people decide its future status. Resolution 48 reaffirmed the first resolution that had called for an armistice between the two countries and it stated as follows:

Noting with satisfaction that both India and Pakistan desire that the question of the accession of Jammu and Kashmir to India or Pakistan should be decided through the democratic method of a free and impartial plebiscite, Considering that the continuation of the dispute is likely to endanger international peace and security, Reaffirms its resolution 38 (1948) of 17 January 1948.³⁴

There was no protocol to state whether it was adopted under Chapter V or Chapter VI by the Security Council. However, during the period of the UNSC resolutions on Kashmir (1947-57) it was not the practice to *"mention the title of the chapter, whereas the majority of resolutions that were acted upon by the member states did not mention any reference to a chapter of*

the UN Charter". Instead, "it was the content and the substance of the resolution that would determine the nature of implementation. If one looks at the UNSC's practice in its first decade of existence, only a handful of resolutions mention the title of the chapter, whereas the majority of resolutions that were acted upon by the member states did not mention any reference to a chapter of the UN Charter". It is apparent that "there is no reference to either Chapter VI or Chapter VII in any of the 17 resolutions".³⁵

The International Court of Justice (ICJ) has established the basis to ascertain whether the Security Council intended the resolution to have legal effect. These factors are: "the language used in the resolution; prior reference establishing the importance of the subject matter through discussions, resolutions, or documents; and the binding charter provisions in the resolution". There is also the additional requirement of "international law, which includes reference to, or reliance of the resolution on, treaties, jus cogens norms, customary law, and other sources of international law".³⁶

The impact depends upon whether those resolutions can be interpreted as 'decisions' or those that are 'recommendations' and while the former are expressed in specific terms as giving rise to a remedy the latter has a persuasive effect only. The decisions are considered as binding by the ICJ. In *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, 'the Namibia case'³⁷ the Court had to respond to the question by the Security Council of the United Nations, "What are the legal consequences for States of the continued presence! of South Africa in Namibia notwithstanding Security Council resolution 276 (1970)?" The Court offered its advisory opinion that "there was a UNSC Resolution 276 that sought to terminate the mandate of South Africa in South West Africa(Namibia)".³⁸

The Court held that "[a] binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence ... there is an obligation, especially upon Members of the United Nations, to bring that situation to an end".³⁹

The determination was that South Africa's actions were illegal and that the Security Council resolutions were obligatory and that in taking

this into consideration the following factors were relevant:

"It has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. Article 25 is not confined to decisions in regard to enforcement action but applies to "the decisions of the Security Council" adopted in accordance with the Charter. Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter, which deals with the functions and powers of the Security Council".⁴⁰

However, the Court was at pains to point out that all UNSC resolutions have a mandatory effect and that Member States are bound to accept them to uphold the principles of international law.

The decisions made by the Security Council... were adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25. The decisions are consequently binding on all [Member States] of the United Nations which are thus under obligation to accept and carry them out. Accordingly, Article 25 may apply to resolutions passed under Chapters VI, VII, VIII, and XII.⁴¹

The commentary on the case states that the "Court offered no explanation, the legal determination was presumably binding because it was included in a decision contained in SC Resolution 276. The causative effect is binding upon the states that apply the norm".⁴² It can be summed up that the binding or non-binding nature of a resolution (decision or recommendation) also covers determinations made therein; "a determination made in a recommendation is not binding, whereas a determination made in a decision is of mandatory effect".⁴³

This ruling was confirmed in the *Legal Consequences of the Construction of a Wall in the Palestinian Territory*,⁴⁴ in which the General Assembly requested an Advisory Opinion on the construction of the Israeli wall based on the UNSC Resolutions 452, 465 and 446 on the following question : "What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the Report of the Secretary-

provisions invoked. Article 25 includes a fourth factor by addressing the international laws, including the application of treaties, customary law and *jus cogens norms*".⁵⁴ The analogy can be extended to the UNSC resolutions on Kashmir which transcend the principles of both Chapter IV and Chapter VII in enforcing the mechanisms for a plebiscite. There is also the text because under Chapter VI the term 'resolution' is not used and UN practice emphasises a generic meaning of the word whether conveying a decision or a recommendation.⁵⁵

Appiagyei-Atua, argues that this Resolution 1325 imposes mandatory obligations on states in the international domain in an effort to promote and protect the rights and dignity of women and children during conflict. This he argues should have binding effect because it is objectively based on the three principles which are, firstly, the Resolution seeks to "ensure greater representation, participation, and involvement of women in peace-making processes, and to include a gender perspective in peacekeeping operations. Secondly, the Resolution calls for respect for humanitarian law with a special emphasis on ensuring better protection of women and girls, such as excluding impunity clauses, in order to better promote justice for female victims of conflict. The state must also take affirmative action to prevent third parties from abusing the rights of women and girls during armed conflict. Thirdly, it calls for the promotion of the rights of women and girls and their special needs during the process of repatriation, resettlement, reintegration, and reconstruction.⁷ Further, states have the duty not to interfere or act in any way that would compromise women and girls' enjoyment of fundamental rights".⁵⁶

Sir Michael Wood, a member of the International Law Commission accepts that in order to determine the binding or non-binding effect of a UNSC resolution there needs to be "an evaluation of its intent by reference to its travaux préparatoires, which does not diverge from a contextual, or an object and purposeful approach to interpretation".⁵⁷ The travaux préparatoires are found in the previous deliberations made in connection with the resolution prior to its formulation and passage. Its impact is that "a decision or a recommendation can change depending on context. Therefore, a rigid application of these distinctions leads to

confusion, as some decisions are non-binding and some recommendations have the force of law".⁵⁸

This analysis finds support in Professor Stefan Talmon's observation that UNSC practice and the common understanding of the UN membership in essence establishes "that 'threat to the peace' is a constantly evolving concept and from the 1990s, the understanding of what constitutes a 'threat to the peace' has broadened considerably from the narrow concept of absence of the use of armed force, to the wider concept of situations that may lead to the use of armed force".⁵⁹ This implies that the separation between Chapters VI and VII is not arbitrary and enables a broad based interpretation of Article 25 of the UN Charter as applied to resolutions created under non-enforcement measures.

There is also another basis for the application of UNSC resolutions passed notionally under Chapter VI, such as the Kashmir dispute, which is that they conform to a rule of international customary law and reflect the *opinio juris* of the General Assembly. There is a debate between those who recognise UN resolutions as constitutive of state practice or *opinio juris*,⁶⁰ and the ICJ has settled this issue in favour of the latter.⁶¹ The GA Res 2625 (XXV) in the Nicaragua case was adopted unanimously.⁶² The General Assembly resolutions even if they are not binding may sometimes have normative value and they can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. The evidence can be found in the ICJ rulings that have identified the General Assembly resolutions to be a step in the development of international law or encapsulating the rules of international law without specifying the content of these rules.⁶³

This principle can also be applied to Security Council resolutions adopted under Chapter VI that are considered to be non binding. In the *Nuclear Weapons Case*⁶⁴ the ICJ held that that the relevant resolutions "fall short of establishing the existence of an *opinio juris*", because "several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions".⁶⁵ There might still be an emerging "customary rule specifically prohibiting the use of nuclear weapons", based on factors such as "the adoption each year by the General Assembly, by a large

majority, of resolutions recalling the content of resolution 1653 (XVI)".⁶⁶

The Court noted that "a series of resolutions may show the gradual evolution of the opinio juris required for the establishment of a new rule."⁶⁷ It emphasise the importance of the adoption "each year by the General Assembly resolutions calling for the use of nuclear weapons to be prohibited".⁶⁸ The significance of a series of resolutions is to create an opinio juris because of their persuasive affect that emanates from being adopted with greater frequency.⁶⁹ The ICJ has found repetition to be important because the voting and passing of resolutions could be interpreted as state practice.⁷⁰

The UNSC resolutions on Kashmir meet the test of regularity and each one of them have affirmed the principle in Security Council resolution 47 (1948) [The India-Pakistan Question]. They all invoke the clause that calls for an administration of a plebiscite that would determine the aspirations of the Kashmiri people and their future status. The UNSC Resolutions on Kashmir do not preclude their binding effect because the adoption of a resolution does not distinguish between the effect of a decision and a recommendation but is based on a 'determination' which even if made in a decision is of mandatory effect. The resolution that is to promote peace and which is to achieve a solution to end the conflict by a referendum is a determination and is therefore compulsory, and India which is a party to the dispute has breached international law by not establishing a mechanism for a plebiscite.

4. RIGHT TO SELF DETERMINATION UNDER INTERNATIONAL LAW

i) De colonialization and inalienable rights

Prior to the examination of the specific breaches of international human rights and humanitarian law by India in Kashmir it is necessary to consider the right of self determination recognised in the UN Charter. This principle is embodied in Article I of the Charter of the United Nations which states: "All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".⁷¹

There are two UN declarations, in addition to the UN Charter itself which have dealt with the issue of decolonisation and self-determination and these are the Declaration on the Granting of Independence to Colonial Countries 1960 and Friendly Relations Declaration 1970.⁷² The underlying principles of both these declarations is that self-determination leading to severance from the state is the final option and exercisable only within the decolonization context. The qualification for meeting the conditions for such a right is based on the notion that colonised peoples were living under imperial subservience and the colonial governments had exercised their dominion over centuries.⁷³ While these declarations emphasised the principle of territorial integrity of existing states they were the precursor to the movements for the self-determination where there was a transfer of power to a state that was prima facie decolonised.

The concept of self determination originates in de colonisation and is supported by the United Nations General Assembly Resolution 1514 that states:

All peoples have the right to self-determination; by virtue of that right they may freely determine their political status and freely pursue their economic, social and cultural development.⁷⁴

The Instrument of Accession stemmed from a colonial dispensation and the Indian union became the new sovereign over the Princely state of Kashmir and exercised its power to incorporate it into the union by invoking Article 70. While there is no universal definition of statehood in international law⁷⁵ this can be inferred by various means, such as international commissions of inquiry, and facts, such as the actual manifestation of a people to assert their identity;⁷⁶ and (iii) while self-determination may take various forms, including continued association with an existing state, a strong preference is placed on the grant of statehood on the people in question.⁷⁷

The Indian union's possession of J&K has to be contextualised as a process of colonialism because when the State enacted its new Constitution in 1956 it affirmed its inclusion within the Indian Union (article 3). The object clause of this Constitution states the "pursuance of the accession of this State [J&K] to India ..., to further define the existing relationship of the

State with the Union of India as an integral part thereof". This implies that J&K was considered territorially a part of India, even if its legal integration on the other hand is still in pending. The essence of this clause is that the inclusion of Kashmir in the Indian union was by conveyance of the *Instrument of Accession*, and finally incorporation into the Indian Constitutional framework.

The international law principles can designate the minority groups as "peoples" who have the right to self-determination to provide the ability to freely determine their political fate and form their own representative government. Michael P. Scharf argues that *"Although no international treaty defines the term "people" for the purposes of self-determination, it is generally accepted that this classification entails a subjective element, such as a common belief by members of the group that they share the same characteristics and beliefs and thus form a common unit, as well as an objective element, such as common racial background, culture, ethnicity, religion, language, and history"*.⁷⁸

Els Bogaerts argues that *"like many globally embracing terms, such as imperialism and post colonialism de colonialization was seldom restricted in application to a particular political activity or a neatly defined era. Moreover, as a binary activity decolonialisation was interpreted to be both a calculated process of military engagement and diplomatic negotiation between the two contending parties colonial and non colonial"*.⁷⁹

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

form a binding norm but is an "expression of political principle".⁸⁰

The analogy applies to India because of the eminent domain power it used to annex Kashmir on 5 August 2019 and the fact that it has revoked Articles 370 and 35A which were the device used to give legal effect to the accession. This process annulled the territorial integrity of Kashmir and denied the people their rights by refusing to consider the aspirations of its people or to conduct a referendum. The demographic changes are likely to follow the voiding of Article 35 A that served to protect the native population from encroachment from non Kashmiri people on its soil. Section 3A of the Jammu and Kashmir Reorganization -Adaptation of State Laws Order 2020 enables Indian government to enact laws to reconfigure the demographic balance. Under this ordinance the J&K Civil Services (Decentralisation and Recruitment) Act 2020 has been enacted to settle non Kashmiri on Kashmir. Section 5(a) defines a domiciled person as the one who has resided for a period of 15 years in the union territory of Jammu and Kashmir or has studied for a period of seven years and appeared in class 10 or 12 examination in an educational institution located in the territory. This will result in the settlement of migrants from various parts of India that will lead to the alienation of the real estate and it will also undermine its cultural and traditional value system.

ii) International Covenants and right of secession

The principle of territorial integrity applies to an already sovereign state and it is of continuing effect even after it has gained independence from a colonial power. This is because of the guiding principle that a state must not disintegrate after it has attained independence from a colonial power. The International Covenant of Civil and Political Rights (ICCPR) 1966 and the International Covenant of Social, Economic and Cultural Rights 1966 have both stipulated the rights that can be construed as leading to self determination. The Covenants share an identical Article 1 that states as follows:

All peoples have the right to self determination. By virtue of that right they freely determine their political status and freely pursue their economic, cultural and social development.

The issue is whether these covenants prescribe a legal right that overrides the territorial integrity of a state and if they grant a human right that can be interpreted as the exercise of self determination. It is documented that in the process of formulating the above Covenants some delegates opposed to the common Article 1 and argued that the "UN Charter referred to the principle of self determination but that was not to a right". The advocates of the right to self determination argued that "the right was essential for the enjoyment of human rights and should appear in the forefront of covenants".⁸¹

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

In *State Bank of India vs Santosh Gupta And Anr. Etc*⁸² the Supreme Court of India ruled that the state of Jammu and Kashmir had no "absolute sovereign power" on account of Article 370. The Supreme Court held that it has "no vestige" of sovereignty outside the Constitution of India and its own Constitution is subordinate to the Indian Constitution. The Court upheld the applicability of the union Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI) Act Sections 13 (1) and (4) to Jammu and Kashmir as it was under the Union list of subjects for which the Indian Parliament is empowered to enact laws for the whole of India, including Jammu and Kashmir.⁸³

Joshua Costellino traces the development of principles enshrined in the Resolution 1514 which connects "self determination to better standards of life and larger freedom". He points to the resolution's concept of self determination stating that "one of the important results of decolonisation is that it is a fundamental human right bringing it within the scope of the United Nations Declaration of Human Rights 1948".⁸⁴ The adoption of the ICCPR/ICESCR meant that this was a culmination of self determination emerging as a human right and underpinned the principle in the multi lateral treaties by

extending to not just "civil and political rights but facilitating passage to the economic, social and cultural rights".⁸⁵

There is another important aspect of these covenants which is that they do not restrict the right of self determination to colonial or oppressed peoples but includes all peoples.⁸⁶ It is apparent that the Article 1 has a uniform approach by its emphasis on the free determination of "political status" and "economic and social and cultural development" of states and that should lead to them being able to "freely dispose of their national wealth".⁸⁷ The ratification by countries of these covenants can be with exclusions and reservations which implies a more restricted application. This is also the approach of India which upon endorsing entered a reservation to Article 1 in the following terms:

The right to self determination appearing in those articles apply only to the peoples under the foreign domination and that these words do not apply to sovereign independent states.⁸⁸

This caveat provides India with a waiver and discharges any responsibility it may have to offer self determination from its annexation of the state of J&K, and its inclusion within the Indian union.⁸⁹ The fact that it defeats the objective of the ICCPR/ICESCR and the United Nations General Assembly Resolution 1514 (1960) which established the right of self determination that applied to the decolonization process and created a multi lateral framework to which India became a signatory. The development of legal norms by the process of these covenants, political principle of self determination and its fusion within human right is consistent with the respect for international law and its framework⁹⁰

5. INTERNATIONAL HUMAN RIGHTS AND ARMED FORCES IMMUNITY

i) Atrocities committed under special powers

There are fundamental human rights such as the right to life, right to be free from torture, right not be imprisoned without due process, right to a fair trial, right to privacy etc. These are non derogable and apply in all circumstances in the treatment of persons under the jurisdiction of the state or its agencies. There is also an international dimension that transfers liability to

the state based on the International Declaration of Human Rights⁹¹ and the covenants that include binding human rights provisions.

It is necessary to understand that as an occupying force the Indian military operates in a legal vacuum in the Valley of Kashmir and their armed operations are governed by the Armed Forces Special Protection Act (AFSPA) 1958. The AFSPA 1958 was first introduced in states in the north-east region of India, including Assam and Manipur, in response to armed political activity arising from demands for self-determination. A version of the Act was implemented in the state of Punjab in 1983, but later repealed in 1997. This was promulgated in 1990 in J&K and is still effective. There are two sections of this act that provide draconian powers to members of the armed forces and complete immunity which are as follows:

Section 4. Special powers of the armed forces.—Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area,— (a) if he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances;

Section 6. Protection to persons acting under Act. No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act.

The AFPSA provides extra ordinary powers that have been used extensively in the J&K to commit human rights abuses by Indian troops. The violence and its impact began before the arrival of Prime Minister Modi into power. According to one estimate in the period leading up to 2011 “over 60,000 people had been killed, thousands have gone missing and hundreds had been brutally tortured, and a staggering

50,000 or more have been orphaned”.⁹² This has continued after Modi’s ascent to power in 2013 and in its current phase reached critical mass after the security forces killed a popular leader of an armed group, Burhan Wani, on July 8, 2016, in southern Kashmir.⁹³ The killing led to a renewed uprising, which continued for the next six months and the Indian occupational forces launched “Operation All-Out” in 2017.⁹⁴ This has heralded the relaunch of the Cordon and Search Operations (CASO) which are conducted on regular basis and in the “first six months of 2020 there were 107 of them in the Valley” causing a shutdown by the armed forces of areas designated for intervention.⁹⁵

The Indian Interior Ministry has stated that there was a 167% increase in civilian killings in 2017 compared to 2015 and a 6.21% jump in the number of violent incidents compared to 2016. The number of insurgents killed went up by 42%. There was an increase by 166% rise in Civilian casualties in 2017-18.⁹⁶ The Jammu Kashmir Coalition of Civil Society (JKCCS), a local rights group, has estimated “that more than 586 people were killed in 2018, including militants, Indian security forces, and 160 civilians”.⁹⁷

The powers granted under AFPSA are supplemented by the Jammu and Kashmir Public Safety Act 1978 (PSA) which empowers security personnel to detain people and suspend the writ of habeas corpus. The powers exercisable under the PSA have been defined as opaque and arbitrary.⁹⁸ Action 13 (2) allows the detention of a person without giving them the reasons and can keep them in confinement indefinitely. Section 13 does not require the detaining authority to set out the reasons for detention and non-disclosure for the grounds of detention means the detainees cannot challenge the grounds for their incarceration.

Section 16(5) prohibits a counsel of choice for the suspect. This is a breach of international law as the UN Human Rights Committee has clarified that to reserve the right “to arbitrarily arrest and detain persons” would be incompatible with the object and purpose of the ICCPR.⁹⁹ In 2008, the UN Working Group on Arbitrary Detention concluded that “10 individuals detained under the PSA in J&K had been arbitrarily detained in violation of articles 7, 9, 10 and 11(1) of the Universal Declaration of Human Rights and Articles 9 and 14 of the ICCPR”.¹⁰⁰

is still being employed by security forces". The official statistics provided showed "17 people were killed by shotgun pellets between July 2016 and August 2017, and 6,221 people were injured by the metal pellets between 2016 and March 2017. Civil society organizations believe that many of them have been partially or completely blinded".¹¹²

The debilitating injuries caused by shooting of pellet guns into unarmed demonstrators has led to many of them being permanently blinded. The UNHCR Guidance on the use of non-lethal weapons, such "as tear gas shells should not be used indiscriminately or put innocent bystanders or peaceful members of an assembly at risk".¹¹³ However, if law enforcement agencies resort to "any use of violent means to police or disperse an assembly, such use must be promptly and transparently recorded to enable an ex post facto review of the proportionality, necessity and impact of the usage".¹¹⁴

ii) Characterization of the conflict as NIC

The disputed status of Kashmir involves the population of Kashmir and the armed forces of India employed in overwhelming numbers. The Indian State is one of the High Contracting Parties to the 1949 Geneva Convention and its actions have to be evaluated under the principles of the international humanitarian law (IHL). The Indian state party has ratified all four Geneva Conventions and has also adopted the Geneva Convention Act 1960 into its domestic legislation. The state parties under Common Article 1 of the Geneva Convention are obliged to "respect and to ensure respect in all circumstances" toward the convention and obliges "a duty on the part of all States to use all available means to ensure respect for all provisions of the Conventions by all other States during all armed conflicts, even those to which the State in question is not a party".¹¹⁵

The Geneva Conventions, together with the laws of the Hague Convention form the basis of contemporary IHL which comes into effect during an armed conflict. The IHL aims to regulate the conduct of belligerents; all combatants and to those no longer taking part in hostilities, including POWS. The application of IHL is based on the framework of the Geneva Conventions for the protection of civilian persons in times of war. The International Committee of the Red Cross (ICRC) is the main international agency that oversees its implementation whose "basic principle underlying

that law -humanity, impartiality, and neutrality that are as valid as ever and of utmost relevance" in its work.¹¹⁶

The Indian government had signed a Memorandum of Understanding (MoU) in 1995 which permitted the ICRC to visit persons arrested, detained and imprisoned in relation to the situation in J&K.¹¹⁷ However, it has been gradually withdrawing this support since 2016 when initially it "only stopped ICRC officials from visiting jails and working for inmates, which was the Geneva-based organisation's key mission".¹¹⁸ After the revocation of Article 370 the ICRC has not "been able to work in India-held Kashmir since it was stripped of its political autonomy on August 5, foreign aid workers are not being issued visas and Kashmiris are being left without support". This has led to the ICRC stopping "its humanitarian works in the erstwhile state of Jammu and Kashmir" and the Indian government "enforced a security and communications clampdown that continues to this day in some form or other".¹¹⁹

The Indian government has an obligation under the Common Article 3 that is generic to all four Geneva Conventions and which states "(1) Persons taking no active part in the hostilities, ---shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria;" and '(2) An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict". The Common Article 3 is based on a negative description: it is applicable in the case of armed conflicts 'not of an international character'. Armed conflicts 'not of an international character' are armed conflicts where at least one Party is not a State.¹²⁰

This provision has application to Non International Conflicts (NIC) and the Kashmir dispute must now be assigned as an NIC and the compliance by the Indian government of its obligations need examination. The Indian government has implemented counterinsurgency measures in the Kashmir Valley with its 1 million-strong occupation forces that have used "excessive force" against the lightly armed rebel forces.¹²¹ Under customary international law the "use of lethal force must respect the legal principles of military necessity, distinction, (and) proportionality."¹²² In executing a proactive, offensive and retributive doctrine the Indian forces have breached the rules

*Threat of Nuclear Weapons*¹³³ where the ICJ held that the "entitlement to resort to self-defence under Article 51 is subject to the conditions of necessity and proportionality".¹³⁴ The Court stated in *Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*¹³⁵ "there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law".¹³⁶

The ICJ held the purpose of IHL was "aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets".¹³⁷ The Court also expounded on an essential ingredient in armed conflict which was the "the principle of neutrality, whatever its content, which is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used".¹³⁸ It was comparable to other humanitarian laws, where the laws of the conduct of war mandate its use within certain limits to restraint unnecessary suffering and destruction.

It seems that the Indian state by its abuse of human rights as documented by the OHCHR reports has been responsible for the breach of international human rights law. There are also infringements of international humanitarian law which makes it liable for the crimes committed by the enforcement of AFSPA against the people of Kashmir. The operations carried out by its armed forces, such as extra judicial killings have caused the infliction of harm to the civilian population. The standards that the actions of the armed forces will be judged are of NIC which governs conflict between state and the non state actors and the fact that India has not signed the API/II militates heavily in the direction of being guilty of the offences.

6. CONCLUSION

It has been established that the Instrument of Accession that served as a legal device for the state of Kashmir to be integrated into the Indian union was not a valid transfer under the law of treaties. The demilitarisation that followed the India and Pakistan conflict in its aftermath was

followed by the UNSC resolutions mandated a plebiscite to determine the aspirations of the people and the territory 's future status. This was the solution to the problem that would have ended the conflict peacefully and not led to the subsequent human rights abuses that have been magnified after India's annexation in 2019.

The UNSC Resolutions for a plebiscite had been adopted under Chapter VI procedures and were labeled as non binding. However, upon closer scrutiny the practice of the Security Council was not to issue its resolutions under a specific Chapter at the time and the main determinant was whether they followed a decision or a recommendation. If the text was substantive then even it was couched as a recommendation the fact the intended goal was peace and security they can be deemed as of binding effect under Article 25 of the SC.

The denial of self determination has been the factor of this conflict and the inalienable right of the people of Kashmir to be decolonised. This essentially revolves around the breach of the ICCPR/ICESCR which share a common Article 1 that raises self determination for all peoples as a cardinal principle of international law. The human rights standards derive from the UNDHR and the de colonialisation process is associated with human rights because it has rejected the fetters of colonial rule. In this instance India has been a successor state to British colonial dispensation that created this historical-legal quagmire.

However, India has imposed a military rule over the territory by the machinery of the AFSPA that provides immunity to the armed forces and allows them to conduct operations, and searches under CASO that inevitably impacts on the civilian population. This has led to human rights abuses and there has been no prosecution of armed forces personnel and the PSA has been instrumental in imposing the lockdown and the disbandment of the associations after the revocation of Article 370 and 35 A of the Indian Constitution. The use of both lethal and non-lethal weapons in the suppression of local dissent has been the issue that infringes international human rights law.

The conflict between the government and the insurgents leads to its definition as a NIC that is governed by the rules of International Humanitarian Law. The Indian government has not allowed International Committee of the Red Cross the ability to function in the territory as stipulated by the Geneva Conventions. It has

also not signed the Additional Protocols I/II that is necessary to accept Common Article 3 as a high contracting party to this treaty. The abuses its forces have committed have not been the subject of redress in any war crimes tribunal.

It is now overdue that the officials are tried in international courts that are established in a conflict that is a NIC which this can be defined after India's annexation of Kashmir.

NOTES

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48. Para 72.
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66. Para. 73.
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68. Ibid.
69. Namibia, *Supra* 38, 40, 42, dissenting opinion of Judge Tanaka, at 292; Barcelona Traction, Light And Power Company, Limited (Belgium v Spain) (Second Phase) [1970] ICJ Rep 3, Separate Opinion of Judge Ammoun, at 303.
70. GA Res 2625 (XXV) (Nicaragua, at 101, para. 191) was adopted unanimously.
71. Article 55 of the Charter reinforces this principle by affirming that “conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”.
72. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (Dec. 14, 1960); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (Oct. 24, 1970).
73. Ibid, para. 6 (declaring “[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country” as incompatible with the purposes and principles of the United Nations’ Charter); Friendly Relations Declaration, *supra* note 7 (“[n]othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States . . .”).
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112. OHCHR (2019) Office of the United Nations High Commissioner for Human Rights. Update of the Situation of Human Rights in Indian -Administered Kashmir and Pakistan. p 22 Available at: https://www.ohchr.org/Documents/Countries/PK/KashmirUpdateReport_8July2019.pdf.
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