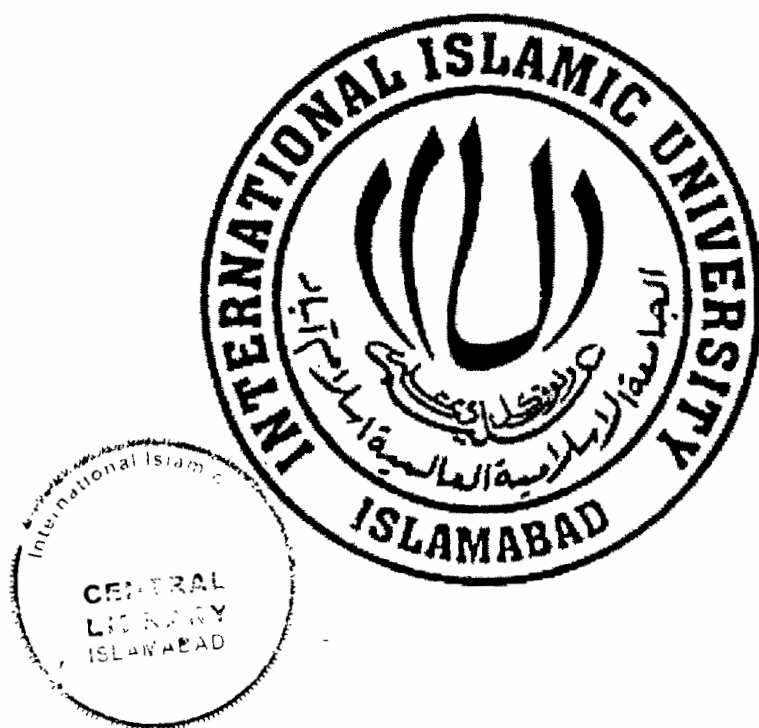


**HUMANITARIAN CATASTROPHE IN JAMMU  
AND KASHMIR: OBLIGATIONS ON STATES  
AND INTERNATIONAL COMMUNITY UNDER  
INTERNATIONAL LAW**



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INTERNATIONAL LAW**



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Submitted in partial fulfilment of the requirements for the  
Ph.D in Law at the faculty of Shahrta and Law,  
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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

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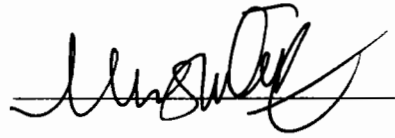
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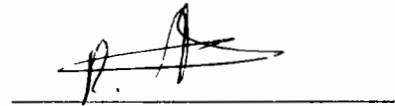
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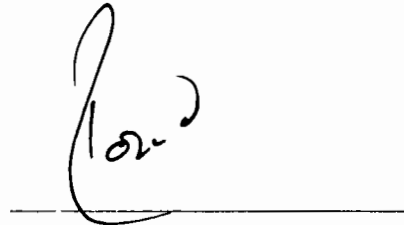
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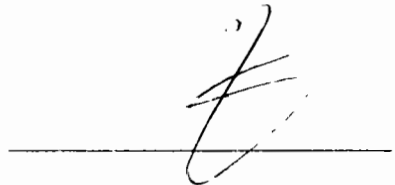
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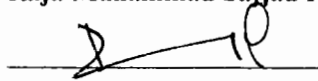


## DECLARATION

I, **Raja Muhammad Sajjad Khan**, hereby declare that this dissertation is original and has never been presented in any other institution. I, moreover, declare that any secondary information used in this dissertation has been duly acknowledged.

**Student** **Raja Muhammad Sajjad Khan**

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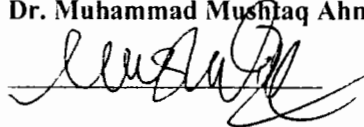


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## TABLE OF CONTENTS

Table of contents .....	i
List of Abbreviations.....	v
Dedication.....	VIII
Acknowledgement.....	IX
Abstract.....	X
Thesis Statement.....	1
Introduction .....	1
Theoretical Framework.....	4
Hypothesis .....	7
Significance of Study .....	8
Literature Review .....	8
Objective of Research .....	21
Research Questions .....	22
Research Methodology .....	22
Outline of thesis.....	22
<b><i>Chapter I</i></b>	
<b>LEGAL STATUS OF THE STATE OF JAMMU AND KASHMIR</b>	
Introduction .....	24
1.1 Historical Background of Kashmir Conflict .....	24
1.2 United Nations Intervention and Resolutions .....	30
1.3 Legal and Constitutional Status of Jammu Kashmir .....	34
1.4 Occupation or Administration in IIOJK .....	40
1.5 Pakistani Administration Areas of State .....	41
1.6 Constitution of Pakistan and India .....	42
1.7 Constitution of Azad Jammu and Kashmir and Gilgit Baltistan .....	43
1.8 Constitutional Position of Indian Occupied Kashmir .....	45
1.9 National Liberation Movement or Terrorism .....	46
1.10 Kashmir as an International Armed Conflict .....	51
1.11 Kashmir Conflict is Bilateral or International .....	54
1.12 Territorial Integrity and Kashmir Movement .....	57
1.13 Concept of Sovereignty and Territorial Integrity .....	62

1.14	Remedial Secession and Kashmir Conflict	63
1.15	Right to Self-determination of People of Jammu and Kashmir in International Law	64
	Conclusion	68

## ***Chapter II***

### **JAMMU AND KASHMIR BEING AN OCCUPIED TERRITORY**

	Introduction	71
2.1	Theoretical Framework of occupation	72
2.2	Advisory opinion of ICJ on the construction of wall on occupied Palestinian territory	77
2.3	Jammu and Kashmir as occupied territory	79
2.4	Military Occupation to Constitutional Occupation in IIOJK	83
2.5	Wall Case and Occupation of Kashmir	88
	2.5.1 Acquisition of territory by threat or use of force is illegal	89
	2.5.2 <i>Erga Omnes</i> Obligation	90
	2.5.3 Plea of Self Defense	91
	2.5.4 Violations of International Humanitarian Law	92
	2.5.5 Violations of International Human Rights Law	94
	2.5.6 Transfer of population/ Demographic Changes	95
	2.5.7 Responsibility of UNGA for maintenance of peace and security	96
	Conclusion	97

## **Chapter III**

### **APPLICABLE INTERNATIONAL HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAWS**

	Introduction	99
3.1	Development of International Human Rights Law (IHRL)	100
3.2	Human Rights instruments	103
3.3	Development of International Humanitarian Law (IHL)	109
	3.3.1 Essential Principle of IHL	116
3.4	The Islamic concept of human rights and armed conflict	114
3.5	International Criminal law	119
3.6	Applicability of International Human Rights and Humanitarian Law in Kashmir Conflict	121

Conclusion	122
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#### **CHAPTER IV**

### **HUMANITARIAN CATASTROPHE IN IN JAMMU AND KASHMIR**

Introduction	123
4.1 Systematic and gross human rights violations IOJ&K	124
4.2 Violation of <i>Jus Cogens</i> Norms in Kashmir	126
4.3 Torture in Kashmir	128
4.4 Genocide in IIOJK	136
4.5 Enforced Disappearances in IIOJK	144
4.6 Crimes against Humanity in IIOJK	149
4.7 Sexual Violence/ Rape	151
4.8 Extra Judicial Killings in Kashmir	155
4.9 Demographic Changes	160
4.10 War Crimes in IIOJK	166
4.11 Impunity to Perpetrators under draconian laws	170
4.12 Human Rights Situation in Azad Jammu and Kashmir	176
4.13 Human Rights Situation in Gilgit Baltistan	181
Conclusion	184

#### ***Chapter V***

### **LEGAL OBLIGATIONS ON GOVERNING STATES AND THE INTERNATIONAL COMMUNITY**

Introduction	186
5.1 Legal Consequences of Prolonged Occupation of Kashmir	186
5.1.1 Legal Consequences for India and Pakistan	187
5.2.2 Legal Consequences for International Community and UN	188
5.2 Theoretical Context on Legal Obligations	189
5.3 Legal Obligations in Pakistan and India	191
5.4 Legal obligations to International Community	192
5.4.1 Humanitarian Intervention	194
5.4.2 Responsibility to Protect	196
5.5 International practice and jurisprudence on international crimes	199

5.5.1	The International Court of Justice(ICJ)	199
5.5.2	The International Criminal Court (ICC)	202
5.5.3	International Tribunals	205
5.5.4	Universal Jurisdiction	206
5.6	The United Nations Mechanisms	208
	Conclusion	210
<b><i>Chapter V</i></b>		
<b>RECOMMENDATIONS</b>		
	Introduction	211
6.1	The way forward for Pakistan	211
6.2	Legal Way Forward for Govt. of Azad Jammu and Kashmir and National Liberation Movement	216
	Conclusion	218
	<b>CONCLUSION</b>	219
	Bibliography	224
	Appendices	243
	Map of Jammu Kashmir	70

## **LIST OF ABBREVIATIONS**

AFSPA	-	Armed Forces Special Power Act, 1958
AJ&K	-	Azad Jammu and Kashmir
APDP	-	Association of Parents of Disappeared Persons
APPGK	-	All Parties Parliamentary Group on Kashmir
BSF	-	Border Security Force
CAT	-	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment
CEDAW	-	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	-	Convention on the Elimination of All Forms of Racial Discrimination
CRC	-	Convention on the Rights of the Child (CRC)
CRPD	-	Convention on the Rights of Persons with Disabilities
ECHR	-	European Convention on Human Rights
ECtHR	-	European Court of Human Rights
EU	-	European Union
GB	-	Gilgit Baltistan
IACtHR	-	Inter American Court of Human Rights
ICC	-	International Criminal Court

- ICESCR - International Covenant on Economic, Social and Cultural Rights, 1966
- ICJ - International Court of Justice
- ICRC - International Committee of the Red Cross
- ICTR - International Criminal Tribunal for Rwanda
- ICTY - International Criminal Tribunal for the Former Yugoslavia
- IDPs - Internally displaced Persons
- IHL - International Humanitarian Law
- IHRL - International Human Rights Law
- IIIOJK - Indian Illegally Occupied Jammu and Kashmir
- IPTK - International People's Tribunal on Human Rights and Justice
- J&K - Jammu and Kashmir
- JKCCS - Jammu and Kashmir Collation for Civil Societies
- JKMC - Jammu and Kashmir Muslim Conference
- JKNC - Jammu and Kashmir National Conference
- LoC - Line of Control
- OHCHR - Office of the High Commissioner of Human Rights
- OIC - Organization of Islamic Conference
- POTA - Prevention of Terrorism Act

- PRF - Policy and Research Forum
- PSA - Public Safety Act
- R2P - Responsibility to Protect
- SHC - State Human Rights Commission
- TADA - Terrorist and Disruptive Activities Act, 1987.
- UDHR - Universal Declaration of Human Rights, 1948
- UN - United Nations
- UNCHR- United Nations Commission for Human Rights
- UNCIP - United Nations Commission for India and Pakistan
- UNGA - United Nations General Assembly
- UNMOGIP- United Nations Military Observer Group for India and  
Pakistan
- UNSC - United Nations Security Council
- VCLT - Vienna Convention on the Law of Treaties, 1969

## DEDICATION

DEDICATED TO چاچا AND مائے

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## ABSTRACT

Jammu and Kashmir (J&K) is a disputed territory under United Nations resolutions. Indian claim of accession based on Instrument of Accession was rejected by United Nations Security Council resolution 27 of 21<sup>st</sup> April 1948 and subsequent resolutions. J&K is divided into three administrative parts; Azad Jammu and Kashmir and Gilgit Baltistan are under the indirect administration of Pakistan, Aksai Chin is under the control of China and one part of the erstwhile state of Jammu and Kashmir is under the illegal and belligerent occupation of India.

The theoretical framework of this dissertation is based on John Rawls's political theory of human rights which rejects the idea of absolute sovereignty and argues for sovereignty with responsibility. Human rights are not an internal matter of the state and their protection is the responsibility of all the states and the United Nations. The development of international criminal law and the principles of *jus cogens* and *Urga Omnes* obligations strengthened this theory.

This dissertation identifies that the struggle of the indigenous people of Jammu and Kashmir is for the right to self-determination which is their inalienable right and also acknowledged by United Nations resolutions. India had belligerently occupied Kashmir and had not a sovereign title over Kashmir. The freedom struggle in Kashmir is a war of national liberation and this conflict is an international armed conflict. The illegal occupation of Kashmir, gross violations of human rights, and grave breaches of international human rights law impose obligations on United Nations and states to intervene on the grounds of humanitarian intervention and responsibility to protect. This research recommends some legal steps that should be taken by the Azad Govt. of the State of Jammu and Kashmir and Pakistan.

The dissertation concluded that the Kashmir conflict is on the agenda of the United Nations Security Council (UNSC), and the efforts of peaceful resolution through mediation, negotiation, and other means provided in the sixth chapter of the UN charter has been failed due to the Indian attitude. The efforts to the resolution of Kashmir conflict through bilateral talks were also not successful. Now the UN must invoke the remedies and actions provided in chapter 07 of the charter otherwise this simmering conflict will destabilize the peace and stability in the world.

This study aims to identify the legal obligations of states and the international community on the humanitarian catastrophe in Kashmir based on the legal status of the conflict and international law.

## THESIS STATEMENT

The international community and states have legal obligations to prevent gross and systemic human rights violations such as crimes against humanity war crimes, demographic changes, torture, etc by occupational forces in Jammu and Kashmir to suppress the struggle against illegal occupation and to achieve the right to self-determination.

## INTRODUCTION

It is well established and widely agreed principle of international law that the human rights of the people are not an internal matter of any state. The erstwhile State of J&K is a disputed territory divided into three administrative areas under the control of three countries Pakistan, India, and China.<sup>1</sup>

During the time of British rule on the subcontinent, there were almost 565 princely states in India.<sup>2</sup> All these states had decided either to accede with India or Pakistan except Jammu Kashmir, Hyderabad, and *Junagarh*.<sup>3</sup> *Junagarh* was a Hindu-majority state and its Muslim ruler had announced accession to Pakistan but India forcefully occupied it because the majority of the population is Hindu.<sup>4</sup> Whereas Hyderabad was a non-Muslim majority state and its ruler was Muslim, who had announced independence, India forcefully annexed her.<sup>5</sup> In Jammu and Kashmir, the ruler was Hindu Maharaja *Hari Singh* with a 77% Muslim population.<sup>6</sup> Geographically the state

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<sup>1</sup>D. N. Saraf, Arts and Crafts, *Jammu and Kashmir: Land, People, Culture* (New Delhi: Abhinav Publications, 1987), 14.

<sup>2</sup>Alex von Tunzelmann, *Indian Summer: The Secret History of the End of an Emperor* (London: Simon & Schuster Ltd, 2007), 221-225.

<sup>3</sup>Waseem Ahmad Sofi, *Autonomy of States in Federation: A Special Case Study of Jammu and Kashmir* (Springer Nature, 2021), 71.

<sup>4</sup>Dr. Saji Abraham, *China's Role in the Indian Ocean: Its Implications on India's National Security* (New Delhi: Vij Books India Pvt. Ltd, 2015), 10.

<sup>5</sup>Abraham, *China's Role in the Indian Ocean: Its Implications on India's National Security*, 10.

<sup>6</sup>Christopher Snedden, *The Untold Story of the People of Azad Kashmir* (New York: Oxford University Press, 2013), 10.

shares its major borders with Pakistan whereas, only a narrow strip about a dozen miles near *Pathankot* touches India. It is pertinent to mention that Radcliffe handed over the Muslim majority district of *Gurdaspur* (51 %) to India against the partition plan and to provide her land link to Kashmir.<sup>7</sup>

The people of Kashmir have socio-cultural, economic, and religious links with the people of *Punjab* and NWFP (KPK). The people of Kashmir through demonstrations, resolutions, and petitions demanded accession to Pakistan. *Dogra* ruler Hari Singh ordered to collect the ammunition from Muslims and he had also unarmed Muslims serving in the army and police in April 1947. According to Lord Bird Wood, this was completed before July 1947 and then the armed groups of *Rashtriya Sevak Singh* (RSS) and Sikhs entered Kashmir to kill the Muslims.<sup>8</sup> Maharaja had imposed martial law and ruthlessly handled the protests demanding their rights and expressing their wishes about the future. The people of the *Poonch* and *Mirpur* districts had started an armed struggle against the *Dogra* regime. Simultaneously, the tribal people came to help their brethren. Freedom fighters of the State liberated a considerable part of the State and established the provisional Govt. of Azad Jammu and Kashmir on October 24, 1947.<sup>9</sup> It was proved through research that "Patiala forces had already landed at Srinagar airfield on October 17, 1947, well before October 27, the date claimed by the Indian Govt. of landing Indian forces in J&K."<sup>10</sup> British historian Alastair Lamb revealed that the Maharaja was forced to sign a conditional Instrument of Accession (IoA) after the landing of Indian troops at Srinagar.<sup>11</sup> The Indian belligerent occupation of Kashmir is the basic reason for this

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<sup>7</sup>Alastair Lamb, *Incomplete Partition, The Genesis of the Kashmir Dispute 1947-48* (New York: Oxford University Press, 2002), 84.

<sup>8</sup>Lord Bird Wood, *India and Pakistan : A continent Decides* (New York , Frederick A. Praeger, 1954) , 94-95.

<sup>9</sup> Chitralekha Zutshi, *Kashmir: History, Politics, Representation*(Cambridge: Cambridge University Press, 2017), 114.

<sup>10</sup>Alastair Lamb, *Birth of a Tragedy* (UK: Roxford Books, 1994), 91-98.

<sup>11</sup>Lamb, *Incomplete Partition*, 175.

conflict. India launched a complaint against the UN on January 01, 1948, against Pakistan.<sup>12</sup> UN had passed the resolutions admitting the disputed nature of the state and affirmed that future status shall be determined through a free and fair plebiscite.

The people of Jammu and Kashmir are struggling for the right to self-determination through peaceful means since 1947. In 1989 a new phase of struggle was started in J&K. The Govt. of India is trying to curb this peaceful struggle by enforced disappearances, killings, extrajudicial killings, torture, crackdowns, arson, mass rapes, sexual violence, detentions, use of lethal weapons, media gags, restrictions on congregational religious activities, ban on communications, and pellet guns, etc. To provide immunity to occupational forces many draconian laws were imposed. The Govt. of India is attempting to convert a Muslim majority state into a minority by all means. Office of the United Nations Commissioner for Human Rights published its first report on the human rights situation in Kashmir on June 14, 2018,<sup>13</sup> and the second on July 08, 2019<sup>14</sup>. Both reports testify to human rights violations in Kashmir.

Many books had been written and a lot of research has been done on different dimensions of the Kashmir conflict but no one had contextualized the aspect of occupation and obligations on states and the international community on the humanitarian catastrophe in Kashmir.

This study will answer some basic legal questions about the legal status of Kashmir from a historical perspective and the intervention of the United Nations. The constitutions of the Pakistan, Azad Jammu and Kashmir (AJ & K), and Gilgit Baltistan

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<sup>12</sup> Saira Khan, *Nuclear Weapons and Conflict Transformation: The Case of India- Pakistan* (Rutledge, 2008), 91.

<sup>13</sup> United Nations, Office of High Commissioner for Human Rights. Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan. Geneva, 14 June, (2018).

<sup>14</sup> United Nations, Office of High Commissioner for Human Rights. Update of the Situation of Human Rights in Indian-Administered Kashmir and Pakistan-Administered Kashmir from May 2018 to April 2019. Geneva 8 July (2019).

(GB) Order provide the disputed nature of the state, while India had annexed the IIOJK as its union territory to provide legal backing to its belligerent occupation. This research explains the concept of the national liberation movements, terrorism, state sovereignty, the right to self-determination, and the nature of the armed conflict in Kashmir. Kashmir and Palestine's cases have many similarities and both are occupied territories, the advisory opinion of the International Court of Justice (ICJ) on the construction of the wall in occupied Palestine has addressed many legal questions about Kashmir. The thesis also analyses the applicability of IHRL and IHL instruments to the situation in Kashmir. There are many reports and case studies on violations of IHL and IHRL in IIOJK this study aims to analyze these reports with specific provisions of international law. The human rights situation in all three administrative parts AJ & K, GB, and IIOJK of the erstwhile state of Jammu and Kashmir are under discussion. There are some concerns about the human rights situation in AJ & K and GB, but the governing state is trying to address these concerns. In Indian Occupied Jammu and Kashmir Indian occupational forces are involved in systematic and gross human rights violations and violations of international humanitarian law. This shows the failure of the Indian state to fulfil its legal obligations and impose the responsibility on the international community to fulfil its legal obligations. For the protection of the people of J&K and the accountability of perpetrators of international crimes, humanitarian intervention is necessary.

## **THEORETICAL FRAMEWORK**

The concept of humanitarian intervention is very old and historically connected with the just war theory. Michael Walzer believes that humanitarian intervention should be limited and should be only justified in the cases of extreme human rights breaches, genocide, mass murder, and enslavement. According to him, it should not be political

and only states that respect human rights at home can rightly intervene to protect human rights abroad.<sup>15</sup>

John Rawls introduced the idea of a “political conception of human rights”. This concept of human rights was further developed by Joseph Raz. This theory provides that these rights could not be only tested on moral grounds, these are plural and universal. John Rawls in his book “Law of people” described human rights as:

Among the human rights are the right to life (to the means of subsistence and security); to liberty (to freedom and slavery), serfdom, and forced occupation, and to a sufficient measure of liberty of conscience (to ensure freedom of liberty and thought); to property (personal property); and to formal equality as expressed by the rules of natural justice (that is that similar cases be treated similarly).<sup>16</sup>

According to Rawls if a regime is not fulfilling the requirements of human rights then forceful intervention like economic and diplomatic sanctions and in grave cases military intervention is justified. American writer Joseph Raz, also justifies the international intervention, according to him, “Sovereignty does not justify state actions, but it protects states from external interference, violation of human rights disables this response...”<sup>17</sup>

Charles Beitz considers that human rights only develop in contemporary international practice. According to him, “most international rights are a matter of international concern and that they are potential triggers of international protective and remedial

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<sup>15</sup>Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 5<sup>th</sup> Ed. (New York: Basic Books, 2015),215-16.

<sup>16</sup>John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999),65.

<sup>17</sup>J.Raz, *Human Rights without foundation* (Oxford: Oxford University Press, 2009),328.

actions.”<sup>18</sup> The author has the view that human rights are not an internal matter of the states and these should be protected by remedial and protective actions.

The concept of “Responsibility to Protect (R2P)” is also a theory of legal obligations. In 2001 this concept was introduced in the report of the International Commission on Intervention and State Sovereignty<sup>19</sup> and was endorsed by the United Nations General Assembly in the 2005 World Summit Outcome Document. The Secretary General of the UN released a report on implementing the R2P in January 2009. The first UN General Assembly debate on the R2P was held in July 2009 as follow-up to the report. The UN Member States overwhelmingly reaffirmed the 2005 commitment and the General Assembly passed a consensus resolution taking note of the Secretary-General's report.<sup>20</sup> This refers to the obligation of states toward their populations and all populations at risk of genocide and other mass atrocity crimes. The report states,

“R2P stipulates three pillars of responsibility: Pillar One: Every state has the Responsibility to Protect its populations from four mass atrocity crimes: genocide, war crimes, crimes against humanity,, and ethnic cleansing. Pillar Two: The wider international community has the responsibility to encourage and assist individual states in meeting that responsibility. Pillar Three: If a state is manifestly failing to protect its populations, the international community must be prepared to take appropriate collective action, in a timely and decisive manner and following the UN Charter.”<sup>21</sup>

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<sup>18</sup>Charles, Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2011),193-214.

<sup>19</sup>Evans, Gareth, and Mohamed Sahnoun. Co-chairs (2001). *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*. Ottawa, ON, Canada: International Development Research Centre, Minister of Foreign Affairs. ISBN 0-88936-960-7. <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

<sup>20</sup>GA Res. UNGOAR on 16 September 2005. 60/1: 2005.

<sup>21</sup> Evans Gareth, *The Responsibility to Protect: Ending Mass Atrocity Crimes once and for all* (Washington DC: Brookings, 2008). R2P has been invoked in more than 80 UN Security Council resolutions concerning crises in Central African Republic, Côte d'Ivoire, Democratic Republic of the Congo, Liberia, Libya, Mali, Somalia, South Sudan, Syria, and Yemen, as well as thematic resolutions concerning the prevention of genocide, prevention of armed conflict and restricting the trade of small arms and light weapons. The Responsibility to Protect has also been invoked in more than 50 Human Rights Council resolutions and 13 General Assembly resolutions. These resolutions and their related preventive and – as a last resort – coercive measures, have demonstrated that collective action to protect populations at risk is possible.

Michael Walzer, a leading scholar of this strand, argues that “military intervention can be justified as a last resort and as a means to protect civilians from human rights violations, such as genocide and crimes against humanity.”<sup>22</sup>

All the important theories related to the obligations of states and the international communities on gross human rights violations were analyzed. After the establishment of the United Nations, many conventions, covenants, resolutions, and declarations were adopted to protect human rights at the international level. The decisions of the International Court of Justice, Inter-American Court of Human Rights, International Criminal Tribunal for the former Yugoslavia and Rwanda, International Military Tribunal at Nuremberg, and the Khmer Rouge Trials contributed a lot to the jurisprudence on human rights. The Political Theory of Human Rights as described by J. Rawls and Charles Beitz is applicable to protect human rights at the international level.

This research intends to follow the Political Theory of Human Rights as this theory is not only according to the research framework but the recent forceful interventions of the UN and NATO to protect human rights in different countries and the decisions of the international and regional courts are also demonstrating this theory. The complaint mechanism on human rights violations by individuals in the United Nations and the monitoring of international human rights organizations is also supporting the political theory of human rights.

## **HYPOTHESIS**

Whatever actions or lack of actions the United Nations Security Council has taken to maintain peace in Kashmir, a disputed area, the right to self-determination is justified

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<sup>22</sup> Michael Doyle and Stefano Recchia, “Liberalism in International Relations” *International Encyclopedia of Political Science* (2011).

in the presence of territorial integrity. International law protects from gross human rights violations by occupational forces. The failure of states and the international community in certain legal obligations to protect human rights in the disputed area is a question mark on the implementation of International Human Rights Law and International Humanitarian Law. Along with all previous efforts has failed to bring peace to the region due to focus on political aspects and ignoring the legal nature of the conflict.

## **SIGNIFICANCE OF STUDY**

This study will be beneficial to understand the true nature of the Kashmir conflict as a case of violation of international human rights law and peremptory norms. Moreover, this research will provide a detailed account of cases of human rights violations from an international law perspective and will depict a true picture of the Kashmir conflict to get international support. This study will also provide academic insight into the claims of Pakistan and India as well as the real context of the people of Jammu and Kashmir. It will also indicate the avenues available for the people of Kashmir to protect their human rights. This research will help the academia, policymakers, diplomats, and politician to establish true insight into Kashmir Conflict from the international human rights law and humanitarian law perspective to pursue their case effectively before the international community.

## **LITERATURE REVIEW**

This research is based upon plenty of literature on the genesis of the Kashmir conflict and international human rights instruments to analyze the Kashmir conflict in its true

perspective and basis in international law. A few of them are mentioned hereinafter being most relevant to the topic along with the review.

The idea, origin, and theories of human rights are contested fields. The political conception of human rights was very well elaborated by Charles.R. Beitz in his book "*The Idea of Human Rights*."<sup>23</sup> He analyzed human rights in the international order and wider context. The author defined human rights as a matter of international concern and it gave the reason for external elements to act. According to him, the theory of natural rights is only imaginary and illusionary. These theories suppose a basic consensus of the world on basic values of human rights, which is not possible. There is no mechanism for the protection and enforcement of these rights. Some human rights like social and economic rights could not be general. The agreement theories are based on the common understanding of human rights among different societies, which is also imaginary. There is no such practice in the world and societies should not be mandated to violate the moral basis of human rights. Human rights are practical and it is not the power of an individual state to make those laws that are in contrast to the international system. Human rights protection is a shared responsibility between the international community and states. It is the prime responsibility of the state government to protect the human rights of people but if the state fails to do so the non-governmental organizations and the international community can assume this responsibility. He discussed and justified the international intervention using examples of political rights especially the right to self-determination, women's rights, and anti-poverty rights. Beitz's theory will be helpful to analyze the human rights situation in Kashmir and the role of the international community to protect these rights of the people.

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<sup>23</sup>Charles, Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2011)..

The book "*The Law of the Peoples*"<sup>24</sup> written by John Rawls, provides the basis of the political theory of human rights. His prime focus of the study is on the present system of human rights and institutional mechanisms provided by the UN. In the law of peoples initially, Rawls gives the theory of justice at the domestic level based on the basic two components which are the original position (OP) and the veil of ignorance (VI) for the establishment of the principles of justice. In the original position, people are equal and free but they are considered rational, self-interested, and reasonable, however, in the veil of ignorance, they know general welfare but not about status, talent, and race. Rawls extended these ideas to the international level and he uses the word peoples, not states. He divided the people into non-liberal and decent people. According to him,

Decent people respect minimal set of basic human rights, including rights to life, liberty, and formal equality; they are nonaggressive with respect to other people; they live under something like the rule of law; they have decent consultation hierarchy in which the interest all groups are represented; and they view all persons as moral citizen.<sup>25</sup>

Rawls did not consider these societies as liberals because they did not give the same rights to people who are opposed to their political or religious doctrine. The basic conceptions of Rawls are also basic principles of international law. According to him the freedom and independence of the people should be respected. Peoples are equal and treaties are binding on them. They have the right to self-defence and they have to respect human rights. Peoples are duty-bound to help other peoples who are living in unflavored conditions. He justified the intervention of other people in violations of human rights. He limits the concepts of regimes' internal sovereignty. He has the view

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<sup>24</sup> John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999).

<sup>25</sup> Ibid, 64.

that "If a society fails to respect human rights then external agents may in certain circumstances be permitted to interfere in its internal affairs through economic and political intervention or even coercive intervention."<sup>26</sup> The theory of Rawls is applicable in this research work because this paper will also advocate for international intervention on the grounds of serious human rights violations in Kashmir.

The article by William W. Burke-White, "*Human Rights and National Security: The Strategic Correlation*"<sup>27</sup> is about the national security debate in the US and human rights. The author discussed the interventions of US and NATO forces in Afghanistan, Kosovo, Iraq, Kuwait, Bosnia, Congo, and the war between Ethiopia and Eritrea. These interventions were to protect the human rights of the people of that country. He justified all these interventions and also suggested that the US and all other countries which are working to protect human rights should play a more active role in this regard. The author also discussed the human rights situation in these countries and also in Iran and Chechnya. This article is useful for this research to the extent of aggressions of countries against human rights abusing countries to protect their human rights.

To analyze the situation of the State of Jammu and Kashmir during Dogra rule the article of Showkat Ahmad Wani published in 2015 titled "*Nature of the Dogra State and condition of the Muslims of Kashmir (1846-1930)*"<sup>28</sup> is more relevant. The author has analyzed the legal, political, judicial, and administrative setup of the rulers and their attitude towards the Muslims who were the overwhelming majority of the state population. Wani considers the government of Dogras as the Hindu government working for the welfare of Hindus and against Muslim subjects. A large number of

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<sup>26</sup> John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), 81.

<sup>27</sup> William W. Burke-White, "Human Rights and National Security: The Strategic Correlation", *Harvard Human Rights Journal* Vol.17(2004), 249-280.

<sup>28</sup> Showkat Ahmad Wani, "Nature of the Dogra State and condition of the Muslims of Kashmir (1846-1930)", *International Journal of Scientific and Research Publications*, 4:5 (2015).

mosques and shrines of Muslims were declared state property. Many laws were promulgated against Muslims. If a Hindu changes his religion and become Muslim he could not get his right in inheritance but if a Muslim becomes Hindu he has liberty. Initially on the cow slaughter death penalty was imposed and later on it was changed to life imprisonment. According to the author in the last era of the 20<sup>th</sup> century in Kashmir, there were 119 prisoners; among those 99 were Muslims, which were punished for cow killing. In administration, there were only 22 % of Muslims on gazetted posts. In the education department among 27 gazetted officers, only 04 were Muslim. The policies of the rulers were anti-Muslim and in favour of Hindus. This article is helpful during this research to understand the reasons and background of the liberation movement of the people of Kashmir during Dogra rule and the Maharaja's inclination toward India. Victoria Schofield in her book, "*Kashmir in Crossfire*"<sup>29</sup> provided the historical perspective of the Kashmir conflict as well as the background of the recent uprising in the Indian Occupied Kashmir. She is of the view that the Kashmir conflict roots back in the partition of the sub-continent. India is in continuous denial of the right to self-determination of the people of Kashmir. She describes that the present uprising in Kashmir is due to the continuous oppression of Kashmiris. The author concludes that the right to self-determination is the only long-lasting solution to the conflict. This book is helpful during this research to identify the root cause of the Kashmir conflict and the Indian attitude toward Kashmiris.

Josef Korbel in his book "*Dangers in Kashmir*"<sup>30</sup>, analyzed the historical account of Kashmir. The author was a member of UNCIP and had visited India, Pakistan, and Kashmir. He was an eyewitness to many developments in Kashmir in the last '40s and

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<sup>29</sup> Victoria Schofield, *Kashmir in the Crossfire* (London: IB Tauris & Co, 1997).

<sup>30</sup> Josef Korbel, *Dangers in Kashmir* (Princeton NJ: Princeton University Press, 1954).

early '50s. The book provides a detailed account of the struggle in Kashmir against the *Dogra* regime, accession, and invasion, intervention of the United Nations, work of UNCIP, and efforts made by the UN representatives to mediate between India and Pakistan. He concluded that the Kashmir conflict is a threat to regional peace and security and should be resolved according to the wishes of the people. This work will be useful in analyzing the legal position of India in Kashmir and understanding the genesis of the conflict.

The legal aspect of the Kashmir dispute is discussed in the book titled "*Kashmir Dispute and International law Perspective*"<sup>31</sup> written by Dr. Ijaz Hussain is most relevant. The author discussed the legal and political aspects of the Kashmir conflict. The author was most specific about the right to self-determination, United Nations resolutions, and India's claim of accession. This book was written in 2000 and after 9/11 many dimensions of international politics had been changed. There is also a need to discuss all the human rights available to the people of Jammu & Kashmir and analyze the systematic violations of these rights. For the historical perspective of the Kashmir conflict, I have studied the Alastair Lamb's book, "*Incomplete Partition, The Genesis of the Kashmir Dispute 1947-48*"<sup>32</sup> the author has discussed the reasons for the Kashmir conflict, the boundary commission role, the freedom movement in *Poonch*, the first Kashmir war, United Nations resolutions and mediations. According to him, the partition plan was ambiguous about the princely states. The Radcliffe commission had awarded the Muslim majority district Gurdaspur to India and provided a road link to India with Kashmir. The people of *Poonch Jagir* were against the *Dogra* rule because

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<sup>31</sup> Dr. Ijaz Hussain, *Kashmir and International Law Perspective* (Islamabad: National Institute of Pakistan Studies Quaid-e-Azam University, 2000).

<sup>32</sup> Alastair Lamb, *Incomplete Partition, The Genesis of the Kashmir Dispute 1947-48* (New York: Oxford University Press, 2002).

of heavy taxes and cruelty and they started their armed struggle in July 1947 by 14 August 1947, these movements had spread beyond the Mirpur and Jammu. The author has questioned the originality and legality of the instrument of accession. This original instrument was not presented in any forum by India and India claims that this was stolen. Lamb had analyzed the debate and resolutions as well as the role of different countries in the UN in the Kashmir cause. He had discussed the proposals of different mediators appointed by the UN to resolve the Kashmir Dispute. This book will be useful during this research to understand the historical background of the Kashmir conflict and the role of the international community in this regard.

Victoria Schofield in his book "*Kashmir in Conflict: India, Pakistan and the Unending War*"<sup>33</sup> has discussed the history of Kashmir, the origin of the conflict, and the latest uprising in Kashmir. She also elaborated on the human rights situation in Indian-occupied Kashmir. According to her the right to self-determination is the only way to resolve Kashmir Dispute; however both countries Pakistan and India should take some measures to normalize their relations. People-to-people contact and trade relations should be increased. This book is helpful to understand the historical aspects of conflict and human rights situations up to 1996.

Lubna Mohiuddin's article "*Human Rights Violations: A Case Study of Kashmir*"<sup>34</sup> written in 1997, elaborates on the international human rights law, UN resolutions, and charter of fundamental rights of the Indian constitution. She analyzed the commitments of Indian leadership for the free and fair plebiscite. She had given a brief account of extrajudicial killings, different methods of torture, arson and looting, and the use of

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<sup>33</sup> Victoria Schofield, *Kashmir in Conflict: India, Pakistan and the Unending War* (London & New York: IB Tauris, 1996).

<sup>34</sup> Lubna Mohiuddin, "Human Rights Violations: A Case Study of Kashmir", *Pakistan Horizon*, Vol. 50, No. 2 (April 1997), 75-97 <http://www.jstor.org/stable/41393573>. " Last accessed 12-01-2019.

excessive force against women and children. Her article is based on reports from various international organizations. She concluded that India is violating the basic human rights of the people of Kashmir and suppressing the voice of people to continue her illegal occupation of Kashmir. This article is relevant to this study to understand the human rights situation in Kashmir before 1996.

Brian Farrell in his article, "*The Role of International Law in the Kashmir Conflict*"<sup>35</sup> discussed the historical background of the Kashmir conflict, efforts to resolve the dispute, legal analysis, and proposals for management of the conflict according to international law. He is of the view that the Indian partition plan about states was ambiguous and this created this conflict. The efforts of the international community and bilateralism failed and the unilateral steps taken by India and Pakistan were hurdles in reaching an agreement. Although the right to self-determination is in the United Nations charter at the time of the partition of the sub-continent its enforcement and implementation mechanism were weak. His argument that international law does not provide a strong way to resolution of this dispute is not correct. In this research, this aspect will be discussed in detail. The article is beneficial to understand the counter versions about the application of international law in the Kashmir conflict.

Origins of Kashmir conflict, evaluation, and causes of the resistance movement in IOK, human rights violations, and options for settlement of conflict briefly discussed in the book "*Mass Resistance in Kashmir: Origins, evaluation, options*"<sup>36</sup> written by Tahir Amin in 1995. The book provides a detailed account of history and efforts to resolve the dispute. The author is of the view that the main causes of the current movement in

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<sup>35</sup>Farrell, Brian. "The Role of International Law in the Kashmir Conflict." *Penn St. Int'l L. Rev.* 21 (2002): 293.

<sup>36</sup>Tahir Amin, *Mass Resistance in Kashmir: Origins, Evaluation, Options* (Islamabad: Institute of Policy Studies, 1995).

Kashmir are the political, economic, and cultural policies of Govt. of India. This movement is well organized and has deep roots in the people of the valley. The Indian government is involved in extrajudicial killings, rape, molestation, arson, looting, and custodial deaths. He has analyzed different options for the settlement of the dispute. Although the author has not provided any information about the legal aspects of conflict however this book is helpful to understand the human rights situation up to 1995.

*"The Status of Human Rights in Kashmir: An international Law Perspective"*<sup>37</sup>

thesis of Muhammad Mumtaz, department of Kashmir Studies University of Punjab session 2006-2011 is to some extent relevant to this research. The author has discussed the history of Kashmir and some international human rights instruments. The case studies of the human rights situation in Zimbabwe, Bosnia, Rwanda, South Africa, Sierra Leone, and Argentina were also discussed by the author. He had also given an overview of some reports on the human rights situation in Kashmir but it needs detailed analysis regarding international human rights instruments. The right to self-determination and its application has been discussed. The author had generally discussed international human rights and humanitarian law but there is a need to discuss specific cases of human rights violations. The thesis is the collection of data but failed to link the situation of Kashmir with an international human rights instrument. Moreover, the work is silent about some grave human rights violations, violations of IHL as well as the legal basis of conflict and international mechanisms. The author had not discussed the concept of occupation, the liberation movement, and other basic legal questions of the issue.

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<sup>37</sup>Muhammad Mumtaz, *"The Status of Human Rights in Kashmir: An international Law Perspective"* (Ph.D. Diss., Department of Kashmir Studies University of Punjab session 2006-2011).

The report on the judicial system in Indian Occupied Kashmir has been published by Allard K. Lowenstein International Human Rights Clinic Yale School titled “*The Myth of Normalcy: Impunity and Judiciary in Kashmir*”<sup>38</sup> in 2009. The report evaluated the legal system with international standards of human rights. According to the report the judicial system is IOK and India are the same and laws are also the same but the outcome is different. The judicial system is failed at both the structural and operational levels. Security forces have immunity and executive agencies are hurdles to equity and fairness. This report is helpful to understand the militarized justice system of IIOJK.

“*Secession: International Law Perspective*”<sup>39</sup> edited by Marcelo G. Kohen is a compilation of different essays on the relationship between international law and secession. In this book Li-Ann Thio in the article “*International law and secession in the Asia and Pacific Regions*”<sup>40</sup> discussed that *Maharja* had acceded to India against the popular will of the people and People are still waiting for the impartial plebiscite. The movement in Kashmir is for the implementation of the right to self-determination. To understand the international law on armed conflict the book “*An Introduction to the International Law of Armed Conflict*”<sup>41</sup>, written by Robert Kolb and Richard Hyde is very useful. The authors discussed the relationship between *Jus ad Bellum* and *Jus in Bello*, the history, and applicability of the law of armed conflict, the relationship between human rights law and the law of armed conflict, and humanitarian law. The

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<sup>38</sup> Allard K , “The Myth of Normalcy: Impunity and the Judiciary in Kashmir” , *Lowenstein International Human Rights Clinic Yale Law School* (2009).

<sup>39</sup> Marcelo G.Kohen, *Secession: International Law Perspective* (New York: Cambridge University, 2006).

<sup>40</sup> Thio, Li-Ann. “International Law and Secession in the Asia and Pacific Regions.” Chapter. In *Secession: International Law Perspectives*, edited by Marcelo G. Kohen, 297–354. Cambridge: Cambridge University Press, 2006. doi:10.1017/CBO9780511494215.012.(Accessed on December 22, 2020).

<sup>41</sup> Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflict* (Oxford: Portland Oregon, 2008).

belligerent occupation was also discussed. This book will be useful to clarify the basic concepts of international law.

Anjum Zamarud Habib's book "*Prisoner No.100: An Account of My Nights and Days in an Indian Prison*"<sup>42</sup> is an account of her case under POTA and her day and nights in jail. The author was a political activist and member of the All Parties Hurriyat Conference, which was booked under POTA. Her crime was a political struggle for the right to self-determination. She was arrested on February 06, 2003, and was released on December 08, 2007. She was physically and mentally harassed, imprisoned for five years without any criminal offense, tortured in jail, and humiliated. This book reveals that there is no justice for the people of Jammu and Kashmir; even they are facing discrimination, the threat to life, and inhuman treatment in jails. The book helps understand the judicial system of India, the impacts of draconian laws on the people of Jammu and Kashmir, and the human rights situation in J&K.

Human rights violations in Kashmir are systemic and the Indian Govt. is using security forces to suppress the peaceful struggle for the right to self-determination. The Article "*Untold Stories of Human Rights Violations in Kashmir*"<sup>43</sup>, written by Hilal Ahmed Wani, Andi Suwirta, and Joseph Fayeye provides a detailed account of fake encounters, disappearances, rapes, condition of Kashmiris detained in *Tihar* jail, and medical consequences of the conflict. Authors had discussed the draconian laws promulgated in Kashmir which are providing complete immunity to security forces. Security forces can kill a person only on suspicion, enter the house without a warrant, and could arrest any person. The forces are involved in many massacres and gang rapes but are not accountable in any forum. They have analyzed some reports from international human

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<sup>42</sup>Anjum Zamaurd Habib, *Prisoner No.100: An Account of My Nights and Days in an Indian Prison*, trans.Sahba Husain (New Delhi:ZUBAN,2011).

<sup>43</sup> Hilal Ahmad Wani, Andi Suwirta, and Joseph Fayeye. "Untold stories of human rights violations in Kashmir." *Educare* 6, no. 1 (2013).

rights organizations, which show that majority of the population is in trauma and psychological disorder. The ratio of suicide has increased. The article is helpful to study the human rights situation in Kashmir.

The Ph.D. thesis of Muhammad Idress Abbasi on “The Internal Aspects of The Right to Self Determination and International Obligations of Human Rights: The Case Study of Azad Jammu and Kashmir and Gilgit Baltistan”<sup>44</sup> is about the internal right to self-determination, however, the author had discussed the concept of the right to self-determination, especially its internal aspect in detail. The discussion on the concept of the right to self-determination and the constitutional position of AJ & K and GB is helpful in this study. He had discussed the constitutional arrangements and relationship of Pakistan with AJ & K and GB, whereas he had not discussed the Indian Occupied Kashmir, external right to self-determination, occupation, and the human rights situation in Jammu and Kashmir.

Dr. Waseem Ahmad Qureshi in his book “*The Use of Force in International Law*”<sup>45</sup> discussed the rules and norms relating to the use of force. According to him, there are different phases of human history in the use of force. United Nations Charter provides a guideline about the use of force. Several ethics should be followed for waging a war and during the war. The scope of war in self-defense has been widening in recent centuries. Geneva conventions provide the categories of people having protection in armed conflicts. National liberation movements can use force but these movements should follow the norms of international humanitarian law. Force can be used against any state for systematic human rights violations. The author analyzed the responsibility

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<sup>44</sup> Muhammad Idress Abbasi “*The Internal Aspects of The Right to Self Determination and International Obligations of Human Rights : The Case Study of Azad Jammu and Kashmir and Gilgit Baltistan*” (Ph.D. Diss., International Islamic University Islamabad, 2017)

<sup>45</sup> Dr. Waseem Ahmad Qureshi, *The Use of Force International Law* (Islamabad: National Book Foundation, 2017).

to protect doctrine. This book is helpful to analyze the armed struggle in Indian Occupied Kashmir.

The concept of *Jus Cogens* and its development was briefly discussed by Md. Salahuddin Mahmud and Md. Shafiqur Rahman in their article, “The *Concept and Status of Jus Cogens: An Overview*.”<sup>46</sup> According to them although the concept of *Jus Cogens* is new, however, this concept has got the position of the basic norm of international law. These rules are binding irrespective of the consent of the parties and no derogation is allowed. The authors discussed various decisions of the International Court of Justice and the Permanent Court of International Justice about the *Jus Cogens*. Crimes against humanity, genocide, torture, war crimes, and slavery are *Jus Cogens* norms and these could not be allowed even though the agreements between the states. This article helps to understand the concept of *Jus Cogens* and their development.

Freny Manecksha in her book, “*BEHOLD, I SHINE: Narratives of Kashmir’s Women and Children*”<sup>47</sup>, collected first-hand information about the condition of women and children in Kashmir. She interviewed many women who were the victims of Indian forces. The life of Kashmiri women is very tough, they are facing humiliation, threat, trauma, sexual violence, and torture. But they have struggle and resistance. This book is helpful in research to analyze the real stories of human rights violations in Kashmir.

Dr. Muhammad Mushtaq Ahmed in his book *Jihad, “Muzahamat awr Bagawat: Islami Qanun awr Benul aqwami qanun ki roshni men”*<sup>48</sup> discussed the concepts of Islamic and international law of war. Moreover, he also discussed international humanitarian

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<sup>46</sup> Md. Salahuddin Mahmud and Md. Shafiqur Rahman, “The Concept and Status of Jus Cogens: An Overview” *International Journal of Law*, volume 3; Issue 6; November 2017, 111-114.

<sup>47</sup> Freny Manecksha, *BEHOLD, I SHINE: Narratives of Kashmir’s Women and Children* (New Delhi: Rupa Publications, 2017).

<sup>48</sup> Muhammad Mushtaq Ahmad, *Jihad, Muzahamat awr Bagawat: Islami Qanun awr Benul aqwami qanun ki roshni men* (Gujranwala : Al-Shariah Academy, 2009).

law. The author clarified the Islamic concept of *Dar al -Islam* and *Dar al -Harb* and this is helpful to understand the reason and justification of war. This book contains 25 chapters and 03 appendices. Every chapter is important to understand the Islamic and Western concepts of International law. The most relevant to my research is chapter 22 which clarifies the concept of the National Liberation Movement, Jihad, and Terrorism. The author discussed the evaluation of the right to self-determination and concluded that this right is included in *Jus Cogens* and even an expressive section of an agreement cannot change this right. He also elaborated on the concept of the national liberation war and included it in international armed conflict instead of non-international conflict. According to him the liberation movement in occupied territories is not an internal matter of the occupier state. The author discussed the legal position of freedom struggle and also emphasized that freedom fighters should also follow international humanitarian law.

Besides books and articles, this research will analyze different reports of the United Nations High Commissioner for Human Rights, Amnesty International, Human Rights Watch, Collation of Civil Societies of Jammu and Kashmir, Doctors without Borders, and other human rights organizations. This research also includes international human rights law, humanitarian law instruments, and the decisions of international and national courts related to the subject.

## **OBJECTIVES OF RESEARCH**

This study is aimed to analyze the indigenous Kashmir liberation movement and human rights situation from an international law perspective. This will be a comprehensive document to present the Kashmir conflict in international and national forums as a case of the right to self-determination of the people of Jammu Kashmir.

## **RESEARCH QUESTIONS**

- i. What is the status of the Kashmir conflict from an international law perspective?
- ii. How right to self-determination is justified in the presence of the territorial integrity concept?
- iii. What are the systematic human rights violations in Jammu and Kashmir?
- iv. What are the obligations of the governing states and international community on violation of international human rights and humanitarian law?
- v. Whether international institutions have jurisdiction to address system human rights violations constituting crimes against humanity in Kashmir?

## **RESEARCH METHODOLOGY**

The doctrinal legal research method is mostly applied in legal research. This method is about looking into the law and not about the law. This method is not about what should be the law but how the law and legal theory will be applicable. The doctrinal research method will be applied during this research because this is theoretical research not empirical and based on an analysis of the legal instruments with the situation. This thesis was made through an analytical approach that includes systemization.

## **OUTLINE OF THE THESIS**

The thesis contains five chapters; the first chapter is about the legal status of the state of Jammu and Kashmir, this chapter also addresses some legal questions about the Kashmir conflict and the right to self-determination. The concepts of state sovereignty and the constitutional status of J&K in the constitutions of governing states clarify through the provisions of international law. The second chapter is about the occupation of Kashmir, and the difference between administration and occupation is explained. The third chapter is an overview of international human rights and humanitarian law with special reference to applicability in Kashmir. The fourth chapter is about the

violations of international human rights law and humanitarian law in Jammu and Kashmir. This chapter provides insight and case studies of violations of international law instruments and customary international law. The chapter also reveals the systemic and organized gross human rights violations by occupying forces in Jammu and Kashmir. The fifth chapter provides the legal obligations of the international community and governing states in Kashmir. The analysis of obligations of the UN and international judicial mechanism to address gross human rights violations and serious breaches of the Geneva Conventions provides a remedial mechanism. This chapter also recommends the legal forums and way forward for the principal party people of Jammu and Kashmir.

## **Chapter I**

# **LEGAL STATUS OF THE STATE OF JAMMU AND KASHMIR**

### **Introduction**

The chapter explores the genesis of the Kashmir conflict from a historical perspective, UN intervention, and the legal basis of the Kashmir conflict. The chapter includes the legal and constitutional status of all administrative units of Kashmir because the legal warfare between India and Pakistan had different and contesting stances; these stances are analyzed from an international law perspective. Simultaneously this chapter answers some basic legal questions about the Kashmir conflict, that Kashmiris have the right to the self-determination or whether it is interference in the territorial integrity and sovereignty of India, Kashmir conflict is an international armed conflict or an internal armed conflict, and the nature of conflict as bilateral or international. The status of the people of Kashmir as indigenous people, the right to succession, and the validity of UN resolutions are also under discussion. The legal debate on the resistance movement in IIOJK as a war of national liberation or terrorism is analyzed from the international law perspective.

### **1.1 Historical Background of Kashmir Conflict**

The political history of Kashmir is very old, but the modern “State of Jammu and Kashmir” was established in 1846 through the Treaty of Amritsar. This treaty was concluded between Gulab Singh and British Govt. Through this treaty, the British Govt. had transferred all the mountainous and hilly areas situated to the westward areas of River Ravi, including *Chamb*, excluding *Lahul*, and eastward of River Indus to *Maharaja Gulab Singh*. Article 1 provides,

The British Government transfers and makes over forever in independent possession to Maharajah Gulab Singh and the heirs male of his body all the hilly or mountainous country with its dependencies situated to the eastward of the River Indus and the westward of the River Ravi including Chamba and excluding Lahol, being part of the territories ceded to the British Government by the Lahore State according to the provisions of Article IV of the Treaty of Lahore, dated 9 March 1846.<sup>1</sup>

The Dogra rule in Kashmir was repressive and tyrannical, heavy taxes were imposed on everything, and people were treated as slaves of the ruler. The British Governor General, Lord Henry Harding had himself admitted that Gulab Singh, 'was the greatest Rascal in Asia'<sup>2</sup>

People were dissatisfied and raised their voices individually, the killing of 22 people in front of Central Jail Srinagar on 13<sup>th</sup> July 1931 by Dogra forces united the different individual voices in a united voice against Dogras.<sup>3</sup> In 1932 the first political party All Jammu and Kashmir Muslim Conference was established<sup>4</sup>. Due to the political struggle of the people of Kashmir, the legislative assembly for the state was established in 1934, through regulation No.1 issued by the ruler of Kashmir Maharaja Hari Singh<sup>5</sup>. This assembly had limited powers and the majority of members were nominated by Maharaja although only three per cent of the population had the right to vote it was the beginning of legal reforms. The first constitution of Jammu and Kashmir, The Jammu and Kashmir Constitution Act, of 1939 was promulgated on September 07, 1939.<sup>6</sup> Part II of this act provides the legislature consisting of Maharaja and a chamber

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<sup>1</sup> A..S. Anand, *The Development of the Constitution of Jammu and Kashmir* (Mirpur: Verinag Publishers, 1991) 343-345.

<sup>2</sup> Victoria Schofield, *Kashmir in the Crossfire* (London: I.B. Tauris, 1996), 54.

<sup>3</sup> Victoria Schofield, *Kashmir in Conflict: India, Pakistan and the Unending War* (London & New York: IB Tauris, 1996) 18.

<sup>4</sup> *The political party having President Sheikh Abdullah from Valley and General Secretary Ch. Ghulam Abbas from Jammu.*

<sup>5</sup> Alaister Lamb, *Kashmir A Disputed Legacy 1846-1990* (UK: Oxford Books, 1990) 92.

<sup>6</sup> D. N. Saraf, Arts and Crafts, *Jammu and Kashmir: Land, People, Culture* (New Delhi: Abhinav Publications, 1987), 45-69.

(*Praja*<sup>7</sup>*Sabha*). The *Praja Sabha* had 75 members, 33 elected by general constituencies, seven from special constituencies, and 35 nominated by Maharaja. These general constituencies were in the provinces of Jammu and the valley of Kashmir and the distribution of seats was on a religious basis. Twenty-one seats were allocated to Muslims, ten to Hindus, and two to Sikhs. Special seats were reserved for *Tazimi Sardars*<sup>8</sup>, landlords, *Jagirdars*<sup>9</sup>, taxpayers, and pensioners. Five nominated members were from the frontier province (Ladakh, Skardu, Kargil, and Gilgit), the rest were divided into valley and Jammu.<sup>10</sup> Elections were held in 1934, 1939, and 1947, but the assembly has very limited legislative powers, and the people of Jammu and Kashmir were still under autocratic and brutal rule.

In 1947, the State of Jammu and Kashmir was under the suzerainty of the British Govt. The Indian States were defined in Govt. of India Act, 1935 as, “any territory, whether described as a state, an estate, a *jagir* or otherwise, belonging to or under the suzerainty of a ruler who is under the suzerainty of His Majesty and not being a part of British India.”<sup>11</sup>

At the end of World War (WW II), the British government was interested to leave the sub-continent. They were working on different plans to devise a way out of leaving. According to the Cabinet Mission Plan of 1946, states will be part of the union of India and have all powers other than those ceded to the union.<sup>12</sup> In the 3<sup>rd</sup> June partition plan, it was reiterated that states will be free to join either Pakistan or India or remain

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<sup>7</sup> *Parja* mean people.

<sup>8</sup> A person enjoys respect in court of Maharaja and could sit in court.

<sup>9</sup> A person to whom certain number of villages granted by ruler.

<sup>10</sup> Justice Syed Manzoor Hussain Gilani, *The Constitution of Azad Jammu and Kashmir: In the Historical Backdrop with Corresponding Pakistan, India and Occupied Jammu and Kashmir Constitutions* (Islamabad: National Book Foundation, 2008), 591-617.

<sup>11</sup> Government of India Act 1935, Section 311(1).

<sup>12</sup> Inamullah Khawaja, *The Creation of Pakistan* (Lahore: Research Society of Pakistan, 2012), 121-137.

independent.<sup>13</sup> In the meeting of the chamber of princes on 25<sup>th</sup> July 1947, Mountbatten said, “although their states would technically and legally become independent, there were certain geographical compulsions that could not be avoided.”<sup>14</sup> He advised them to sign a ‘Standstill Agreement’ with the future authorities of India or Pakistan.<sup>15</sup> Mountbatten in a speech after the visit to Kashmir and meeting with Maharaja in 1947 said, “I persisted with the same advice, ascertain the will of your people by any means and join whichever Dominion your people wish to join by August 14, this year.”<sup>16</sup> The statements of Mountbatten show that the option to remain independent was not practical so all the states joined either Pakistan or India after or before 15<sup>th</sup> August 1947.

The Indian Independence Act was enforced on 18<sup>th</sup> July 1947.<sup>17</sup> Two independent dominions, Pakistan and India emerged but this act did not provide any clear future for princely states. Article 07 of this act provides that the suzerainty of the British Govt. over these states will lapse on 15<sup>th</sup> August 1947 but there was ambiguity on the political future of the states.<sup>18</sup>

At the time of partition, the State of Jammu and Kashmir has an overwhelming Muslim majority which was almost 78 per cent in the census of 1941<sup>19</sup>, but ruler *Maharaja Hari Singh* was Hindu. The people of Jammu and Kashmir had religious, cultural, social, economic, and personal relations with the people of Punjab and *Khayber Pakhtun Khawa* (KPK), moreover, a large number of Muslims from Kashmir migrated and their population was 206,180 in Punjab and North West Frontier Province according to

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<sup>13</sup> Massarat Abid, *Britain, India & Pakistan: Partition and After, 1947-51* (Lahore: Research Society of Pakistan, 2013), 150-51.

<sup>14</sup> Vitoria Schofield, *Kashmir in the Crossfire* (London: I.B.Tauris Publications, 1996), 123.

<sup>15</sup> Abid, *Britain, India & Pakistan: Partition and After, 1947-51*, 150.

<sup>16</sup> Mountbatten, L. "The Time Only to Look Forward. Speeches of Rear Admiral the Earl Mountbatten of Burma as Viceroy of India and Governor-General of the Dominion of India 1947-1948." (1949), 268–69 .

<sup>17</sup> Indian Independence Act, 1947.

<sup>18</sup> Indian Independence Act, 1947, Article 7.

<sup>19</sup> Josef Korbel, *Dangers in Kashmir* (New Jersey: Princeton University Press, 1954), 6.

censuses of 1911 and they were in contact with their families in Kashmir.<sup>20</sup> After the announcement of the partition plan and promulgation of “The Indian Independence Act 1947”, the people of Kashmir want to join Pakistan. AJ & KMC, the only political party of Kashmir that was representing Muslims and had the majority of elected members in the state assembly had passed the Accession to Pakistan Resolution on 19<sup>th</sup> July 1947, in Srinagar<sup>21</sup>. Even two other political parties “All Jammu and Kashmir *Kisan Mazdoor* Conference” on September 5, 1947,<sup>22</sup> and “Kashmir Socialist Party” on September 18, 1947,<sup>23</sup> had also passed accession to Pakistan resolutions. On 12<sup>th</sup> August 1947, Maharaja offered a standstill agreement to both Pakistan and India. Pakistan accepted it on 15<sup>th</sup> August 1947 but India did not.<sup>24</sup> Kashmiris had a fear that the Maharaja will accede Kashmir to India and the actions of the Maharaja were proving their fear. In July 1947 *Hari Singh* ordered to unarm Muslims of the state and distribute these to Non-Muslims. The Muslims from the police and army were dismissed.<sup>25</sup> Gangs of Sikhs and *Rashtriya Swayam Sewak Sangh* (RSS) entered Kashmir to exterminate the Muslims from Kashmir.<sup>26</sup> The Prime Minister of Kashmir R.C. Kak, who was considered an opponent of accession with India by Congress was replaced by Mehar Chand Mahajan, the nominated member of Congress in the Boundary Commission.<sup>27</sup> On 13<sup>th</sup> September 1947, a serving officer in the Indian army Lt.Col. Kashmir Singh

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<sup>20</sup> Ayesha Jalal, *Self and Sovereignty: Individual and Community in South Asian Islam Since 1850* (Routledge, 2002), 352.

<sup>21</sup> Mushtaqur Rahman, *Divided Kashmir: Old Problems, New Opportunities for India, Pakistan and Kashmiri People* (USA: Lyne Rienner Publishers, 1996), 44.

<sup>22</sup> Prem Nath Bazaz, *The History of Struggle for Freedom in Kashmir*, trans. Abdul Hameed Nizami (Mirpur: Verinag Publisher, 1992), 331.

<sup>23</sup> Ibid, 333.

<sup>24</sup> Ibid, 112.

<sup>25</sup> Massarat Abid, *Britain, India & Pakistan: Partition and After, 1947-51* (Lahore: Research Society of Pakistan, 2013), 67.

<sup>26</sup> Ijaz Hussain, *Kashmir Dispute: An International Law Perspective* (Islamabad: Quaid-I-Azam Chair, National Institute of Pakistan Studies, Quaid -I-Azam University, 1998), 8.

<sup>27</sup> Alastair Lamb, *Incomplete Partition: The Genesis of the Kashmir Dispute 1947-48* (New York: Oxford, 1997), 109.

TH-26359

Katoch was appointed as a military advisor to Maharaja and commander in chief of his forces.<sup>28</sup> On 28<sup>th</sup> September Indian Defense Minister Patel at the urgent request of Maharaja arranged a civil aircraft (DC3) to run from Dehli to Srinagar to take ammunition. The wireless system was provided at Srinagar airport by October 1<sup>st</sup>. In the second week of October, New Delhi decided to send troops of Patiala forces and ammunition to Jammu and Kashmir and they were stationed in Jammu and on roads accessing Pakistan.<sup>29</sup> All this urged the people of Jammu and Kashmir to convert their political struggle into an armed struggle against Maharaja. At that time about 70,000 ex-servicemen of the British army were in Punch, who had served during the Second World War and these people started the guerrilla war.<sup>30</sup> The freedom fighters of Kashmir along with volunteers from KPK and tribal areas had liberated AJ&K and established the provisional Govt. on 24<sup>th</sup> October 1947. The people of GB also succeeded in liberation and established their independent Govt. on 1<sup>st</sup> November 1947. India had landed her forces at Srinagar airport on 27<sup>th</sup> October 1947 in violation of the partition plan.<sup>31</sup> India is claiming that the Maharaja of Kashmir had signed an instrument of accession with her on 27<sup>th</sup> October 1947. The acceptance of the instrument of accession and occupation of Kashmir is also a violation of Mountbatten's stance. When the Nawab of *Junagarh* who was Muslim and the majority of the population was Hindu sent an accession request to Pakistan and Pakistan accepted, then the Mountbatten who was the Governor-General of India wrote to Quaid -I- Azam that this acceptance is an utter violation of principles of the partition plan <sup>32</sup>, which mean

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<sup>28</sup> Brigadier Samir Bhattacharya, *Nothing But!: Book Three: What Price Freedom* (India: Partridge Publishing, 2013) 32.

<sup>29</sup> Abid, Mussarat, *Britain, India & Pakistan: Partition and After, 1947-51*, 129-130.

<sup>30</sup> Indian Independence Act, 1947., 8-9.

<sup>31</sup> Victoria Schofield, *Kashmir in Crossfire* (London: B Taurus Publishers, 2001) 20.

<sup>32</sup> Muhammad Ali, *The Emergence of Pakistan* (New York: Columbia University Press, 1967), 227.

that Hindu majority states should join with India and Muslim Majority with Pakistan. The last viceroy Lord Mountbatten and his wife's inclination toward India is also a reason for the unresolved status of Kashmir. A secret report by the CIA published in 1948, declassified in 2013 testifies to this fact "That Mountbatten and his wife have identified themselves with the Indian cause is unquestionable; this attitude is alleged to have resulted largely from the desire for personal popularity and acclaim."<sup>33</sup>

The freedom fighters were approaching towards remaining areas of the state for their liberation, India approached the United Nations (UN) and a ceasefire was agreed upon. On the issue of the state's future, it was decided by the UN with the agreement of Pakistan and India that it is a disputed territory and its future had to be determined by a fair and free plebiscite under UN auspices. Due to this conflict, thousands of people lost their lives and divided people and families. Pakistan and India had fought three full-scale wars in 1947, 1965, and 1971, and in 1999 both countries were on the brink of large-scale war. This simmering conflict is a threat to international security, peace as well as development, and stability in the region.

## **1.2 United Nations Intervention and Resolutions**

The Indian forceful occupation was challenged and resisted by the people of the area. They had liberated AJ&K and GB and were struggling for the liberation of the rest of the state. Indian Govt. felt that these freedom fighters will soon capture the whole state. Lord Birdwood also testified this,

It will be recalled that December 1947 had not been a good month for India's Army in Kashmir. They managed to relieve Kotli, which had been pressed by raiders for 31 days; but apart from the initial advance from Srinagar, the Azad Kashmir troops were hitting back at many points along India's tenuous lines of

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<sup>33</sup> CIA, *India-Pakistan*, [https://www.cia.gov/library/readingroom/docs/CIA-RDP78-01617A001\\_60\\_00\\_10\\_001\\_-2\\_.pdf](https://www.cia.gov/library/readingroom/docs/CIA-RDP78-01617A001_60_00_10_001_-2_.pdf) (accessed on November 19, 2019).

communication. There was therefore some relief in Delhi at the government's decision to take the matter to the Security Council.<sup>34</sup>

In this situation, India knocked on the doors of the United Nations Security Council (UNSC) under article 35 of the UN charter on 1<sup>st</sup> January 1948. India claimed that Kashmir is her integral part because of the instrument of accession and alleged that Pakistan is supporting the invaders. These complaints further state,

The Government of India request the Security Council to call upon Pakistan to put an end immediately to the giving of such assistance, which is an act of aggression against India. If Pakistan does not do so, the Government of India may be compelled, in self-defence, to enter Pakistan territory, in order to take military action against the invaders. The matter is, therefore, one of extreme urgency and calls for immediate action by the Security Council for avoiding a breach of international peace.<sup>35</sup>

The Govt. of Pakistan rejected the Indian allegations of aggression. On 15<sup>th</sup> January 1948, Pakistan submitted her reply to (UNSC), that the Govt. of Azad (free) Kashmir (GoAJ&K) is struggling for the liberation of its areas and some volunteers from Pakistan and independent tribesmen may be supporting them. The complaint of India is a threat to Pakistan which can endanger security and peace. Pakistan further stated that "the withdrawal of all outsiders, whether belonging to Pakistan or the Indian Union... steps for the establishment of an impartial and independent administration, ... and a plebiscite to ascertain the free and unfettered will of the people... • as to whether the state shall accede to Pakistan or India."<sup>36</sup>

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<sup>34</sup>Lord Birdwood, *Two Nations and Kashmir*, 87.

<sup>35</sup>Westcott, Stephen P. "Self-Determination and State Sovereignty: The Case of UN Involvement in Jammu and Kashmir." *The United Nations*: 127.

<sup>36</sup>United Nations. Security Council. *Verdict on Kashmir: Being an Account of the Security Council Debate from 21st February to 2nd April 1951*. Verlag nicht ermittelbar, 1951.

There were lengthy debates and discussions in UNSC on this issue from both sides Pakistan and India. In the first resolution of 17<sup>th</sup> January 1948, both India and Pakistan were asked to refrain from any act which might aggravate the situation.<sup>37</sup> United Nations Commission for India and Pakistan (UNCIP) was established through UNSC resolution 39 of 1948. This commission was responsible to investigate the situation according to article 34 of the UN Charter and use mediatory influence to smooth away difficulties.<sup>38</sup> Through resolution, No. 47 of 24<sup>st</sup> April 1948 membership of UNCIP has increased moreover this resolution also states that “The question of accession of Jammu and Kashmir to India or Pakistan should be decided through the democratic method of a free and impartial plebiscite.”<sup>39</sup> UNCIP passed the first resolution on 13<sup>th</sup> August 1948, which provides that both countries agree on a ceasefire, truce agreement, and the right to self-determination for the people of Jammu and Kashmir. Part II A (3) of this resolution provides that, “Pending to final solution the territory evacuated by the Pakistani troops will be administrated by the local authorities under the surveillance of the Commission.”<sup>40</sup> AJ&K will be administered by the local authority under the surveillance of the commission. Part II B (3) provides that, “The Government of India will undertake to ensure that the government of State of Jammu and Kashmir will take all measures within their power to make it publically known that peace, law, and order will be safeguarded and that all human and political rights will be guaranteed.”<sup>41</sup> This resolution was partially implemented to the extent of the ceasefire on 1<sup>st</sup> January 1949.

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<sup>37</sup>Farrell, Brian R. "The Security Council and Kashmir." *Transnat'l L. & Contemp. Probs.* 22 (2013): 343.

<sup>38</sup>Ahmed, Zahid Shahab, Stuti Bhatnagar, and Ahmad AlQadri. "The United Nations Military Observer Group in India and Pakistan: analysis of perceptions in India and Pakistan." *Global Change, Peace & Security* 33, no. 2 (2021): 125-141.

<sup>39</sup>Gahlaut, Baibhaw. "Jammu and Kashmir: legal position, Security Council mediation and future prospect." *Commonwealth Law Bulletin* 40, no. 1 (2014): 17-31.

<sup>40</sup>Victoria Schofield, "Kashmir and its regional context, self-determination and prospects for peace." In *Democratic Transition and Security in Pakistan*, pp. 139-156. Routledge, 2015.

<sup>41</sup> Victoria Schofield, "Kashmir and its regional context, self-determination and prospects for peace." In *Democratic Transition and Security in Pakistan*, pp., 139-156.

On 5<sup>th</sup> January 1949, another resolution was passed by UNCIP, the opening paragraph of this resolution also shows the agreement between two countries (India and Pakistan), and paragraph 1 is about the plebiscite reproduced below:

Having received from the government of India and Pakistan in the communication dated December 23 and December 25, 1948, respectively their acceptance of the following principles which are supplementary to the commission's resolution of August 13, 1948; The question of the accession of the state of Jammu and Kashmir to India and Pakistan will be decided through the democratic method of a free and impartial plebiscite.<sup>42</sup>

The ceasefire line<sup>43</sup> was marked between two parts of Kashmir through the Ceasefire Agreement of July 27, 1949.<sup>44</sup>

Besides passing the resolutions UNSC had appointed a plebiscite administrator, mediators, and representatives to resolve the Kashmir Conflict. Fleet admiral Chester W. Nimitz was appointed as plebiscite administrator.<sup>45</sup> Security Council had appointed Sir Owen Dixon<sup>46</sup> and Dr. Frank Graham as UN representatives for India and Pakistan.<sup>47</sup> Dr. Graham submitted his report to UNSC on September 04, 1952. According to his report, the governments of India and Pakistan did not agree on the number of their forces on each side of the ceasefire line. In 1956 the constituent assembly of HIOJK passed the constitution and India tried to get accession approval

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<sup>42</sup> UNCIP Res. of 5<sup>th</sup> January 1949, doc. no. S/1196, para 15.

<sup>43</sup>The Cesaee Fire Line runs 742km (460 miles) dividing Kashmir, and acts as part of the de facto border between India and Pakistan. It was renamed as Line of Control (LoC) in 1972 through Simla Agreement.

<sup>44</sup>Ahmed, Zahid Shahab, Stuti Bhatnagar, and Ahmad AlQadri. "The United Nations Military Observer Group in India and Pakistan: analysis of perceptions in India and Pakistan." *Global Change, Peace & Security* 33, no. 2 (2021): 125-141. [https://peacemaker.un.org/sites/peacemaker.un.org/files/IN\\_PK\\_490729\\_Karachi\\_Agreement.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/IN_PK_490729_Karachi_Agreement.pdf)

<sup>45</sup> Yves Beigbeder, *International Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transition to Democracy* (BRILL, 2021), 127.

<sup>46</sup> Security Council resolution S/1469, *Resolution concerning the India-Pakistan question adopted at the 470th meeting of the Security Council*, S/RES/80( 14 March 1950), available from <https://digitallibrary.un.org/record/475230?ln=en>

<sup>47</sup> Security Council resolution S/RES/91, *deciding to appoint a UN Representative for India and Pakistan in succession to Sir Owen Dixon, who resigned*, S/RES/91(30 March 1951), available from <https://digitallibrary.un.org/record/112064?ln=en>.

from this assembly, the UNSC declared that the future status of J&K shall be determined through a plebiscite and further reaffirmed:

Reaffirms the affirmation in its resolution 91 (1951) and declares that the convening of a constituent assembly as recommended by the General Council of the "All Jammu and Kashmir National Conference" and any action that assembly may have taken or might attempt to take to determine the future shape and affiliation of the entire state or any part thereof or action by the parties concerned in support of any such action by the assembly, would not constitute a disposition of the state in accordance with the above principle; decides to continue its consideration of the dispute.<sup>48</sup>

These resolutions are providing a legal basis for the Kashmir Conflict with some other legal standings. These resolutions declared Kashmir as a disputed territory, whose future will be decided by the people of the state through a plebiscite.

### **1.3 Legal and Constitutional Status of Jammu Kashmir**

The erstwhile State of Jammu and Kashmir is now divided into three administrative parts. India claims that the whole state is its integral part whereas the Govt. of Azad (Free) Jammu and Kashmir is claiming that it is the representative government of the whole state and successor of Maharaja Hari Singh. In international law, there are two theories about statehood which are constitutive, and declarative theory. According to constitutive theory, the recognition of a state from existing states as sovereign is necessary for statehood.<sup>49</sup> Considering a state as sovereign 'declarative theory', necessitates four essential elements, "a defined territory, permanent population, government, and capacity to enter into relations with other states."<sup>50</sup> These elements

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<sup>48</sup>UNSC Res. 122 (1957). 24 January 1957, S/RES/122(1957).

<sup>49</sup>Worster, William Thomas. "Two Competing Theories of State Recognition." *Exploring Geopolitics* (2010),

<sup>50</sup> Thomas. "Two Competing Theories of State Recognition." *Exploring Geopolitics* (2010).

are also included in the Montevideo Convention for the recognition of newly emergent states.<sup>51</sup> Another theory which is relatively new and given by the Buchanan which is based on human rights states that the protection of basic human rights is the primary goal of international law.<sup>52</sup> When we analyze the theories of statehood with the situation of Kashmir, the GoAJ&K was established in 1947 as the representative Govt. of the erstwhile state. The “Declaration of Azad Kashmir Govt. of 1947” (Appendix- I) provides the objectives of the establishment of the Govt. and its status. This Govt. was a provisional, non-communal, self-government on liberated territories to safeguard the political identity of J&K. It was also reaffirmed that the question of accession will be decided by the people and this Govt. will establish friendly relations with both India and Pakistan. The declaration also states that “the new government represents the united will of the Jammu and Kashmir to be free from the rule of *Dogra* dynasty which has long suppressed and oppressed the people.”<sup>53</sup>

The declaration also shows commitment to the liberation of the remaining parts of the state from Dogra rule. It is evident from historical documents that the people of AJ&K had liberated their area and established the government. The Govt. has full control over 13297 Sq. Kms, and also has a *de facto* capacity for foreign relations. However this Govt. is not recognized by any country including Pakistan as a sovereign state. Initially, the Govt. of AJ&K attempted for recognition from the UN and different countries but not succeeded. AJ&K is not a sovereign state in terms of international law. “Status of

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<sup>51</sup> Montevideo Convention on Rights and Duties of the States (1933) signed at Montevideo, December 26, 1933, Article 1.

<sup>52</sup> Allen Buchanan, *Justice, Legitimacy, and Self-Determination* (Oxford: Oxford University Press, 2004), 74-82. 2

<sup>53</sup> Please see appendix- I.

Azad Jammu and Kashmir has never been legally defined in international terms; it is neither a sovereign state nor a province of Pakistan.”<sup>54</sup>

Another legal term used for states that are not fully sovereign is a protectorate. According to ‘Richard Longhorne’ and ‘Erik Goldstein’, “Protectorates are dependent or not fully sovereign states. The territorial integrity of a protectorate state was guaranteed under a treaty negotiated with a protecting power.”<sup>55</sup> Before partition, the status of the princely states in India was also protectorates of the British Govt. This concept was initially adopted by European colonial powers and natives of Africa.<sup>56</sup> In 1833 a treaty was signed between the King of Loango and the French Govt., to place Loango as a protectorate of France. The term suzerainty was used for sovereign powers by European countries. The history of protectorates the relations between protecting states and protectorates were different. One important requirement for protectorates is that they should be an independent state and by treaty, it gives foreign affairs to protecting states.

Comparative analyses of the history of protectorates with the status of AJ&K show that it is not an independent state, moreover, AJ&K is a necessary part of the whole state including IIOJK and GB. According to UN resolutions, the whole state is disputed territory; the term used for Govt. of Azad Kashmir is local authority “Pending a final solution, the territory evacuated by the Pakistani troops will be administered by the local authorities under the surveillance of the commission”.<sup>57</sup> The term local authority

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<sup>54</sup> Victoria Schofield, *Kashmir in Conflict: India, Pakistan and the Unending War*, (I.B. Tauris, 2010), 89.

<sup>55</sup> Michael G Fry; Erik Goldstein; Richard Langhorne, *Guide to international relations and diplomacy* (London ; New York : Continuum, 2002), 8.

<sup>56</sup> Treaties containing this combination of suzerainty and protection regarded the territories of Haback (21.4.1880), Candiah, Maneah and Tombo (20.6.1880), Loango (12.3.1883), Bramaya (14.6.1883), Bangone and Betimbe (5.9.1883), Ouvinia (23.8.1884), Djolof (18.4.1885), Caniak (2.2.1887), Impfondo (21.9.1887), Bougombo (6.10.1888), Bozolo (8. and 9.10.1888), Bozangné (11.10.1888), Badjongo (11.10.1888), Konga (12.10.1888), Bodjo (19.10.1888), Boyelé (21.10.1888), N’Goma (22.10.1888), Mondjimbo (23.10.1888), Bollembé (30.10.1888) and Longo (4.11.1888).

<sup>57</sup> Abid, Mussarat, *Britain, India & Pakistan: Partition and After, 1947-51*, 29.

has been clarified by the UNCIP through two communiqués to both India and Pakistan. In reply to the letter of Indian Prime Minister Jawaharlal Nehru dated August 20, 1948, the chairman of UNCIP clarified through a letter dated August 25, 1948, that “ the local people of the evacuated territory will have freedom of legitimate political activity. In this connection, the evacuated territory refers to those territories in the state of Jammu and Kashmir which are at present under the effective control of the Pakistani High Command.”<sup>58</sup> The second clarification was made by the UNCIP to Pakistan in writing and orally. The important points of these clarifications are,

The term local authority means the people of Azad Jammu and Kashmir, Subject to the commission surveillance the local authorities will have full political and administrative control and will be responsible for the maintenance of law and order and security. Neither the Indian army nor the Maharaja's Government at Srinagar will be permitted to send any military or civil official to the evacuated areas.<sup>59</sup>

Another important point which was clarified by the Chairman UNCIP, Mr. Joseph Korbelt about the status of Azad Kashmir, he had elaborated, “We have tried to deal with the *de facto* position but we can not lose sight of the fact that the state of Jammu and Kashmir still exists as a legal entity, we have to respect its sovereignty. The commission has made no demand either for the disarming or the withdrawal of Azad Forces.”<sup>60</sup> UNCIP also transmitted truce terms to both governments (India and Pakistan) on May 2, 1949, the important point about the sovereignty of the state is included in Part II (G) as, “ These terms are without prejudice to the territorial integrity and the sovereignty of the State of Jammu and Kashmir”<sup>61</sup>

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<sup>58</sup> P.N. Lakhanpal, *Essential Documents and Notes on Kashmir Dispute* (New Delhi: International Publications, 1958), 168.

<sup>59</sup> Ibid., 181.

<sup>60</sup> Lakhanpal, P.N. *Essential Documents and Notes on Kashmir Dispute*, 181-82.

<sup>61</sup> Ibid., 187-89.

Snedden states, “the Azad Kashmir Government recognized only as a “local authority”: one with limited power, control, and influence’ by the UN.”<sup>62</sup> UNCIP was established by UNSC resolution No.38 of 1948<sup>63</sup> and on 27<sup>th</sup> July 1949 under the auspices of the truce committee of UNCIP, Pakistan and India signed the Ceasefire agreement (Karachi Agreement) and through this agreement, both countries agreed that the ceasefire line will be supervised by UN observers.<sup>64</sup> On March 30, 1951, through UNSC resolution No. 91 of 1951, UNMOGIP was established and UNCIP was terminated.<sup>65</sup> The first agreement between Pakistan and the provisional government of AJ&K was signed on April 28, 1949, known as Karachi Agreement (Appendix –II), this agreement has three parties: First, the Government of Pakistan, second, the Government of Azad Kashmir, and third All Jammu and Kashmir Muslim Conference (AJ&KMC), the only political party of AJ&K at that time. The AJ&K Interim Constitution Act, 1974 was amended through the 13<sup>th</sup> amendment on 2<sup>nd</sup> June 2018; besides other amendments, two additional paragraphs were added. About the status of AJ&K the following two paragraphs are important:

**AND WHEREAS**, it is necessary to cause further empowerment of the Legislative Assembly of Azad Jammu and Kashmir and Azad Government of the State of Jammu and Kashmir as being chosen representative of the people of Azad Jammu and Kashmir to exhaustively exercise their legislative powers and executive authority, as the case may be, for the better governance, socio-economic development and in particular for general welfare of people of Azad Jammu and Kashmir in the sustained manner and other matters ancillary thereto beside pursuing and fostering our cause of securing self-determination under the UN Charter and according to the UNCIP Resolutions through the

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<sup>62</sup> Christopher Snedden, *The Untold Story Of The People Of Azad Kashmir* (London: C. Hurst & Co. Publishers, 2012), 78.

<sup>63</sup> Hussain, Ijaz, *Kashmir Dispute: An International Law Perspective*, 26.

<sup>64</sup> Fahmida Ashraf "Jammu and Kashmir dispute: Examining various proposals for its resolution." *Published by the institute of strategic studies in Islamabad, Series: Islamabad Papers (20)* 1 (2002): 51.

<sup>65</sup> UN Security Council resolution 91 (1951), 30 March 1951, S/RES/91(1951).

democratic method of free and fair plebiscite under the auspices of the United Nations;”

**AND WHEREAS**, in the discharge of its responsibilities under the UNCIP Resolutions, the Government of Pakistan has approved of the proposed repeal and re-enactment of the said Azad Jammu and Kashmir Government Act, 1970, and authorized the President of Azad Jammu and Kashmir to introduce the present Bill in the Legislative Assembly of Azad Jammu and Kashmir for consideration and passage.<sup>66</sup>

The initial paragraph provides that “being chosen representative of people of AJ&K, the Govt. and legislative assembly exhaustively exercise their legislative powers”<sup>67</sup>, whereas the preceding paragraph provides “the Govt. of Pakistan had authorized and approved reenactment under the UNCIP resolutions”<sup>68</sup>. Through a detailed study of UNSC resolutions, it is clear that UNCIP has not mentioned any responsibilities to Govt. of Pakistan regarding legislation and administration of AJ&K however, through the “Ceasefire Agreement of 1949” defence of AJ&K is the responsibility of Pakistan. All other powers were assigned to Govt. of Pakistan through the “Karachi Agreement of 1949”. Another legal status for the territories which are not sovereign or independent is disputed territory. The definition of a dispute according to the world court is, “a disagreement on a point of law or fact, a conflict of legal views or interests between the parties.”<sup>69</sup> According to Hans Kelsen, “a dispute exists if one party makes a claim and other rejects the claim.”<sup>70</sup> It is evident from Indian complaint in UN, UNSC resolutions, and bilateral agreements or talks between India and Pakistan, that both countries as well the international community consider Kashmir as a disputed territory. Dr. Ijaz Hussain in his book after a detailed discussion it is concluded that “Kashmir is a disputed

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<sup>66</sup> Azad Jammu and Kashmir Interim Constitution Act 1974.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> *Mavrommatis Palestine Concessions (Greece v. U.K.)*, (1924) P.C.I.J. (ser. B) No. 3.

<sup>70</sup> Hans Kelsen, *The Law of the United Nations* (New York: Praeger, 1951)360.

territory between India and Pakistan.”<sup>71</sup> It is correct to extend that it is a disputed territory but not between India and Pakistan but this dispute has three necessary parties Pakistan, India, and the people of Jammu and Kashmir, who had to exercise their right to self-determination.

Therefore AJ&K is not a sovereign state nor a protectorate, or just a local authority. It has a legislative assembly, Supreme Court, flag, and constitution. It is a disputed territory, which has assigned some responsibilities to Govt. of Pakistan through agreements and the constitution. Moreover, this territory could not be bifurcated from other parts of the state according to UNSC resolutions 91(1951) and 122(1957). The future status of the whole state has to be determined by the will and wishes of the people of this state.

#### **1.4 Occupation or Administration in IIOJK**

Kashmir is not administrated by India but it is under the illegal occupation of India. Although the instrument of accession is fraudulent and was not accepted by the UN however if we consider it legal for sake of arguments then it was provisional and conditional. The instrument of accession signed by Maharaja Hari Singh protects his sovereignty over the state and did not accept the sovereignty of India which is in clauses 07 and 08 of IoA reproduced below:-

Nothing in this Instrument shall be deemed to commit me in any way to acceptance of any future constitution of India or to fetter my discretion to enter into arrangements with the Government of India under any such future Constitution.

Nothing in this Instrument affects the continuance of my sovereignty in and over this State, or, save as provided by or under this Instrument, the exercise

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<sup>71</sup>Hussain, Ijaz, *Kashmir Dispute: An International Law Perspective*, 47.

of any powers, authority and rights enjoyed by me as ruler of this State or the validity of any law at present in this State.<sup>72</sup>

The acceptance letter of accession by Mountbatten clearly states that after the restoration of law and order, the question of accession shall be determined by reference to the people of Kashmir.<sup>73</sup> The statements of Indian leadership also ratify these conditions. The Prime Minister of India Mr Nehru on many occasions said that the future of the State shall be decided through the will and wishes of the people. The letter by Govt. of India to the UN on 31<sup>st</sup> December 1947 states, “ The people of Kashmir would be free to decide their future by the recognized democratic method of plebiscite or referendum which to ensure complete impartiality may be held under international auspices.”<sup>74</sup>

The UN resolutions clearly state that J&K is a disputed territory and its future shall be decided through a free, fair, and impartial plebiscite. India besides her commitment to national and international forums, claims that Kashmir is her integral part. Initially, article 370, a temporary and special provision was introduced in the constitution of India in 1950 but on 9<sup>th</sup> August 2019 through an amendment special position of Kashmir was also snatched by India. In chapter II the occupation law and Indian occupation will be discussed in detail.

## **1.5 Pakistani Administration Areas of State**

AJ & K and GB are not constitutional parts of Pakistan. AJ&K had its constitution, flag, legislative assembly, Supreme Court, president, and Prime Minister. The Govt. of Azad Jammu and Kashmir had given some responsibilities to Govt. of Pakistan initially

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<sup>72</sup> M.J. Akbar, *Kashmir: Behind the Vale* (New Delhi: Viking, 1991), 135.

<sup>73</sup> Lord Birdwood, *Two Nations and Kashmir* (London: Robert Hale, 1956), 213

<sup>74</sup> Maj.Gen. Tariq Nizami, *The Undying Spirit: Kashmir Amidst the Nuclear Blasts* (Rawalpindi: Kashmir Liberation Cell, 1998), 43.

through the Karachi Agreement of 1949<sup>75</sup> and now in the “Interim Constitution of Azad Jammu and Kashmir 1974.”<sup>76</sup> The administrative affairs of GB were given to Pakistan by Para III-A (VIII) of the Karachi Agreement of 1949 by the Govt. of AJ&K, which was signed between *Sardar Muhammad Ibrahim Khan* President AJ&K, Ch. *Ghulam Abbas Khan* President All Jammu and Kashmir *Muslim Conference* and M.A. *Gurmani* Minister without Portfolio Govt. of Pakistan on 28<sup>th</sup> April 1949. Para III –A(I) of this agreement provides that the defence and foreign affairs of AJ&K will be the responsibility of the Govt. of Pakistan (Govt. of Pakistan). Through this agreement, GB is under the administrative control of Pakistan.

## 1.6 Constitution of Pakistan and India

The major part of the state is under the governance of India and Pakistan. Pakistan did not claim Kashmir as her part and considers the whole state as a disputed territory. India is changing its claims from 1947 to date. Article 1(2)(D) of the Constitution of the Islamic Republic of Pakistan defines the territories of Pakistan, AJ&K and GB are not included in the territories of Pakistan.<sup>77</sup> The relationship between Pakistan and the State of Jammu and Kashmir has been provided in article 257 of the Constitution of Pakistan, “When the people of State of Jammu and Kashmir decide to accede to Pakistan, the relationship between Pakistan and the State shall be determined in accordance with the wishes of the people of that State.”<sup>78</sup>

The Indian constitution was amended on August 09, 2019, through the “Jammu and Kashmir Reorganization Act 2019”<sup>79</sup>, which became operative on 31<sup>st</sup> October 2019.

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<sup>75</sup> Muhammad Yusuf Saraf, *Kashmiris Fight for Freedom, Vol-2(1947-1978)* (Mirpur: NIKS, 2015), 551-552.

<sup>76</sup> The Interim Constitution of Azad Jammu and Kashmir, 1974.

<sup>77</sup> Constitution of Islamic Republic of Pakistan 1973, Article 1(2)(d).

<sup>78</sup> Ibid., Article 257.

<sup>79</sup> Jammu and Kashmir Reorganization Act, 2019, <http://egazette.nic.in/WriteReadData/2019/210407.pdf> (accessed on 15 August 2019).

Through this Act, the status of Jammu and Kashmir was reduced from state to union territory and divided into two parts *Ladakh* and JK as union territories.<sup>80</sup> Article 239-A of the constitution was made applicable to Jammu and Kashmir. This act changed the special status of JK and India had illegally annexed IIOJK as its part.

### **1.7 Constitution of Azad Jammu and Kashmir and Gilgit Baltistan**

The provisional Govt. of Azad Jammu Kashmir was established on 24<sup>th</sup> October 1947. The declaration of Govt. of Azad Jammu and Kashmir was published in the Civil and Military Gazette in October 1947<sup>81</sup>. According to this declaration, this Govt. is non-communal and represents the united will of the people of Jammu and Kashmir. The deceleration of this Govt. clearly says that the basic objective of this Govt. is to provide a base camp for the liberation of the remaining areas of the state. It was also stated that accession of the state shall be decided through a referendum and the Govt. will arrange that. “Azad Jammu and Kashmir Interim Constitution Act, 1974” with 14 amendments so far is the constitution of AJ&K. The preamble of this constitution provides that the future status of the state shall be decided by the people through a plebiscite.

Whereas the future status of the State of Jammu and Kashmir is yet to be determined in accordance with the freely expressed will of the people of the State through the democratic method of free and fair plebiscite under the auspices of the United Nations as envisaged in the UNCIP Resolutions adopted from time to time;

And Whereas a part of the territories of the State of Jammu and Kashmir already liberated by the people are known for the time being as Azad Jammu and Kashmir.<sup>82</sup>

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<sup>80</sup>Constitution of India, Article 3-4 (First Schedule).

<sup>81</sup> Manzoor Hussain Gilani, *The Constitution of Azad Jammu and Kashmir*, 620-621.

<sup>82</sup>Azad Jammu and Kashmir Interim Constitution 1974, Preamble.

Article 31 (3) provides “The Government of Pakistan shall have exclusive power to make laws for any matter enumerated in ‘Part-A’ of the Third Schedule.”<sup>83</sup> and Article 31(4) provides “The Assembly shall, with the consent of Government of Pakistan, make laws concerning any matters enumerated in ‘Part-B’ of the Third Schedule.”<sup>84</sup> Thirty-two subjects including defense, security, external affairs, currency, and foreign trade are under the exclusive jurisdiction of Govt, of Pakistan. The Supreme Court declared that AJ&K is not a constitutional part of Pakistan.<sup>85</sup>

The legal history of GB shows that the Govt, of Pakistan had taken many legislative and administrative measures since 1947. The High Court of AJ&K in 1993 decided that “The Northern Areas (GB) are constitutionally and historically part of AJ&K and the AJ&K Govt. should establish administrative and legal institutions in these areas.”<sup>86</sup> This decision was challenged before the Supreme Court AJ&K(SC) and the court held that “ Although the Northern Areas are the part of the state of Jammu and Kashmir but are not part of Azad Jammu & Kashmir territory”<sup>87</sup> In 1999 Supreme Court of Pakistan in a petition about constitutional status and human rights of the people of GB declared that:

...that Northern Areas were constitutional part of the state of Jammu and Kashmir... that the people of the Northern Areas are citizens of Pakistan for all intent and purposes. The government of Pakistan should ensure that basic human rights and other political and administrative institutions are provided in the areas within six months. However, the action should not adversely affect Pakistan’s stand concerning the Kashmir dispute.<sup>88</sup>

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<sup>83</sup> Azad Jammu and Kashmir Interim Constitution 1974. Article 31(3).

<sup>84</sup> Ibid, article 31(4).

<sup>85</sup> Messrs MASTER FOAM (PVT.) LTD. and 7 others Versus Government of Pakistan through Secretary, Ministry of Finance and others, PLD 2005 SC 373.

<sup>86</sup> Malik Miskeen, *Legal Decisions Azad Kashmir High Court* (Islamabad: Federal Law House, September, 1999).

<sup>87</sup> Federation of Pakistan v Malik Mohammad Miskeen (PLD 1995 SC AJ&K 1)

<sup>88</sup> Al-Jehad Trust & others v Federation of Pakistan and others, 1999 SCMR 1379.

On 28<sup>th</sup> August 2009, “GB Empowerment and Self-Governance Order, 2009” was introduced by the Govt, of Pakistan, the order 92 also provides the link of GB with the Kashmir conflict. “The provision of this order shall not derogate from, or in any manner prejudice, the declared stand of the Government of Pakistan regarding the right of self-determination for the people of Jammu and Kashmir in accordance with the United Nations Resolutions.”<sup>89</sup> The Constitutions of both the areas GB and AJ&K show that Kashmir is a disputed area.

### **1.8 Constitutional Position of Indian Occupied Jammu and Kashmir**

India had changed its stance on the plebiscite and planned to merge IIOJK into the Indian union. For this purpose, rigged elections were held for Jammu and Kashmir Constituent Assembly in 1951.<sup>90</sup> “*All Jammu and Kashmir National Conference (NC)*” was serving as a puppet political party of Dehli, the nomination papers of all other candidates were rejected except NC and they won unopposed.<sup>91</sup> This assembly adopted the constitution on November 17, 1956, and was come into force on 26<sup>th</sup> January 1957. This constitution was providing some special privileges to the people of IIOJK. Article 06 of this constitution defines the permanent residents of the state.<sup>92</sup> On 9<sup>th</sup> August 2019, the status of the state of Jammu and Kashmir was minimized to union territory and through amendments, in the Indian constitution, the identity, constitution, and flag of IIOJK had been snatched. Now there is not any separate constitution of IIOJK and the Indian constitution is applicable in the state. Although the Indian parliament or Govt. had no legal or constitutional right to change or abrogate the constitution of

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<sup>89</sup> GilgitBaltistan Empowerment and Self Governance Order, 2009. Order 92.

<sup>90</sup> B Singh, *Autonomy or Secession Jammu and Kashmir* (India: Har-Anand Publications Pvt Ltd, 2001), 12.

<sup>91</sup> Ibid, 40.

<sup>92</sup> A.S. Anand, *The Development of the Constitution of Jammu and Kashmir* (Lahore: Shirkat Printing Press, 1991), 115.

<sup>93</sup> Ibid, 260.

IIOJK. The constitutional merger and division of IIOJK by the Indian government is a clear violation of all UN resolutions, especially UNSC resolutions No 91 of 1951 and No.122 of 1957. Kashmir is not part of India and is recognized as a disputed territory by the UN the shifting of the Indian population in Kashmir, and changing the status and demography is a clear violation of international law.

## **1.9 National Liberation Movement or Terrorism**

A national liberation movement is a very old phenomenon and is even applicable today. After 9/11 the dynamics of world politics had changed and the concept of terrorism had got importance even in international law. The national liberation movement has been defined by different scholars according to their comprehension but not a single comprehensive definition. Based on different definitions Richard J. Tyner identified four components of wars of national liberation, which are,

- (1) a nation which feels itself to be culturally or ethnically distinct from the occupiers, colonizers, puppet regime or other nationality that dominates the state structure(s) in which the nation resides;
- (2) the impossibility of access to, or the unwillingness to utilize, democratic/political means to redress grievances which flow from the perception of national separation;
- (3) the willingness to resort to guerrilla warfare to achieve separate nationhood-  
-a willingness which presupposes the availability of arms, the organization of guerrilla forces, and support among the people of the nation to be liberated;  
and
- (4) some degree of external support—whether the support be manifested by international propaganda, the training of cadres abroad, money and arms received from friendly states and organizations, or neighboring states which (through design or impotence) provide sanctuaries.<sup>94</sup>

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<sup>94</sup>Tyner, Richard J. "Wars of National Liberation in Africa and Palestine: Self-Determination for Peoples or for Territories." *Yale Stud. World Pub. Ord.* 5 (1978): 234.

Every occupier is trying to defame national liberation movements with terrorism. National liberation movements adopt political struggle or armed struggle or both to achieve their right to self-determination. People had started national liberation movements against foreign occupation, colonial or alien domination, and racist regimes. The people under foreign occupation had a right to struggle for freedom. Article 20(2) of the “African Charter on Human and People Rights (ACHPR)” recognizes that all oppressed and colonial people have a right to freedom from oppression.<sup>95</sup> The right to resist occupation is also acknowledged by the “Arab Charter on Human Rights”.<sup>96</sup> “UNGA’s Declaration on Friendly Relations of 1970” states have to refrain from taking any forcible action to deprive the people of the right to self-determination. Such people may seek support for achieving their rights and they can resist.<sup>97</sup> The United Nations General Assembly (UNGA) had defined aggression in 1974 through resolution No. 3314 of 1974 and Article 7 of this resolution provides,

Nothing in this Definition, and in particular Article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to [in Resolution 2625], particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support.<sup>98</sup>

UNGA adopted another resolution that declares that fighting for the right to self-determination is the basic right of the people. UNGA Res. No 2787 states,

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<sup>95</sup> Umozurike, U. Oji. "The African charter on human and peoples' rights." *American Journal of International Law* 77, no. 4 (1983): 902-912.

<sup>96</sup> Mattar, Mohamed Y. "Article 43 of the Arab charter on human rights: reconciling national, regional, and international standards." *Harv. Hum. Rts. J.* 26 (2013): 91.

<sup>97</sup> UN General Assembly, *Declaration of 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 (XXV) of 24 October 1970.

<sup>98</sup> Dr. Muhammad Mushtaq Ahmad, *Jihad, Muzahmataur Baghawat: Islami Shariataur Bain-ul-Aqwami Qanoon ki Roushni Main 3<sup>rd</sup> edition* (Gujranwala: Sharia Academy, 2016), 544.

2. Affirms man's basic human right to fight for the self-determination of his people under colonial and foreign domination;
3. Calls upon all States dedicated to the ideals of freedom and peace to give all their political, moral, and material assistance to peoples struggling for liberation, self-determination, and independence against colonial and alien domination ...<sup>99</sup>

UNGA Res.No 3103 states that to achieve the right to self-determination it is the inherent right of people to struggle through all necessary means.<sup>100</sup> Article 1(4) of Additional Protocol I of the Geneva Conventions describes that this protocol shall also apply to the armed conflicts in which peoples are fighting against colonial domination, alien occupation, and racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States under the Charter of the United Nations.<sup>101</sup>

Article 96 of this protocol also considers people to engage in the liberation movement as a party to this protocol as well as the Geneva Convention. The armed struggle of the people of South Africa and Namibia against the apartheid regime was commended by UNGA<sup>102</sup>. In Southern Rhodesia and Namibia, the national liberation movements were waging an armed struggle for the right to self-determination, which was recognized by UNSC.<sup>103</sup> A War of national liberation could be an armed struggle with some

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<sup>99</sup>“ UN General Assembly, *Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights*, G.A.Res.2787 (XXVI), U.N. Doc.A/ RES/ 2787 (XXXVI) (1971).

<sup>100</sup> UN General Assembly, *Basic Principles of the Legal Status of the Combatants Struggling against Colonial and Alien Domination and Racist Regimes*, G.A. Res. 3103 (XXVIII), U.N. Doc. A/ RES/ 3103 (XXVIII) (1973).

<sup>101</sup>Arnold Krammer, *War Crimes, Genocide, and the Law: A Guide to the Issues* (California:PRAEGER,2010),227.

<sup>102</sup>Question of Namibia, G.A. Res. 34/ 92, U.N.Doc. A/ RES/ 34/ 92 (1979), section G; Question of Namibia. G.A.Res. 35/ 227, U.N. Doc.A/ RES/ 35/ 227 (1981), preamble; Policies of Apartheid of the Government of South Africa, G.A.Res.36/ 172, U.N. Doc.A/ RES/ 36/ 172 (1981), sec.A, para. 13

<sup>103</sup>Security Council Resolution 269, U.N. Doc. S/ RES/ 269 1969, para 4; Resolution 301, U.N.Doc. S/ RES/ 301 (1971), preamble Resolution 403, U.N. Doc. S/ RES/ 403 (1977),

restrictions and regulations under international law. According to Ronzitti, "A war of national liberation has been described as the armed struggle waged by a people through its liberation movement against the established government to reach self-determination."<sup>104</sup> Armed struggle is legitimate against the forceful denial of the right to self-determination. Pangalangan considers, that "the use of armed force to deny a people of their right to self-determination is an act of aggression and entitles the party thus aggrieved to legitimately resort to armed means to resist such forcible denial of their right to self-determination."<sup>105</sup>

Terrorism is an old phenomenon but after the end of the cold war, some countries tried to defame the liberation movements with terrorism. After 9/11 the world is trying to reach a consensus about the comprehensive convention on Terrorism. In 2004 UNSC defined terrorism as:-

Criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a Government or an international organization to do or to abstain from doing any act.<sup>106</sup>

The definition shows that the basic intent of terrorism is to provoke a state of terror. There is a clear distinction between the freedom struggle and terrorism and it is proved legally that the freedom struggle of Kashmiris is for the right to self-determination. Before 1947 Jammu and Kashmir was a princely state, it was never being a part of

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preamble; Resolution 445, U.N. Doc. S/ RES/ 445 (1979), preamble; Resolution 448, U.N. Doc. S/ RES/ 448(1979), preamble.

<sup>104</sup>Ronzitti, N., *Resort to Force in Wars of National Liberation in Cassese (ed.) Current Legal Problems of International Law and the Law of Armed Conflict* (Milan: Dott. A. Guiffre, 1975), 321.

<sup>105</sup>Pangalangan, Raul C., and Elizabeth H. Augiling. "The Privileged Status of National Liberation Movements under International Law." *Phil. LJ* 58 (1983): 44.

<sup>106</sup> UN Security Council Resolution , *threats to International Peace and Security caused by Terrorist Acts*, UNSC Res.1566(2004) dated October 08,2004.

India. Even during British rule, it has direct relations with the British Govt. At the time of the partition of the sub-continent, it was a princely state and people were fighting against the *Dogra* ruler. Indian claim of accession was not recognized by the UN and the international community except India recognizes Kashmir as a disputed territory. The presence of Indian troops in Kashmir and the annexation of disputed territory is an occupation. The people of Kashmir had never accepted the occupation and from the very first day, they are struggling against the occupation. The peaceful struggle was converted into armed resistance in 1989, due to suppression by Indian forces. Many reports were published by international organizations about the human rights situation in IIOJK, but no one had indicated that freedom fighters are targeting the civilian population or non-combatants. These freedom fighters are targeting the military and its camps. Antonio Cassese, Professor of International law elaborated as:

Attacks by freedom fighters and other combatants in armed conflict, if directed at military personnel and objectives in keeping with IHL, are lawful and may not be termed terrorism. If instead, they target civilians, they amount to terrorist acts (not, therefore, to war crimes) if their purpose is to terrorize civilians.<sup>107</sup>

According to these criteria, the people involved in the armed struggle in Kashmir are freedom fighters, not terrorists. Initially, the people of IIOJK were struggling peacefully but due to the use of excessive force by India to suppress this movement besides political struggle, armed struggle was also started. “*Muttahida Jihad Council (MJC)*”<sup>108</sup> is a forum of all groups involved in armed struggle, whereas on the political front “ All parties *Hurriyat Conference (APHC)*”<sup>109</sup> a forum of political parties were established.

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<sup>107</sup> Antonio Cassese, “The multifaceted criminal notion of terrorism in international law.” *Journal of International Criminal Justice* 4, no. 5 (2006): 933-958.

<sup>108</sup> United Jihad Council was established in 1990, alliance of 15 organizations involved in armed struggle.

<sup>109</sup> APHC was established on 09 March 1993. <http://www.hurriyatconference.com/>

There are many similarities between Kashmir and Palestine, both are occupied areas and the people of both nations are struggling for the right to self-determination and resisting illegal occupation. Through UNGA Res. 3210 “The *Palestine Liberation Organization*( PLO)”<sup>110</sup> was invited as observer in UN, “The General Assembly, Considering that the Palestinian people is the principal party to the question of Palestine, invites the Palestine Liberation Organization, the representative of the Palestinian people, to participate in the deliberations of the General Assembly on the question of Palestine in plenary meetings.”<sup>111</sup>

Like PLO in Kashmir, the All Parties Hurriyat Conference (APHC) is also an alliance of different political organizations that are working against Indian occupation in Kashmir. Like Israel, India is also a foreign occupier in Kashmir. The armed struggle, as well as the political struggle of the people of Kashmir, is for the right to self-determination.

### **1.10 Kashmir as an International Armed Conflict**

This is a legal debate that whether Kashmir is an international armed conflict or an internal armed conflict. Common Article 2 to four Geneva Conventions and Article 4 of AP-I of Geneva Conventions define and elaborate on the international armed conflict as:

the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or

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<sup>110</sup> PLO was established in 1964 to centralize the leadership of various Palestinian groups previously had operated as clandestine resistance movements. It came into prominence only after the Six-Day War of June 1967, however, and engaged in a protracted guerrilla war against Israel during the 1960s, '70s, and '80s before entering into peace negotiations with that country in the 1990s.

<sup>111</sup> UN General Assembly, *Invitation to the Palestine Liberation Organization*, Res. 3210(XXIX), 29 GAOR (1974) Supplement No. 31, (A/9631) at p. 3.

total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.<sup>112</sup>

Wars of national liberation or people struggling for the right to self-determination are also international armed conflicts:

The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.<sup>113</sup>

According to above mentioned two definitions, Kashmir conflict has two different dimensions. First, it is a conflict between India and Pakistan and second, it is the struggle for the right to self-determination of the people of Kashmir. Initially, Pakistan and India were two parties but now it is a conflict between three nuclear states Pakistan, India, and China. China is controlling Aksai Chan after the Sino- India war of 1962 and the *Shiksgam* Tract through the Sino-Pak agreement of 1963.<sup>114</sup> Armed forces of these three countries are present on contested de facto borders and the violations, killing and human suffering are everyday routine. Pakistan and India fought three full-scale wars although recently there is no full-fledged war, there continues to be an international armed conflict between the two countries. Although the intensity of the violence has been fluctuating, since 2013 regular border skirmishes have continued and increased. Pakistan confirmed that in 2020, the Indian forces have carried out above 3,000

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<sup>112</sup> Article 2 common to the four Geneva Conventions of 1949.

<sup>113</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

<sup>114</sup> Rongxing Guo, *Avoiding War, Territorial Disputes and Conflict Management: The Art of Avoiding War* (Routledge, 2011), 65.

ceasefire violations resulting in 27 deaths and serious injuries to 250 innocent civilians<sup>115</sup> whereas the Indian Govt. claimed "A total of 5,601 instances of ceasefire violations were reported along the LoC under the operational control of Indian Army in Jammu and Kashmir from November 30, 2019, to November 29, 2021."<sup>116</sup> Due to ceasefire violations, many civilians in AJ & K and army personnel on both sides of LoC were killed. The ICTY in the case *Prosecutor v. Tadic*<sup>117</sup> determined, that "even minor instances of armed violence, such as an individual border incident or capture of a single prisoner, may suffice to cross the threshold for IHL to apply."

Geneva Convention declares that IHL applies in international armed conflict "to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."<sup>118</sup> In this context, it is an international armed conflict. It is also an international armed conflict because people in Kashmir are struggling against foreign occupation. UNGA Res.3103 of 12<sup>th</sup> December 1973 provides:

The armed conflicts involving the struggle of peoples against colonial and racial domination and racist regimes are to be regarded as international armed conflicts in the sense of 1949 Geneva Conventions and their legal status envisaged to apply to the combatants in the 1949 Geneva Conventions and other international instruments are to apply to the persons engaged in armed struggle against colonial and alien domination and racist regimes.<sup>119</sup>

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<sup>115</sup> Govt. of Pakistan "LoC saw 'over 3,000 ceasefire violations' by India in 2019" , Daily Times, 02 January 2020, <https://dailytimes.com.pk/531119/loc-saw-over-3000-ceasefire-violations-by-india-in-2019/> (Accessed on 17 January 2021)

<sup>116</sup> Govt. of India "5,601 incidents of ceasefire violations reported along LoC in last two years", *The Economic Times* , 20 December 2020, [https://economictimes .indiatimes.com /topic /ceasefire-violations ,accessed on 17 January 2021](https://economictimes.indiatimes.com /topic /ceasefire-violations ,accessed on 17 January 2021)).

<sup>117</sup> ICTY, *Prosecutor v. Tadic*, 1995:para. 70.

<sup>118</sup> GC I-IV, Art. 2(1).

<sup>119</sup> Wild.Verwey, "The International Hostages Convention and National Liberation Movements", *The American Society of International Law, The American Journal International Law*, January 1981;75 A.J.I.L.69.

War of national liberation is defined as “the armed struggle waged by a people through its liberation movement against the established government to reach self-determination.”<sup>120</sup> The struggle in IIOJK is a war of national liberation against the illegal occupation and annexation by India. In Additional Protocol 1 of the Geneva Convention, the war of national liberation is considered an international armed conflict.<sup>121</sup> This protocol also extends the definition of combatant and includes freedom fighters in the definition of prisoner of war. In some unavoidable circumstances, combatants can also participate in a war without a uniform. Hence the guerilla war got legal backing.

In addition to these generally applicable prescriptions, international humanitarian law treaties contain certain provisions specifically addressing the issue of humane treatment. Article 3 Common to the Four 1949 Geneva Conventions provides a general right to humane treatment, applicable in all armed conflicts. The resistance movement in occupied or colonial territories against foreign occupation could not be treated as an internal issue of state or non-international conflict. The armed struggle of the people whose right to independence is recognized by the UNSC is called international armed conflict. In all contexts Kashmir conflict is an international armed conflict, hence Geneva convention IV and AP-I are applicable in this conflict.

### **1.11 Kashmir Conflict is Bilateral or International**

An important question related to the Kashmir conflict is whether it is an international issue or a bilateral issue between India and Pakistan. India claims that due to the *Simla* agreement Kashmir conflict is bilateral. The Indian claim of bilateralism is not

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<sup>120</sup> Natalino Ronzitti, *Resort to Force in Wars of National Liberation*, in 60 *Current Problems of International Law, Essays on U.N. Law and on the Law of Armed Conflict*, 319-353 (Antonio Cassese, ed., Dott. A. Guiffre Editore, 1975).

<sup>121</sup> Additional Protocol 1, Geneva Convention, Article 2 (4).

according to international law; even though it was never decided in bilateral agreements between India and Pakistan. At the time of partition, Kashmir was a princely state and it had not acceded to India or Pakistan before 15<sup>th</sup> August 1947. The ruler of Kashmir *Maharaja Hari Singh* had offered a standstill agreement to both India and Pakistan and Pakistan accepted this on 15<sup>th</sup> August 1947.<sup>122</sup> According to the scheme of partition the states have to sign the IOAs or agreements before the 15<sup>th</sup> of August. Before 15<sup>th</sup> August *Hari Singh* was *de Jure* ruler of the state and he had powers to accede to or sign agreements. Article 07 of the Indian Independence Act of 1947 clearly states that the treaties between the rulers and British Govt. will be ended on 15<sup>th</sup> August. The article provides

7.--(1) As from the appointed day- (a) His Majesty's Government in the United Kingdom have no responsibility as respects the government of any of the territories which, immediately before that day, were included in British India ; (b) the suzerainty of His Majesty over the Indian States lapses, and with it, all treaties and agreements in force at the date of the passing of this Act between His Majesty and the rulers of Indian States, all functions exercisable by His Majesty at that date with respect to Indian States, all obligations of His Majesty existing at that date towards Indian States or the rulers thereof, and all powers, rights, authority or jurisdiction exercisable by His Majesty at that date in or in relation to Indian States by treaty, grant, usage, sufferance or otherwise , and (c) there lapse also any treaties or agreements in force at the date of the passing of this Act between His Majesty and any persons having authority in the tribal areas, any obligations of His Majesty existing at that date to any such persons or with respect to the tribal areas, and all powers, rights, authority or jurisdiction exercisable at that date by His Majesty in or in relation to the tribal areas by treaty, grant, usage, sufferance or otherwise.<sup>123</sup>

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<sup>122</sup> Evans Gareth, *The Responsibility to Protect: Ending Mass Atrocity Crimes once and for all* (Washington DC: Brookings, 2008),52.

<sup>123</sup> Indian Independence Act, 1947,art.7.

The Maharaja was the ruler of Kashmir because of the treaty of Amritsar, which he had signed with the British Govt. in 1846. The British paramountcy had lapsed as well as agreements were ended on 15<sup>th</sup> of August. Due to the popular freedom struggle, a major portion of the state was liberated. The *Maharaja* fled from its capital and he was not *de facto* ruler on 27 October 1947. The Maharaja had lost his legal capacity to sign an instrument of accession with India. India also approached the United Nations and UN resolutions clearly stating that Kashmir is a disputed territory. The Maps issued by the UN clearly show the disputed nature of the state, the map of areas of Jammu and Kashmir in Map -1.

Indian claim that through the *Simla* agreement Kashmir is a bilateral issue between India and Pakistan is not correct in the context of the text of the agreement as well as UN charter and international law. The initial paragraph of this agreement shows that the purposes and principles of the UN charter shall govern the relations between India and Pakistan, "That the principles and purposes of the Charter of the United Nations shall govern the relationship between the countries....that in accordance with the Charter of the United Nations, they will refrain from the threat or use of force against the territorial integrity or political independence of each other."<sup>124</sup>

The Charter of the UN is clear about the right to self-determination of the people. UN resolutions say that the future status of the people of Kashmir shall be decided through the will of the people. Hence the people of Kashmir are also the principal party of this conflict. This principal party could not be bound through any bilateral agreement between India and Pakistan. Article 103 of the UN charter says, "In the event of a conflict between the obligations of the Members of the United Nations under the present

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<sup>124</sup>Simla Agreement of 3<sup>rd</sup> July 1972.

Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”<sup>125</sup>

According to this article, any bilateral agreement between Pakistan and India could not deprive the people of Kashmir of their RSD and cannot supersede international obligations and UN resolutions. The presence of UNMOGIP on both sides of the line of control also shows that it is a disputed territory and international conflict. The mandate of this group is to observe ceasefire violations on LoC.<sup>126</sup> ICJ in the Western Sahara Case observed that the right to self-determination is the right of people rather than of governments alone.<sup>127</sup>

## 1.12 Territorial Integrity and Kashmir Movement

Before discussing the right to self-determination (RSD) and territorial integrity, it is necessary to discuss the concept of ‘peoples’, because RSD is the right of people, not the states. The concept of popular sovereignty was the transfer of powers to people from the monarch. The modern form of self-determination of people became significant from the revolutions of America, French, and Bolshevik.<sup>128</sup> A comprehensive definition of “people” was provided by UNESCO in 1989, which is also called the Justice Kirby definition.

a ‘people’ is a group of individual human beings who enjoy some or all of the following common features, a common historical tradition, a racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection and common economic life.<sup>129</sup>

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<sup>125</sup> Charter of United Nations, art.103.

<sup>126</sup> UNMOGIP, <https://unmogip.unmissions.org/mandate>, (accessed on September 05, 2019).

<sup>127</sup> *Western Sahara*, Advisory Opinion, I.C.J. Rep. 1975(Oct.16), p. 61.

<sup>128</sup> B Wells, *United Nations Decisions on Self-Determination* (New York University, 1963), 1-14.

<sup>129</sup> UNESCO, International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, Paris, 1989 [2], SHS.89/CONF.602/7, <http://unesdoc.unesco.org/images/0008/000851/085152Eo.pdf> (accessed on September 05, 2019).

To clarify the concept of people experts of UNESCO further added that: “the group must be of a certain number which need not be large...but which must be more than a mere association of individuals within a state; ....”<sup>130</sup> To define people there are two theories of self- determination, Koskenniemi describes them as romantic and classical theories.<sup>131</sup>

According to romantic theory, a cultural group having a common language and history is identified as people on the other hand classical theory identifies people within the territorial framework. In the specific case of the people of Kashmir, both theories are applicable. Dr. Fozia Nazir Lone concluded this applicability as,

Kashmiris can utilise both of these theories to describe them as people and become the legal aspirants of self-determination. Utilising the classical theory, Kashmiris at the time of decolonisation could be identified as a population which had a right to determine its future within the territorial limits. On the other hand, in employing the romantic theory, Kashmiris can rely on their ethnicity of *Kashmiriyat* to recognise them as a people, which has given them a sense of belonging to a specific group that has a common history and culture.<sup>132</sup>

The RSD is the right of people to choose their future status. It could be defined as, “the right of all peoples to determine their political future and freely pursue their economic, social, and cultural rights. This is reflected through independence as well as local self-government and autonomy and integration, association, or some other forms of participation in government, all working externally and internally to ensure democratic governance.”<sup>133</sup>

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<sup>130</sup> UNESCO , International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, Paris, 1989 [2],SHS.89/CONF.602/7.

<sup>131</sup> M Koskenniemi “National Self-Determination Today: Problems of Legal Theory and Practice” (1994) 43 *ICLQ* 249.

<sup>132</sup> Dr. Fozia Nazir Lone, “The Creation Story of Kashmiri People: The Right to Self-Determination” *Denning Law Journal*, Vol 21: 1-25, on September 08, 2019).

<sup>133</sup> A. A. Idowu, “Revisiting the Right to Self-Determination in Modern International Law: Implications for African States”, *European Journal of Social Sciences* (2008) Vol. 6, No. 4.

The right to self-determination is a basic principle in international law whereas the concept of territorial integrity is also a basic principle of international law. Article 2(4) of the UN charter says that “all members shall respect the territorial integrity of other states and will not use force against the political independence of any state inconsistent with the purpose of UN.”<sup>134</sup>

The principle of RSD was used in different contexts. This concept could be traced back to the Declaration of Independence of the US, and the French Revolution. In the decolonization context, it was initially used in the independence war of the US, in the revolution context, the French revolution, the unification of Italy, and Germany is the starting of irredentism and the division of Austro-Hungarian and Ottoman empires is the starting of autonomism and secessionism. In 1918-19, Vladimir Lenin and Woodrow Wilson projected this concept, although their concept was not universal and they were talking about some specific contexts. Lenin was advancing violent succession to liberate people whereas Wilson’s approach was based on the free will of people.<sup>135</sup> US President Roosevelt and British Prime Minister Churchill introduced this concept in eight common principles of the Atlantic Charter.<sup>136</sup> According to Article 1(2) of the UN charter, one of the purposes of the establishment of this organization is to develop friendly relations among the nations based on respect for self-determination, and Article 55 says that peaceful relations among states shall be promoted on respect to RSD of people, reproduced as.

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect

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<sup>134</sup> United Nations Charter, art.2(4).

<sup>135</sup> Michael J. Kelly, Pulling at the Thread of Westphalia: “Involuntary Sovereignty Waiver”? Revolutionary International Legal Theory or Return to Rule by the Great Powers?” *10 UCLAJ.INT’L.& for.AFF* 387-88(2005).

<sup>136</sup> The Atlantic Charter, <https://www.un.org/en/sections/history-united-nations-charter/1941-atlantic-charter/index.html> (Accessed on 03-01-2020).

for the principle of equal rights and self-determination of peoples, the United Nations shall promote:.....universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.<sup>137</sup>

In this era from 1946 to 1960 thirty-seven nations had got independence.<sup>138</sup> In 1960, the UNGA, adopted resolution No. 1514, a declaration granting independence to colonial countries, which provides a legal linkage between the right to self-determination and decolonization.<sup>139</sup> This whole debate was most specific to the colonial context, but in 1966 the UN extended this concept to all the nations. Two international covenants, International Covenant on Civil and Political Rights and International Covenant on Economic, Social, and Cultural Rights were adopted by UNGA resolutions. Common Article 01 of both the covenants is about RSD. This article says, "All peoples have the RSD, by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."<sup>140</sup> UNGA adopted Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among the States in 1970 through Resolution No.2625, which bounds the nation to respect the right to self-determination of the people and also acknowledges the right of people to determine their future freely.<sup>141</sup>

The UNGA also adopted the "Declaration on the Rights of Indigenous People in 2007", which also stresses the right to self-determination of the indigenous people.

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<sup>137</sup>United Nations Charter, 1945.

<sup>138</sup> Decolonization of Asia and Africa, 1945-1960, State Department Govt. of USA, <https://2001-2009.state.gov/r/pa/ho/time/cwr/98782.htm>

<sup>139</sup> UN General Assembly, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, 14 December 1960, A/RES/1514(XV).

<sup>140</sup> International Covenant on Civil and Political Right and International Covenant on Economic, social and Cultural Rights.

<sup>141</sup>UN General Assembly Resolution 2625 (XXV), *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* A/Res/25/2625 (1970)

Although the whole declaration is very important about the rights of Indigenous people, however, Articles 3, 4, and 5 are very important, which reads as follows:

Indigenous 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.

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.<sup>142</sup>

Many other regional and international conventions also provide the right to self-determination to nations. International Court of Justice in the Western Sahara Case<sup>143</sup> and Eastern Timor Case<sup>144</sup> had confirmed that the right to self-determination is *erga omnes*.<sup>145</sup> The right to self-determination outside the context of colonialism was recognized in the walls case by ICJ in 2004.<sup>146</sup> International law considers these rights as the mothers of all human rights and without granting this right to the people all other rights are useless.

There are two types of right to self-determination: external and internal. The internal right to self-determination is limited to the boundaries of the state, it could be defined as, the “right of all the people in decision making of the state”<sup>147</sup>, whereas the external

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<sup>142</sup>United Nations Declaration on the Rights of Indigenous People, 2007.

<sup>143</sup> (1975) I.C.J. Rep.12

<sup>144</sup>(1995) I.C.J. Rep. 90.

<sup>145</sup> In relation to everyone

<sup>146</sup>*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion I.C.J. Rep. 2004 (July9).

<sup>147</sup> David Raic, *Statehood and the Law of Self-Determination* (Kluwer Law International 2002) 237.

right to self-determination is defined as, “the right of all peoples to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination, and exploitation.”<sup>148</sup>

This right depends upon the will and wishes of the people and their democratic right of the plebiscite. Initially, this concept was part of the decolonization phase and UNGA’S resolution of 1960 elaborate it as a delocalization process that could result in the formation of a new state, association, or integration with the existing state.<sup>149</sup> In another resolution of UNGA of 1970, it was elaborated as, “The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitutes modes of implementing the right of self-determination by that people.”<sup>150</sup>

### **1.13 Concept of Sovereignty and Territorial Integrity.**

The concept of territorial integrity and respect for sovereignty is present in the UN charter. It is linked to political independence and the charter of the UN. Through this concept, states are protected from force or any kind of intervention by other states. The Helsinki Final Act<sup>151</sup> refrains the states to use force or threats against the territorial integrity of other states and political independence.<sup>152</sup> The ICJ in many cases declared that the concept of territorial integrity and sovereignty are important principles of

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<sup>148</sup>United Nations Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation XXI on the right to self-determination*, Forty-eighth session, 1996. (accessed on 02-01-2020).

<sup>149</sup>UN G.A. Res. 1541 (XV).

<sup>150</sup>UN G.A. Res. 2625 (XXV) A/RES/2625 (XXV) ,24<sup>th</sup> October 1970.

<sup>151</sup>The Helsinki Final Act ,<https://www.osce.org/files/f/documents/5/c/39501.pdf> (accessed on June 19,2020).

<sup>152</sup>Malcolm Nathan Shaw, *International law* (Cambridge: Cambridge University Press, 2003) , 440-44.

international law.<sup>153</sup> Article 21 of the charter of the Organization of American States (OAS) states,

The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized.<sup>154</sup>

After 9/11 this concept has been changed to some extent. The forceful intervention in Afghanistan, Libya, and Iraq changed this concept. The concept of territorial integrity does not apply in the case of Kashmir, because it is recognized as a disputed territory by the UN. Soon after the occupation, India was claiming that it is a temporary arrangement to maintain law and order and that the future status of the state will be decided by the people. UN also considers Kashmir a disputed territory. Prolonged occupation could not entitle permanent sovereignty to the occupying state. Moreover, the line of control dividing Kashmir is not a permanent border. India's actions also prove that the state of J&K whether it is administrated by Pakistan or occupied by India is one geographical unit. In 2005 Confidence Building Measures (CBMs) between India and Pakistan were taken and people from both parts were travelling to the other side with permits instead of visas.<sup>155</sup>

### 1.14 Remedial Secession and Kashmir Conflict

Secession is defined by Marcelo Kohen as, "the creation of a new independent entity through the separation of part of the territory and population of an existing State,

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<sup>153</sup> *Corfu Channel (United Kingdom v. Albania, Merits, Judgment*, I.C.J. Rep.1949(April 9), p. 35.

<sup>154</sup> Charter Of The Organization Of American States, OAS, [http://www.oas.org/en/sla/dil/inter-american\\_treaties\\_A-41\\_charter\\_OAS.asp](http://www.oas.org/en/sla/dil/inter-american_treaties_A-41_charter_OAS.asp). (accessed on 30<sup>th</sup> January 2020).

<sup>155</sup> A.G. Noorani, "Trading in Kashmir", *Dawn* 14 February 2009. Opinion.

without the consent of the latter.”<sup>156</sup> The remedial secession of the state had been recognized by ICJ in Western Sahara Case.<sup>157</sup> The right to secession or independence was initially limited to colonial domination or oppression but in modern days non-colonial people could succeed an existing state, “when the group is collectively denied civil and political rights and subject to egregious abuses.”<sup>158</sup>

The remedial right of secession through self-determination is exercised in case of consistent denial of human rights in the form of genocide or crimes against humanity against the indigenous people's gross and systematic human rights violations.<sup>159</sup> Declaration on Principles of international law adopted by UNGA also authorizes the non-colonial people to separate from the existing state on denial of democratic self-government.<sup>160</sup> “Vienna Declaration of the World Conference on Human Rights 1993”, which was accepted by all UN member states, also advances the concept of remedial secession.<sup>161</sup> This right of remedial secession was exercised by Eritrea, Kosovo, East Timor, and Bangladesh and validated by the international community.

### **1.15 Right to Self-determination of People of Jammu and Kashmir in International Law**

The right to self-determination of the people of Jammu and Kashmir is protected in international law in different mechanisms. Being indigenous people, disputed territory, occupation, suppression, gross human rights violations, and humanitarian grounds they

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<sup>156</sup> Marcelo G Kohen, *Introduction in Marcelo G Kohen, ed. Secession: International Law Perspectives* (New York: Cambridge University Press, 2006), 1-3.

<sup>157</sup> *Western Sahara Case*, Advisory Opinion I.C.J., Rep. 1975(Oct.16), p. 20.

<sup>158</sup> Michael P. Scharaf, “Earned Sovereignty: Judicial Underpinnings”, 31 *DENV. J. INT’L L. & POL’Y*, 381(2005).

<sup>159</sup> S. James Anaya, *Self-Determination as a Collective Human Right Under Contemporary International Law*, in *Operationalizing The Right Of Indigenous Peoples to Self Determination* (Pekka Aikio & Martin Scheinin eds., 2000).

<sup>160</sup> UN G.A. Res. 2625, UN GAOR, 25th Sess., Supp. No. 28, at 121, UN Doc. A/8028 (1970).

<sup>161</sup> *Vienna Declaration and Programme of Action, World Conference on Human Rights*, para.2, UN doc. A/CONF.157/23 (1993).

are entitled to the right to self-determination. Besides international law, UN resolutions on Kashmir and Indian commitments are also providing this legal right to the people of Jammu and Kashmir.

Jammu and Kashmir had a very old history. It has distinct cultures, traditions, and socio-cultural identities. The ancient history of Kashmir is the history of invaders, missionaries, kings, and sacrifices. In 1354 King *Shahab-ud Din* established an independent government of Kashmir.<sup>162</sup> The areas of Kashmir, Jammu, Ladakh, and Baltistan were under his sovereignty. There is not any uniform definition of indigenous people, however, the definition by Martinez Cobo the Special Rapporteur on Discrimination against Indigenous People is very comprehensive, which states:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the Societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.<sup>163</sup>

According to this definition, the People of Jammu and Kashmir were organized in the form of a society, having its government, and political, social, cultural, and economic identity. People of Jammu and Kashmir are still considering themselves as having an ethnic identity. The *Kashmiriyat*<sup>164</sup> is a common identity of all the people of Kashmir whether they are living in Kashmir or any other country. Article 03 of The United

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<sup>162</sup> Victoria Schofield, *Kashmir in the Crossfire* (London: I.B. Tauris & Co. Ltd, 1996), 16.

<sup>163</sup> UN Economic and Social Council Res. 1589 (L), May 21, 1971).

<sup>164</sup> The special cultural bond unites the people of Kashmir. the ethos of *Kashmiriyat* is a thirteenth century principle that was spawned due to religious activities of the Shaivites and Sufis in Kashmir.

Nations Declaration on Rights of Indigenous people adopted in 2007, recognizes the right to self-determination, “Indigenous peoples have the right to self-determination. Under that right, they freely determine their political status and freely pursue their economic, social, and cultural development.”<sup>165</sup> The people of Jammu and Kashmir are entitled to the right to self-determination being indigenous people.

UN resolutions on Kashmir had been discussed in detail in section 02 of this chapter. India is claiming that the resolutions on Kashmir had been passed under Ch.VI of the UN charter; hence they are non-binding, which is baseless. The UN Charter provides the dispute resolution mechanism in different stages; it does not mean that if all the mechanisms provided in Ch-VI will be exhausted then there is no other way. According to the UN Charter, it is necessary to invoke UN intervention under Ch. VI is the first stage. Article 33(1) is very much clear about this and states,

33(1). The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, **first of all**, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.<sup>166</sup> (*Emphasis added*).

The stressed word ‘first of all’ in the article shows that it is the initial procedure to settle a conflict. In Kashmir conflict to settle the dispute through mediation, negotiations, and other peaceful means United Nations Commission for India and Pakistan was established which passed two important resolutions as well as appointed mediators. All the peaceful mean had been exercised but the issue is still unresolved, now it is the responsibility of the UN to take action according to chapter VII. Article 25 of the UN charter imposes a responsibility to members to accept and implement the decisions of

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<sup>165</sup>UN Declaration on the Rights of Indigenous Peoples, 2007.[http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) (accessed 2nd February 2020)

<sup>166</sup> UN Charter, article 33(1).

the UNSC. The article provides, “The members of the United Nations agree to accept and carry out the decisions of the Security Council under the present Charter.”<sup>167</sup>

It does not provide any distinction among the chapters of the charter. If for sake of argument we believe in the authenticity of the accession of state with India, the letter written by Lord Mountbatten the Governor-General of India in reply to the letter of accession by *Hari Singh* is also self-explanatory about the future status of Kashmir,

Consistent with the policy that in the case of any (native) state where the issue of accession has been subject of dispute, the question of accession should be decided in accordance with the wishes of the people of the state, it is my government's wish that as soon as law and order have been restored in Kashmir and her soil cleared of the invaders the question of state's accession should be settled by a reference to the people.<sup>168</sup>

Prime Minister of India P.J.L Nehru in many of his speeches, letters, and talks reiterated this claim of the plebiscite. On 2<sup>nd</sup> November 1947 in his All India Radio broadcast, he said:-

We have declared that the fate of Kashmir is ultimately to be decided by the people. That pledge we have given, and the Maharajah has supported it, not only to the people of Jammu and Kashmir, but also to the world. We will not and cannot back out of it. We are prepared when peace and law have been established to have a referendum held under international auspices like the United Nations. We want it to be a fair and just reference to the people and we shall accept their verdict.<sup>169</sup>

Another important aspect of this conflict is it is the case of the right to self-determination, which had been declared as *Jus Cogens* by the ICJ in the Nicaragua

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<sup>167</sup>Ijaz Hussain, *Kashmir Dispute: An International Law Perspective* (Islamabad: Quaid-I-Azam University, 1998), 182.

<sup>168</sup> *Supra* N. 18, 165.

<sup>169</sup> P. L. Lakhanpal, *Essential Documents and Notes on the Kashmir Dispute* (New Delhi: Council on World Affairs, 1965), 57.

Case.<sup>170</sup> *Jus Cogens* are peremptory norms of international law, which could not be snatched even through any multilateral or bilateral agreement. Article 53 of the “Vienna Convention on the Law of Treaties, 1969” clearly states:-

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.<sup>171</sup>

The right to self-determination of the people of Jammu and Kashmir could not be bound by any of the bilateral agreements between India and Pakistan.

## **Conclusion**

The state of Jammu and Kashmir had a very old history, and the people are indigenous people as per the criteria laid down by international law. This state was never part of India and after the end of colonialism in the Sub-continent, the colonial powers failed to decide the political status of this state. The history of the struggle for the right to self-determination could be traced back to the early nineteenth century and which is continued up to now. Indian occupation of the IIOJK is illegal and against the will and wishes of the people of Kashmir. It is an international armed conflict and the resistance movement in IIOJK is against the occupation. The people of Kashmir liberated a considerable part of the state and established the government of the base camp, which is representing the whole state. The people of Kashmir are the necessary party to this conflict because their future status has to be decided. According to the Geneva laws, the war of national liberation in IIOJK is a legal, political, and indigenous struggle.

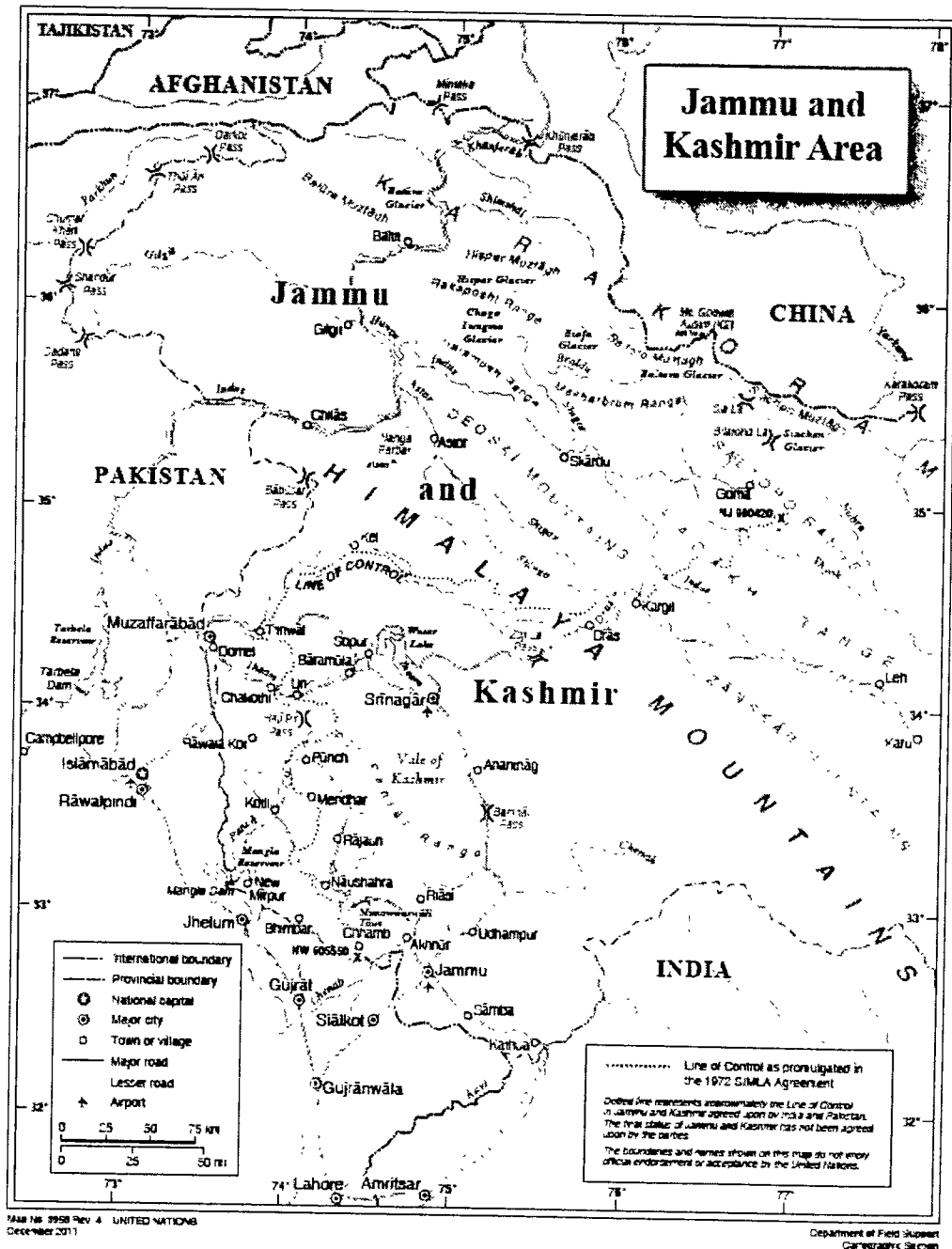
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<sup>170</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgement, I.C.J. Rep. 1986 (June 27), pp. 14 et seq.

<sup>171</sup> Vienna Convention on the Law of Treaties, 1996, art.53.

Except for India, the international community and UN consider the whole state as a disputed territory, whose future had to be determined yet. The concept of territorial integrity and sovereignty of India on Kashmir did not apply because it is disputed since the Independence of India. The right to self-determination of the people of Kashmir was recognized by UN resolutions as well in international law. AJ & K and GB are not a constitutional part of Pakistan; hence they are administrated by Pakistan. India had merged IIOJK as its union territories, despite their disputed nature and in violation of UN resolutions, hence these areas are occupied. The next chapter will address the laws of occupation and the applicability of these laws in Kashmir conflict.

MAP-1



Reference: Jammu and Kashmir Area: United Nations,

<https://www.un.org/Depts/Cartographic/map/profile/kashmir.pdf>

## Chapter II

### JAMMU AND KASHMIR BEING AN OCCUPIED TERRITORY

*"You love liberty, you are worthy of it; you have defended it against a powerful and cunning aggressor who, under the pretence of offering you the bonds of friendship, shackled you with the chains of servitude. Now, weary of your fatherland's troubles, you sigh for tranquility. I believe it is very easy to attain; but to preserve it together with liberty, that seems to me to be difficult. The patriotic souls that protected you against the yoke were formed in the midst of the anarchy you find so hateful. They fell into a lethargic sleep; the storm awoke them. Having broken the chains intended for them, they are weighed down with weariness. They would like to combine the peace of despotism with the sweetness of freedom. I am afraid that they want things that are contradictory. Repose and liberty seem to me incompatible; one has to choose".<sup>172</sup>*

*Jean Jacques Rousseau*

## Introduction

The situation of occupation arises when a part of a state or a complete state comes under the control of a foreign state. The basic objective of the creation of nation-states, the establishment of the UN, and the development of international law, and national laws is to end the rule of might is right and protect the rights of individuals and states. An occupation is a negation of the political rights of people. Legal consequences of occupation and international law about occupation are analyzed. The question, of

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<sup>172</sup> Jean Jacques Rousseau, *Principles of the Rights of War*, trans. Grace Roosevelt, *Reading Rousseau in the Nuclear Age* (Philadelphia: Temple University Press, 1990), 954-5.

whether Jammu and Kashmir are occupied territories is also answered. The development of the law of occupation, the advisory opinion of ICJ on the Wall case, and its similarities with Kashmir are also discussed. The last section of this chapter is about the legal consequences for governing states and the international community of the prolonged occupation of Jammu and Kashmir.

## 2.1 Theoretical Frame Work of Occupation

The occupation of one state by another state through the use of force or other means is a very old phenomenon. In the modern history of the states due to some economic or strategic interests, some countries had occupied other states, and these occupied states were called colonies.<sup>173</sup> After the establishment of the League of Nations, a new regime of trusteeship was introduced and tasked to support “peoples not yet able to stand by themselves under the strenuous conditions of the modern world as a sacred trust of civilization.”<sup>174</sup> The mandate was entrusted to those former colonial powers that were responsible for abuses in the past. The Covenant of the League of Nations was also protecting the political independence of the States. According to Anthony D Amato, “Article 10 of the League’s Covenant protects from invasions and other acts disrespecting territorial integrity and political independence.”<sup>175</sup> After the establishment of the UN, the concept of “Trusteeship” was redefined as “promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence.”<sup>176</sup>

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<sup>173</sup> Jorg Axel Kammerer, ‘Colonialism’, *Max Planck Encyclopedia of Public International Law* (March 2008) 2.

<sup>174</sup> League of Nations, Covenant of the League of Nations, 28 April 1919, art. 22(4).

<sup>175</sup> Anthony D’Amato, “*International Law: Process and Prospect*” (Transnational, 1987) 62-65.

<sup>176</sup> Charter of the United Nations, 24 October 1945, art. 73(b).

Initially, the states were concerned about the rights of the state, not of the people. Gradually concentration was diverted toward the people. When a state through military power invaded another state or area and establishes control over it is called a belligerent Occupation. Benvenisti considers that occupation of an area, whether it is through the threat or actual use of force could not be a valid transfer of sovereignty.<sup>177</sup> According to Dinstein, “once combatants stabilize along fixed lines, not coinciding with the original international frontiers, the cross-border areas seized and effectively controlled are deemed to be subject to belligerent occupation.”<sup>178</sup> The Law of war and occupation are interrelated. The first document about the occupation is the Lieber Code of 1863, which were the instructions by the US Govt. to her army in the field. Article 04 of this code says that occupying power, is “strictly guided by the principles of justice, honor, and humanity.”<sup>179</sup> It also provides individual and collective guarantees of private property, morality, and religion. Some principles were protecting the rights of occupied people; however, there were also some shortcomings. Article 33 of this code recognizes the right of occupiers to annex the occupied territories.<sup>180</sup> In 1874, seventeen European States in Brussels drafted the regulations of warfare and law of occupation. Article 1 of the Brussels declaration defines the belligerent occupation as, “a territory placed under the authority of a hostile army bounded by the territories around which it could establish and exercise authority.”<sup>181</sup> According to the British Military Manual, “Occupation differs from the annexation of territory by being only of a temporary nature and during occupation; the sovereignty of the occupied state does not pass to the occupying power.

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<sup>177</sup> Eyal Benvenisti, *The International Law of Occupation* 2<sup>nd</sup> Ed. (Oxford: Oxford Univ. Press, 2012), 22.

<sup>178</sup> Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge: Cambridge University, 2009) 1.

<sup>179</sup> John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (Free Press, 2012)

<sup>180</sup> Chris Jochnick & Roger Normand, “The Legitimizing of Violence: A Critical History of the Laws of War”, *HARV. INT'L. L. J.* 49 (1994): 35

<sup>181</sup> Christopher Greenwood, “Historical Development and Legal Basis”, in *The Handbook of Humanitarian Law in Armed Conflicts* 1, 10 (Dieter Fleck ed., 1995) Oxford University Press

It is suspended.”<sup>182</sup> ICJ defined occupied territory as, “territory [that is] actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.”<sup>183</sup> US Military Tribunal at Nuremberg ruled in 1949 that,

an occupation indicates the exercise of governmental authority to the exclusion of the established government. This presupposes the destruction of organized resistance and the establishment of an administration to preserve law and order. To the extent that the occupant’s control is maintained and that of the civil government eliminated, the area will be said to be occupied.<sup>184</sup>

The law of occupation had attained an important position in international law.

Hague conventions were multilateral treaties recognized as customary international law.<sup>185</sup> The first Hague convention was held in 1899 and the second in 1907. The second convention is relevant to the laws of occupation. This convention was signed on 18<sup>th</sup> October 1907 and entered into force on 26<sup>th</sup> January 1910. This convention consisted of thirteen treaties and treaty IV was about “Respecting the Laws and Customs of War on Land.”<sup>186</sup> The regulations adopted in this convention define occupied territory in Article 42 as “Territory is considered occupied when it is 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.”<sup>187</sup>

This definition provides two basic components for occupation; one is the territory should be under the actual control of the occupier and the second the exercise of

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<sup>182</sup> UK, Ministry of Defense, *The Manual of the Law of Armed Conflict* (2004), para. 11.19.

<sup>183</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, para. 78.

<sup>184</sup> Eyal Benvenisti, *The international law of occupation* (Princeton: Princeton University Press, 1993), 4-5.

<sup>185</sup> *PROSECUTOR v. Mladen NALETILIC, aka “TUTA” and Vinko MARTINOVIC, aka “ŠTELA”*, Case No. IT-98-34-T (31 March 2003).

<sup>186</sup> ICRC, <https://ihl-databases.icrc.org/ihl/WebART/195-200052>.

<sup>187</sup> *Hague Convention (IV) Respecting the Laws and Customs of War on Land*, Oct. 18, 1907, 36 Stat. 2277, 539 T.S. 63.

authority by the occupier in such areas. Articles 43 to 56 of these regulations also provide some rights to the people of the occupied territory.<sup>188</sup> The occupier had to ensure civil life and restore public order while respecting enforced laws in that territory. He cannot enforce people to inform him about the army and defence. The occupied people could not be compelled to swear allegiance to the occupier. Respect for religious practice, private property, family rights, and honour is the responsibility of the occupier. The occupier will be considered the administrator of the properties of a hostile state. The religious, cultural and educational properties will consider private property and in case of destruction legal proceedings will be initiated.<sup>189</sup>

The fourth Geneva Convention is about the protection of civilians in times of war. This convention is important regarding national liberation movements and occupation. About the applicability of this convention article 02 provides that it will be applied to the total and partial occupation even if there is no any resistance from the occupied population. It shall also apply even if one party in the conflict is not a party to this convention but bound herself to this convention.<sup>190</sup> If the organizations participating in the wars of national liberation accept the rules and regulations of the law of war they can become the party of this convention. This convention also prohibits colonization and transfer of its population to occupied territory.<sup>191</sup>

Additional Protocol First of the Geneva Conventions is an important document regarding wars of national liberation and the people involved in them. Article 1(4) provides that this protocol will apply to armed conflicts between the states and, “include

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<sup>188</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 539 T.S. 63.

<sup>189</sup> Yale Law School, Lillian Goldman Law Library, [https://avalon.law.yale.edu/20th\\_century/m.asp](https://avalon.law.yale.edu/20th_century/m.asp) (Accessed on 04-02-2020).

<sup>190</sup> Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

<sup>191</sup> Geneva Convention IV.art .49(6).

armed conflicts in which peoples are fighting against colonial domination and alien occupation and racist regimes in the exercise of their right of self-determination”<sup>192</sup> Article 44 of this protocol declares that every combatant shall be a prisoner of war, whether it is from the state party or the member of the group fight for self-determination.

People in different states were struggling against colonialism because it was “alien subjugation, domination, and exploitation.”<sup>193</sup> “The Declaration on the Granting of Independence to Colonial Countries of 1960”<sup>194</sup> was not limited to colonial countries and it was also applicable to the occupied territories and non self-governing territories. The US representative had affirmed this view as, “to transfer all powers to the peoples of those territories [...] to enable them to enjoy complete independence and freedom.”<sup>195</sup> Occupation by use of force is also prohibited in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States: of 1970 “[t]he territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter.”<sup>196</sup> “The Charter on Economic Rights and Duties of States of 1974” called on states “to eliminate colonialism, apartheid, racial discrimination, neo-colonialism, and all forms of foreign aggression, occupation, and domination.”<sup>197</sup> The occupation was also declared as a threat

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<sup>192</sup> Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978).

<sup>193</sup> Robert E Gorelick, “Apartheid and Colonialism”, *Comparative and International Journal of Southern Africa*, Vol 19 (1986) 71.

<sup>194</sup> UN General Assembly Resolution 1514 (XV), 14 December 1960.

<sup>195</sup> Declaration on Granting of Independence to Colonial Countries and Peoples 1960, art. 5. This was also affirmed by the ICJ in Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, 31, para. 52.

<sup>196</sup> *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, General Assembly Resolution 2625 (XXV), Annex, UN Doc. 5217, 24 October 1970, 121.

<sup>197</sup> *Charter of Economic Rights and Duties of States*, General Assembly Resolution 3281, 12 December 1974, art. 16,

against sovereignty in the Declaration on the Right to Development of 1986 “racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty.”<sup>198</sup>

US Military tribunal at Nuremberg in 1949 ruled that occupation is the exclusion of an established government from a territory and exercise of all administrative and governing authority. The occupant maintains law and order after the destruction of resistance. The area in which occupiers maintain control is called the occupied area.<sup>199</sup>

## **2.2 Advisory Opinion of ICJ on the Construction of Wall on Occupied Palestinian Territory**

ICJ’s advisory opinion on the legal consequences of the construction of the wall in the Occupied Palestinian territories on July 09, 2004, had elaborated some important articles of humanitarian as well as human rights law. On the question of jurisdiction and resolution of UNGA according to Article 12 of the charter, the court declared that UNGA can refer to a matter even if the issue is on the agenda of the UNSC. The court recalled the resolution 377A(V)<sup>200</sup> which provides that if permanent members of the UNSC could not reach a consensus on an issue that could be a threat to peace or breach of peace or act of aggression the UNGA shall recommend collective measures. The second legal principle as laid down in UNGA Res.2625 of 24<sup>th</sup> October 1970 that acquisition of the territory by use of force is not legal.<sup>201</sup> The third important principle which was referred to in many legal documents and decisions that right to self-

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<sup>198</sup> *Declaration on the Right to Development*, General Assembly Resolution 41/128, UN Doc. A/RES/41/128, 4 December 1986, art. 5

<sup>199</sup> *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Rep. 2004(July 9), p. 136.

<sup>200</sup> G.A. Res. 337 (V) , U.N.Doc.A/RES/377(V) A(1950).[https://undocs.org/en/A/RES/377\(V\)](https://undocs.org/en/A/RES/377(V))

<sup>201</sup> *Ibid.* para. 87.

determination is *erga omnes*.<sup>202</sup> The court also declared that although Israel is not the party of the fourth Hague Convention of 1907, ICJ declared this convention as customary law hence it is applicable.<sup>203</sup> This means that customary law is universally applicable to all states. In the interpretation of the Fourth Geneva Convention, the court opined that this convention is applicable in armed conflict, whether it is a recognized state of war or not and occupation will be considered as a state of war even if there is no resistance.<sup>204</sup> Regarding the applicability of the “International Covenant on Civil and Political Rights (ICCPR)”<sup>205</sup>, “The International Covenant on Economic, Social and Cultural Rights (ICESCR)”<sup>206</sup> and “The Convention on the Rights of Child (CRC)”<sup>207</sup> in areas under the territorial jurisdiction of Israel due to occupation, the court declared that Israel is under a legal obligation to protect the rights provided in these instruments.<sup>208</sup> Israel’s attempts to change the demography were considered illegal. The court referred the Article 49 paragraph 6, of the IV Geneva Convention which provides that occupying power could not transfer its population to occupied territories or force the transfer of the population of occupied areas.<sup>209</sup> The court also interpreted Article 51 of the UN charter about self-defence. ICJ declared that the principle of self-defence will be applicable in case of an attack by one state on another.<sup>210</sup> It does not apply to liberation organizations. The court declared the principle of necessity is, “applicable on

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<sup>202</sup> G.A. Res. 337 (V) , U.N.Doc.A/RES/377(V) A(1950). 88.

<sup>203</sup> *Ibid.* para. 89.

<sup>204</sup> *Ibid.* para. 95.

<sup>205</sup> The International Covenant on Civil and Political Rights (ICCPR) is a multilateral treaty adopted by UNGA Resolution 2200A (XXI) on 16 December 1966, and in force from 23 March 1976.

<sup>206</sup> The International Covenant on Economic, Social and Cultural Rights is a multilateral treaty adopted by the United Nations General Assembly on 16 December 1966 through GA. Resolution 2200A (XXI), and came in force from 3 January 1976.

<sup>207</sup> The UN General Assembly adopted the Convention and opened it for signature on 20 November 1989. It came into force on 2 September 1990.

<sup>208</sup> Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. Rep. 2004(July 9), para. 112-13.

<sup>209</sup> *Ibid.* para. 126.

<sup>210</sup> *Ibid.* para. 139.

an exceptional basis and the concerned state is not sole judge to interpret this concept.”<sup>211</sup> The court also observed that “Israel had violated certain legal obligations including *erga omnes* obligations and it is the duty of other states that they did not recognize the illegal situation resulting from the construction of the wall.”<sup>212</sup>

### **2.3 Jammu and Kashmir as Occupied Territory**

In chapter 01 the brief legal position of all administrative parts of the State of Jammu and Kashmir had been discussed. On 15<sup>th</sup> August 1947, J&K was a princely state, having a standstill agreement with Govt, of Pakistan. The overwhelming majority of the state was Muslim and wants to accede to Pakistan, whereas the ruler Maharaja was Hindu and his actions were showing that he is inclined toward India. The people of the state were already struggling against his autocratic rule and he had loosed the trust of the people and control over the state. The important question related to occupation is why the part of the state of Jammu and Kashmir under the territorial administration of India is considered occupied and the areas of Azad Kashmir and Gilgit Baltistan are considered as administrated?. In chapter 01 the constitutional position of Jammu and Kashmir had been analyzed. The constitutional history of Pakistan shows that from the 1<sup>st</sup> constitution of 1956 to the present constitution of 1973, Pakistan never included AJ & K and GB as her constitutional parts, and Article 257 of the “Constitution of the Islamic Republic of Pakistan, 1973” is providing that the relations will be decided in future.<sup>213</sup> The people of AJ & K through their elected representatives (Legislative Assembly) decided on the administrative and legal arrangements with Pakistan through

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<sup>211</sup> Legal Consequences of the Constructi.on of a Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. Rep. 2004(July 9 para, 140.

<sup>212</sup> *Ibid.* para. 158-59.

<sup>213</sup> UN Charter , Ch-I.

AJ & K Interim Constitution 1974<sup>214</sup>. Pakistan never claimed Kashmir as her integral part and always admitted the disputed nature of J&K and voiced the right to self-determination of the people. From a legal perspective, the role of Pakistan is administrator according to principles laid down in IHL.

The position of areas under the territorial jurisdiction of India is quite different and opposite. According to India's claim, Maharaja had signed an Instrument of Accession (IoA) with her on 26<sup>th</sup> October and her forces landed to maintain law and order and defend the Maharaja's rule. The facts are different and these facts provide that J&K was occupied by India in a systematic way and planning. The first claim of India that her forces landed in Kashmir on 27 October 1947 is factually incorrect. The Patiala forces which were under the control of the Commander in Chief of the Indian Army were deputed in Kashmir in the first week of October 1947.<sup>215</sup> This was an act of aggression by India. The second claim of India about the aggression from Pakistan is also contradictory. The people of Jammu and Kashmir were struggling against *Dogra* rule and demanding rights from 1931. In June 1947 no tax campaign was also launched in Poonch. After the announcement of the partition plan, the people of J&K want to accede to Pakistan and they celebrated 14<sup>th</sup> of August as their independence day. The actions of the Maharaja from early 1947 like the appointment of *Mehar Chand Mahajan*, the release of Sheikh Abdullah, and the arrest of *Ch. Ghulam Abbas*, disarming of Muslim soldiers, transfers of Muslim officers, and activities of RSS and Akali Dal in Kashmir, increased the momentum of the struggle. In Poonch Jagir there were more than 70,000 ex-army servicemen.<sup>216</sup> These people in AJ & K and the people of GB had liberated a

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<sup>214</sup> UN Charter. *Ch-I*.

<sup>215</sup> Alastair Lamb, *Birth of Tragedy in Kashmir* (Oxford: OUP, 1994), 73.

<sup>216</sup> Alastair Lamb, *Kashmir A Disputed Legacy 1846-1990* (Oxford : OUP 1991), 123-55.

considerable part of the State before the entrance of Tribal *Laskar*<sup>217</sup> on 22<sup>nd</sup> October 1947. So this freedom movement was indigenous by the people of the state and later on supported by their relatives and associates from KPK and tribal areas.

Some historians like Josef Korbel and others through research proved that IOA was not signed before 27<sup>th</sup> October 1947.<sup>218</sup> If IoA is also illegal in the eyes of international law. The Maharaja of Kashmir had already signed a standstill agreement with Pakistan, in the presence of this agreement he could not sign an agreement with India. It is evident that in the last week of October 1947 that he was not *de facto* nor *de Juro* ruler according to the Indian Independence Act of 1947. The People of Kashmir had already established their government to replace Maharaja on 24<sup>th</sup> October 1947, so he had not any legal authority to decide the future of the people. In the case of *Junagarh*, where a Muslim ruler with a Hindu majority population decided to accede to Pakistan was declared a violation of the partition plan by Mountbatten because the majority of the population belongs to Hindus and it is contiguous to India,<sup>219</sup> the same principle is ipso facto applicable on Kashmir. The IOA was conditional and before fulfilling this condition the state could not become part of India. The acceptance letter of Mountbatten clearly states the conditions of accession, “as soon as the law and order have been restored in Kashmir and her soil cleared by the invaders, the question of the State’s accession should be settled by a reference to people.”<sup>220</sup>

Alaister Lamb also revealed some important facts from Patel’s correspondence, which are important in the context of the Maharaja’s intentions of accession.

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<sup>217</sup> Lashkar mean group of people

<sup>218</sup> Josef Korbel, *Dangers in Kashmir*, 85-88

<sup>219</sup> Ijaz Hussain, *Kashmir Dispute: An International Law Perspective*, 5.

<sup>220</sup> Ijaz Hussain, *Kashmir Dispute: An International Law Perspective*, 253.

In the context of UNSC on 25<sup>th</sup> January 1948, Maharaja wrote to Patel that he and his government are still sovereign in the state of Jammu and Kashmir was a polity quite different from the Dominion of India. He was accession as it applied at the time as nothing more than a bilateral agreement between his state and Indian Dominion relating to a transient emergency.<sup>221</sup>

The language of the letter shows that the intention of *Maharaja* was an interim arrangement with India which was provisional and temporary. On 31<sup>st</sup> January 1948 Maharaja proposed to Patel “withdraw the accession”.<sup>222</sup> It means the unilateral withdrawal of all the arrangements between the state of J&K and India. There are many controversies regarding the alleged IOA, the Maharaja's version is quite opposite of the Indian claim. In 1995 a lawsuit was instituted in the court of IIOJK to produce the original copy of IOA, the state authorities told that it is missing and might be stolen<sup>223</sup> which shows that the original document is not present. UN in her resolutions declared J&K as a disputed territory. India despite her commitments and UNSC resolutions attempted to strengthen her occupation through barbaric means. In the first Constitution of India, 1950 Jammu and Kashmir were added as the state in the areas of the Indian Union.<sup>224</sup> and a Special provision Article 370 was incorporated into the constitution. Article 370 provides a special status of IIOJK and limited powers to Govt. of India regarding Kashmir. Through this article, the Indian constitution and laws are not ipso facto applicable in Kashmir, for the application of constitutional provisions and other laws concurrence of the state's constituent assembly is required.

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<sup>221</sup> Alastair Lamb, *Incomplete Partition*, 169.

<sup>222</sup> *Ibid*, 176.

<sup>223</sup> *Ibid*, 170.

<sup>224</sup> Constitution of India, 1950 Article 1(2) Schedule 1.

## 2.4 Military Occupation to Constitutional Occupation in IIOJK

India had forcefully occupied Kashmir in 1947 and from that time she is interested to change the status of Jammu and Kashmir. In 1956 India tried to manage the accession of Kashmir through the constituent assembly of IIOJK, whose member was elected by the selection of puppets from Delhi. UNSC in resolution No 122 of 1957 declared that any action taken by the assembly of any part of the state is not a substitute for the plebiscite and the future status of the state shall be decided according to the principles laid down in previous resolutions.<sup>225</sup> IIOJK is still a Muslim-majority state and the Indian government is attempting to change the demography. On 5<sup>th</sup> August 2019, the President of India issued an order “The Constitution (Application to Jammu and Kashmir) Order 2019” in exercising his power under Article 370(1) of the Indian Constitution which provides,

1. Notwithstanding anything in this Constitution:
  - a. the provisions of article 238 shall not apply in relation to the State of Jammu and Kashmir,
  - b. the power of Parliament to make laws for the said State shall be limited to those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and such other matters in the said Lists, as, with the concurrence of the Government of the State, the President may by order specify.<sup>226</sup>

This order superseded “The Constitution (Application to Jammu and Kashmir) order 1954”, which provides special rights to permanent residents of Jammu and Kashmir as

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<sup>225</sup> UNSC Res. 122 (1957). 24 January 1957, S/RES/122(1957).

<sup>226</sup> Govt. of India, [https://www.india.gov.in/sites/upload\\_files/npi/files/coi\\_appendix.pdf](https://www.india.gov.in/sites/upload_files/npi/files/coi_appendix.pdf) (Accessed on December 11, 2019).

it was in Article 35-A of the Indian constitution. This order in 2019 abrogated Article 35-A, to change the demography of the State. Before the abrogation of this article, no one could purchase land in Kashmir other than permanent residents (State Subject) of Kashmir. This rule was initially enforced by Maharaja Hari Singh as the permanent residents were called the State Subjects in 1927.<sup>227</sup> Through this order in 2019, all constitutional provisions of the Indian Constitution were extended to Kashmir, some clauses had been added in Article 367 and the word “Constituent Assembly” in Article 370(2) was replaced with the word Legislative Assembly of State. This order is also a violation of the proviso of clause 3 of Article 370 which provides,

Notwithstanding anything in the foregoing provisions of the article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may notify: Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.<sup>228</sup>

The Constituent Assembly was dissolved on January 25, 1957, and even the legislative assembly and Govt. were dissolved on 21<sup>st</sup> November 2018, and Governor Rule was imposed.<sup>229</sup> Indian Govt. introduced the Jammu and Kashmir Reorganization Bill, 2019 in *Rajya Sabha*<sup>230</sup> and was passed on the same day, on the next day 06<sup>th</sup> August it was introduced in *Lok Sabha*<sup>231</sup> and was passed on the same day. This bill was assented to by President on 9<sup>th</sup> August and was made applicable from 31<sup>st</sup> October 2019.<sup>232</sup> This act changed the status of Jammu and Kashmir; the status of the state had been reduced

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<sup>227</sup> Manzoor Gillani, *The Constitution of Azad Jammu and Kashmir*, 589.

<sup>228</sup> A.S. Anand, *The Development of the Constitution of Jammu and Kashmir*, 129-132.

<sup>229</sup> India dissolves Kashmir assembly, fresh polls likely, *Al Jazeera*, <https://www.aljazeera.com/> (Accessed on December 12, 2019)

<sup>230</sup> Lower House of Indian Parliament.

<sup>231</sup> Upper House of Indian Parliament.

<sup>232</sup> Jammu Kashmir Reorganization Bill, <https://prsindia.org/billtrack/jammu-and-kashmir-reorganisation-bill-2019> (Accessed on December 12, 2019).

to union territories. IIOJK had been divided into two union territories, Jammu Kashmir and Ladakh. Jammu Kashmir will have a legislative assembly and Ladakh will be without a legislature, both have Lt. Governors, law, and order will be directly managed by Govt. of India. This constitutional occupation snatched the identity, constitution, flag, and status of the people of IIOJK.

“The J&K Reorganization Bill 2019” is a clear violation of the IOA, Indian Constitution, and International law. India claims that Kashmir is her integral part due to IOA, article 7 of this instrument says, “Nothing in this instrument shall be deemed to commit me in any way to acceptance of any future Constitution of India or to fetter my discretion to enter into arrangements with the Government of India under any such future Constitution.”<sup>233</sup> Article 370 was also debated in the Constituent Assembly of IIOJK, and Sheikh Abdulla who was involved in all negotiations with India elaborated, “I would like to make it clear, that any suggestions of altering arbitrarily the basis of our relationship with India would not only constitute a breach of the spirit and letter of the constitution, but it may invite serious consequences for a harmonious association of our State with India.”<sup>234</sup>

The Supreme Court of India also observed in the case titled, “*Prem Nath Kaul V The State of Jammu and Kashmir*” that the relationship of the Kashmir with India will be determined by the constituent assembly:-

The effect of the application of the present article (Article 370) has to be judged in the light of its objects and its terms considered in the context of the special features of the constitutional relationship between the State and India. The constitution-makers were obviously anxious that the said relationship

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<sup>233</sup> Manzoor Gillani, *The Constitution of Azad Jammu and Kashmir*, 640-641.

<sup>234</sup> A.S. Anand, *The Development of the Constitution of Jammu and Kashmir*, 131.

should be finally determined by the constituent Assembly of the State itself.<sup>235</sup>

IIOJK had been divided into two parts without debate and consent of the Legislative Assembly of Kashmir, which is also a violation of Article 3 of the Indian constitution, which provides that before changing the name of any state or diminishing its areas the President, will send this bill to the state legislature for its views.<sup>236</sup> Constitutional expert of India A.G. Noorani had written a book on Article 370 and discussed its legal as well as political aspects. According to him:-

Once the Constituent Assembly [of the State] met, the State government could not give its own 'concurrence'; still less, after the Assembly met and dispersed. Moreover, the President cannot exercise his power to extend the Indian Constitution to Jammu and Kashmir indefinitely. The power has to stop at the point the State's Constituent Assembly drafted the State's Constitution and decided finally what additional subjects to confer on the Union, and what other provisions of the Constitution of India it should get extended to the State, rather than having their counterparts embodied in the State Constitution itself. Once the State's Constituent Assembly had finalized the scheme and dispersed, the President's extending powers ended completely.<sup>237</sup>

From the above discussion, it is clear that the Jammu and Kashmir Reorganization Bill 2019 is a clear violation of the Constitution of India and IOA. IOA was incorporated in Article 370 and India was claiming that Kashmir is her part due to this instrument. After this bill, Kashmir is constitutionally occupied by India besides her military Occupation. In "the Jammu and Kashmir Reorganization Bill 2019", India merged the disputed state of Jammu and Kashmir into her union territories, which is a gross violation of international law and bilateral agreements between India and Pakistan. UNSC

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<sup>235</sup> Prem Nath Kaul v. The State of Jammu and Kashmir (A.I.R.(1959) S.C. 749).

<sup>236</sup> Article 03 Of Constitution of India, 1950 .

<sup>237</sup> A.G. Noorani, *Article 370*

Resolutions No 91 of 1951 and No 122 of 1957 clearly state that the future status of Kashmir could not be decided by any unilateral action by the assembly of one part. The abrogation of Article 35-A clearly shows that India is trying to change the demography of the State. Article 49 of “The Geneva Convention IV” occupying power could not transfer its population in the occupied area, “The Occupying Power shall not deport or transfer parts of its civilian population into the territory it occupies.”<sup>238</sup> India ratified this convention in 1950. Kashmir is illegally annexed by India and Geneva Convention protects unlawfully annexed areas.<sup>239</sup> Article 85(4)(a) of Additional Protocol I of the Geneva Convention also provides that the transfer of its own civilian population by occupying power in occupied territory is a grave breach of this protocol.<sup>240</sup> The statute of the International Criminal Court considers it a war crime<sup>241</sup>. UN resolution on the occupation of Iraq by coalition forces in 2003 clearly says that the occupying powers have to return the Govt. to its people.<sup>242</sup> According to international law expert M. Shaw, “It is, however, clear today that the acquisition of territory by force alone is illegal under international law.”<sup>243</sup> A. Cassese considers non- annexation as a binding legal principle. According to him, “conquest does not transfer a legal title of sovereignty, even if it is followed by de facto occupation and assertion of authority over the territory.”<sup>244</sup> Indian annexation of Kashmir is illegal and a violation of international law.

India had always violated bilateral agreements with Pakistan but insisted that Pakistan should follow the Simla agreement concerning Kashmir. Initially, India had violated this agreement during the Siachin war but the recent unilateral annexation of Kashmir

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<sup>238</sup> Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949(GC IV), art. 49 .

<sup>239</sup> GC IV.art. 47.

<sup>240</sup> Additional Protocol I of GC IV of the 1977, art. 85(4)(a).

<sup>241</sup> Statute of International Criminal Court 1998, art. 8(2)(b)(viii) .

<sup>242</sup> S.C. Res. S/RES/1483 (2003).

<sup>243</sup> M. Shaw, *International Law* , 8<sup>th</sup> ed.(Cambridge: Cambridge University Press, 2017),372.

<sup>244</sup> A. Cassese, *International Law* , 2<sup>nd</sup> ed.(Oxford: Oxford University Press, 2005) , 57.

by India is also a clear violation of Clause 1(ii) and Clause 06 of the Simla agreement which provides:

Pending the final settlement of any of the problems between the two countries, neither side shall unilaterally alter the situation and both shall prevent the organization, assistance or encouragement of any acts detrimental to the maintenance of peaceful and harmonious relations;.....

Both Governments agree that their respective Heads will meet again at a mutually convenient time in the future and that, in the meanwhile, the representatives of the two sides will meet to discuss further the modalities and arrangements for the establishment of durable peace and normalization of relations, including the questions of repatriation of prisoners of war and civilian internees, a final settlement of Jammu and Kashmir and the resumption of diplomatic relations.<sup>245</sup>

India had unilaterally changed the status of Jammu and Kashmir which is also a violation of the Simla agreement.

## **2.5 Wall Case and Occupation of Kashmir**

There are many similarities between Kashmir and Palestine conflicts. Both territories had an old history and unique culture and were occupied by foreign countries. The issue of Palestine and Kashmir are on the agenda of the UN as unresolved disputes. The people of Kashmir and Palestine are struggling for the right to self-determination and occupying powers India and Israel are continuously violating IHRL and IHL. International Court of Justice in the advisory opinion on the Wall case in occupied

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<sup>245</sup> Agreement on Bilateral Relations between the Government of India and the Government of Pakistan (Simla Agreement) 1972. [https://peacemaker.un.org/sites/peacemaker.un.org/files/IN%20PK\\_720\\_702\\_Simla %20 Agreement. pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/IN%20PK_720_702_Simla%20Agreement.pdf) (Accessed on 30-12-2019)

Palestinian territory had discussed the occupation in detail and laid down some legal principles which are also applicable in Kashmir.

### **2.5.1 Acquisition of Territory by Threat or Use of Force is Illegal.**

The court referred to Article 2 paragraph 4 of the UN charter which provides that members of the UN shall refrain from the threat or use of force against the territorial integrity or political independence of any other state or any other manner which is against the purpose of the UN. Court also mentioned the UNGA Res. No 2625 and the judgment of ICJ in Nicaragua v. USA that provides the acquisition of territory by threat or use of force is illegal.<sup>246</sup> India had landed her forces in Kashmir on 27<sup>th</sup> October 1947 in utter violation of the Sub-continent partition plan and the will and wishes of the people and occupied some areas of Kashmir. India had maintained her occupation of Kashmir with military might. Kashmir is one of the most heavily militarized zones in the world<sup>247</sup>, according to a report published by IPTK <sup>248</sup> and APDP <sup>249</sup> (civil society organizations of IIOJK) in 2015 the total number of Indian forces was 7, 50,981.<sup>250</sup> Before changing the special status of Kashmir on 5<sup>th</sup> August 2019, India had deployed 38,000 additional troops in Kashmir.<sup>251</sup> On the night of the 4<sup>th</sup>, August curfew was imposed in Kashmir, modes of communication were blocked, and political leadership

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<sup>246</sup> Wall Case, 2004 I.C.J. 136, p.171-172 para. 87-88

<sup>247</sup> “Do you need 700,000 soldiers to fight 150 militants?": Kashmiri rights activist Khurram Parvez", Scroll.in, 21 June 2016. Available from <https://scroll.in/article/812010/do-youneed-700000-soldiers-to-fight-150-militants-kashmiri-rights-activist-khurram-parvez>. And “Black Day in Kashmir marks 1947 Indian army arrival”, Al Jazeera, 27 October 2017. Available from <https://www.aljazeera.com/news/2017/10/day-kashmir-marks-1947-indian-army-arrival-1171027122649223.html>.( accessed on January 01,2020).

<sup>248</sup>The International Peoples’ Tribunal on Human Rights and Justice in Indian Administred Kashmir(IPTK), a civil society organization.

<sup>249</sup> The Association of Parents of Disappeared Persons (APDP), an organization established by civil society.

<sup>250</sup> Structure of Violence, IPTK & APDP, September 2015, 10-13.

<sup>251</sup> Prabhask K Dutta, “Kashmir: Why Centre is sending additional 38000 troops to J&K”, India Today, August 02, 2019, [www.indiatoday.in](http://www.indiatoday.in). (accessed on October 28,2019).

and civilians were arrested.<sup>252</sup> These all actions of India before introducing the bill to change the status of Kashmir in Parliament show that the people of J&K will not accept and they will protest against this action. Indian military occupation in 1947 as well as the constitutional occupation in 2019 were through military might and excessive use of force.<sup>253</sup>

### 2.5.2 *Erga Omnes* Obligations

ICJ in its opinion discussed the right to self-determination and referred UN resolutions about the right to self-determination of the people of Palestine. The court referred to the UN charter, UNGA Res. No. 2625, Common Article 01 of ICCPR and ICESCR and its various earlier decisions<sup>254</sup> declared that the right to self-determination of the people is *erga omnes*.<sup>255</sup> Jammu Kashmir is also a disputed territory and UNSC had passed several resolutions on right to self-determination of the people of Kashmir. UNSC Res.No 122(1957) reaffirms

Reminding the Governments and authorities concerned of the principle embodied in its resolutions 47 (1948) of 21 April 1948, 51(1948) of 3 June 1948, 80 (1950) of 14 March 1950 and 91(1951) of 30 March, 1951, and the United Nations Commission for India and Pakistan resolutions of 13August, 1948, and 5 January 1949, that the final disposition of the State of Jammu and Kashmir will be made in accordance with the will of the people expressed through the democratic method of a free and impartial plebiscite conducted under the auspices of the United Nations.<sup>256</sup>

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<sup>252</sup> Kashmir Under Lockdown, *Al Jazeera*, <https://www.aljazeera.com/news/2019/08/india-revokes-kashmir-special-status-latest-updates-190806134011673.html> (Accessed on 01-01-2020).

<sup>253</sup> India revokes special status of Kashmir, putting tense region on edge, *The Washington Post*, [https://www.washingtonpost.com/world/india-revokes-special-status-of-kashmir-putting-tense-region-on-edge/2019/08/05/2232fcd0-b740-11e9-8e83-4e6687e99814\\_story.html](https://www.washingtonpost.com/world/india-revokes-special-status-of-kashmir-putting-tense-region-on-edge/2019/08/05/2232fcd0-b740-11e9-8e83-4e6687e99814_story.html) (Accessed on January 01, 2020).

<sup>254</sup> Legal Consequences of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1. C. J.Reports 1971, p. 31, paras. 52-53).

<sup>255</sup> Wall Case, 2004 I.C.J. 136, para. 88.

<sup>256</sup> UNSC Resolution No 122 of 1957.

The resolutions of UNCIP are also an agreement between Pakistan and India for the right to self-determination; it is clear from the wording of both the resolutions of UNCIP, which provides, **“The Government of India and the Government of Pakistan reaffirm** their wish that the future status of State of Jammu and Kashmir shall be determined in accordance with the will of people.”<sup>257</sup> (*emphasis added*)

This resolution clearly shows that this resolution is not only passed by UNCIP but is also a reaffirmation of both countries for the fair and free plebiscite. Besides these resolutions, India herself committed that the future status of Kashmir shall be determined through a plebiscite. In a broadcast, on 2<sup>nd</sup> November 1947, Pandit Jawahar Lal Nehru said, “We are prepared when peace and law and order have been established to have a referendum in Kashmir under international auspices.”<sup>258</sup> Pakistan had always demanded the implementation of UNSC resolutions<sup>259</sup> whereas India is denying her commitments and RSD to the people of J&K.<sup>260</sup> The advisory opinion of ICJ about to RSD of the people of Palestine is also applicable in Kashmir.

### 2.5.3 Plea of Self Defense

During the proceeding, Israel claimed that her actions and construction of the wall is her right of self-defence according to Article 51 of the UN charter as well as UNSC Resolutions 1368(2001) and 1373(2001). The court observed that this right is protected against another state hence in the areas occupied by Israel and these are not foreign states.<sup>261</sup> In Kashmir an area is under illegal and forceful occupation of India, the LoC

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<sup>257</sup> Resolution adopted by the United Nations Commission for India and Pakistan on 13 August 1948.(Document No.S/1100, Para.75. Dated the 9<sup>th</sup> November 1948).

<sup>258</sup> Lord Birdwood, *Two Nations and Kashmir* (London: Robert Hale Ltd.,1956), 61.

<sup>259</sup> “PM says Pakistan committed to Kashmiris’ right to self-determination” Pakistan Today, January 5, 2020, <https://www.pakistantoday.com.pk/2020/01/05/pm-says-pakistan-committed-to-kashmiris-right-to-self-determination/> (accessed on March 05, 2020).

<sup>260</sup> “Jammu and Kashmir ‘was, is and shall forever’ remain its Integral Part; India Tells Pakistan at UNHRC meeting”, Times of India, Feb.26,2020, <https://timesofindia.indiatimes.com/>, (accessed on March 05, 2020).

<sup>261</sup> Walls Case Para 138-141.

is a *De facto* border between two administrative units of the State. In 2004 India had a fenced 742 KM line of Control, which is dividing both parts of State Jammu and Kashmir.<sup>262</sup> This fence is electrified and also divides the villages of IIOJK. India had replicated Israel's wall idea. Indian Govt. is not allowing people to travel from one side of LoC to another to visit their relatives. Indian claim of self-defense like Israel is not according to international law because she had divided the parts of State and LoC is not an international boundary. India also claimed that AJ&K is also part of IOJ&K and she had reserved 24 seats for liberated areas in the legislative assembly of Kashmir. In Jammu and Kashmir Reorganization Act, 2019, clause 14 subsection 4 (a) provides,

Until the area of the Union Territory of Jammu and Kashmir under the occupation of Pakistan ceases to be so occupied and the people residing in that area elect their representatives, 24 seats in the legislative assembly of Union Territory of Jammu and Kashmir shall remain vacant and shall not be taken into account for reckoning the total membership of the assembly.<sup>263</sup>

This provision shows that India herself admitting that an erstwhile state is a unit then India should allow people from Pakistani-administrated Kashmir into IIOJK and vice versa. The freedom struggle in IIOJK is the indigenous movement of the people who are allowed to use any means for the achievement of RSD.

## **2.5.4 Violations of International Humanitarian Law(IHL)**

Israel is not a party to the Fourth Hague Convention of 1907 and the regulations attached to it. The Court observed that these regulations were declared as customs and

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<sup>262</sup> FACTBOX-Line of control between India and Pakistan, Reuters , [www.reuters.com](http://www.reuters.com). (accessed on 04-01-2020).

<sup>263</sup> Jammu and Kashmir Reorganization Act, 2019, Cluse 14(4)(a), [http://egazette .nic.in/WriteRea dData /2019 / 210407 .pdf](http://egazette.nic.in/WriteRea dData /2019 / 210407 .pdf) (accessed on November 10,2019).

laws of war by all civilized nations<sup>264</sup> and are part of the customary international law<sup>265</sup> which are supplementing article 154 of GC IV. The ICJ had observed that the conditions mentioned in Article 2 of the fourth GC IV apply to Palestine and Section III of Hague regulations are also applicable.<sup>266</sup> In IIOJK, which is an occupied territory, all these laws are applicable. India had ratified GC IV on 09<sup>th</sup> November 1950<sup>267</sup> and was obliged to respect this convention. Kashmir is a hostile state and India had military authority and control over this state. Kashmir conflict is also fulfilling the conditions of Article 2 of GC IV, which provides

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.<sup>268</sup>

This article is applicable in the situation of Kashmir, as Kashmir is an armed conflict having two parties people of Kashmir and India, and the area of Kashmir is partially occupied by India. India herself admits the serious intensity of armed conflict as;

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<sup>264</sup> Judgment of the International Military Tribunals of Nuremberg 30<sup>th</sup> September and 1<sup>st</sup> October 1946, P-65.

<sup>265</sup> Legality of the threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Report 1996(1) p 256 para 75.

<sup>266</sup> Legal Consequences of The Construction of Wall, p. 89-101.

<sup>267</sup> Geneva Conventions UNTC, <https://treaties.un.org/Pages/showDetails.aspx?objid= 080000028015 8b 1a> (accessed on November 06, 2019).

<sup>268</sup> Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Art. 2.

Militancy in Jammu and Kashmir has claimed a total of 41,000 lives in the past 27 years which means an average of 4 deaths per day in the state or 1519 casualties every year, according to the latest available government data. The casualties include 14,000 civilians, 5,000 security personnel and 22,000 militants between 1990 and March 2017. In all, there have been 69,820 militancy-related incidents during the period; that's like the state witnessing 2586 militancy incidents every year.<sup>269</sup>

Although the figures provided by India are not factually correct the data shows that India is admitting that there is an armed conflict in Kashmir. Detail of violations of humanitarian law shall be discussed in Ch-IV.

### **2.5.5 Violations of International Human Rights Law**

In Wall's case, Israel denied the application of ICCPR and ICESCR and argued that these Covenants are applicable in times of peace and international humanitarian law is applicable in conflicts.<sup>270</sup> The ICJ declared that Israel had ratified both the covenants and this will be applicable to the humanitarian law. The court referred to its previous reports and elaborated on the scope of Article 4 of the ICCPR. According to ICJ, "As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law, yet others may be matters of both these branches of international law."<sup>271</sup>

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<sup>269</sup> Jayanth Jacob and Aurangzeb Naqshbandi, "41,000 deaths in 27 years: The anatomy of Kashmir militancy in numbers", Hindustan Times, September 25, 2017, <http://southasiajournal.net/> (accessed on December 4, 2019).

<sup>270</sup> Legal Consequences of The Construction of Wall Para. 102.

<sup>271</sup> Legal Consequences of The Construction of Wall , *Para 106*.

Occupied forces in Kashmir are also violating these two covenants and are involved in serious human rights violations. India ratified ICCPR<sup>272</sup> and ICESCR in 1979<sup>273</sup>, whereas the Convention on Rights of Child in 1992.<sup>274</sup> The decision of ICJ is applicable in the situation of Kashmir. UNOHCHR published two recent reports on the human rights situations in Kashmir in June 2018 and July 2019, which are exposing the gross violations of human rights. These reports and many other reports published by international organizations are testimony. The account of human rights violations in IIOJK will be discussed in detail in Ch-IV.

### **2.5.6 Transfer of Population/ Demographic Changes**

Israel is establishing new settlements in Palestine; one purpose of the construction of the wall is also to change the demography. In an advisory opinion, the ICJ referred the article 49 paragraph 06 of GC IV and further elaborated, “That provision prohibits not only deportations or forced transfers of the population such as those carried out during the Second World War, but also any measures taken by an occupying Power to organize or encourage transfers of parts of its population into the occupied territory.”<sup>275</sup>

The court concluded that the transfer of population is a breach of international law. In IIOJK India is also using different methods to change the demography. The first systematic attempt was made in 1947

During the partition of British India, occurred what has come to be known as the ‘Muslim massacre of Jammu’. Before 1947, Muslims comprised 61% of the population of Jammu which is another province in the region. Estimates suggest that the Hindu mobs killed between 2–5 lakh Muslim men, women and

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<sup>272</sup>International Covenant on Civil and Political Rights (ICCPR), Adopted by General Assembly *resolution 2200 (XXI)* of 16 December 1966, enter in to force 23 March '976.

<sup>273</sup> International Covenant on Economic, Social and Cultural Rights, adopted by UNGA on 16 December 1966, entry into force 3 January 1976.

<sup>274</sup> United Nations Human Rights, Office of The High Commissioner, <https://www.ohchr.org/> ( Accessed on March 01,2020).

<sup>275</sup> Advisory Opinion on Wall Case, Para.120.

children, and about 2 lakh people went missing. The number of women abducted by Hindu extremists varies from 256 to 27,000 because of unreported cases. Evidence shows that the Hindu monarch oversaw the pogrom.<sup>276</sup>

For the last 73 years, India was trying to settle Indians in IIOJK the only hurdle in their designs was Article 35-A of the Indian constitution and article 06 of the Jammu and Kashmir Constitution. Through constitutional amendments, India had abrogated these articles and had also enforced a new domicile law to provide citizenship to Indians in Kashmir. The situation in IIOJK is the same as in Palestine and India is also transferring its population to IIOJK. The detail shall be discussed in Ch-IV.

### **2.5.7 Responsibilities of UNGA for maintenance of Peace and Security**

It was argued by Israel that UNGA has no mandate to recommend advisory opinion because this specific issue was not discussed in UNSC. On the question of jurisdiction, the ICJ noted

Indeed, the Court notes that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security (see, for example, the matters involving Cyprus, South Africa, Angola, Southern Rhodesia and more recently Bosnia and Herzegovina and Somalia). It is often the case that, while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects.<sup>277</sup>

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<sup>276</sup> Ather Zia (2020): "*Their wounds are our wound: a case for affective solidarity between Palestine and Kashmir Identities*", DOI: 10.1080/1070289X.2020.1750199

<sup>277</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (hereinafter Wall )*, Advisory Opinion I.C.J.Rep. 2004 (July 9), par.27.

It was also contested by Israel that the UNGA request for advisory opinion did not fulfill the requirement of resolution 377 A(V) because the UNSC never seized this resolution.<sup>278</sup> The Court referred the resolution;

"if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures . . .".<sup>279</sup>

The court declared that this request is not contrary to this resolution. The Kashmir conflict is on the agenda of the UNSC, but from 1971 to date the UNSC had not passed any resolution or recommended any action. There is always division in permanent members of the council because of their interests. The unresolved Kashmir conflict is a threat to the peace and stability of the world. Both Pakistan and India are nuclear powers. The Indian crimes against humanity in Kashmir, ethnic cleansing, and the daily ceasefire line violations can trigger a large-scale war between two neighbouring countries.

## Conclusion

Occupation is not the permanent acquisition of sovereignty of other states it is temporary, and the role of the occupier is the only *de facto* administrator of the area until it returns the area to its sovereign, the people of the occupied area. It is not allowed to acquire the territory by use of force or rule this occupied territory permanently or even for an indefinite period.

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<sup>278</sup> *Wall Case*, Para. 29.

<sup>279</sup> *Wall Case*, para. 30.

The law of occupation is part of international humanitarian law and it has got the status of *jus cogens*. Kashmir is a disputed territory according to international law and India had forcefully occupied this state. People of the IIOJK had never accepted the Indian constitution and forced the annexation of India. The freedom struggle in Kashmir is a national liberation movement and it is an international armed conflict. Indian prolonged occupation of Kashmir did not give her sovereign rights. The legal principles and obligations identified in the advisory opinion of ICJ on the construction of the wall in occupied Palestinian areas apply to Kashmir because both conflicts are of the same nature. Kashmir is under the control of two states Pakistan and India, Pakistan is ready to fulfil its *erga omnes* obligations of the right to self-determination and protection of human rights of the people of Kashmir, whereas India is continuously violating its obligation of granting the right to self-determination of people of Kashmir, violating international humanitarian law and human rights law.

## **Chapter III**

# **APPLICABLE INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAWS**

### **Introduction**

The concept of rights and duties is very old. The concept of human rights was developed in different stages in international law. The only qualification for these rights is to be human. These human rights are protected through international legal instruments and jointly called International Human Rights Law. These rights are applicable in peace as well as in armed conflicts. The other important branch of international law is International Humanitarian law which is applicable during armed conflicts or wars. The basic purpose of both laws is to save humanity. International Criminal Law has emerged as the most important law in the post-1990s, for the accountability of individual perpetrators of international crimes. Besides these international legal instruments, the concept of human rights is very old and is based on faith and divine rules. The Islamic law of human rights is not for some regions, states, or some definite period it is universal and will be applicable forever without any amendment. The first section of this chapter is about the evolution of international human rights law and different human rights law instruments with special reference to applicability in the Kashmir conflict. The second section is the analysis of the origin, development, and conventions of international humanitarian law. The concept of human rights is very comprehensive and obligatory in Islamic Law, the overview of these concepts is in the fourth section. International criminal law is providing remedies for international crimes that are under discussion in the next section. This chapter provides those legal instruments that are applicable in Kashmir and their violations could be made accountable.

### 3.1 Development of International Human Rights Law (IHRL)

Human rights have been defined by many scholars and the approaches of all scholars are the same. The definition of the UN is very comprehensive and provides “human rights as those rights which are inherent in our state of nature and without which we cannot live as human beings.”<sup>1</sup> Christian Bay considers human rights as claims and defines them as, “ human rights as any claims that ought to have legal and moral protection to make sure that basic needs will be met.”<sup>2</sup>

There are different views on the origin of human rights and their applicability. In the Western context, this idea can be found in the work of famous scholars Grotius, Pufendorf, Locke, and Kant in the 17<sup>th</sup> and 18<sup>th</sup> Centuries.<sup>3</sup> There are several theories about the nature of human rights and their enforcement. Naturalists like John Locke, Kant, Pufendorf, and Grotius believe that all human beings possess these rights under their humanity. According to John Locke

Man being born with a little to perfect freedom and to an uncontrolled enjoyment of all the rights and privileges of law of nature, equally with any other man hath by nature not only to preserve his property, his life, liberty and estate against the injuries and attempts of other men, but to judge and punish the breaches of law in others.”<sup>4</sup>

John lock also believes that monarch is not sovereign people are sovereign who had elected the government to secure their life and property.<sup>5</sup> Griffin considers that “The secularized notion [of a human right] that we were left with at the end of the

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<sup>1</sup>Mishra, Pramod *Human Rights Global Issues* (Delhi: Kalpaz Publications, 2000), 4.

<sup>2</sup> Vincent, R. J., *Human Rights and International Relation* ( Cambridge: Cambridge University Press. 1986), 12-14.

<sup>3</sup> Hugo Grotius, *The Rights of War and Peace* (1625), Samuel Pufendorf, *On the Law of Nature and of Nations* (1672), John Locke, *Two Treatises of Government* (1689), Immanuel Kant, *The Metaphysics of Morals* (1797).

<sup>4</sup>Joshi, S. C. (ed.) *Human Rights, Concepts, Issues and Laws* (New Delhi: Akansha Publishing House, 2006), 16.

<sup>5</sup> Robertson, A. H. and Merrills, J. G, *Human Rights in the World* (Delhi: Universal Law Publishing Co. Pvt. Ltd.2005), 4-5

Enlightenment is still our notion today . . . a right that we have simply in virtue of being human.”<sup>6</sup> Social contract theory of Rousseau states, "Man was born free, yet everywhere he is in chains.”<sup>7</sup> Jeremy Bentham was the leading critic of natural rights theory and was the founder of the philosophy of Utilitarianism. According to him, “rights were determined from law and the people. it was the people who made laws which later became rights.”<sup>8</sup> In recent years a new concept of political philosophy was introduced by John Rawls, Joseph Raz, and Charles Beitz on the applicability of human rights. According to Rawls, “one of the defining features of human rights is that if a society fails to respect them, then external agents may in certain circumstances be permitted to interfere in its internal affairs, e.g., by means of economic or political sanction, or even coercive intervention.”<sup>9</sup> Raz believes that “human rights characteristically set limits to a society’s internal autonomy”<sup>10</sup>

Before analyzing the development of human rights law, it is necessary to discuss the types of human rights. According to Karel Vasek, there are “three generations of human rights: first Civil and political rights, secondly social rights, and thirdly solidarity rights including group rights and rights to peace and development.”<sup>11</sup> First-generation rights are freedom from slavery, freedom from discrimination, freedom from arbitrary detention, freedom from torture and inhuman treatment, freedom of religion, thought, opinion, expression, conscience; right to participate in elections, and the right to a fair trial. The second generation includes the right to education, health, work, social

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<sup>6</sup> James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), 1-2.

<sup>7</sup> Jean-Jacques Rousseau, *The Social Contract* (1743), ed. by Maurice Cranston (Harmonsworth: Penguin, 1968), Bk.I, ch.1, p.49.

<sup>8</sup> Jeremy Bentham, ‘Anarchical Fallacies’ in Jeremy Waldron (ed.), ‘Nonsense Upon Stilts’: Bentham, Burke, and Marx on the Rights of Man (London: Methuen, 1987).

<sup>9</sup> John Rawls, *The Law of Peoples with “The Idea of Public Reason Revisited”* (Cambridge, Mass.: Harvard University Press, 1999), 81.

<sup>10</sup> Joseph Raz, ‘Human Rights without Foundations’, in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), 338.

<sup>11</sup> Karel Vasek, ‘A 30-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights’, UNESCO Courier 10 (1977), 29-30.

security, and well-being of self and family. Third-generation rights are solidarity or group rights including the right of an individual to join the membership of any minority group and the right to self-determination of the people.

The theories about the origin of human rights have been discussed it is also important to discuss the justification of human rights. Some scholars argued that human rights are necessary for human dignity. According to James Griffin, “When these rights are violated, our human dignity is compromised and we are not treated with the respect that is owed to us as human beings.”<sup>12</sup> James Nickel argues that human rights are grounded in four secure claims: to have a life, to lead one’s life, and claims against severely cruel or degrading, and against severely unfair treatment.”<sup>13</sup> According to Beitz, “Responses to human rights violations can take different forms, including economic and diplomatic sanctions, or even simply formal censure from other states or some international body.”<sup>14</sup>

The concept of rights of the individuals was documented in the UK in the “Magna Carta of 1215”<sup>15</sup>, “Petition of Rights of 1628”<sup>16</sup>, “Habeas Corpus Act of 1679”<sup>17</sup>, and the “English Bill of Rights of 1689.”<sup>18</sup> Some treaties were concluded in this era but these were only protecting the rights of religious minorities.<sup>19</sup> In the US the initial document was the “Virginia Declaration of Rights”<sup>20</sup> and in same year “American Declaration of Independence, 1776 “ was adopted.<sup>21</sup> After the development of human rights law in the US, on the first day of the French Revolution, the French Declaration of the “Rights of

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<sup>12</sup> James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), 52.

<sup>13</sup> James W. Nickel, *Making Sense of Human Rights, Second Edition* (Malden, MA; Oxford: Blackwell Pub.,2007)61-69.

<sup>14</sup> Charles R. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009),121.

<sup>15</sup> Magna Carta 1215).

<sup>16</sup> Petition of Rights (1628).

<sup>17</sup> Habeas Corpus Act (1679).

<sup>18</sup> English Bill of Rights (1689).

<sup>19</sup> Treaty of Westphalia (24 October 1648). Treaties of Utrecht (1713), Treaty of Paris (1763).

<sup>20</sup> Virginia Declaration of Rights (12 June 1776).

<sup>21</sup> American Declaration of Independence (4 July 1776).

Man of 1789” was adopted, which was providing some human rights like men being free and equal, no one could be arrested without due process of law, the presumption of innocence and religious freedom.<sup>22</sup> After World War I (WWI), The League of Nations was established in 1919, although the charter did not provide any clear provision about human rights, however, the mandate system was created and mandatory was responsible to protect freedom of religion and conscience.<sup>23</sup> This mandate system divided the states into three categories and only the European countries were mandatory for all these nations.<sup>24</sup> The Permanent Court of International Justice was also established through this charter to address the issues of minorities.<sup>25</sup> League of Nations established the International labour office and also addressed the issue of refugees.<sup>26</sup> WWI many peace treaties were signed and the concept of self-determination was discussed.<sup>27</sup>

### 3.2 Human Rights Instruments

During WW –II due to the human suffering in WWI and WWII the need for human rights and fundamental freedoms was felt and leaders of the US, USSR, and the UK were discussing this, especially the right of people to decide about their future status. Before WWII the concept of human rights was limited to the domestic level of the states. The atrocities committed by the Nazi regime were one of the reasons for the discussion of human rights in a broader context. In January 1941, US President Franklin Roosevelt in his famous address on January 01, 1941, elaborated his four points about human rights

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<sup>22</sup> Declaration of the Rights of Man (26 August 1789), art. 1-10.

<sup>23</sup> Covenant of the League of Nations (Including Amendments Adopted to December 1924) (28 April 1919), art..22.

<sup>24</sup> Dr. Muhammad Muhtaq Ahmad, *Jihad, Muzamat aur Bighwat*, 531-33

<sup>25</sup> Covenant of the League of Nations , arts 13-14.

<sup>26</sup> JC Hathaway, *The Rights of Refugees under International Human Rights Law* (Cambridge : Cambridge University Press, 2005) 86.

<sup>27</sup> Treaty of Versailles (28 June 1919).

In the future days which we seek to make secure, we look forward to a world founded upon four essential human freedoms.

The first is freedom of speech and expression—everywhere in the world.

The second is freedom of every person to worship God in his own way—everywhere in the world.

The third is freedom from want, which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants—everywhere in the world.

The fourth is freedom from fear, which, translated into world terms, means a world-wide reduction of armaments.<sup>28</sup>

This speech which is known as the four freedoms speech played a vital role in the development of international human rights law. The institutional development of international human rights law was started after the establishment of the UN. The preamble of the charter of the UN reaffirms its commitment to fundamental human rights, human dignity, and the equality of men and women and small and large nations. One of the purposes of the establishment of the UN is to promote and encourage respect for human rights and fundamental freedoms for all without any distinction.<sup>29</sup> According to John P. Humphrey, this article is of the same importance as the purpose of the UN is the maintenance of peace and security.<sup>30</sup> In the charter of UN article 13 (1)(b) impose responsibility on UNGA to assist in the realization of human rights. Article 55(c) is about the responsibilities of the UN to promote respect and observation of human rights and fundamental freedoms of all people without any distinction. Article 56 puts legal obligations to states for the promotion and respect of human rights, Economic and Social Council is empowered through Article 62(2) for the recommendation on

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<sup>28</sup> F D Roosevelt, *The Public Papers and Addresses of Franklin D. Roosevelt* (Macmillan, London 1941) vol 4, 672.

<sup>29</sup> U.N. CHARTER, art.1(3).

<sup>30</sup> John P. Humphrey, "The International Law of Human Rights in the Middle, Twentieth Century" in Mararten Bos (ed.), *The Present State of International Law and other Essays* (Deventer: Kluwer, 1973). 75-84.

observance and promotion of human rights. Article 68 is for the establishment of the commission in the economic and social council for the promotion of human rights and Article 76(c) is about the objectives of trusteeship, which is responsible to encourage the independence of the people of the world and respect for human rights. UN Charter also imposes legal obligations to member states for cooperation to achieve, “to take joint and separate action in cooperation with the organization for the achievement of universal respect for and observance of, human rights and fundamental freedom for all without distinction as to race, language, religion or sex.”<sup>31</sup>

The provisions in the UN charter about human rights show that one of the basic objectives of the establishment of this organization is to protect the human rights of the people and these rights are universal. This charter also imposes individual and collective obligations on states to respect human rights. After the establishment of the UN, the first step taken by this organization was the establishment of the Commission on Human Rights in February 1946 by the Economic and Social Council.<sup>32</sup> This commission was directed to prepare reports and recommendations on the following human rights issues, “An international bill of rights, international convention or declaration on civil liberties, the status of women, freedom of information, the protection of minorities, the prevention of discrimination based on race, sex, language or religion and any other matter concerning human rights.”<sup>33</sup>

This commission had prepared the draft of the “Universal Declaration of Human Rights (UDHR)”, which was adopted by UNGA on December 10, 1948. Although this declaration is not a legally binding document, however, it had provided a list of universally accepted human rights. The preamble of the UDHR recognizes the dignity

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<sup>31</sup>UN Charter , art. 55( C) and 56.

<sup>32</sup> L.N. Tandon and S.K.Kapoor, *International Law* ( Lahore: Mansoor Book House, 2018) , 341.

<sup>33</sup> *Ibid*, 342.

and equal rights of all people, freedom from fear and want, and freedom of belief and speech. This declaration is a common standard of human rights among the people of territories under the state's jurisdiction and the people of member states. Thirty articles of UDHR are about freedoms and rights which include equality, freedom, non-discrimination, and universality. This charter also provides rights including the right to life, equality, and recognition before the law, fair trial, privacy, asylum, nationality, marriage, found a family, own property, social security, partake in public affairs, asylum, leisure, and rest, privacy, education, an adequate standard of living, take part in cultural, social and artistic activities, free and fair world. Freedoms provided are freedom from discrimination, torture, slavery, and arbitrary detention. Freedom of movement, expression, religion, belief, and assembly are also included in UDHR. Access to justice and presumption of innocence are also included in human rights. Article 30 of the UDHR declared these all rights as inalienable.<sup>34</sup> The commission on Human Rights also established a sub-commission on the prevention of discrimination and protection of minorities in its first session in 1947.<sup>35</sup>

Core international human rights instruments are those instruments for which the UN had established committees to monitor their implementation and state parties are legally obliged to send their reports on implementation and violations. After UDHR it was necessary to enforce a binding document for the protection of human rights. After a long discussion and dialogue, two covenants were agreed. One is the "International Covenant on Civil and Political Rights (ICCPR)", which was adopted by UNGA Res. 2200A (XXI) of December 16, 1966, and was entered into force on March 23, 1976.<sup>36</sup>

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<sup>34</sup>*Universal Declaration of Human Rights* (UDHR) 1948, (resolution 217 A), adopted 10 December 1948.

<sup>35</sup> L.N. Tandon, S.K. Kapoor, *International Law*, 342

<sup>36</sup> International Covenant on Civil and Political Rights (16 December 1966) GA Res 2200A (XXI), UN Doc A/6316 (1966), 999 UNTS 171, entered in to force on 23<sup>rd</sup> March 1976.

The second is the “International Covenant on Economic Social and Cultural Rights (ICESCR)”, which was about economic, social, and cultural rights that were also adopted on December 16, 1966, and entered into force on 3<sup>rd</sup> January 1976.<sup>37</sup> To empower the human rights committee to considering individual complaints first optional protocol of ICCPR was introduced.<sup>38</sup> To abolish the death penalty second optional protocol of ICCPR was introduced.<sup>39</sup> Other important human rights legal instruments are, “The Convention on the Prevention and Punishment of the Crime of Genocide”<sup>40</sup>, “Convention Relating to the Status of Refugees”<sup>41</sup>, “Convention on the Elimination of All Forms of Racial Discrimination of December 21, 1965”<sup>42</sup>, “Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of December 10, 1984”<sup>43</sup>, “Convention on the Elimination of All Forms of Discrimination against Women of 18<sup>th</sup> December 1979”<sup>44</sup>, “Convention on the

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<sup>37</sup> International Covenant on Economic Social and Cultural Rights (16 December 1966) GA Res 2200A (XXI), UN Doc A/6316 (1966), 993 UNTS 3, entered into force on 3<sup>rd</sup> January 1976.

<sup>38</sup> Optional Protocol to the International Covenant on Civil and Political Rights (16 December 1966) GA Res 2200A (XXI), UN Doc A/6316 (1966) 999 UNTS 302.

<sup>39</sup> Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (15 December 1989) GA Res 44/128, Annex, UN Doc A/44/49 (1989).

<sup>40</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948 Entry into force: 12 January 1951, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CrimeOfGenocide.aspx> (accessed on February 15, 2020).

<sup>41</sup> Convention Relating to the Status of Refugees of 28<sup>th</sup> July 1951, Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950 Entry into force: 22 April 1954.

<sup>42</sup> Convention on the Elimination of All Forms of Racial Discrimination, Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969, UN, Treaty Series, Vol. 660, p. 195, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en) (accessed on February 18, 2020).

<sup>43</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987, UN, Treaty Series, vol. 1465, p. 85, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-9&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en) (accessed on February 18, 2020).

<sup>44</sup> *Convention on the Elimination of All Forms of Discrimination against Women* of 18th December 1979 entered into force September 3, 1981, <https://www.un.org/womenwatch/daw/cedaw/> (accessed on February 18, 2020).

Rights of the Child of November 20, 1989”<sup>45</sup>, “International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 18<sup>th</sup> December 1990”<sup>46</sup>, “International Convention for the Protection of All Persons from Enforced Disappearance, 2005”<sup>47</sup> and “Convention on the Rights of Persons with Disabilities, 2006”<sup>48</sup>. After WW II, in 1949 regional organization Council of Europe was established, which had adopted the European Convention on the Protection of Human Rights and Fundamental Freedoms<sup>49</sup>, which is about human rights protection and observance.

“The Organization of American States” (OAS) had contributed a lot to the development of international human rights law. The member states had adopted the “American Convention on Human Rights in 1969”<sup>50</sup> which include provisions for the protection of civil and political rights as well as economic and social rights One important human rights document is the “African Charter on Human and Peoples, Rights”<sup>51</sup> which was adopted by the African Union, this charter include other human rights as in other international and regional instruments and some additional rights which are third-generation rights like peace and satisfactory rights.<sup>52</sup> and the “right to self-

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<sup>45</sup> *Convention on the Rights of the Child*, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990.

<sup>46</sup> *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* Adopted by General Assembly resolution 45/158 of 18 December 1990, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx> (accessed on February 20,2020).

<sup>47</sup> *International Convention for the Protection of All Persons from Enforced Disappearance, 2005*, <https://www.ohchr.org/en/hrbodies/ced/pages/conventionced.aspx> (accessed on February 20,2020).

<sup>48</sup> *Convention on the Rights of Persons with Disabilities, 2006*. Adopted on 13 December 2006, entered into force on May 3,2008, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=I V-15 &chapter=4](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I V-15 &chapter=4) (accessed on February 22,2020).

<sup>49</sup> *Convention on the Protection of Human Rights and Fundamental Freedoms* (4 November 1950) 213 UNTS 222, amended by Protocols No 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.

<sup>50</sup> *American Convention on Human Rights* (22 November 1969) OAS TS 36, art.26.

<sup>51</sup> *African Charter on Human and Peoples' Rights* (27 June 1981) OAU Doc CAB/LEG/67/3 rev. 5.

<sup>52</sup> *African Charter on Human and Peoples' Rights* (27 June 1981) OAU Doc CAB/LEG/67/3 rev. 5. Art. 23-24

determination of peoples.”<sup>53</sup> “Organization of the Islamic Conference” adopted the “Cairo Declaration on Human Rights in 1990”<sup>54</sup> which is different from international and regional instruments in the context that it recognizes human rights according to Islamic *Sharia*. Arab League also adopted the “Arab Charter on Human Rights in 1994.”<sup>55</sup> This charter was redrafted in 2004 and was enforced in 2008. According to Article 38 (1) of the charter of ICJ

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply to , international conventions, whether general or particular, establishing rules expressly recognized by the contesting states, international custom, as evidence of a general practice accepted as law, the general principles of law recognized by civilized nations, subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.<sup>56</sup>

In this context, the decisions of international courts, resolutions of the UN, and the opinions of jurists are sources of international law and had played an important role in the development of human rights law and its application.

### **3.3 Development of International Humanitarian Law (IHL)**

IHL is also called the Law War or Armed Conflict. Its development was started before the IHRL. Initially, the work to make rules and regulations during the war was started by Henry Dunant, who was on a business trip to Algeria in 1859. He witnessed a large number of wounded soldiers of the Battle of Solferino, who were without any medical

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<sup>53</sup>*Ibid.*, Art. 20.

<sup>54</sup>*Cairo Declaration on Human Rights in Islam* (5 August 1990) UN GAOR, World Conf. on Hum.Rts., 4th Sess., Agenda Item 5, UN Doc A/CONF.157/PC/62/Add.18 (1993) [English translation].

<sup>55</sup> League of Arab States, *Arab Charter on Human Rights*, 15 September 1994, ST\_HR\_] CHR\_NONE\_2004\_40\_Rev.1-EN - PDF

<sup>56</sup> Karen Hulme, *Core Documents on International Law* ( US: PALGRAVE MACMILLAN, 2010), 22-24.

care. In 1862 he wrote a book, "A Memory of Solferino"<sup>57</sup>, which became a base for the development of IHL. The book was on the sufferings of war and the ways by which suffering could be prevented or alleviated. He also emphasized the establishment of relief societies at the time of peace to protect victims at times of war and recommended some suggestions for an international treaty. Permanent relief societies were established by Gustave Moynier to help the wounded during the war in Feb 1863. International Committee for Relief to the Wounded (International Committee of the Red Cross), was established.<sup>58</sup> In 1864 the convention had adopted the "Convention for the Amelioration of the Condition of the Wounded in Armies in the Field" 1864.<sup>59</sup> These Geneva laws are first written laws about armed conflict and still, they are considered core legal instruments. The first law was improved and sick were added in 1906 this convention is called, the "Convention for the Amelioration of the Condition of the Wounded and Sick in Armies, 1906".<sup>60</sup> These laws were revised in 1929.<sup>61</sup> After WW I an exclusive law was made on prisoners of war, i.e. "Convention Relating to the Treatment of Prisoners of War."<sup>62</sup>

A German Professor living in the USA, Francis Lieber drafted rules for troops of the US in the 1860s. These instructions known as Lieber Code was published in 1863 and these are about the conduct of war.<sup>63</sup> During this era, Russian Tsar Alexander II was also working on methods of warfare and also suggested an International Military Commission discuss the prohibition of explosive bullets. This convention was held in

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<sup>57</sup> H Dunant, *A Memory of Solferino* (ICRC, Geneva 1986).

<sup>58</sup> From the Battle of Solferino to the First Geneva Convention and Beyond: Founding and Early Years of the ICRC (1863-1914)' [www.icrc.org](http://www.icrc.org) .

<sup>59</sup> Schindler, Dietrich, and Jiri Toman. "Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field." In *The Laws of Armed Conflicts*, pp. 409-420. Brill Nijhoff, 2004.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> Baxter, Richard R. "The First Modern Codification of the Law of War: Francis Lieber and General Orders No. 100." *International Review of the Red Cross (1961-1997)* 3, no. 25 (1963): 171-189.

December 1868, the convention had adopted “the St-Petersburg Declaration” which includes the rules about the conduct of war.<sup>64</sup> Oxford manual which is known as the Law of War on Land was drafted and was adopted by the Institute of International Law in 1880.<sup>65</sup> First International Peace Conference was convened in The Hague by Tsar Nicholas II of Russia In 1899, this conference had adopted the Hague Conventions and Declarations.<sup>66</sup> The Second International Peace Conference was held in Hague in 1907 and was very successful for the development of IHL, it had adopted fourteen treaties.<sup>67</sup> These treaties are called Hague conventions or Hague regulations. After WW II like IHRL, humanitarian law was also developed. A diplomatic conference was held in Geneva, to strengthen the laws of armed conflict and adopted four Geneva Conventions on 12<sup>th</sup> August 1949.<sup>68</sup> The ICJ confirmed that both the Hague conventions and Geneva Conventions are a single system of International Humanitarian Laws,

these two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law.<sup>69</sup>

After these Geneva Conventions, the important step in the development of IHL was the adoption of two additional protocols. Additional Protocol –I which is about international armed conflicts, defines it as “armed conflicts in which peoples are fighting against colonial domination and alien occupation and racist regimes in the

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<sup>64</sup> Schindler, Dietrich, and Jiri Toman. "Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight." In *The Laws of Armed Conflicts*, pp. 91-93. Brill Nijhoff, 2004

<sup>65</sup> Boothby, William H. *Weapons and the law of armed conflict*. Oxford University Press, 2016.

<sup>66</sup> Final Act of the International Peace Conference (29 July 1899); Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (29 July 1899); Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864 (29 July 1899).

<sup>67</sup> Hazeltine, M. W. "The Second Peace Conference." *The North American Review* 186, no. 625 (1907): 576-580

<sup>68</sup> Convention relative to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 UNTS.

<sup>69</sup> International Court of Justice, Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion of 8 July 1996) para 75 [thereafter: Nuclear Weapons Advisory Opinion].

exercise of their right of self-determination.”<sup>70</sup> The Additional Protocol-II <sup>71</sup> is about the protection of non-combatants and other regulations of non-international armed conflict. UN resolutions, decisions and advisory opinions of ICJ, *Opinio Juris*, and decisions of other international and regional courts played a significant role in the development of IHL.

IHL conventions, rules, and norms provide several basic principles that can also help in the interpretation of legal issues. Among these principles ‘distinction’ is a basic which applies to all types of armed conflicts. It means that there should be a clear distinction between combatants and non-combatants, military, and civil objects. Article 48 ad 52 of AP-I of GC defines the military objects and combatants. Article 48 provides

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.<sup>72</sup>

Article 52 of AP-I states.

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.
2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is

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<sup>70</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (8 June 1977) 1125 UNTS 3 [thereafter Protocol I], Article I(4).

<sup>71</sup> Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977) 1125 UNTS 609 [thereafter Protocol II].

<sup>72</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (8 June 1977) 1125 UNTS 3 [thereafter Protocol I], *art. 48*.

being used to make an effective contribution to military action, it shall be presumed not to be so used.<sup>73</sup>

The principle of ‘necessity’ means a military necessity and those targets could be not attacked which are not necessary to defeat the enemy. Article 52 of the first AP of GC provides a list of legitimate targets.<sup>74</sup> The principle of ‘proportionality’ protects the life and property of the civilian population. Article 51(5)(b) of AP-I prohibits excessive use of force.

an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.<sup>75</sup>

Article 57(2)(A)(iii) of AP-I clarifies the proportionality;

Those who plan or decide upon an attack shall: (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damages to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.<sup>76</sup>

A direct attack against a single non-combatant is a violation of IHL. The principle of humanity is an important principle, which means respect and care for all humans irrespective of affiliation with any party in the conflict. It is also called the “Martens Clause”<sup>77</sup> which provides, that "civilians and combatants remain under the protection

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<sup>73</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (8 June 1977) 1125 UNTS 3 [thereafter Protocol I], 52.

<sup>74</sup> Prokosch Eric, *"Arguments for Restricting Cluster Weapons: Humanitarian Protection Versus 'Military Necessity'"*, in IRRC, No. 299, March-April 1994, pp. 183-193.

<sup>75</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (8 June 1977) 1125 UNTS 3 [thereafter Protocol I], Article 51(5)(b).

<sup>76</sup> *Ibid*, article 57(2)(A)(iii).

<sup>77</sup> *Corfic ChanneZ case*, Judgment, I.C. J. Rep. 1949(April,9), P. 22.

and authority of the principles of international law derived from established custom, from the principles of humanity and the dictates of public conscience.”<sup>78</sup> Hague Convention IV and AP-I of GC both provide that parties in armed conflict had no unlimited powers. Article Art. 22 of the Hague Convention IV provides “The right of belligerents to adopt means of injuring the enemy is not unlimited.”<sup>79</sup> Art. 35 AP I states “In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.”<sup>80</sup> Another important principle of IHL is individual criminal responsibility, according to this principle in case of violation of IHL, not only the state but every individual will be held responsible.<sup>81</sup> This shows that IHL is not only applicable to states but it is also applicable to individuals.

### 3.4 Islamic Concept of Human Rights and Armed Conflict

Islam provides a complete system of life in every aspect whether it is human rights, economy, international law, municipal law, or social life. According to Imran Ahsan Nayzee the word religion should not be used for Islam it is *Din*, “with no distinction between church and state in Islam, this term conveys the meanings of system, way of life, order, and so on. It is, therefore, misleading to call Islam a religion in the sense Christians use the term for theirs. In Islam, the meaning is wider.”<sup>82</sup>

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<sup>78</sup> This clause was first introduced based on a compromise proposal by the Russian delegate at the 1899 Hague Peace Conference into the preamble of Hague Convention No. II of 1899 and appears now in the preambles of Hague Convention No. IV of 1907 and of the 1980 UN Weapons Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons and in Arts. 63/62/142/158, respectively, of the four Conventions (concerning the consequences of a denunciation) and in Art. 1 (2) of Protocol I. Preamble para. 4 of Protocol II contains similar wording.

<sup>79</sup> Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (18 October 1907), art.22, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/0/1d1726425f6955aee125641e0038bfd6> (accessed on February 15, 2020).

<sup>80</sup> Convention relative to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 UNTS. article 35.

<sup>81</sup> Dr. Muhammad Muhtaq Ahmad, *Jihad, Muzamat aur Bighwat*, 327.

<sup>82</sup> Imran Ahsan Nayzee, “Islamic Law and Human Rights” *Islamabad Law Review* Vol 1:1 & 2 (2003): 19.

Islamic law is divine law and no one can alter the laws provided in the Quran and the Sunnah of the Holy Prophet (SAW), because of this there are some differences between international human rights instruments and Islamic law of human rights.<sup>83</sup> All human rights included in UDHR are present in Holy Quran and Hadiths. Islamic laws are not recommendatory it is binding law as well as universal. In the Holy Quran, there are clear verses about human rights. Some of these rights shall be discussed here. About the right to life The Quran says, “Whosoever kills a human being without (any reason like) manslaughter, or corruption on earth, it is as though he had killed all mankind .....”.<sup>84</sup> The Holy Prophet (SAW) on the occasion of farewell Hajj said, "Your lives and properties are forbidden to one another till you meet your Lord on the Day of Resurrection."<sup>85</sup> The property right is also protected in Holy Quran, Allah says, “ And eat not up your property among yourselves in vanity”.<sup>86</sup> About justice, Allah says, "O you who believe! Stand out firmly for justice, as witnesses to Allah, even though it be against yourselves, or your parents, or your kin, be he rich or poor ...".<sup>87</sup> Islam believes in the equality of all human beings the Quran Says, “And of His signs is this: He created you of dust and you are now human being dispersed everywhere”.<sup>88</sup> Arbitrary punishment is protected in Islam, “No bearer of burdens shall be made to bear the burden of another.”<sup>89</sup> The right to privacy is protected by the Holy Quran, “Do not spy on one another.”<sup>90</sup> The right to participation in public affairs is also granted by the Holy Quran, “Allah has promised such of you as believed and do good deeds that He will surely make them succeed in the earth even as He caused those who were before them

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<sup>83</sup> Imran Ahsan Nayzee, “Islamic Law and Human Rights, 34.

<sup>84</sup> Surah Al Maida, 5:32 .

<sup>85</sup> Al Bukhari and Muslim.

<sup>86</sup> Al Quran, Al Buqra 2:188.

<sup>87</sup> Surah An Nisa, 4:135.

<sup>88</sup> Ar- Rum , 30:20.

<sup>89</sup> Surah Al Anam, 6:164.

<sup>90</sup> Surah Al Huzurat, 49:12.

to succeed over others.”<sup>91</sup> Islam also protects the honor of human beings, "You who believe, do not let one (set of) people make fun of another set, do not defame one another, do not insult by using nicknames and do not backbite or speak ill of one another.”<sup>92</sup> Islam believes in religious freedom, it is said, “ There is no compulsion in religion.”<sup>93</sup>

The first written constitution “The Constitution of Madina” was drafted by the Holy Prophet (SAW) in 622 C.E.<sup>94</sup> Freedom and rights of the human being irrespective of any distinction were guaranteed in this constitution. In the famous address after the conquest of Makah, the Holy Prophet(SAW) declared peace, freedom, and equality for all Human beings.<sup>95</sup> The Holy Prophet Muhammad (SAW), delivered his last sermon at Makah, during the Farewell Pilgrimage known as *Hajjat-ul-Widda*’ which is a complete human rights charter. About equality of human beings, He said, “O, people! No Arab has any superiority over a non-Arab, nor does a non-Arab have any superiority over an Arab. Nor does a white man have any superiority over a black man or the black man any superiority over the white man. ...”<sup>96</sup>

Some verses from the Holy Quran and Hadiths about human rights have been discussed, which proves that Islam protects the rights of every human being. There are some differences between the Islamic and Western approaches to human rights. In the international or Western concept of human rights, these rights are enforceable through any legal instrument which could be amended or repealed whereas the rights granted

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<sup>91</sup> *Al Quran, an- Nisa* , 24:55

<sup>92</sup> *Al Quran* , (49:11-12).

<sup>93</sup> *Al Buqra* 2:256.

<sup>94</sup> It is the first written constitution in the recorded historical consciousness of the world. This was actually a covenant between Muslims of Medina, both Anasar (Helpers) and Muhajireen, (Migrants) and Jews of the same place. This can be also label as shortest but comprehensive written constitution in the history of world.

<sup>95</sup> *The 8th year of Hijrah, when Muslims conquered Makkah is known as Fath-i-Makkah.*

<sup>96</sup> *Ibn Hisham, Muhammad Abdul Malik, Siratun Nabi, Dar al Hidayah, Qahirah, n.d., vol. II*

by Shariah could not be changed by any human authority or agency. The preamble of the Cairo Declaration is different from UDHR and it provides

Believing that fundamental rights and freedoms according to Islam are an integral part of the Islamic religion and that no one shall have the right as a matter of principle to abolish them either in whole or in part or to violate or ignore them in as much as they are binding divine commands, which are contained in the Revealed Books of Allah and which were sent through the last of His Prophets to complete the preceding divine messages and that safeguarding those fundamental rights and freedoms is an act of worship whereas the neglect or violation thereof is an abominable sin, and that the safeguarding of those fundamental rights and freedom is an individual responsibility of every person and a collective responsibility of the entire Ummah;<sup>97</sup>

Islam also provides the rules for *Jus in bello* and *Jus ad bello* . These rules were also implemented during the period of the Holy Prophet (SAW) and pious Caliphs. War is not prohibited in Islam but there are some principles for waging a war. Dr. Muhammad Munir in his book concluded causes of war in Islam as

War in Islam is an instrument devised to protect the believers and their religion from the enemies and it is a tool used only when necessary and when there is an attack on Islamic state; and it is never meant to force people to become Muslims. Islamic military history shows that preemptive attacks on self defense as well as a humanitarian intervention to rescue Muslim citizens are allowed.<sup>98</sup>

The Holy Quran provides a complete guideline about the laws of War. Humanity is the basic principle and consideration even during the war. The Holy Quran in *Surah An Nahl* verse No. 126 orders, “And if you punish [an enemy, O believers], punish with an

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<sup>97</sup> UDHR. Preamble.

<sup>98</sup> Muhammad Munir, *The Law of War and Peace in Islam: Causes and Conduct of Jihad and Non- State Islamic Actors Under Islamic Law* (Islamabad: IRD, International Islamic University, 2019), 129.

equivalent of that with which you were harmed. But if you are patient – it is better for those who are patient.”<sup>99</sup> The principle of proportionality is directed by the Holy Quran in *Surah Al- Baqra* verse No 190, “Fight in the way of Allah those who fight you but do not transgress. Indeed. Allah does not like transgressors.”<sup>100</sup>

In Islamic law, the human rights and dignity of a human being are very important. The summary of these rights has been very well concluded by Dr. Muhammad Munir;

Islamic law makes a distinction between combatants and non- combatants and allows fighting with former and protection to the later. Verse 2:190 lays down the principle of distinction because its authoritative interpretation is that ‘those who do not fight cannot be killed’. The immunity of protected persons that is women, children, servants, peasant, sick and priests who do not mix up with the people is provided for in many *ahadith*. The prohibition of killing of women, children and servants is very stick .<sup>101</sup>

The Holy Prophet (SAW) had brought reforms in the conduct of war through practice and instructions. These reforms are not limited to human beings but also natural resources, living things, and even dead bodies;

The Prophet (Peace be Upon Him) also prohibited the destruction of harvest, livestock and forests. Looting, plundering and corruption from war booty are strictly prohibited. Prohibited activities also include indiscipline, loud noises and occupying the whole passage while passing through and thereby excluding other people. Mutilation of dead or alive was strictly forbidden. Suicide attacks and using weapons of mass destruction also fall in the forbidden category. Genocide and war crimes are unlawful practices that never happened in early Islamic military history, both are strictly prohibited in Islamic Law.<sup>102</sup>

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<sup>99</sup>*Surah An Nahl* : 126.

<sup>100</sup>*Surah Al- Baqra* : 190.

<sup>101</sup> Muhammad Munir, *The Law of War and Peace in Islam* , 240.

<sup>102</sup> *Ibid*, 340.

### 3.5 International Criminal Law(ICL)

ICL had got importance in the 20<sup>th</sup> century as a part of international law. This law is different from domestic law because at the domestic level there is a single sovereign but at the international level, there is no concept of a single sovereign. According to Cherif Bassiouni, “international criminal law is ‘the convergence of two different legal disciplines, the ‘international aspects of national criminal law’ and the ‘criminal aspects of international law.’”<sup>103</sup> The ICL is based on three basic perceptions, “that international law recognizes individuals, not merely as objects, but as subjects with rights and duties which it defines; that it defines certain crimes for which individuals are liable; and that it distinguishes this criminal liability from the civil responsibility of states under international law.”<sup>104</sup>

ICL was developed by IHRL and IHL and it assigns criminal responsibility to individuals in international crimes. Cassese defined International crimes as “breaches of international rules entailing the personal criminal liability of the individuals concerned (as opposed to the responsibility of the State of which the individuals may act as organs).”<sup>105</sup> Werle defined as “Crimes under international law are all crimes involve direct individual criminal responsibility under international law.”<sup>106</sup> “International Law Commission of the United Nations” in 1996 provided a modern list of “crimes against the peace and security of mankind which includes (i) aggression, (ii) genocide, (iii) crimes against humanity, (iv) crimes against United Nations and

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<sup>103</sup> O C. M. Bassiouni, “*The Penal Characteristics of Conventional International Criminal Law*” (1983) 15 Case Western Reserve Journal of International Law 27.

<sup>104</sup> Q. Wright, ‘*The Scope of International Criminal Law: A Conceptual Framework*’ (1975) 15 Virginia Journal of International Law 565.

<sup>105</sup> M. Cherif Bassiouni, ‘*International Crimes: The Ratione Materiae of International Criminal Law*’, in: M. Cherif Bassiouni (ed.), *International Criminal Law. Vol. I: Sources, Subjects and Contents*, 3<sup>rd</sup> ed., Martinus Nijhoff Publishers: Leiden 2008, p. 23.

<sup>106</sup> G. Werle, *Principles of International Criminal Law*, (The Hague: T.M.C. Asser Press, 2005), 25.

associated personnel and (v) war crimes.”<sup>107</sup> In the theoretical context, there are two theories about international crimes, first is the Evil Nature of the Offence (*Malum in se*) and the second is Prohibited Evil (*Malum Prohibitum*). According to the theory of the evil nature of offences, international crime depends upon the nature of the offence.

these crimes can be investigated and prosecuted internationally even though they are not enshrined in a universally applicable treaty. States which have custody over perpetrators have the obligation to take the necessary and reasonable steps to apprehend the offender and ensure the prosecution and trial by a competent jurisdiction.<sup>108</sup>

Cecile Fabre defined “all crimes that are dehumanizing and violate basic human rights should be regarded as international crimes.”<sup>109</sup> The theory of prohibited evil relies on the level of prohibition and considers those crimes as international crimes that are prohibited by international law. According to Kevin Heller, “this the direct criminalization thesis.”<sup>110</sup> International Criminal Court (ICC) was established through the Rome Statute of 1998. Article 05 of the statute provides the list of international crimes;

Crimes within the jurisdiction of the Court : The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.<sup>111</sup>

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<sup>107</sup> ILC, Draft Code of Crimes against the Peace and Security of Mankind (1996), Arts. 17–20, in ILC, Report of the International Law Commission on the Work of its Forty-Eighth Session, UN GAOR, 51st Sess., Supp. No. 10, at 93, UN Doc. A/51/10 (1996).

<sup>108</sup> Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge : Cambridge University Press, 2019), 19.

<sup>109</sup> C. Fabre, *Cosmopolitan Peace* (Oxford: Oxford University Press, 2016), 181.

<sup>110</sup> Heller, “What Is an International Crime?” *Harvard International Law Journal* / Vol. 58 Number 2, (Spring 2017). 362–391. [https://harvardilj.org/wp-content/uploads/sites/15/H\\_ILJ205\\_crop.pdf](https://harvardilj.org/wp-content/uploads/sites/15/H_ILJ205_crop.pdf) (accessed on January 28, 2020).

<sup>111</sup> Rome Statute of the International Criminal Court, 1998, art.5, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187.

ICL is applied through ICC, International criminal tribunals, ad hoc tribunals, and hybrid tribunals. ICC, International Criminal Tribunal for former Yugoslavia, International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone had played a significant role in the application of ICL and in devising norms and rules of IHL and IHRL.

### **3.6 Applicability of International Human Rights Law and International Humanitarian Law in Kashmir Conflict**

IHL is only applicable in armed conflicts whether they are international or internal armed conflicts. IHR law is applicable both in peace and wartime. The relationship between both the laws was explained by ICJ as;

... the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.<sup>112</sup>

In situations where both laws apply, IHL is considered as *lex specialis* by ICJ.<sup>113</sup>

Kashmir conflict is an international armed conflict, all human rights instruments are applicable except for some rights which have been suspended by IHL provisions. All four Geneva conventions, AP I of 1977 and international customary law is also applicable. ICL is an important branch of international law and this law is also applicable in the situation of Kashmir, which will be discussed in detail in the next chapters.

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<sup>112</sup>Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, I.C.J. Reports 2004, para. 106.

<sup>113</sup> *Ibid.*

## Conclusion

According to John Simmons, “Human rights are the rights possessed by all human beings (at all times in all places), simply in virtue of their humanity.”<sup>114</sup> From this concept of natural rights to the recent political theory of human rights and all international IHRL and IHL instruments, it is clear that the human rights of every member of the international society are protected. The implementation mechanism of these human rights instruments is weak like other branches of international law and some time political interests of the states creates hurdle in the implantation. It was observed that IHRL provides some implementation and reporting mechanisms that are helpful for the protection of these rights at the national level. International and regional bodies and courts had developed some legal norms which are getting universal acceptability. The development of ICL is an important step towards the accountability of individual crimes. There are some issues of cultural relativism in international law but Islamic law of human rights is not contradictory to fundamental human rights. Islamic law provides complete mechanisms and principles of IHRL and IHL. Kashmir conflict is an international armed conflict and the people of J&K have all the rights provided in IHRL instruments and IHL. The struggle of the indigenous people of Kashmir is falling in the category of the ‘national liberation movement’ for the right to self-determination.

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<sup>114</sup> James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), 1-2.

## **Chapter IV:**

# **HUMANITARIAN CATASTROPHE IN JAMMU AND KASHMIR**

### **Introduction**

Jammu and Kashmir are disputed territories and the governing countries do have not sovereign titles over Kashmir. There are many reports by international organizations, local human rights activists, institutions, and think tanks on human rights and humanitarian law violations in Kashmir. For the first time in the history of this conflict United Nations Office of Human Rights Commissioner (UNOHCHR) has published two reports, it's first in June 2018 and the second in July 2019. These reports reveal systematic and gross human rights violations as well as patterns of impunity for the perpetrators. This chapter is an analysis of violations of international law with documentary pieces of evidence from Kashmir.

In international law and legal jurisprudence, the concept of systemic and gross human rights violations is getting concentration; the first section discusses this in the context of Kashmir. The second section is about the violation of *Jus Cogens* norms which includes violation of the right to self-determination, the crime of torture, the crime of genocide and enforced disappearances in international law and their violations in Kashmir. The third section is about crimes against humanity and in this section sexual violence, unlawful killings, and attempts to change the demography of Kashmir is under discussion. International Criminal Law provides a legal mechanism to punish perpetrators of war crimes, the fourth section is an analysis of these crimes in Kashmir. The fifth section is about the pattern of impunity for perpetrators of crimes. The erstwhile State of J&K is administratively divided into three parts, Gilgit Baltistan(GB )and Azad Jammu and Kashmir (AJ & K) are under the administration of Pakistan, for

the first time in the reports of OHCHR some human rights concern has been shown the sixth section is about these concerns.

#### **4.1 Systematic and Gross Human Rights Violations in Kashmir**

The terms gross and systematic human rights violations have been discussed in many conventions and international law instruments. In Jammu and Kashmir, almost all the human rights provided through international legal instruments have been violated, but this chapter will be limited to gross and systematic human rights violations. There is not any single definition for systematic and gross human rights violations; however international law had declared some violations as gross and systematic. The 'Declaration of Vienna World Conference on Human Rights 1993', states:

violations and situations that constitute serious obstacles to the full enjoyment of all human rights continue to occur in different parts of the world. Such violations and obstacles include, as well as torture and cruel, inhuman and degrading treatment or punishment, summary and arbitrary executions, disappearances, arbitrary detentions, all forms of racism, racial discrimination and apartheid, foreign occupation and alien domination, xenophobia, poverty, hunger and other denials of economic, social and cultural rights, religious intolerance, terrorism, discrimination against women and lack of the rule of law.<sup>1</sup>

The concept of gross and systematic human rights violation has been elaborated in 'An Interpretative Guide on Corporate Responsibility, published by OHCHR as

There is no uniform definition of gross human rights violations in international law, the following practices 'would generally be included: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, enforced disappearances, arbitrary and prolonged detention, and systematic discrimination. Other kinds of human rights violations, including of economic,

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<sup>1</sup> The Vienna Declaration and Programme of Action, World Conference on Human Rights, 1993, para. 30.

social and cultural rights, can also count as gross violations if they are grave and systematic, for example, violations taking place on a large scale or targeted at particular population groups.<sup>2</sup>

International law and jurisprudence provide that crimes against humanity, arbitrary detention/ arrest, unlawful killings, enforced disappearances, transfer of population from occupier to the occupied territory, excessive use of force, torture, sexual violence, impunity, massacres, rapes, etc are the gross human rights violations.<sup>3</sup> These gross and systematic human rights violations are crimes and are accountable under international criminal law. Chernichenko considers, “the large scale and gross violations of human rights are an international crime.”<sup>4</sup> These violations should be criminalized and hardcore human rights could not be derogated.<sup>5</sup> The United Nations General Assembly (UNGA) resolution also provides, “in cases of gross and systematic violations of human rights: the General Assembly may suspend the rights of membership in the Council of a member state that commits such violations.”<sup>6</sup> According to definitions of the gross and systematic human rights violations, there are two ingredients one should be at a large scale, and the second targeting a particular group. The analysis of the situation of IOJK shows that all violations are systematic for the last thirty years and the people of IOJK are the targeted populations. These violations are not limited to some persons

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<sup>2</sup> OHCHR, The Corporate Responsibility to Respect Human Rights: An Interpretative Guide”, UN, 2012, UN doc. HR/PUB/12/02, p. 6. [http://www.ohchr.org/Documents/Publications/H\\_R\\_PUB\\_12.2\\_En.pdf](http://www.ohchr.org/Documents/Publications/H_R_PUB_12.2_En.pdf). (accessed on May 05,2020).

<sup>3</sup> The Geneva Academy of International Humanitarian Law and Human Rights Law, “What amounts to ‘a serious violation of international human rights law’? An analysis of practice and expert opinion for the purpose of the 2013 Arms Trade Treaty”, August 2014, Annex A

<sup>4</sup> Definition of Gross and Large-scale Violations of Human Rights as an International Crime’, Working Paper submitted by Mr. Stanislav Chernichenko in accordance with Sub-Commission Decision 1992/109, UN doc. E/CN.4/Sub.2/1993/10, 8 June 1993, para. 13.

<sup>5</sup> Dupuy, Pierre-Marie, *Droit International Public*, (Paris: Dalloz, 1998), 206-210

<sup>6</sup> General Assembly Resolution 60/251, 3 April 2006, para. 3. Human Rights Council Resolution 5/1, Institution-building of the United Nations Human Rights Council, para.8.

or some specific area, these are everyday routines in the whole occupied area. The numbers and details will be discussed in the next sections.

## 4.2 Violation of *Jus Cogens* norms in Kashmir

*Jus Cogens* means ‘the compelling law’, these norms are non-derogable and peremptory. This concept was developed in the early nineteenth century in international law to protect the human rights of the people. According to Professor Oppenheim, “a number of universally recognized principles of international law existed in the *jus Cogens* which rendered any conflicting treaty void and *jus cogen* was unanimously recognized as a customary rule of international law.”<sup>7</sup> The reference of *Jus Cogens* was used in 1928 in the decision of *Pablo Nájera* Case<sup>8</sup> by the French-Mexican Claims Commission. In 1934, judge Schücking of the Permanent Court of International Justice referred to this in the *Oscar Chinn* Case.<sup>9</sup> ICJ in the “*Nicaragua Case*” ruled that “the rules of *jus Cogens* as an accepted doctrine in international law.”<sup>10</sup> These norms were considered necessary for peace and the protection of human rights. For the first time in legal instruments, it was included in the “*Vienna Convention on the Law of Treaties 1969*”(VCLT). Article 53 provides,

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.<sup>11</sup>

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<sup>7</sup>Oppenheim Et Al., *Oppenheim's international law: vol 1 Peace: introduction to part I*, (9th edn, Longman 1992); Kamrul Hossain, ‘*The Concept of Jus Cogens and the Obligation Under The U.N. Charter*’ (2005) 3 Santa Clara Journal of International Law 74.

<sup>8</sup>*Pablo Nájera (France) v United Mexican States*, Decision no. 30-A, 19 October 1928, in U.N.R.I.A.A., vol, V, p, 466.

<sup>9</sup> *Oscar Chinn (U.K. v. Belg.)*, (1934) P.C.I.J. (ser. A/B) No. 63.

<sup>10</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment I.C.J. Rep.1986 (June,27),p.14.

<sup>11</sup> *Vienna Convention on the Law of Treaties*, May 23, 1969, art. 53, U.N. Doc. A/Conf. 39/ 27, 1155 U.N.T.S. 331, <http://treaties.un.org/doc/Publication/UNTS/Volume%201155/v1155.pdf>.

According to this provision, all the treaties which violate peremptory norms of international law (*Jus Cogens*) are void. These *Jus Cogens* norms place states on erga omnes obligations (obligations towards all) and there is no immunity for the violators of such crimes.<sup>12</sup> These two terms were elaborated as, “*jus Cogens* refer to the legal status that certain international crimes reach, and obligation *erga omnes* pertains to the legal implications arising out of a certain crime’s characterization as *jus Cogens*.”<sup>13</sup> These jus cogen norms are not derogable by consent or by treaty.<sup>14</sup>

It was discussed and debated which norms of international law are *Jus Cogens*. The decisions of international courts as well as some regional courts and *Opino Juris* had identified some norms which had attained the status of peremptory norms. These are, “jus Cogens to include, at a minimum, the prohibitions against genocide; slavery or slave trade; murder or disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination and ‘the principles of the United Nations Charter prohibiting the use of force.’”<sup>15</sup>

These norms are essential principles of international law and their violation is not allowed. In Jammu and Kashmir, these norms are not respected and violated by the occupier state.

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<sup>12</sup> See, E.H. GUISSSE & L. JOINET, PROGRESS REPORT ON THE QUESTION OF IMPUNITY OF PERPETRATORS OF HUMAN RIGHTS VIOLATION, U.N. Commission on Human Rights, Sub-Commission on the Prevention and Protection of All Minorities, 45th Sess., Item 10(a), U.N. Doc.E/CN.4/Sub.2/1993/6 (1993)(prepared pursuant to Sub-Commission Res. 1992/23); L. JOINET, QUESTION OF THE IMPUNITY OF PERPETRATORS OF VIOLATIONS OF HUMAN RIGHTS (CIVIL AND POLITICAL RIGHTS): FINAL REPORT, U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 48th Session, Item 10, U.N. Doc. E/CN.4/Sub.2/1996/18 (1996)(prepared pursuant to Sub-Commission Resolution 1995/35.

<sup>13</sup> Cherif Bassiouni, “*International crimes: jus Cogens and obligation erga omnes, Law and Contemporary Problems*”, Vol. 59, No. 4, p. 64.

<sup>14</sup> 4 S. T. Hermelsen, “*The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations*” [2014] 2 Netherlands Int’l L. Rev. 167.

<sup>15</sup> Evan J. Criddle & Evan Fox-Decent, ‘*A Fiduciary Theory of Jus Cogens*’ (2009) 34 Yale Journal of International Law 331

The right to self-determination had attained the position of *Jus Cogens* norms in international law. The ICJ in the East Timor case declared that the right to self-determination (RSD) is a right *erga omnes*.<sup>16</sup> In the advisory opinion on the wall's case, the ICJ also reaffirmed this.<sup>17</sup> India is violating this norm by denying the RSD to the people of Kashmir since 1949. The Indian claim that ruler Maharaja Hari Singh had signed an instrument of accession (IoA) by which it is her integral part. This IoA and many verbal and written commitments of India also show that the future status of the state shall be determined by the will of the people. Prime Minister of India, Nehru on 31<sup>st</sup> December 1947 wrote to UN Secretary-General, "the Govt. of India wants to make it very clear that as soon as the raiders are driven out as normalcy is restored, the people of the state will freely decide their fate and the decision will be taken according to the universally accepted democratic means of plebiscite or referendum."<sup>18</sup>

The letter of accession written by the Maharaja and the reply of Mountbatten is the part of a treaty as Article 31 of the "Vienna Convention on Law of Treaties (VLT)" provides, "that correspondence between the two contracting parties that is related to the treaty shall be used in construing the terms of the treaty."<sup>19</sup> These documents and UN resolutions provide that both Pakistan and India agreed on granting RSD to the people of J&K.

### 4.3 Torture in Kashmir

The crime of torture has been defined in article 1 of the UN Convention against Torture, 1984 as,

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or

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<sup>16</sup> East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p.102, para 29.

<sup>17</sup> Advisory opinion on Legal Consequences of the Construction of Wall, 199.

<sup>18</sup> Victoria Schofield, *Kashmir in the Crossfire* (London: I.B. Tauris, 1996), 160.

<sup>19</sup> Ijaz Hussain, *Kashmir Dispute: An International Law Perspective*, 60-61.

a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>20</sup>

The convention also declares that torture is not allowed in any situation, and the states will take administrative and judicial measures to prevent torture not only in their territories but also in the areas of their jurisdiction.<sup>21</sup> International Criminal Tribunal for Former Yugoslavia (ICTY) in Prosecutor V. Anto Furundzija<sup>22</sup> declared that the prohibition of torture is an absolute right and even at the time of emergency it cannot be derogated. Hence prohibition on torture is *Jus Cogens*. Torture is prohibited by international law. Article 5 of UDHR states, "No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment."<sup>23</sup> Article 7 of ICCPR<sup>24</sup> also prohibits torture. An important development in international law is the Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment(UNCAT), of 1984.<sup>25</sup> It is also prohibited by many international

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<sup>20</sup> United Nations Convention Against Torture (UNCAT), (adopted 4 February 1985, entered into force 26 June 1987), Art. 1(1).

<sup>21</sup> Ibid. Art. 2(1)(2)(3).

<sup>22</sup> Prosecutor V. Anto Furundzija (trial judgment), International Criminal Tribunal for Former Yugoslavia (ICTY) –IT-95-17/I-T(21 July 2000)

<sup>23</sup> Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

<sup>24</sup> International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. Article 7. ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.").

<sup>25</sup> The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment(UNCAT), G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987.

conventions<sup>26</sup> and regional human rights charters, the “African Charter on Human and Peoples' Rights”<sup>27</sup>, the “European Convention for the Protection of Human Rights and Fundamental Freedoms”<sup>28</sup>, and the “American Convention on Human Rights.”<sup>29</sup> Torture is considered an international crime and universal jurisdiction is applicable, article 5 of UNCAT states;

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offenses referred to in article 4 in the following cases:
  - (a) When the offenses are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) When the alleged offender is a national of that State; (c) When the victim is a national of that State if that State considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.<sup>30</sup>

Torture and degrading punishment are also prohibited in time of war. Geneva Conventions are about the law of war common Article 3 of all four Geneva conventions prohibits torture, “cruel treatment and torture and outrages upon personal dignity, in particular, humiliating and degrading treatment of civilians and persons hors de

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<sup>26</sup> Article 37 of the Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990; Article 10 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), entered into force July 1, 2003.; and Article 15 of the Convention on the Rights of Persons with Disabilities, G.A. res. A/61/611 (2006). Additionally, Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force Jan. 4, 1969.

<sup>27</sup> African (Banjul) Charter on Human and Peoples' Rights art. 5, June 27, 1981, 21 I.L.M. 58

<sup>28</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 222.

<sup>29</sup> Inter-American Convention to Prevent and Punish Torture art. 1, Dec. 9, 1985, O.A.S. T.S. No. 67

<sup>30</sup> The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), art.5.

combat.”<sup>31</sup> These conventions also provide separate provisions for torture.<sup>32</sup> Torture is also prohibited in international and non-international armed conflicts. Article 75 of the “Additional Protocol -I of Geneva Conventions” (AP-I)<sup>33</sup> and article 4 of the “Additional Protocol-II” (AP-II)<sup>34</sup> prohibits Genocide. Article 7 (1) (f) of the “Rome Statute of International Criminal Court” (ICC)<sup>35</sup> included torture as a crime against humanity, whereas article 89(2) (a) (ii) provides that torture is the grave breach of the Geneva Convention and punishable under the statute of war crimes.

It is evident from the above discussion that torture is not only a jus cogen norm but it is also included in the war crimes. India had signed CAT in 1997, she had ratified ICCPR in 1979, and Pakistan has signed CAT in 2008, ratified in 2010, and ratified ICCPR in 2010.<sup>36</sup>

In Jammu and Kashmir, the situation of torture in two divided parts of the former state of Jammu and Kashmir is quite opposite and different. In AJ & K and GB local police are administering law and order whereas external security and defence are the responsibility of Govt. of Pakistan. There is not any reported case of torture in both areas by the Pakistan army; however local police use torture in police stations in some individual cases of heinous crimes. The situation in IOJ&K is quite different, not only local police but the Indian army was also involved in the torture, inhuman and

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<sup>31</sup> Common Article 3 of four Geneva Conventions of 1949.

<sup>32</sup>First Geneva Convention, Article 12, second paragraph (“torture”); Second Geneva Convention, Article 12, second paragraph (“torture”); Third Geneva Convention, Article 17, fourth paragraph (“physical or mental torture”)), Article 87, third paragraph (“torture or cruelty”)) and Article 89 (“inhuman, brutal or dangerous” disciplinary punishment; Fourth Geneva Convention, Article 32 (“torture” and “other measures of brutality”).

<sup>33</sup>Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted on 8 June 1977, entry into force: 7 December 1979.

<sup>34</sup>Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted on 8 June 1977, entry into force: 7 December 1978.

<sup>35</sup>Rome Statute of the International Criminal Court July 17, 1998, UN Doc. A/CONF.183/9.

<sup>36</sup>United Nation, Office of Human Rights Commissioner, STATUS OF RATIFICATION INTERACTIVE DASHBOARD, [www.indicators.ohchr.org](http://www.indicators.ohchr.org) (accessed on June 01, 2020).

degrading treatment, and punishment, especially after 1989. There are many case studies and reports of international, national, and local organizations<sup>37</sup> but some important and recent reports shall be discussed. Jammu and Kashmir Coalition of Civil Society (JKCCS) and the Association of Parents of Disappeared Persons (APDP) published a report “Torture: Indian State’s Instrument of Control in Indian-administered Jammu & Kashmir”<sup>38</sup> in February 2019. This is a detailed account of 432 cases of torture from 1990 to 2018. This research report reveals that Indian forces are using barbaric methods of torture. According to the report,

- Apart from verbal abuse, the other forms of torture that we have come across during this research include stripping the detainees naked (or down to bare minimum), beatings with wooden sticks, iron rods or leather belts, roller treatment whereby a heavy wooden log or an iron rod is rolled over the legs of the detainee, with extra weight applied to it by forces personnel who sit on the opposite sides of this rod, water-boarding, electrocution, hanging from the ceiling, dunking detainees’ head in water (which is sometimes mixed with chili powder), burning of the body with iron rods, heaters or cigarette butts, solitary confinement, sleep deprivation, sexualized torture including rape and sodomy, among others.<sup>39</sup>

Indian occupational forces are violating international human rights and humanitarian law. The report shows the methods of torture as well as the detail of every case. This shows that three hundred twenty-five victims were beaten with iron rods, leather belts,

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<sup>37</sup>United Nations Office of the High Commissioner on Human Rights (2018), Jammu Kashmir Coalition of Civil Society (2012, 2015, 2016, 2017), Amnesty International (1992, 1993, 1995, 1996, 1997, 1999, 2000, 2001, 2005, 2011, 2012, 2015), Human Rights Watch (1993, 1996, 1999), and Indian democratic rights and civil liberties groups such as People’s Union for Democratic Rights (PUDR), Human Rights Forum (HRF), and Andhra Pradesh Civil Liberties Committee (APCLC) (1990, 1991, 1995, 1996, 1997, 2001)

<sup>38</sup> Jammu and Kashmir Coalition of Civil Society and Association of Parents of Disappeared Persons, “Torture: Indian State’s Instrument of Control in Indian-administered Jammu & Kashmir in February 2019 (Srinagar: JKCCS and APDP, 2019), ( accessed on March 30, 2020), [www.jkccs.net](http://www.jkccs.net) .

<sup>39</sup> *Ibid*, 13.

wooden sticks, and bamboo.<sup>40</sup> Seventy people had been burned by using iron, cigarette, etc.<sup>41</sup> One hundred sixty nine people were tortured by roller, heavy iron or wooden lodged was pressed and rolled over their legs which caused fractures and breakdown of muscles.<sup>42</sup> Ninety three people were slapped, punched, kicked, and dragged.<sup>43</sup> Petrol, salt, or chilli was rubbed on their genitals, eyes, or in the wounds of fifteen victims.<sup>44</sup> Besides the physical torture, the victims were forced to act against their religious beliefs. Fifteen victims were forced to rub snakes, dogs, rats, and piglets on their bodies. Thirty three victims were forced to drink or eat urine; chili powder mixed with water, dirty water, gravel, dirt, and human excreta. Forty nine victims of torture were died due to injuries or shot dead or poisoned.<sup>45</sup> Sexual torture is another tool used by occupational forces. Two hundred thirty eight victims were sexually tortured.<sup>46</sup>

According to the report;

190 people were stripped naked. 127 people were electrocuted in their genitals. Foreign objects like rods, petrol, chili powder and needles were inserted into the rectums of 23 of the victims. On October 27, 2009, 11 boys between the age of 13 and 19 were arrested in Srinagar on the charges of stone pelting. During their detention, the boys were forced to sodomize each other. Not only did the perpetrators watch the whole incident, they even recorded it on their mobile phone, hurled abuses on the victims and spat on them.<sup>47</sup>

The Trial Chamber in *Prosecutor v Simić, Tadić, and Zarić* identified the acts of inhuman treatment as, “harassment, humiliation, the creation of an atmosphere of fear through torture or other forms of physical or psychological abuse, an insufficient supply

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<sup>40</sup> Jammu and Kashmir Coalition of Civil Society and Association of Parents of Disappeared Persons, “Torture: Indian State’s Instrument of Control in Indian-administered Jammu & Kashmir in February 2019(Srinagar: JKCCS and APDP, 2019),” 56.

<sup>41</sup> *Ibid*, 57.

<sup>42</sup> *Ibid*, 57.

<sup>43</sup> *Ibid*, 56.

<sup>44</sup> *Ibid*, 58.

<sup>45</sup> *Ibid*, 112.

<sup>46</sup> *Ibid*, 73.

<sup>47</sup> *Ibid*, 74

of food and water, lack of space, unhygienic detention conditions, and insufficient access to medical care.”<sup>48</sup>

The report shows that the Indian Army, Jammu Kashmir Police, Central Armed Police Force (CAPF), Central Reserve Police Force (CRPF), Village Defense Committees (VDCs), intelligence agencies, and state-sponsored terrorist groups like Ikhwanis are the perpetrator of the torture. Amnesty International in several reports exposed the methods of torture by occupational forces in IIOJK. Amnesty International published a report in 1993 and stated that Indian forces are involved in extrajudicial killings, torture, and other grave human rights violations. Report revealed,

..Many have died in custody after torture and numbers of custodial deaths in Jammu and Kashmir have reached alarming proportions; they are currently by far the highest in any Indian state. Hundreds of people are alleged to have died in custody in recent years in Jammu and Kashmir and often their bodies were dumped in the open, sometimes with visible injuries.<sup>49</sup>

In 1995 Amnesty International reported that the basic cause of death in custody is brutal torture by Indian armed forces.<sup>50</sup> The Indian army is using people as human shields. Amnesty International not only condemned this act but also stated that this act is, “cruel, inhuman and degrading treatment amounting to torture”.<sup>51</sup> Human Rights Watch 1996 reported,

While attempting to reassure the international community that they have taken steps to curb human rights abuses in Kashmir, Indian forces have in effect

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<sup>48</sup>Prosecutor v Simić, Tadić and Zarić, Case No. IT-95-9, ICTY Trial Chamber II, judgement of 17 October 2003, Prosecutor v Limaj and Others, Case No. IT-03-66, Trial Chamber II, judgement of 30 November 2005, Prosecutor v Blagojević and Jokić, Case No. IT-02-60-T, Trial Chamber, judgement of 17 January 2005.

<sup>49</sup> Amnesty International. *An Unnatural Fate: Disappearances and Impunity in the Indian States of Jammu and Kashmir and Punjab*.1993; Page 6, <https://www.amnesty.org> (accessed on March 30, 2020).

<sup>50</sup> Amnesty International. *India: Torture and Deaths in Custody in Jammu and Kashmir*. 1995:Page 2.<https://www.amnesty.org/download/Documents/176000/asa200011995en.pdf>, (accessed on March 30,2020).

<sup>51</sup> 144BBC News. *Why Indian army defended Kashmir 'human shield' officer*. 2017 May. . - india-40103673, accessed on March 31, 2020.

subcontracted some of their abusive tactics to groups with no official accountability. The extrajudicial killings, abductions and assaults committed by these groups against suspected militants are instead described as resulting from “intergroup rivalries.”<sup>52</sup>

In 1999, Human Rights Watch reported that VDCs sponsored by the Indian army are involved in extrajudicial killings and assaults.<sup>53</sup> According to the International Federation of Human Rights Leagues, “A doctor from a major government hospital told that twenty percent of beds in the hospital were occupied by young men who were being treated for gunshot wounds or burns and other injuries caused by serious torture.”<sup>54</sup> There are many reports of torture in IIOJK. Office of the United Nations High Commissioner for Human Rights published two reports on the human rights situation in Jammu and Kashmir. The first report was on the situation from June 2016 to April 2018, Paras No 92 to 96 are about the reported cases of torture and impunity to Indian army personnel involved.<sup>55</sup> The second report was published on July 08, 2019; this report states that “No Security personal accused of torture or other forms of degrading and inhuman treatment have been persecuted in a civilian court since these allegations started emerging in the early 1990s.”<sup>56</sup> Cases of torture are also reported in this report. ICJ in the case of questions relating to the obligation to extradite or prosecute observed:

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<sup>52</sup> Human Rights Watch. *India's Secret Army In Kashmir: New Patterns Of Abuse Emerge In The Conflict. 1996*; Page 1. <https://www.hrw.org/legacy/reports/1996/India2.htm>, (accessed on March 31, 2020).

<sup>53</sup> Human Rights Watch. *Behind the Kashmir Conflict. 1999*.

<sup>54</sup> Amnesty International. Torture and deaths in custody in Jammu and Kashmir. 1995; Page 2. India: Torture and deaths in custody in Jammu and Kashmir (includes correction: number of custodial deaths amended to 706) - Amnesty International (accessed on March 31, 2020).

<sup>55</sup> Office of the United Nations High Commissioner for Human Rights. Report on the Situation of Human Rights in Kashmir: Development in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit Baltistan, June 14, 2018, page 26-27. <https://www.ohchr.org/Documents/Countries/IN/DevelopmentsInKashmirJune2016ToApril2018.pdf> (accessed on March 31, 2020).

<sup>56</sup> Office of the United Nations High Commissioner for Human Rights. Update of the Situation of Human Rights in Indian –Administrated Kashmir and Pakistan- Administrated Kashmir from May 2018 to April 2019, 8 July 2019, page 28, [https://www.ohchr.org/Documents/Countries/IN/KashmirUpdateReport\\_8July2019.pdf](https://www.ohchr.org/Documents/Countries/IN/KashmirUpdateReport_8July2019.pdf). (accessed on March 31, 2020).

“the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus Cogens*).”<sup>57</sup> It is evident from the above discussion that Indian armed forces are involved in torture in IIOJK and the Indian Govt. is providing impunity to these perpetrators. India is violating *jus cogen* norm of international law, as well as UNCAT, article 07 of ICCPR, Article 5 of UDHR, Common Article 3 of all four Geneva conventions, and their relevant provisions, article 75 of AP-I, and article 4 of AP-II. This violation is a grave breach of the Geneva Conventions and international law and according to article 89(22)(a)(ii) of the ICC, the charter is a war crime.

#### 4.4 Genocide in IIOJK

The term genocide was initially used in 1944 by Raphaël Lemki a Polish lawyer in his book “Axis Rule in Occupied Europe.”<sup>58</sup> This term was introduced mainly because of the systematic murder of the Jewish population by the Nazi regime. UNGA unanimously adopted resolution No.260 A (III) on the prevention and punishment of crime of genocide on December 09, 1948.<sup>59</sup> This was the first step toward the prohibition of genocide. The definition of genocide is provided in article II of the genocide convention, article 2(2) of the ICTR Statute, Article 4(2) of the ICTY, and article 6 of the Rome Statute of ICC are the same. Article II provides,

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical

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<sup>57</sup> *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment, I.C.J. Rep.2012(July 20), par.99.

<sup>58</sup> Vrdoljak, Ana. (2009). “*Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law*”. European Journal of International Law. 20. 10.1093/ejil/chp090, (accessed on March 31, 2020).

<sup>59</sup> Convention for the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, G.A. Res. 260 A (III) of 9 December 1948, entered into force 12 January 1951.

destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.<sup>60</sup>

Article III of the Genocide Convention also includes direct and public incitement, conspiracy, complicity, and an attempt to commit genocide as a crime. ICJ in DRC vs. Rwanda case declared that prohibition of genocide is jus Cogens in international law<sup>61</sup> and in the Barcelona Traction case prohibition of genocide was considered as an erga omnes obligation.<sup>62</sup> Genocide is prohibited in article 2 of the statute of ICTR, article 4 of the statute of ICTY, and article 6 of the statute of ICC. It is clear that under customary international law prohibition of genocide is a peremptory norm. According to Schabas “it is uncontroversial to maintain that the duty to prevent genocide is one of customary law, applicable even to states that have not signed or ratified the 1948 Genocide Convention”.<sup>63</sup> ICJ in its judgment in Serbia vs. Bosnia case confirmed that “... the rights and obligations enshrined by the Convention are rights and obligations erga omnes.”<sup>64</sup> It is clear from the above discussion that genocide and attempt to commit genocide is a crime and it is an a peremptory norm as well it is binding on all states whether they had ratified or not ratified the convention.

The analysis of the situation of the Indian occupied Jammu and Kashmir shows that since 1947 India is intentionally and systematically committing all the crimes included in the definition of genocide. The Muslim population of Kashmir is the target to convert

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<sup>60</sup> Convention for the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, G.A. Res. 260 A (III) of 9 December 1948, entered into force 12 January 1951 art.II.

<sup>61</sup> *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, I.C.J.Rep.2006 (Feb, 3), par.64.

<sup>62</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain); Second Phase*, I.C.J. Rep.1970 (Feb.5) , par.33,34.

<sup>63</sup> Schabas, A. William, “Genocide, Crimes Against Humanity, And Darfur: The Commission of Inquiry’s Findings on Genocide”, *Cardozo Law Review*, Vol. 27, No 4, 2006, 1703-1721, p. 1703.

<sup>64</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary objections, I.C.J. Rep.1996(July11),par.31.

the Muslim majority into a minority. According to Article II of the genocide convention, killing members of a group is genocide. Jammu and Kashmir were Muslim-majority states and the killing of Muslims was started in 1947. This massacre of the targeted Muslim population of the state and especially Jammu was not accidental, it was well-planned, organized, and systematic. According to Alex Von Tunzeleemann;

Maharaja had ordered the ethnic cleansing of Muslims from Kashmir. During September and October 1947, the Maharaja's Dogra led troops carried out a campaign of sustained harassment, arson, physical violence and genocide... India would deny that any Holocaust had taken place perhaps because it had secretly providing arms to the Dogra side.<sup>65</sup>

This systematic killing of Muslims in Kashmir is continued now but it is increased since 1989. The incidents of killing of civilian Kashmiris by Indian occupational forces are not individual but also organized massacres. APDP and IPTK documented a report in 2009 that shows that in three districts of IIOJK (Kupwara, Bandipora, and Baramulla) there are 2,700 unmarked, unknown, and mass graves, containing over 2,943 bodies.<sup>66</sup> According to another report, "There are over 7000 unmarked and mass graves across 7 districts of IIOJK (Baramulla, Bandipora, Kupwara, Poonch, Rajouri, Srinagar and Budgam)."<sup>67</sup>

The Special Rapporteur on violence against women, its causes and consequences, on her mission to India in 2013 said,

Women living in militarized regions, such as Jammu and Kashmir and the north-eastern states, live in a constant state of siege and surveillance, whether in their homes or in public. Information received through both written and oral testimonies highlighted the use of mass rape, allegedly by members of the State

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<sup>65</sup> Alex Von Tunzeleemann, *Indian Summer: The Secret History of the End of an Empire* (UK: Simon & Schuster Ltd., 2008) 286-87.

<sup>66</sup> APDP & IPTK, Buried Evidence: Unknown, Unmarked, and Mass Graves in Indian-Administered Kashmir, November 2009, <https://jkccs.files.wordpress.com/2017/05/buried-evidence-report-on-mass-graves.pdf>.

<sup>67</sup> *Ibid*, 31

security forces, as well as acts of enforced disappearance, killings and acts of torture and ill-treatment, which were used to intimidate and to counteract political opposition and insurgency and she was not informed of any measures to ensure accountability and redress for victims.”<sup>68</sup>

In 2015, Amnesty International reported a case that shows the pattern of killings and impunity. The report reveals;

The Central Bureau of Investigation (CBI) – India’s premier investigating agency - which initially investigated the killings (including identifying the buried bodies through forensic tests and subsequently establishing that the individuals killed were not associated with militancy) said the incident was ‘cold-blooded murder’. In 2006 they charged five soldiers with offences including criminal conspiracy, murder and kidnapping. Utilizing Section 7 of the Armed Forces Special Powers Act, the army blocked prosecution, arguing that the case required government sanction under the AFSPA. The Supreme Court upheld the requirement that no criminal proceeding could be initiated against army personnel without the central government’s permission and gave the army the option of handing over the accused army personnel to the civilian courts, or trying them by court-martial.”<sup>69</sup>

JKCCS , IPTK and APDP published a report titled as “Structure of Violence: The Indian State in Jammu and Kashmir”<sup>70</sup> in 2015, which provides a long list of massacres/ ethnic cleansing attempts of Muslims of Kashmir but some of them are; Gaw Kadal Massacre of 21<sup>st</sup> January 1990 conducted by CRPF in which thirty one people were killed and thirty two were injured, Alamgare Bazar massacre of 22<sup>nd</sup> January 1990 conducted by CRPF resulting killing of hundred people and sixteen were injured, Zakura and Bypass crossing massacre of 1<sup>st</sup> March 1990 conducted by CRPF in which thirty people were killed and fifteen were injured, *Hawal* Srinagar massacre of 21<sup>st</sup> May

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<sup>68</sup> Yves Beigbeder, *International Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transition to Democracy* (BRILL, 2021). 35.

<sup>69</sup> Amnesty International, “DENIED” Failures in accountability in Jammu and Kashmir, 2015, p.37. [www.amnesty.org](http://www.amnesty.org) (accessed April 2, 2020).

<sup>70</sup> Jammu and Kashmir Collation of Civil Society (JKCCS), International Peoples Tribunal Kashmir (IPTK) and Association of Parents of Disappeared Kashmiris (APDP), “Structure of Violence: The Indian State in Jammu and Kashmir” (Srinagar: IPTK & APDP, 2015).

1990 conducted by CRPF in which sixty people were killed and twenty five were injured, *Chotta Bazaar* massacre of 1991 conducted by CRPF in which thirty two people were killed, Sopore massacre of 13<sup>th</sup> April 1992 conducted by BSF, in which thirteen people were killed, *Sopore* massacre of 6<sup>th</sup> January 1993 conducted by BSF in which forty six were killed and 16 were injured, *Bijbehara*, Islamabad massacre of 22<sup>nd</sup> October 1993 conducted by BSF in which thirty five were killed and fifty seven were injured, Kupwara massacre of 27<sup>th</sup> January 1994 conducted by Indian army in which eighteen people were killed and thirty nine got injured, *Chittisinghpura* massacre of 3<sup>rd</sup> April 2000 by unidentified gunmen in which thirty five innocent people were killed, *Qasim Nagar* massacre of 13<sup>th</sup> July 2002 by unidentified gunmen killed twenty nine people, *Nadimarg* massacre of 24<sup>th</sup> March 2003 by unidentified gunmen in which twenty four people were killed and *Panjdobi*, *Doda* massacre of 1<sup>st</sup> May 2006 by unknown gunmen resulting the death of twenty two people.<sup>71</sup> According to the report of civil society organizations, APDP and JKCCS three hundred sixty six persons were killed in 2019 in IIOJK, including twelve women and 08 children, whereas from 2008 to 2019 in IIOJK 4427 people were killed.<sup>72</sup>

Physician for Human Rights published a report in December 2016, the report revealed that since 8<sup>th</sup> July 2016, the number of people injured by pellets is 12,000, among these people 837 had injuries in both or one eye, and 4371 people have injuries on other parts of the body by pellets.<sup>73</sup> Médecins Sans Frontières published a report about violence in health in 2006, it was reported,

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<sup>71</sup> Jammu and Kashmir Collation of Civil Society(JKCCS), International Peoples Tribunal Kashmir(IPTK) and Association of Parents of Disappeared Kashmiris (APDP), "Structure of Violence: The Indian State in Jammu and Kashmir" ( Srinagar: IPTK & APDP, 2015). 693-94.

<sup>72</sup> APDP and JKCCS, *A Review of Human Rights situation in Jammu and Kashmir* (Srinagar: JKCCS & APDP, 2019)5.

<sup>73</sup> Physicians for Human Rights, *Blind to Justice: Excessive Use of Force and Attacks on Health Care in Jammu and Kashmir, India*, 2016, p-12, [www.phr.org](http://www.phr.org)

At the time of interview, almost half (48.1%) of the respondents said they felt only occasionally or never safe. In the period 1989-2005, people frequently reported crackdowns A (99.2%), frisking by security forces (85.7%) and round-up raids in villages B (82.7%). In the same period, damage to property (39%) or the burning of houses (26.3%) was considerable. Interviewees reported witnessing (73.3%) and directly experiencing themselves (44.1%), physical and psychological mistreatment, such as humiliation and threats.<sup>74</sup>

In the report of OHCHR of 2018, it was also recommended to the authorities in India that, an credible, impartial, and independent investigation to probe killings of civilians should be established<sup>75</sup>, but India did not positively respond. OHCHR in its second report of July 2019 reported that no one prosecuted or any investigation started on excessive use of force causing casualties by Indian forces in Kashmir. The majority of civilians were killed due to the excessive use of force by Indian forces. It was also reported that “on 15 December 2018, Indian security forces used four civilians as human shields during a gunfight with armed group members in *Pulwama* district. Seven civilians and three armed group members were killed in this armed encounter.”<sup>76</sup>

According to the Kashmir Media service from 1989 to 31<sup>st</sup> March 2020, 95,515 civilians were extra-judicially killed by Indian occupational forces in IIOJK.<sup>77</sup>

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<sup>74</sup> Médecins Sans Frontières, KASHMIR: VIOLENCE AND HEALTH A quantitative assessment on violence, the psychosocial and general health status of the Indian Kashmiri population (Netherlands: Médecins Sans Frontières/Artsen zonder Grenzen, 2006), 2. [https://archive.crin.org/en/docs/msf\\_mental\\_health.pdf](https://archive.crin.org/en/docs/msf_mental_health.pdf)

<sup>75</sup> *Ibid* , 48.

<sup>76</sup> Security Council Resolution S/1469, *Resolution concerning the India-Pakistan question adopted at the 470th meeting of the Security Council*, S/RES/80, 15.

<sup>77</sup> Kashmir Media Service, HR Violations, [www.kmsnews.org/news/](http://www.kmsnews.org/news/) (accessed on April 4, 2020).

<sup>78</sup> *Ibid* , 48.

excessive use of force causing casualties by Indian forces in Kashmir. The majority of civilians were killed due to the excessive use of force by Indian forces. It was also reported that “on 15 December 2018, Indian security forces used four civilians as human shields during a gunfight with armed group members in *Pulwama* district. Seven civilians and three armed group members were killed in this armed encounter.”<sup>79</sup>

There are several reports on the killings of civilians in Kashmir in fake encounters and massacres by international human rights organizations. These all human rights violations are unaccountable, which shows the involvement of the Indian Govt. in these violations.

UNOHCHR in its second report of July 2019 recommended that Govt. of India should independently and impartially investigate unmarked mass graves. The Indian Govt. did not take any step toward the investigation. Article II of the genocide convention also provides that “causing serious bodily or mental harm to members of the group and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part is also genocide”. There is no complete data on victims of serious physical or mental harm. Thousands of people including children and women are injured due to torture, firing, metal bullets, pellet shots, and beating.<sup>80</sup> The basic objective of this all barbaric acts of Indian forces is to silence the voices demanding the right to self-determination and create fear among others. UNOHCHR reported in June 2018 that according to Jammu and Kashmir State Human Rights

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<sup>79</sup> Security Council Resolution S/1469, *Resolution concerning the India-Pakistan question adopted at the 470th meeting of the Security Council*, S/RES/80, 15.

<sup>80</sup> Amnesty International in 2016 profiled 88 cases and adds that many cases could not be tracked because the injured reported false identities at hospitals to avoid arrest. (“Losing Sight in Kashmir”) Also, Physicians for Human Rights quotes statistics from the Jammu and Kashmir Department of Health that 837 of the estimated 12,000 people injured during protests in 2016 had sustained eye injuries, in one or both eyes. (“Blind to Justice”, p. 12)

Commission (JKSHRC), in 2016 in ten districts of occupied Kashmir 1,726 people were injured by metal pellets. According to this report,

The central government told the Supreme Court it continued to use pellet shotguns because all other alternatives such as tear gas, chili-based chemical shells and rubber bullets had failed to stop the protesters.... apart from physical injuries, many victims of pellet shotguns face serious mental health issues, including symptoms of psychological trauma.<sup>81</sup>

The second report of OHCHR was published in July 2019, it was reported that “According to information from Srinagar’s Shri Maharaja Hari Singh Hospital, where most pellet shotgun injured are treated, 1,253 people have been blinded by the metal pellets used by security forces from mid-2016 to the end of 2018.”<sup>82</sup> According to Kashmir Media Service from July 2016 to March 31, 2020, due to indiscriminate firing and torture, 27739 civilians got injured.<sup>83</sup>

According to the first report of OHCHR, the people who are physically injured or blinded by Indian forces are facing serious mental health issues as well as psychological trauma.<sup>84</sup> An international organization Genocide Watch also issued a genocide alert about Kashmir and ask the UN and other counties to stop India from genocide in Kashmir.<sup>85</sup> It is evident from the above discussion and reports that the Indian Govt. is involved in the genocide of the Muslims of Kashmir which is a clear violation of the genocide convention and international law. In many cases, international tribunals

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<sup>81</sup> Yves Beigbeder, *International Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transition to Democracy* (BRILL, 2021),20.,

<sup>82</sup> Security Council resolution S/1469, *Resolution concerning the India-Pakistan question adopted at the 470th meeting of the Security Council*, S/RES/80( 14 March 1950), available from <https://digitallibrary.un.org/record/475230?ln=en>.

<sup>83</sup> Kashmir Media Service, Causalties during ongoing uprising, [www.kmsnews.org](http://www.kmsnews.org) (accessed April2,2020).

<sup>84</sup> Office of the United Nations High Commissioner for Human Rights. Report on the Situation of Human Rights in Kashmir: Development in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit Baltistan, June 14, 2018.

<sup>85</sup> Genocide Watch, Current Alert, <https://www.genocidewatch.com/copy-of-current-genocide-watch-aler>, accessed on April 03,2020.

punished the perpetrators of genocide and these punishments were individual. Moreover, the prohibition of genocide is *jus cogen* norm and it is the legal obligation of all the states to impress upon India to stop the attempts of genocide and ethnic cleansing of Muslims from Kashmir.

#### 4.5 Enforced Disappearances in IIOJK

The systematic and state practice of enforced disappearances was started by the Nazis through the infamous “Nacht und Nebel Decree”<sup>86</sup> which provides the disappearances of political prisoners and people who were a member of the national resistance movement against Germany. The shifting of these people was carried out through secret operations and no one knew about the whereabouts of these disappeared people. From 1960 to 1990 totalitarian regimes in Latin America were also involved in enforced disappearances of their people.<sup>87</sup> The first positive development of the establishment of military tribunals after World War II by allied forces against officials of Nazi Germany for the prosecution of persons involved in enforced disappearances and killings.<sup>88</sup> IMT charged these officials with four crimes, crimes against humanity, war crimes, crimes against peace, conspiracy to commit crimes against peace, crimes against humanity, and war crimes. On October 01, 1946, the judgment was announced, 12 defendants were sentenced to death, three were imprisoned for life and four were sentenced to terms of 10 to 20 years, and were acquitted.<sup>89</sup> The US had also established Nuremberg tribunals for the trial of the perpetrators of war crimes. After 1990 international law was

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<sup>86</sup> Nuremberg Military Tribunals, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10: Nuremberg, October 1946 – April 1949 (United States Government Printing Office, 1951) vol 3, 75–8.

<sup>87</sup> Iain Guest, *Behind the Disappearances — Argentina's Dirty War against Human Rights and the United Nations* (University of Pennsylvania Press, 1990) 16–21.

<sup>88</sup> *Ibid.*, 18.

<sup>89</sup> Holocaust Museum, Holocaust Encyclopedia, <https://encyclopedia.ushmm.org/content/en/article/international-military-tribunal-at-nuremberg#:~:text=International%20Military%20Tribunal%20at%20Nuremberg, half%20 month s%20after%20Germany%20surrendered> . (accessed on March 15, 2020).

developed on the prohibition of the crime of enforced disappearances. In 1992 UNGA adopted the “Declaration on the Protection of All Persons from Enforced Disappearance”<sup>90</sup> this was the first step. At the regional level in 1994 “The Inter-American Convention on Forced Disappearance of Persons has adopted.”<sup>91</sup> The most significant development is the “International Convention for the Protection of All Persons from Enforced Disappearance (ICPED) of 2006.”<sup>92</sup> Article 2 of this convention defines enforced disappearances as,

‘enforced disappearance’ is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.<sup>93</sup>

Article 1 of ICPED clearly says that enforced disappearances are not allowed in any situation whether it is a public emergency, the threat of war, or internal instability.<sup>94</sup>

The definition of enforced disappearances is also provided in article 7(2) (i) of ICC statute as,

Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.<sup>95</sup>

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<sup>90</sup> Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res.47/133, U.N. Doc. A/RES/47/133 (Dec. 18, 1992).

<sup>91</sup>Inter-American Convention on Forced Disappearance of Persons art. 3, June 9, 1994, 33 I.L.M. 1429.

<sup>92</sup> International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. A/RES/61/177, U.N. Doc. A/HRC/RES/2006/I (Dec. 20, 2006), entered into force on December 23,2010.

<sup>93</sup> International Convention for the Protection of All Persons from Enforced Disappearance art.2.

<sup>94</sup> *Ibid*, art 1.

<sup>95</sup> Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 U.N.T.S 3, article 7(2)(i).

The definition provided in the ICC statute is different in some aspects from other definitions, in this definition intention and prolonged period is added. The prohibition of enforced disappearances is of *jus Cogens* nature<sup>96</sup> and it is non –Derogable. Bosnian War Crime Chamber convicted Rasevic and Todovic of the perpetration of the crime of enforced disappearances.<sup>97</sup> UN had established a working group on enforced disappearances (WGEID) which has the mandate to receive individual complaints.<sup>98</sup> Although some countries like India are not responding to complaints however its working is helpful in the prohibition of enforced disappearances. Enforced disappearance is not only a violation of single human rights but it causes violations of several human rights.<sup>99</sup> India had signed the ICPED but was not ratified it to date. Enforced disappearances are crimes against humanity and it is also a violation of ICCPR and other international legal instruments. UNSC passed Res.No 2474 in 2019 which is the first-ever resolution on missing persons during armed conflict. The resolution states,

*Urging* States which have not yet done so to consider becoming parties to Additional Protocols I and II of 1977 to the Geneva Conventions at the earliest possible date,

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<sup>96</sup> The prohibition of the forced disappearance of persons and the corresponding obligations to investigate and punish those responsible has attained the status of *jus cogens*': Goiburú [2006] Inter-Am Court HR (ser C) No 153.

<sup>97</sup> Prosecutor v. Rasevic and Todovic, Case No. X-KR-06/275, First Instance Verdict (Feb. 28,2008).

<sup>98</sup> Working Group on Enforced and Involuntary Disappearances: Mandate, U.N. OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Disappearances/Pages/DisappearancesIndex.aspx>

<sup>99</sup> Independent Expert Manfred Nowak, Rep. Submitted by Mr. Manfred Nowak, Independent Expert Charged with Examining the Existing International Criminal and Human Rights Framework for the Protection of Persons from Enforced or Involuntary Disappearances, Pursuant to Paragraph 11 of Common Resolution 2001/46, 11–16, 70. submitted to the Comm'n on Human Rights, U.N. Doc. E/CN.4/2002/71 (Jan. 7, 2002) [hereinafter Nowak Report] (“[E]nforced disappearance is a very complex and cumulative violation of human rights and humanitarian law which involves violations of the right to personal liberty and security, the right to recognition as a person before the law and the right not to be subjected to inhuman and degrading treatment and at least a grave threat to the right to life. In addition, the disappeared person, by being intentionally removed from the protection of the law, is also deprived of other human rights, including the right to an effective remedy before a domestic authority and to the protection of family life.”).

*Reaffirming* that parties to armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of civilians and recalls that States bear the primary responsibility to respect and ensure the human rights of all individuals within their territory and subject to their jurisdiction, as provided for by relevant international law.<sup>100</sup>

IHL also provides some obligations to the state during an armed conflict. Article 136 to 141 of GC-IV, and articles 32 and 33 of AP-I<sup>101</sup> provides that families have a right to know about the disappearance, and parties in the conflict must search for the missing person. Kashmir is an international armed conflict and enforced disappearances are also a violation of the Geneva Conventions and ICL. In IIOJK the systematic crime of enforced disappearances was started in 1989, and many people who disappeared by the Indian army in the early 1990s are still missing. In Kashmir, the enforced disappearances are an intentional and systematic attempt to change the demography of Kashmir. Mass graves, custodial killings, and half widows are also associated with the enforced disappearances. The attitude of Govt. of India, Govt. of IIOJK, and the judiciary shows that this crime is not the act of some individual but is planned and perpetrated by all occupational forces. The exact number of enforced disappearances is not known, however, some civil society organizations have collected some data. According to the report of IPTK and APDP of 2012, in IIOJK from 1989 to 2012, there are around 8000 enforced disappearances.<sup>102</sup> According to a report by the US state department, 639 cases of enforced disappearances since 2015 have been submitted by

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<sup>100</sup> UNSC Res S/RES/2474(2019).

<sup>101</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

<sup>102</sup> International Peoples' Tribunal on Human Rights and Justice in Indian-Administered Kashmir and the Association of Parents of Disappeared Persons, "Alleged Perpetrators -Stories of Impunity in Jammu and Kashmir" December 2012, <https://jkccs.files.wordpress.com/2017/05/alleged-perpetrators.pdf>

APDP to SHRC.<sup>103</sup> IPTK and APDP published a report in 2015, which contains 73 cases of enforced disappearances by occupational forces in Kashmir with detail of the incident and detail of the perpetrator. This report also consists of 198 cases of studies of extrajudicial killings.<sup>104</sup> Civil society organizations and High Court Bar Association Srinagar had filed cases in SHRC and courts but not a single perpetrator was made accountable. The situation indicated by Amnesty International in 1999 that not a single person involved in disappearances was convicted in IIOJK<sup>105</sup> is the same in 2020. Mian Abdul Qayyum President of JK High Court Bar reported in 2005 that since 1999 at least 60,000 habeas corpus petitions had been filed.<sup>106</sup> Extrajudicial killings are a daily routine in IIOJK. According to Kashmir Media Service, 7139 civilians were extrajudicially killed from January 1989 to March 31, 2020.<sup>107</sup> In IIOJK almost 7000 unmarked mass graves have been identified in only 04 districts out of 22 districts. In Uri sub-district 940 mass graves were identified in 2008<sup>108</sup>, in 3 districts (Baramulla, Kupwara, and Bandipura) 2700 unmarked mass graves<sup>109</sup> in Punch and Rajouri 3844 mass graves. OHCHR in its report of June 2018 also recommended an investigation of unmarked mass graves. These mass graves are near army or police camps and it is believed that disappeared persons are buried in these graves. The families of disappeared persons do not know about the whereabouts of these disappeared persons

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<sup>103</sup> United States Department of State , Bureau of Democracy, Human Rights and Labor, Country Reports on Human Rights Practices for 2018, India, <https://www.state.gov/wp-content/uploads/2019/03/INDIA-2018.pdf> (accessed on April 15,2020).

<sup>104</sup> IPTK and APDP, Structure of Violence: The Indian State in Jammu and Kashmir(Srinagar: IPTK and APDP, 2015) 248-480.

<sup>105</sup> Amnesty International, INDIA “If they are dead, tell us”“Disappearances” in Jammu and Kashmir, 1999, <https://www.amnesty.org/en/documents/ASA20/002/1999/en/> , accessed on April 16,2020).

<sup>106</sup> Human Rights Watch, Everyone Lives in Fear, 2006. [www.hrw.org/reports/2006](http://www.hrw.org/reports/2006) (accessed on April 16,2020).

<sup>107</sup> Kashmir Media Service, HR Violations, [www.kmsnews.org](http://www.kmsnews.org) (accessed on April 16,2020).

<sup>108</sup> ADPD, Facts Under Ground: A fact-finding mission on nameless graves & mass graves in Uri area, 2008,<https://jkccs.files.wordpress.com/2017/05/facts-under-ground-first-report-on-mass-graves-in-kashmir.pdf>.

<sup>109</sup> *Ibid.*

and no one informs them. A new term 'half widows'<sup>110</sup> was introduced which are facing security, social and economic problems. According to a report published in 2011, there are at least 1500 half-widows in Kashmir.<sup>111</sup> The situation of these half-widows could be analyzed by the account of a victim Rafiq whose husband was picked in 1997, according to her, "I went to every security camp and police station in the hope of finding any clue, but all in vain, is he alive or dead? ... It is constant pain. But most of the time my heart tells me he is still alive. How can I remarry?"<sup>112</sup>

The Indian government and occupational forces are intentionally involved in enforced disappearances through systematic and organized mechanisms.

#### **4.6 Crimes against Humanity in IIOJK**

The concept of crimes against humanity was initially used as the laws of humanity in the 1860s.<sup>113</sup> This concept of laws of humanity was also used in the first Hague Peace Conference of 1899, which was later on included in the preamble of the Hague Convention (IV) of 1907.<sup>114</sup> On May 28, 1915, a joint declaration of Russia, France, and Great Britain was issued on the Massacre of Armenians in Turkey, which describes the massacres as crimes against humanity and civilization.<sup>115</sup> After the 2<sup>nd</sup> world war, the expression crime against humanity was used in article 6 of the Charter for the

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<sup>110</sup> Half widows are those women which do not know about whereabouts of their husbands since long.

<sup>111</sup> APDP, Half Widow, Half Wife, Responding to Gendered Violence in Kashmir, 2011, <https://jkccs.files.wordpress.com/2017/05/half-widow-half-wife-apdp-report.pdf>, (accessed on April 16, 2020).

<sup>112</sup> Sheikh Mushtaq, Kashmir's "half widows" wait for lost husbands, <https://www.reuters.com/article/us-kashmir-widows/kashmirs-half-widows-wait-for-lost-husbands-idUSSP31368120071024>, (accessed on April 17, 2020.)

<sup>113</sup> Darryl Robinson, "Developments in International Criminal Law: Defining 'Crimes against Humanity' at the Rome Conference" (1999) 93 American Journal of International Law 43, at 44.

<sup>114</sup> 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, preamble paragraph 8, Miscellaneous, No. 6 (1908), Cmd. 4175, 46.

<sup>115</sup> United Nations War Crimes Commission, (1948) History of the Nations War Crimes Commission and the Development of the Laws of War 35.

International Military Tribunal of 1945.<sup>116</sup> This charter expressly prohibits persecution. Article 11 of the Control Council Law No 10 of 1945<sup>117</sup> and Article 05 of the Tokyo Charter for International Military Tribunal for the Far East of 1946<sup>118</sup> also prohibits persecution.

UNSC had established an ad hoc tribunal for the prosecution of the persons responsible for serious humanitarian law violations in former Yugoslavia in 1993. Article 05 of the statute of the International Criminal Tribunal for Former Yugoslavia (ICTY) provides, “The International Tribunal shall have power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population, Persecutions on political, racial and religious grounds.”<sup>119</sup>

Article 03 of the Statute for the International Criminal Tribunal for Rwanda (ICTR), also provides the prosecution of the persons involved in the persecution.<sup>120</sup> There is one difference between Article 05 of ICTY and article 03 of ICTR, article 03 provides that attacks should be systematic and widespread. The representative of 160 UN member states, specialized agencies, entities, and organizations attended the “UN Conference of Plenipotentiaries in Rome”<sup>121</sup> from 15<sup>th</sup> June 1998 to 17<sup>th</sup> July 1998 and adopted the

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<sup>116</sup>Article 1, Charter of the International Military Tribunal for the Trial of Major War Criminals, appended to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, U.N.T.S., Vol. 82, , 279.

<sup>117</sup>T. H. L. McCormack and G. J. Simpson, *Law of War Crimes: National and International Approaches* (The Hague: Kluwer Law International, 1997) 183.

<sup>118</sup>Richard H. Minear, *Victor's Justice – The Tokyo War Crimes Trial* (Princeton: Princeton University Press, 1971) 166.

<sup>119</sup>Theodor Meron, “War Crimes Come of Age” (1998) 92 *American Journal of International Law* , 462- 463.

<sup>120</sup>Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Annex to Security Council Res. 955, U.N. SCOR, 49th Year, 1994 SC. Res. & Dec. at 15, U.N. Doc. S/INF/50 (1994).

<sup>121</sup> Eric M. Meyer, *International Law: The Compatibility of the Rome Statute of the Criminal Court with the U.S. Bilateral Immunity Agreements Included in the American Servicemembers Protection Act*, 58 OKLA. L. REV. 97 (2005), <https://digitalcommons.law.ou.edu/olr/vol58/iss1/6>

Rome Statute. Through this statute, the International Criminal Court (ICC) was established. According to Article 07 of the Rome Statute crimes against humanity are “any of those acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>122</sup> The acts included in the definition are, “murder, rape or any form of sexual violence, torture, extermination, enslavement, deportation or forcible transfer of population, enforced disappearances, persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender basis, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, the crime of apartheid and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health.” After the Rome Statute, four international tribunals were established to prosecute the persons involved in crimes against humanity.<sup>123</sup> The laws of limitation do not apply to crimes against humanity and can be persecuted at any time.<sup>124</sup> The statute of ICC also provides that there are no limitations on the crimes within its jurisdiction.<sup>125</sup>

#### **4.7 Sexual Violence/ Rape**

Sexual violence and rape have been considered serious crimes for centuries. Development in the law of war was started from Lieber Instructions of 1863, article 44 of this code provides that rape is a capital crime and punishment is death.<sup>126</sup> Rape is

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<sup>122</sup> Rome Statute of International Criminal Court, art.7.[https://treaties.un.org/doc/Treaties/1998/07/19980717 06-33 PM/volume-2187-I-38544-English.pdf](https://treaties.un.org/doc/Treaties/1998/07/19980717%2006-33%20PM/volume-2187-I-38544-English.pdf)

<sup>123</sup> the Panels of Judges with Exclusive Jurisdiction Over Serious Criminal Offences Established within the District Courts in East Timor (2000); the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (2001); the Special Court for Sierra Leone (2002); and the Iraqi Special Tribunal for the Prosecution of Crimes Against Humanity (2003).

<sup>124</sup> Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968, article 1.

<sup>125</sup> ICC Statute, article 29. Non-applicability of statute of limitations.

<sup>126</sup> Francis Lieber, "Instructions for the Government of Armies of the United States in the Field, by Order of the Secretary of War, April 24, 1863," reprinted in FRANCIS LIEBER, LIEBER'S CODE AND THE LAW OF WAR 45 (1983).

also included in the list of crimes against humanity in Control Council Law No. 10 (CCL 10)<sup>127</sup>, Article 27 of the Fourth Geneva Convention prohibits forced prostitution and rape.<sup>128</sup> AP- I of Geneva Conventions provide, “women shall be the object of special respect and shall be protected in particular against rape, enforced prostitution and any other form of indecent assault.”<sup>129</sup> AP II also prohibits, “outrages upon personal dignity, in particular, humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.”<sup>130</sup> Article 5 of the ICTY statute<sup>131</sup> and Article 3 of the “ICTR statute”<sup>132</sup> listed rape as a “crime against humanity.” Article 7 (g) of the Rome Statute also provides “rape and sexual violence as a crime against humanity.”<sup>133</sup> According to article 8(2)(e)(vi) of the ICC statute sexual violence is included in war crimes. Antonio Cassese elaborated, “Rape as a war crime differs from the definition of rape as a crime against humanity only in terms of the context in which the crime is committed. The rape must have been perpetrated in the context of and in association with international armed conflict.”<sup>134</sup> UDHR and ICCPR did not provide any clear provision about rape and sexual violence, and it is included in degrading treatment. In regional conventions article, 07 of the “Inter-American Convention on the

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<sup>127</sup> CONTROL COUNCIL FOR GERMANY, OFFICIAL GAZETTE, Jan. 31, 1946, at 50, reprinted in NAVAL WAR COLLEGE, DOCUMENTS ON PRISONERS OF WAR 304 (International Law Studies vol. 60, Howard S. Levieed., 1979)

<sup>128</sup> Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 27, 6 U.S.T. 3316, 74 U.N.T.S. 287, 306.

<sup>129</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 76(1), 1125 U.N.T.S.

<sup>130</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 4(2)(e), 1125 U.N.T.S. 609,

<sup>131</sup> Statute of the International Tribunal for the Former Yugoslavia, adopted by S.C. Res.827, U.N. SCOR, 55th Sess., 3217th mtg., art. 5, U.N. Doc. S/Res/827 (1993), reprinted in BASIC DOCUMENTS OF THE ICTY (1998) [hereinafter ICTY Statute].

<sup>132</sup> Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, Annex, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/Res/955 (1994) [hereinafter ICTR Statute].

<sup>133</sup> Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

<sup>134</sup> Antonio Cassese, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: , Oxford University Press. 2002), 374–375.

Prevention, Punishment, and Eradication of Violence against Women” not only prohibits rape and sexual violence but also recommends to the parties to eradicate and punish violence against women.<sup>135</sup> “U.N. Declaration on the Elimination of Violence Against Women” ( UNCEDAW) was adopted by UNGA in 1993 and is most significant in this regard which asserts the states to punish the perpetrator of sexual violence whether they are private persons or states.<sup>136</sup> In *Prosecutor v Akayesu*, ICTR held,

Like torture rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment control or destruction of a person. Like torture rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the investigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>137</sup>

From the international and national jurisprudence of many countries, it is evident that rape and sexual violence have attained the status of *jus Cogens*.<sup>138</sup> ICC trial chamber convicted the former vice president of Congo, Jean Pierre Banmba in March 2016 for the crimes of rape and sexual violence and sentenced them to 18 years.<sup>139</sup> In Indian Occupied Kashmir, Indian armed forces are using rape as a weapon of war. Since 1989 many reports have been published and there are many cases of individual and mass rapes by occupational forces. The exact number of victims of sexual violence and rape is not available because rape is a social stigma and many women did not report it to

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<sup>135</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 27 U.S.T. 3301, General Assembly of the O.A.S., Doc.OEA/Ser.P AG/doc.3115/94 rev.2

<sup>136</sup> U.N. Declaration on the Elimination of Violence Against Women, G.A. Res. 104, U.N. GAOR, U.N. Doc. A/RES/48/104. (1993).

<sup>137</sup> *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, ICTR Trial Chamber I, judgment of 2 September 1998.

<sup>138</sup> See Statement by Mary Robinson, United Nations High Commissioner for Human Rights before the Beijing+5 Review Conference, (2000) available at <http://www.unhchr.ch/hurricane.nsf/424e6fc8b8e55fa6802566b0004083d9/db6643258a4cc97f802568fd005b10ba>

<sup>139</sup> *Prosecutor v. Bemba*, Judgment Pursuant to Article 74 of the Statute, ICC-01/05-01/08, 21 March 2016, see also C. S. Mibenge, *Sex and International Tribunals: The Erasure of Gender from the War Narrative* (Philadelphia: University of Pennsylvania Press, 2013).

save their future and family honor. Sexual violence is used as a war tactic in IIOJK, according to a report, “forms of sexual torture, such as rape and sodomy, including the insertion of foreign objects, like rods or chili powder, into the victim’s rectum and the electrocution of genitals, have also been reported.”<sup>140</sup> According to the report of Asia Watch & PHR, Indian forces are raping women to humiliate and punish the whole community and this mostly occurs during the cordon and search operations and crackdowns.<sup>141</sup> According to the report of MSF, incidents of sexual violence have increased during 1989-2006, “1 in 7 respondents had witnessed the rape, and 1 in 20 had witnessed rape more than five times.”<sup>142</sup> Asia Watch and PHR reported some cases of mass rapes in 1993. The first case is the incident of *Kunan* and *Poshpora* villages of the Kupwara district which was conducted by 4 Rajputana Rifles of the Indian army on the night of 23rd February 1991 exposes the brutality and impunity of Indian forces. On this night 40 to 80 women 8 to 80 years old were gang-raped and still, the victims are waiting for justice.<sup>143</sup> The second case of mass rape in the village *Chak Sadipura* Shopian on 10<sup>th</sup> October 1992, in which the unit of 22 Grenadiers gang raped 6 to 9 women including a 60 years old woman and an eleven years old girl by several soldiers.<sup>144</sup> Two women were gang-raped in *Haran* village by five soldiers of the Indian army on 20<sup>th</sup> July 1992.<sup>145</sup> BSF soldiers also gang-raped many women in the village of *Gurihakar* on October 1, 1992.<sup>146</sup> Some other cases of mass rapes are the Shopian rape

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<sup>140</sup> International Federation for Human Rights, Association of Parents of Disappeared Persons (APDP) and Jammu Kashmir Coalition of Civil Society (JKCCS), Key human rights issues of concern in Indian-Administered Jammu & Kashmir, March 2019, p-5

<sup>141</sup> Asia Watch and Physician for Human Rights, Rape in Kashmir : A crime of War, 1993, [www. Hrw.org/ sites/default/files/reports /INDIA935.PDF](http://www.hrw.org/sites/default/files/reports/INDIA935.PDF)(accessed on April 15,2020)

<sup>142</sup> Médecins Sans Frontières, Kashmir: Violence and Health. A quantitative assessment on violence, the psychosocial and general health status of the Indian Kashmiri population, November 2006.

<sup>143</sup> Asia watch and Physician for Human Rights, Rape in Kashmir: A crime of War, September 4, 2012, <https://www.hrw.org/sites/default/files/reports/INDIA935.PDF>.

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*

and murder case of two girls on May 30, 2009, *Kulgam* rape case of July 21, 2011, *Bejbahra*, *Kargil*, and the rape of a minor girl by police in Kathua in January 2018<sup>147</sup>. In 2018 JKCCS filed a petition in State Human Rights Commission and provided a list of 143 cases of sexual violence but no progress has been done till the closure of this commission.<sup>148</sup> OHCHR in its first report also showed concerns about crimes of sexual violence and observed that Indian authorities did not prosecute or investigate allegations of sexual violence by the Indian army.<sup>149</sup> According to KMS from January 1989 to March 31, 2020, in IIOJK 11,179 cases of rape/ molestation had been reported.<sup>150</sup> It is evident from reports that India is violating customary international law(CIL), IHL, IHRL, and UN resolutions. Sexual violence by occupying forces is a violation of article 27 of GC-IV, Article 76(1) of AP-I, article 42 of AP-II, and UNCEDAW. According to article 7(g) of the ICC India is committing crimes against humanity and committing war crimes according to article 8(2)(e)(vi) of the ICC statute.

#### **4.8 Extra Judicial Killings in Kashmir**

Murder, unlawful killing, custodial killing, and target killing are different words used for arbitrary deprivation of life. IHL, IHRL and even the laws of nations are not only prohibiting this act but also providing punishment for this crime. Article 3 of UDHR provides, “ everyone has a right to life, security, and liberty of the person.”<sup>151</sup> Article 6(1) of ICCPR<sup>152</sup> , article 4 of “African Charter on Human and Peoples Rights”<sup>153</sup>, the

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<sup>147</sup> Terrorized: Impact of the violence on the children of Jammu and Kashmir, Published by Jammu Kashmir Coalition of Civil Society(March 2018)

<sup>148</sup> JKCCS and APDP, ANNUAL HUMAN RIGHTS REVIEW 2018, A Review of Human Rights in Jammu and Kashmir, [www.jkccs.net](http://www.jkccs.net)

<sup>149</sup> Office of the United Nations High Commissioner for Human Rights, Update of the Situation of Human Rights in Kashmir: May 2018 to April 2019..

<sup>150</sup> Kashmir Media Service. HR violations, [www.kmsnews.org](http://www.kmsnews.org).

<sup>151</sup> Universal Declaration of Human Rights, art.1.

<sup>152</sup> International Covenant on Civil and Political Rights , art. 6(1.) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

<sup>153</sup> African Charter on Human and Peoples' Rights, art 4:Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

article 1 of “American Declaration on Rights and Duties of Man 1948”<sup>154</sup>, article 2 of “the Cairo Declaration on Human Rights in Islam”<sup>155</sup>, article 5 of “Arab Charter on Human Rights”<sup>156</sup> and article 1 of “European Convention for the Protection of Human Rights and Fundamental Freedoms”<sup>157</sup> also granting right to life and prohibit arbitrary deprivation of this right. The term arbitrary deprivation was defined as:

Meaning of "arbitrary" deprivation of life, has proposed four principles which can be invoked to assess claims that a deprivation of life is justified under international standards. First, the deprivation must purport to have a legal basis; second, it must be a proportionate response in the circumstances; third, the question of justification of a deprivation of life must be subject to an independent judicial process; fourth, deprivation of life may be justified only in defense of life.<sup>158</sup>

Arbitrary killing is also prohibited in IHL, Article 3 common of all four Geneva conventions<sup>159</sup> prohibits the murder of *hors de combat* and civilians, article 50 of GC I article 51 of GC II, article 130 of GC III and article 147 of GC IV had included willful killing in grave breaches of Geneva Conventions.<sup>160</sup> Article 75(2) (a) of AP- I<sup>161</sup> and article 4(2) (a) of AP- II<sup>162</sup> prohibits murder. According to articles 8(2)(a)(i) and (c)(i)

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<sup>154</sup> American Declaration of the Rights and Duties of Man, article I. Every human being has the right to life, liberty and the security of his person.

<sup>155</sup> Cairo Declaration on Human Rights in Islam, art.2.

<sup>156</sup> Arab Charter on Human Rights, art.5( 1) .

<sup>157</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Art.1.

<sup>158</sup> C.K. Boyle, "The Concept of Arbitrary Deprivation of Life", in B.J. Ramcharan, ed., *The Right to Life in International Law*, Nijhoff, Dordrecht, the Netherlands, 1985, pages 221-244.

<sup>159</sup> Geneva Conventions 1949, Common article 3 .

<sup>160</sup> Chile Eboe-Osuji, "Grave Breaches as War Crimes: Much Ado About Serious Violations?", [https://www.icc-cpi.int/NR/rdonlyres/827EE9EC-5095-48C0-AB04-E38686EE9A80/283279/GRAVEBREACHE\\_SMUCH\\_ADOABOUTSERIOUSVIOLATIONS.pdf](https://www.icc-cpi.int/NR/rdonlyres/827EE9EC-5095-48C0-AB04-E38686EE9A80/283279/GRAVEBREACHE_SMUCH_ADOABOUTSERIOUSVIOLATIONS.pdf) (accessed on March 28,2020).

<sup>161</sup> Protocol Additional to the Geneva Conventions of 12 August 1949.

<sup>162</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 5, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

of ICC Statute<sup>163</sup>, article 2(a) of ICTY Statute<sup>164</sup>, article 4(a) of ICTR<sup>165</sup> Statute, and article 3(a) of the Statute of Special Court of Sierra Leone<sup>166</sup>, murder is also included as a war crime in international and no international armed conflicts. UN had also adopted some standards for use of force, Code of Conduct for Law Enforcement Officials which was adopted by UNGA in 1978, provides that force could be used 'only with strict necessary' and it should be 'exceptional'.<sup>167</sup> The UN had adopted 'UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials' in 1990 by which the use of firearms is restricted only in the situation of, "imminent threat of death or serious injury or grave threat to life, and only when less extreme means are insufficient to achieve the objectives specified."<sup>168</sup> Intentional use of lethal force is also allowed only to protect life.

In IIOJK, murder targeted killing, extrajudicial killing, killings on fake encounters, killings by torture, and enforced disappearances were started from Indian forceful occupation in 1947. Since 1989 the intensity of this crime has been increased by occupational forces. The exact number of civilians killed by security forces is not known but some human rights organizations had collected some data. According to the annual report of 2019 published by JKCCS, 2019 at least 80 civilians including 12 women and 8 children were killed by occupational forces in IIOJK. Among these 80 civilians, 45 were killed by a bullet, 2 were tortured to death 4 by pellets and one was

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<sup>163</sup> UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998.

<sup>164</sup> The International Criminal Tribunal for the former Yugoslavia (ICTY). [www.icty.org](http://www.icty.org). (accessed on March 16,2020).

<sup>165</sup> International Criminal Tribunal for Rwanda, [unictr.irmct.org/en/tribunal](http://unictr.irmct.org/en/tribunal), (accessed on March 16,2020).

<sup>166</sup> Agreement for and Statute of the Special Court for Sierra Leone, 16 January 2002, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/b0d5f4c1f4b8102041256739003e6366/65cb6be7caca532cc1256c1d0027f549> (accessed on March 24,2020).

<sup>167</sup> UN Centre for Human Rights, Geneva, 1988, and in UN Centre for Human Rights, *Human Rights; A Compilation of International Instruments*, UN Sales No. E.88.XIV.1, United Nations, New York, 1988.

<sup>168</sup> *Ibid.*

drowned.<sup>168</sup> persons with mental disabilities were killed from 2003 to 2019. 1161 civilians were killed by occupational forces in an extrajudicial manner from 2008 to 2019.<sup>169</sup> The report of OHCHR published in 2018 revealed that from mid of July 2016 to the end of March 2018, an estimated 130- 145 civilians were killed in IIOJK by Indian forces. The report also shows that in the summer of 2010 over 100 protestors were killed.<sup>170</sup> The second report of OHCHR published in 2019 also reported cases of excessive use of force, firearms, and killings in an extrajudicial manner, and no investigation and accountability of perpetrators by the Indian Govt. It is also reported that, after the publication of the report in 2018, many UN Special Rapporteurs issued a joint communiqué and noted:

We regret that, from the information received, it does not appear that efforts have been made to implement the recommendations, including in relation to the repeal the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990; to establish independent, impartial and credible investigations to probe all civilian killings which have occurred since July 2016; to investigate all deaths that have occurred in the context of security operations in Jammu and Kashmir following the guidelines laid down by the Supreme Court of India; and to investigate all cases of abuses committed by armed groups in Jammu and Kashmir, including the killings of minority Kashmiri Hindus since the late 1980s.<sup>171</sup>

IPTK and APDP published a detailed report on the structure of violence by the Indian State in Jammu and Kashmir in 2015. This report is very comprehensive and based on case studies and pieces of evidence about incidents and perpetrators. Moreover, this report also discussed the legal process adopted by the victims and Indian attempts to hide and support the crimes. This report contains 1080 cases of extrajudicial killings

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<sup>169</sup> Jammu and Kashmir Collation of Civil Society, Annual Human Rights Review 2019, [www.kccs.info](http://www.kccs.info). (accessed on April 4,2020).

<sup>170</sup> *Ibid.* 14.

<sup>171</sup> *Ibid.* 15.

and details of 5 massacres. According to this report instead of punishing the perpetrators of crimes against humanity, the Indian Govt. is awarding out of turn promotions, cash awards, and other incentives to them. Up to 2012, out of turn promotion was awarded to 2226 police officials, and the gallantry award was received by 560 police officials.<sup>172</sup> IPTK published a report titled, 'Buried Evidence' and examined fifty killings in the different encounters by Indian forces and claimed that out of these 50 persons 47 were killed in fake encounters, one was drowned and one was a local militant, whereas forces were claiming that these all were foreign insurgents/ militants.<sup>173</sup> Asia Watch and PHR published a report and investigated 47 cases of extrajudicial killings and 19 cases of custodial execution. It was reported that 130 people were killed in custody in the first four months of 1993. It was also reported that Indian forces are using lethal force and shooting unarmed civilians during peaceful protests. Govt. of India failed to institute any neutral investigation or judicial inquiry on the killings of human rights activists and civilians. Indian forces are violating international human rights and humanitarian law.<sup>174</sup> India had launched a catch and kill operation, it was told by an official privately in 1993, "Yes, they're killing them. Maybe it's because the jails are full or they want to frighten the people. We try going by the rules, but nobody else is."<sup>175</sup> In April 1993, a senior security official in Srinagar in April 1993 told the 'New York Times, "We don't have custodial deaths here, we have alley deaths. ... If we have the word of a hard-core

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<sup>172</sup> Jammu and Kashmir Collation of Civil Society(JKCCS), International Peoples Tribunal Kashmir(IPTK) and Association of Parents of Disappeared Kashmiris (APDP), "Structure of Violence: The Indian State in Jammu and Kashmir" ( Srinagar: IPTK & APDP, 2015)..

<sup>173</sup> *Ibid.*

<sup>174</sup> Asia Watch and Physician for Human Rights, *The Human Rights Crisis in Kashmir :A Pattern of Impunity*, 1993, <https://www.hrw.org/sites/default/files/reports/INDIA937.PDF> (accessed on April 18,2020).

<sup>175</sup>Tim McGirk, "Kashmiri Student Tells of Torture," *Independent*, May 25,1993. <https://www.independent.co.uk/news/world/kashmiri-student-tells-of-torture-tim-mcgirk-in-srinagar-reports-on-the-increasing-evidence-of-2325054.html> (accessed on April 18,2020).

militant, we will pick him up, take him to another lane and kill him."<sup>176</sup> According to Kashmir Media Service from January 1989 to April 30, 2020, 95548 civilians were killed, 7139 people were killed in custody, and 107,786 children were orphaned by occupational forces in IIOJK.<sup>177</sup> The killing of Kashmiris is a genocide, ICTY in *Blagojevic* and *Krstic* case sentenced Karstic to 46 years for the killings of Bosnian Muslims.<sup>178</sup>

The case studies and investigations by reputed human rights organizations establish that Indian forces are involved in the killings of civilians through different barbaric acts and Indian laws provide them complete impunity. The crime of extrajudicial and unlawful killing is a violation of IHL. Kashmir is an international armed conflict these killings are a violation of all four Geneva conventions and constitute a grave breach of these laws. This crime is an international crime, a crime against humanity, and a war crime. Moreover, international jurisprudence had established that the perpetrators of this crime are accountable and in many cases, they were punished by international courts and tribunals.

#### **4.9 Forcible Transfer of Population/ Demographic Changes**

The detail of ethnic cleansing has been discussed in genocide. Forcible transfer of population from occupied territories or shifting of its population by the occupier to occupied areas is prohibited in IHL. Article 49 of GC IV prohibits the shifting of the population by the occupier to occupied areas. The article provides, "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory

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<sup>176</sup> Edward Gargan, "Indian Troops Are Blamed as Kashmir Violence Rises," New York Times, April 18, 1993. <https://www.nytimes.com/1993/04/18/world/indian-troops-are-blamed-as-kashmir-violence-rises.html> (accessed on April 18, 2020).

<sup>177</sup> Kashmir Media Service, HR Violations, [www.kmsnews.org](http://www.kmsnews.org) (accessed on April 15, 2020).

<sup>178</sup> Judgment, Krstić, Trial Chamber, 19 April 2004; Judgment, Blagojević and Jokić, Trial Chamber, 17 January 2005.

to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.”<sup>179</sup> Article 85(4)(a) of AP- I,

In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol: a) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention.<sup>180</sup>

Article 8(2)(b))viii) of the statute of ICC considers it a war crime, the article provides, “The transfer, directly or indirectly, by the Occupying Power of parts of its civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory”<sup>181</sup> Jammu and Kashmir is a disputed territory and future status has to be determined through a fair, free and impartial plebiscite. IIOJK is a Muslim majority state and people are struggling for their right to self-determination. India had forcefully occupied Kashmir and for the last 72 years tried to suppress the voice of the people by draconian laws and excessive use of force. In the massacres, killings, enforced disappearances, rapes, and other human rights violations by Indian forces the target are Muslims, which shows that it is a systematic and planned move to convert the Muslim majority area into a minority. Even before the partition, some religious orthodox Hindu groups are working on Hindutva<sup>182</sup> ideology, which means that people from all other faiths should either convert themselves to the Hindu religion or leave India. Initially, the political groups

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<sup>179</sup> GCIV Article 49

<sup>180</sup> AP I Article 85(4)(a)

<sup>181</sup> *Supra* N. 157 Article 8(2)(b))viii).

<sup>182</sup> Hindutva as a political philosophy was first self-consciously articulated by Vinayak Savarkar in his 1923 book *Hindutva: Who is a Hindu?* In this book Savarkar argued that the only form of nationalism possible in India was Hindu nationalism.

and parties projecting this ideology were *Brahmo Samaj* established in 1822, and *Arya Samaj* established in 1875. In 1914, *Hindu Mahasabha* and 1925 *Rashtriya Swayamsevak Sangh* (RSS) were established. After the partition of the RSS and the *Bharatiya Jan Sangh* (BJS), the political party that was the precursor of the BJP promoted this ideology politically, socially, and culturally.<sup>183</sup> BJP came into power in India in 2014 under the leadership of Narendra Modi and started the implementation of the *Hindutva* ideology. The relationship of Modi with *Hindutva* ideology is very precisely elaborated as:

Modi's relationship with the Sangh Parivar defies easy characterization. On the one hand, Modi dedicated many of his formative years to the Hindu nationalist cause. At twenty-one years old, Modi joined the ranks of the RSS, the ideological fountainhead of the Hindu nationalist movement in India and the parent organization of the BJP, as a pracharak (campaigner). Modi spent decades working up the RSS ranks before transitioning to the BJP, as senior RSS members often do, to take up partisan political organizing. While the RSS and the BJP are legally separate entities, they share an especially close form of collaboration under the present dispensation. Many high-ranking ministers cut their teeth in the service of the RSS or other entities linked to the Sangh Parivar. In addition, there are regularly scheduled coordination meetings in which BJP and RSS officials meet to discuss policy issues of the day.<sup>184</sup>

There are two main reasons for which the Indian Govt. and BJP had changed the special status of Jammu and Kashmir and committed demographic engineering; one is to decrease the ratio of the Muslim population in IIOJK and the second is their orthodox *Hindutva* ideology. Kashmir is also part of *Akhnad Bharat*<sup>185</sup>, which should have an only Hindu majority.<sup>186</sup> Kashmir has special status through Article 370 in the Indian

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<sup>183</sup> Milan Vaishnav, editor. "*Indian Democracy and Religious Nationalism*", Carnegie Endowment for International Peace Washington, 2019 **Error! Hyperlink reference not valid.** Pp10-11

<sup>184</sup> *Ibid*, 14.

<sup>185</sup> This term is used for whole British India as it was before partition.

<sup>186</sup> Bhagavan, Manu (2008). *Princely States and the Hindu Imaginary: Exploring the Cartography of Hindu Nationalism in Colonial India.*: The Journal of Asian Studies, 67, 881–915.

Constitution and Article 35-A of the Indian Constitution provides the rights of ownership of land and permanent residence certificate to indigenous people of Kashmir. The Indian government was planning to shift her Hindu population in Kashmir and for this purpose, many actions like ‘Grant of Citizenship Rights to West Pakistan Refugees’<sup>187</sup>, ‘Setting up of Sainik Colonies for Retired Indian Soldiers’<sup>188</sup>, ‘Pandit Colonies’<sup>189</sup>, ‘JK Industrial Policy 2016’<sup>190</sup> etc. The main hurdle to implementing these designs was article 35-A of the Indian constitution. BJP was against the granting of special status for Kashmir even BJP had launched an agitation led by its founder Syama Prasad in 1951. BJP considers him a martyr and the party’s website referred to him as “a martyr leading the movement for complete integration of Jammu and Kashmir.”<sup>191</sup> Indian Govt. was known that even her puppet government in IIOJK will not favor the constitutional occupation and any change in a special status, so they dissolved the legislative assembly and Govt. in IIOJK in December 2018 and imposed governor rule. In the early days of August 2019, the Indian Govt. had increased the number of forces and imposed restrictions on movement, media, and communication, and imposed a curfew in major parts of the state. On 5<sup>th</sup> August 2019, “Jammu and Kashmir Reorganization Bill 2019”<sup>192</sup> was introduced in the Indian Parliament and in 9<sup>th</sup> August

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<sup>187</sup>To woo West Pakistan refugees, PM promises citizenship, Tribune India, <https://www.tribuneindia.com/news/archive/j-k/to-woo-west-pakistan-refugees-pm-promises-citizenship-758513> (accessed on May 04,2020).

<sup>188</sup>Hakeem Irfan, (<http://economictimes.indiatimes.com/news/politics-and-nation/sainik-colonies-would-be-like-planting-saffron-in-kashmir-it-will-bring-fragrance-of-indianess-bjp-mp/articleshow/52200465.cms> (accessed on May 04,2020).

<sup>189</sup> Hindu Resettlement Agenda in Kashmir, The Diplomat., <http://www.zoneasia-pk.com/bjps-hindu-resettlement-agenda-kashmir/>, (accessed on May 04,2020).

<sup>190</sup> Editorial, Kashmir Observer, (<https://kashmirobservers.net/2016/editorial/cms-explanation-sainik-pandit-colonies-simplistic-7130>).

<sup>191</sup> Medha, “*The Revocation of Kashmir’s Autonomy: High-Risk Hindutva Politics at Play*”, GIGA Focus ,Asia Number 5 ,August 2019, **Error! Hyperlink reference not valid.** (accessed on May 05,2020).

<sup>192</sup> Full Text of J&K Reorgnization Bill, 2019, The Hindu, August 05, 2019, <https://www.thehindu.com/news/resources/full-text-of-jk-reorganisation-bill/article28824060.ece> (accessed on May 05,2020).

it got the assent of the President.<sup>193</sup> Through this act the status of the state of Kashmir has been reduced to union territory, it has been divided into two union territories Jammu and Kashmir having legislature and Ladakh without legislature. The separate constitution of IIOJK, flag, and identity have been snatched. Article 35(A) has been abrogated for demographic changes. This act is not only a clear violation of international law and UNSC resolutions on Kashmir but it is also a clear violation of the Indian Constitution as well. According to a constitutional expert of India AG Noorani, "After the dissolution of the Constituent Assembly in 1956, the power of abrogation of Article 370 vanished."<sup>194</sup> The merger of IIOJK in the Indian Union is a violation of UNSC Res. No.91 of 1951, which states,

that the convening of a Constituent Assembly as recommended by the General Council of the "All Jammu and Kashmir National Conference" and any action that Assembly may have taken or might attempt to take to determine the future shape and affiliation of the entire State or any part thereof, or action by the parties concerned in support of any such action by the Assembly, would not constitute a disposition of the State in accordance with the above principle.<sup>195</sup>

It is also a clear violation of UNSC Res. No.122 of 1957 which also states that the future status of a state could not be determined without a plebiscite in the whole state;

it is affirmed in the UNSC Res.No.47 (1948) of 21 April, 1948, 51(1948) of 3 June, 1948, 80 (1950) of 14 March, 1950 and 91(1951) of 30 March, 1951, and the UNCIP resolutions of 13August, 1948, and 5 January, 1949."<sup>196</sup> This Unilateral change is also violation of Simla agreement which states, In Jammu and Kashmir, the line of control resulting from the cease-fire of December 17, 1971 shall be respected by both sides without prejudice to the recognized

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<sup>193</sup>President gives assent to J&K Reorganization Act – TheLeaflet, <http://theleaflet.in/president-gives-assent-to-jk-reorganization-act/> (accessed on May 5, 2020).s

<sup>194</sup> A.G. Noorani, *Kashmir: Scrapping Article 370 "Unconstitutional", "Deceitful"*, HUFFPOST, August 5, 2019, [https://www.huffingtonpost.in/entry/kashmir-article-370-scrapping-constitutional-expert-reacts-noorani\\_in\\_5d47e58de4b0aca341206135](https://www.huffingtonpost.in/entry/kashmir-article-370-scrapping-constitutional-expert-reacts-noorani_in_5d47e58de4b0aca341206135) (accessed on May 5, 2020).

<sup>195</sup> UNSC Resolution 91 (1951) / [adopted by the Security Council at its 539th meeting], of 30 March 1951. *S\_RES\_91(1951)-EN* - PDF

<sup>196</sup> UNSC Resolution No.122 (1957). Adopted on 24 January 1957, [S/3779]

position of either side. Neither side shall seek to alter it unilaterally, irrespective of mutual differences and legal interpretations.<sup>197</sup>

The people of IIOJK are against the revocation of the special status of Jammu Kashmir and the shifting of the Indian population into this territory. Govt. of India had imposed a lockdown in the whole valley in August 2019 and still, the area is under strict restrictions. During this lockdown, India violated all the human rights norms and fundamental rights of the people. According to a report issued by the Govt. of India, in the initial thirty days, more than 3800 people were detained.<sup>198</sup> According to another report, almost 240 detainees were shifted to the Indian jails.<sup>199</sup> A fact-finding report issued by 'Women's Voice' indicated that "13,000 boys and young men have been detained since August 5, including some as young as 14, with some imprisoned for up to 45 days."<sup>200</sup> According to human rights activist Parvez Imroz, "as many as 20,000-30,000 undocumented detentions, primarily of juveniles."<sup>201</sup> The High Commissioner for UN OHCHR stated on October 31, 2019, and showed his concerns about IIOJK as:

Major political decisions about the future status of J&K have been taken without the consent, deliberation or active and informed participation of the affected population. Their leaders are detained, their capacity to be informed has been badly restricted, and their right to freedom of expression and to political participation has been undermined.<sup>202</sup>

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<sup>197</sup> Simla Agreement, 1972. .

<sup>198</sup> "India Jailed Thousands In Kashmir Crackdown – Official Data." TRT World, September 12, 2019 <https://www.trtworld.com/asia/india-jailed-thousands-in-kashmir-crackdown-official-data-29730>.

<sup>199</sup> Mihir Desai at al., 2019. *Imprisoned Resistance: 5th August and Its Aftermath*, October 31, <http://www.pucl.org/reports/imprisoned-resistance-5th-august-and-its-aftermath>

<sup>200</sup> National Federation of Indian Women (NFIW), Pragatisheel Mahila Sangathan Delhi and Muslim Women's Forum, 2019. Women's Voice, September 24, <http://en.maktoobmedia.com/2019/09/24/full-text-womens-voice-fact-finding-report-on-kashmir/>.

<sup>201</sup> Parvez Imroz, 2019. "Kashmir at Unprecedented Juncture." NewsClick Interview with Gautam Navlakha, October 24, <https://www.youtube.com/watch?v=BM21-gHYzLo>.

<sup>202</sup> Press briefing note on Indian-Administered Kashmir, issued by Rupert Colville. Geneva: October 29, 2019. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25219&LangID=E> .

To fulfill her nefarious designs to change the demography of Kashmir India had introduced 'The Jammu and Kashmir Reorganization (Adaptation of State Laws) Order, 2020' on April 1, 2020. According to this act, any Indian who is residing or serving in Kashmir for 15 years or has studied in occupied Kashmir for 7 years and appeared in class 12 or 10 exams will be eligible for the domicile of Kashmir.<sup>203</sup> After the enforcement of this order, the Indian people can purchase land, and get Govt. Job and other benefits like people of Occupied Kashmir. This will be a step towards demographic engineering the immediate implication is the West Pakistan Refugees who are almost 1.5 million, 700,000 migrant workers, almost 700,000 army personnel, and other employees and businessmen will become a citizen of Kashmir and these all are almost Hindus.<sup>204</sup> India is adopting both hard and soft tactics to change the demography of the IIOJK, she is attempting this by changing laws and by use of force. International law prohibits the change in the demography of occupied territories. Indian actions are a clear violation of international law and UNSC resolutions on Kashmir. Moreover, these actions are crimes against humanity as well as war crimes.

#### **4.10 War Crimes in IIOJK**

Kashmir conflict is an international armed conflict; the legal basis of armed conflict has been already discussed in chapter 1. Article 2 of the Fourth Geneva Convention provides that

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other

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<sup>203</sup>Jammu and Kashmir Reorganisation (Adaptation of State Laws) Order, 2020, [https://mha.gov.in/sites/default/files/PR\\_JammuandKashmirReorganisation\\_31032020.pdf](https://mha.gov.in/sites/default/files/PR_JammuandKashmirReorganisation_31032020.pdf) (accessed on May 06,2020)

<sup>204</sup> Riyaz Wani, " India's New Domicile Law for Jammu and Kashmir is Making Residents Anxious," QUARTAZ INDIA, April 7,2020 ,<https://qz.com/india/1834012/after-article-370-new-jammu-kashmir-domicile-law-fuels-anxiety/>(accessed on May 06,2020)

armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.<sup>205</sup>

It is also provided that in cases of occupied territories ‘armed resistance is not required for application of the convention, “The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”<sup>206</sup> In chapter II, it is legally established that Kashmir is an occupied territory. There is also an armed struggle against Indian occupation and India herself admits that there are some organizations that are militants. War crimes are one of the oldest categories of crimes during the war (*jus in bello*).<sup>207</sup> IHL regulates the conduct of war to save the lives of non-combatants and also provides humanitarian assistance to combatants. These crimes were derived from the Hague Conventions of 1899 and 1907, Geneva Conventions, and its additional protocols and codified in article 8 of the Rome Statute of ICC, 1998.<sup>208</sup> Article 8 provides that, there are two basic elements in war crimes; that these crimes took place with intent and knowledge in an international or non-international armed conflict. ICC statute provides that these crimes included willful killing, serious injuries, torture or inhuman treatment, depriving POW or other protected persons of the right of a fair trial, demographic changes of occupied territories, taking hostages, unlawful deportation, extensive destruction of property and grave breaches of Geneva Conventions.<sup>209</sup> A former Judge of the ICTY, Professor Georges Abi-Saab, defined war crimes as “a violation of a rule

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<sup>205</sup> Geneva Convention relative to the Protection of Civilian Persons in Time of War, Oct. 21, 1950, art. 2, para. 1, 75 U.N.T.S. 287.

<sup>206</sup> *Ibid*, para 2.

<sup>207</sup> The origins go back to the just war tradition. See K. Okimoto, *The Distinction and Relationship between Jus ad Bellum and Jus in Bello* (Oxford: Hart, 2011); *Prosecutor v. Šainović et al.*, IT-05-87-A, Judgment, 23 January 2014, para. 1662 (‘Whether the resort to the use of force is legitimate under international law is a question of *jus ad bellum*, which is distinct from whether the way in which that force was used was legal under international humanitarian law, i.e. *jus in bello*’).

<sup>208</sup> Rome Statute of International Criminal Court, 1998, <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> (accessed on April 15, 2020).

<sup>209</sup> *Ibid*, art. 8.

of *jus in bello* that has the special legal effect of entailing the criminal responsibility of the individual who commits it.”<sup>210</sup> The significant development to prosecute and the perpetrators of war crimes was the establishment of ICTY<sup>211</sup> and ICTR<sup>212</sup> in 1993-1994 by UNSC. The detail of war crimes in occupied Kashmir has been discussed in this chapter under different headings. Being an international armed conflict the IHL is applicable in Kashmir. The Indian army is using the people of Kashmir as a human shield, in the areas of CFL, the army had installed their heavy guns in populated villages.<sup>213</sup> An Indian army officer tied Mr. Farooq Dar in front of his jeep and led an army convoy for five hours in different villages of Kashmir, instead of prosecution, the army officer was awarded a medal. Indian occupational forces are destroying the private properties of Kashmiris, houses and shops were burnt or blasted by the Indian army during CSOs and other operations. According to a report, 18 cases of destruction of properties by occupational forces were reported in the initial 4 months of 2019. The report of Asia Watch and PHR has revealed that “Security legislation has encouraged these abuses by authorizing security personnel to use lethal force even against unarmed demonstrators and destroy property.”<sup>214</sup> The report also states that Indian forces are violating IHL by raiding hospitals and detaining health professionals.<sup>215</sup> Another report shows that,

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<sup>210</sup> Georges Abi-Saab, *The Concept of “War Crimes,”* in *INTERNATIONAL LAW IN THE POSTCOLD WAR WORLD: ESSAYS IN MEMORY OF LI HAOPEI* 99, 106 (Sienho Yee & Wang Tieya eds., 2001)

<sup>211</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, May 25, 1993, Res. 827, U.N. Doc. S/RES/827 [hereinafter ICTY Statute] (establishing the International Criminal Tribunal for the Former Yugoslavia).

<sup>212</sup> Statute of the International Criminal Tribunal for Rwanda, Nov. 8, 1994, S.C. Res. 955, U.N. Doc. S/RES/955 [hereinafter ICTR Statute] (establishing the International Criminal Tribunal for Rwanda).

<sup>213</sup> Azad Essa, “Indian army accused of using Kashmiris as human shields in border skirmish with Pakistan”, MIDDLE EAST EYE, April 13, 2020, <https://www.middleeasteye.net/news/india-accused-kashmir-human-shields-border-war-pakistan> (accessed on May 16, 2020).

<sup>214</sup> Asia Watch and Physician for Human Rights, *Rape in Kashmir : A crime of War*, 1993.

<sup>215</sup> *Ibid.*

Security forces beat, shot or strafed ambulance drivers who were attempting to provide care to the wounded, and shot dead one driver while he was on duty. Doctors and other medical staff frequently have been threatened, beaten and detained. Several have been shot dead while on duty; others have been tortured... During raids, hospitals are not accessible to patients in need of emergency care<sup>216</sup>.

According to a report, 109,506 structures were destroyed or burnt by occupational forces from January 1989 to April 30, 2020, in IIOJK.<sup>217</sup> Occupational forces are using excessive and lethal force during peaceful protests. According to the OHCHR report, The state government also informed that 9,042 people had been injured during protests in the same period including through injuries sustained from the use of bullets, metal pellets, and chemical shells.”<sup>218</sup> War crimes are not only committed by the Indian forces but these crimes are backed by BJP as well as the Indian Govt. The comments of an Indian retired Major General and Member of BJP in a live TV program show the Indian attitude and involvement, he said, “*Maut ke badlay maut (death in return of death), balatkar ke badlay balatkar (rape in return of rape)*.”<sup>219</sup> There is no legal remedy for victims in India due to draconian laws and militarized justice system. Fair trial and equality before the law are not for the people of Kashmir, which will be discussed in detail in the next section. The decision of the Supreme Court of India (SCI) in the ‘Afzal Guru Case’ is only one example, the court decided, “As is the case with most conspiracies, there is and could be no evidence amounting to criminal conspiracy. The incident, which resulted in heavy casualties, had shaken the entire nation, and the

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<sup>216</sup> Human Rights Watch, *Human Rights Crisis in Kashmir*, June 1993.

<sup>217</sup> Kashmir Media Service, [www.kmsnews.org](http://www.kmsnews.org) (accessed on May 16,2020).

<sup>218</sup> *Ibid.*

<sup>219</sup> BJP Member (Ex-Army General) Calls For Rape Of Kashmiri Women On Live TV, PARHLO, November 18,2019. <https://www.parhlo.com/sinha-says-rape-kashmiri-women/>.

collective conscience of society will only be satisfied if capital punishment is awarded to the offender.”<sup>220</sup>

In another recent example of SCI from 5<sup>th</sup> August 2019 to 3<sup>rd</sup> October 2019, more than 250 writs of habeas corpus were filed, according to normal procedure, the court issues notice within 48 hours and hear the case on the 4<sup>th</sup> day and decides it in 15 days but in the cases of Kashmiris, it takes months and years. The astonishing fact is SCI did not decide on these cases after many months.<sup>221</sup>

It is evident from the reports of occupied Kashmir that India is committing war crimes in the occupied territory that are accountable.

#### **4.11 Impunity to Perpetrators under draconian laws in IIOJK**

India is violating all norms of international human rights and humanitarian law. The occupying forces are protected through different laws enforced in IIOJK. These laws are violating international standards of human rights. From 1990 to date several human rights organizations have criticized and asked India to revoke these draconian laws but besides its international commitments, India is not ready to revoke them. These laws are special laws to suppress the people of IIOJK, who are demanding the right to self-determination. The era of draconian laws in IIOJK was very briefly analyzed by Sriram, “The Indian government seems to revisit its legitimized mechanism of oppression to repeal one law and fortify it with yet another law, more draconian and heinous than its predecessor.”<sup>222</sup>

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<sup>220</sup> Arundhati Roy, “*The Hanging of Afzal Guru is a Stain on India’s Democracy*”, The Guardian, February 10, 2013, <https://www.theguardian.com/commentisfree/2013/feb/10/hanging-afzal-guru-india-democracy> (accessed on May 12, 2020).

<sup>221</sup> “Kashmir’s crippled courts leave detainees in limbo”, BBC NEWS, October 3, 2019, <https://www.bbc.com/news/world-asia-india-49848899> (accessed on May 05, 2020).

<sup>222</sup> Sriram Ananthanarayanan, South Asian Magazine for Action and Reflection, Issue 18, <http://bibpurl.oclc.org/web/74845> (accessed on April 18, 2020).

“The Jammu and Kashmir Public Safety Act 1978” (PSA)<sup>223</sup> is one of the draconian laws, which is used to detain thousands of Kashmiris for an indefinite period even without fixing any charge. Section 18 of PSA allows the forces;

1)The maximum period for which any person may be detained in pursuance of any detention order which has been confirmed under section 17, shall be -

(a)twelve months from the date of detention in the case of persons acting in any manner prejudicial to the maintenance of public order or indulging in smuggling of timber; and

(b)two years from the date of detention in the case of persons acting in any manner prejudicial to the security of the State.<sup>224</sup>

There is no need for any presentation before court and section 8 provides that a district magistrate or divisional commissioner could order this. One astonishing provision is that detainees will be informed about charges within 10 days but that authority did not disclose facts that it considers necessary in the public interest.<sup>225</sup> Section 22 provides immunity to the personals of armed forces who have done any act in good faith.<sup>226</sup> Before August 2018 the permanent resident (PR) of J&K could not be shifted to any jail outside the state but now it was revoked through amendment.<sup>227</sup> Amnesty International had published several reports on human rights violations in Kashmir<sup>228</sup> and considers PSA as a ‘Lawless Law’. Amnesty International published a report in 2011and reported that from 1989 to 2010 there are 8000 to 20,000 registered cases under PSA. It was also reported that PSA was used for long-term detentions of

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<sup>223</sup> Jammu and Kashmir Public Safety Act, <http://jkhome.nic.in/psa0001.pdf> (accessed on April 20, 2020).

<sup>224</sup> *Ibid*, section 18.

<sup>225</sup> *Ibid*, Section 08.

<sup>226</sup> *Ibid*, Section 22.

<sup>227</sup> The Jammu and Kashmir Public Safety (Amendment) Act, 2018, [jkhome.nic.in /pd f/Public%20Safety.pdf](http://jkhome.nic.in/pd f/Public%20Safety.pdf) (accessed on April 20, 2020).

<sup>228</sup> Amnesty International, India: An unnatural fate – disappearances in the Indian states of Jammu and Kashmir and Punjab (Index: ASA 20/42/93).

suspected members of armed groups, and political activists, and against those individuals for whom there is not sufficient trial evidence. This law is a clear violation of international law “By using the PSA to incarcerate suspects without adequate evidence, India has not only gravely violated their human rights but also failed in its duty to charge and try such individuals and to punish them if found guilty in a fair trial.”<sup>229</sup> Another Law is “The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990”<sup>230</sup>, which declares Kashmir as a disturbed area, section 4 empowers the army personals :

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;”<sup>231</sup>

Jammu And Kashmir Disturbed Area Act, 1990<sup>232</sup> empowers the Governor to declare the whole state or any district as disturbed. According to this law, extra-judicial killing is allowed to head constable or equal rank for maintenance of public order and it also provides blanket impunity for these acts of force. “Terrorist and Disruptive Activities Act (TADA) 1990”<sup>233</sup> was enforced in Kashmir and this law allows the use of force and

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<sup>229</sup> Amnesty International, India: A ‘Lawless Law’, Detentions under the Jammu and Kashmir Public Safety Act, (AI Index: ASA 20/001/2011), 21 March 2011. [www.amnesty.org](http://www.amnesty.org) (accessed on April 20,2020).

<sup>230</sup> Armed Forces(Jammu and Kashmir ) Special Power Act, 1990.

<sup>231</sup> Armed Forces(Jammu and Kashmir ) Special Power Act, 1990,.

<sup>232</sup> Jammu and Kashmir Disturbed Areas Act, 1990.

<sup>233</sup> Terrorist and Disruptive Activities Act (TADA), 1990, [http://legislative.gov.in/sites/default/files/legislative\\_references/1993.pdf](http://legislative.gov.in/sites/default/files/legislative_references/1993.pdf) (accessed on April 20,2020).

preventive detention for one year without formal trial and charges. This law was also providing impunity to armed forces for human rights violations. Although this law was repealed in 1995 and replaced by PSA still the victims are facing trials in different courts without committing any crime. “Prevention of Terrorism Act (POTA), 2002”<sup>234</sup> was enforced to crush the freedom struggle in IIOJK, through this law without framing charges any person could be detained for 3 months and their properties could be seized. This law was replaced in 2004 by other laws of the same nature. Many other laws also provide a free hand to occupational forces for human rights violations as well as impunity to perpetrators. These draconian laws are, “The unlawful Activities (Prevention) Amendment Ordinance 2004”, “National Security Act” (NSA) “Official Secrets Act” (OSA), “The Newspapers Incitement to Offences Act 1971”, “the Egress and Internal Movement (control) Ordinance 1948”, “Enemy Agent Ordinance 1948”, “prevention of Unlawful Activities 1963” and “Subversion and Sabotage Act 1965.”<sup>235</sup>

Amnesty International published its first report on PSA titled ‘A Lawless Law’<sup>236</sup>, the second report in 2012<sup>237</sup>, ‘Still a Lawless Law’, and the third report ‘Tyranny of a Lawless Law’ in 2019<sup>238</sup>. These all reports are based on case studies of victims under this law and systematic violation of international law by occupational forces in IIOJK. OHCHR in its report of June 2018 also criticized PSA and AFSPA and recommended

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<sup>234</sup> The Prevention of Terrorism Act, 2002, <https://www.satp.org/satporgtp/countries/india/document/actandordinances/POTA.htm>

<sup>235</sup> ‘Draconian Laws and Human Rights Violation’ by Usman Hassan in Kashmir : Challenges & Prospects, compiled by Sahibzada Sultan Ahmad Ali (Islamabad: Muslim Institute, 2014), pp. 69-75.

<sup>236</sup> Amnesty International, ‘A ‘Lawless Law’: Detentions under the Jammu and Kashmir Public Safety Act’, (Index: ASA /001/2011), [www.amnesty.org/download/Documents/20000/asa200352012en.pdf](http://www.amnesty.org/download/Documents/20000/asa200352012en.pdf).

<sup>237</sup> Amnesty International, ‘Still A ‘Lawless Law’: Detentions under the Jammu and Kashmir Public Safety Act, 1978’, (Index: ASA 20/035/2012), [www.amnesty.org/download/Documents/20000/asa200352012en.pdf](http://www.amnesty.org/download/Documents/20000/asa200352012en.pdf)

<sup>238</sup> Amnesty International, ‘Tyranny of a Lawless Law’: Detentions without Charges or Trial under the J&K Public Safety Act, <https://amnesty.org.in/wp-content/uploads/2019/06/Tyranny-of-A-Lawless-Law.pdf>

to the Indian government repeal these laws.<sup>239</sup> According to KMS from July 2016 to April 2020, 951 people were detained under PSA.<sup>240</sup>

These laws violate IHL and IHRL as well as the principle of legality and international standards for legal remedies. India had ratified the ICCPR but these laws also violate the provisions of the ICCPR. Article 9(1) provides the right to security, liberty of the person, and protection from arbitrary detention or arrest.<sup>241</sup> India had ratified this convention with some reservations but these reservations are incompatible with the purpose of this convention, so these are not valid. Under customary international law, “reservations must not be incompatible with the object and purpose of the treaty.”<sup>242</sup> These laws like section 8 allow for detention on grounds of maintenance of public order and security of the state but the definition provided for these two terms is broad and vague and empowers the authorities to exercise their discretion.<sup>243</sup> Article 9(2) of ICCPR provides, “Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.”<sup>244</sup> But Section 13 of PSA empowers the authorities not to disclose the facts if it considers necessary in the public interest.<sup>245</sup> In IIOJK a large number of detainees do not know their crimes but they are under detention. According to PSA detainees had no access to the judicial authority which is also a violation of Article 9(4) of ICCPR which provides that a person detained or arrested must be, “entitled to take proceedings before a court,

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<sup>239</sup> Office of the United Nations High Commissioner for Human Rights. Update of the Situation of Human Rights in Indian –Adminstrated Kashmir and Pakistan- Administrated Kashmir from May 2018 to April 2019, 8 July 2019.

<sup>240</sup> Kashmir Media Service, HR Violations, [www.kmsnews.org](http://www.kmsnews.org) (accessed on April 04,2020).

<sup>241</sup> International Covenant on Civil and Political Rights, *art. 9*.

<sup>242</sup> Vienna Convention on the Law of Treaties, A/CONF.39/27 (1969), adopted 22 May 1969, entered into force 23 May 1980, para. 19(c).

<sup>243</sup> Office of the United Nations High Commissioner for Human Rights. Update of the Situation of Human Rights in Indian –Adminstrated Kashmir and Pakistan- Administrated Kashmir from May 2018 to April 2019, 8 July 2019.

<sup>244</sup> ICCPR, *art. 9(2)*.

<sup>245</sup> Public Safety (Amenment) Act, 2018 , Section 13.

so that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”<sup>246</sup>

In 2012 IPTK and APDP published a report based on case studies of human rights violations in IIOJK, containing the complete detail of the perpetrators. This report shows the involvement of armed forces and the structure of impunity to them. The report shows that,

Out of 214 cases, a list emerges of 500 individual perpetrators, which include 235 army personnel, 123 paramilitary personnel, 111 Jammu and Kashmir Police personnel and 31 Government backed militants/associates. The designations of some of these alleged perpetrators point to deep institutional involvement of the Indian State in the crimes. Among the alleged perpetrators are two Major Generals and three Brigadiers of the Indian Army, besides nine Colonels, three Lieutenant Colonels, 78 Majors and 25 Captains. Add to this, 37 senior officials of the federal Paramilitary forces, a recently retired Director General of the Jammu and Kashmir Police, as well as a serving Inspector General.<sup>247</sup>

The report also shows that according to Govt. of IIOJK they have initiated 50 cases of personals of armed forces for sanction to the Ministry of Defense under AFSPA, the ministry responded that they had received only 24 cases and out of these sanction has been declined in 19 cases and for other 05 it was said that they are under examination.<sup>248</sup> This shows that even on the recommendation of their puppet Govt. the Indian government is not ready to persecute any single person. According to the annual report of 2019 published by JKCSS and APDP, 662 fresh petitions were filed in J&K High Court challenging the detentions under PSA.<sup>249</sup> All the special laws and even general

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<sup>246</sup> ICCPR. Art.9(4).

<sup>247</sup> IPTK and APDP, “Alleged Perpetrators: Stories of Impunity in Jammu and Kashmir”, [www.kashmirprocess.org](http://www.kashmirprocess.org) (accessed on April 4,2020).

<sup>248</sup> *Ibid*, 11-12.

<sup>249</sup> Jammu and Kashmir Collation of Civil Society, Annual Human Rights Review 2019, <http://jkcss.net/annual-human-rights-review-2019-2/> . (accessed on April 4,2020).

laws were amended to provide impunity to Indian occupational forces in IIOJK. Both the IHL and IHRL prohibit killings, arbitrary detentions, sexual violence, and other human rights violations by the state but India is violating these all. The special provisions of impunity were present in all enforced laws and still applicable in enforced laws. Section 45 of Indian Penal Code, 197(2) of Criminal Procedure Code of 1973, section 22 of PSA, Section 7 of AFSPA and JKDA provide effective impunity to armed forces in identical language that, “No prosecution, suit or other legal proceedings 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.”<sup>250</sup>

#### **4.12 Human Rights Situation in Azad Jammu and Kashmir**

The legal status of AJ&K and its constitutional status have been already discussed in Ch.1. The human rights situation in AJ & K will be analyzed with the reports of OHCHR because no other report from any reputed organization is available so far. OHCHR published its first report in June 2018 and paragraphs No 141 to 161 are about human rights concerns about AJ&K and GB.<sup>251</sup> The second report was published on July 8, 2019, and paragraphs No 146 to 179 are about both parts administrated by Pakistan.<sup>252</sup> The second report is based on the concerns shown in the 1<sup>st</sup> report, so the second report will be analyzed. The positive point discussed in the report is the constitutional empowerment of both the areas by Govt. of Pakistan. This section is the

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<sup>250</sup> Human Rights Watch, “Everyone Lives in Fear: Pattern of Impunity in Jammu and Kashmir” 2006, <https://www.hrw.org/report/2006/09/11/everyone-lives-fear/patterns-impunity-jammu-and-kashmir> (accessed on April 05, 2020).

<sup>251</sup> Office of the United Nations High Commissioner for Human Rights. Report on the Situation of Human Rights in Kashmir: Development in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit Baltistan, June 14, 2018.

<sup>252</sup> Office of the United Nations High Commissioner for Human Rights. Update of the Situation of Human Rights in Indian –Administrated Kashmir and Pakistan- Administrated Kashmir from May 2018 to April 2019, 8 July 2019.

analysis of the concerns about AJ & K. In paragraph 147 of the report, it was generally discussed that AJ & K Interim Act 1974 was amended through “Azad Jammu and Kashmir Interim Constitution (Thirteenth Amendment) Act, 2018”<sup>253</sup> on June 2, 2019, and that powers of the Kashmir Council has been transferred to Prime Minister of Pakistan, but the concerns are based on newspaper sources, which were not written by any constitutional or legal experts. This concern is not factually correct, according to UN Resolutions the government of AJ&K is a local authority<sup>254</sup>, not a recognized independent state. The GoAJ&K initially through “The Karachi Agreement of 1949”<sup>255</sup>, had handed over the defence, foreign affairs, communication, and some other subjects to Govt, of Pakistan. After this agreement, many rules of businesses and acts were promulgated and these subjects are given to Govt, of Pakistan. The recent amendment 13<sup>th</sup> amendment in the AJ&K constitution was passed by elected representatives of Azad Kashmir and these subjects were given to Govt, of Pakistan. Through the 13<sup>th</sup> amendment, the administrative, financial, and collection of taxes were given to GoAJ&K.<sup>256</sup> Through article 52- C, the natural resources of AJ & K will be used for the economic interest of the people of AJ & K and could be utilized by an enactment which will provide the mechanism.<sup>257</sup> The concern about the shifting of powers to the Prime Minister of Pakistan could be cleared from article 31 (3) which gives exclusive powers to Govt, of Pakistan on 32 subjects, on these subjects AJ & K Legislative Assembly has no legal capacity to make laws, because these all are related

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<sup>253</sup> Government of Azad Jammu and Kashmir, “Azad Jammu and Kashmir Interim Constitution (Thirteenth Amendment) Act, 2018”, 2 June 2018.

<sup>254</sup>Resolution adopted by the United Nations Commission for India and Pakistan on 13 August 1948, (Document No.1100, Para. 75, dated the 9th November, 1948).

<sup>255</sup> Government of Azad Jammu and Kashmir, “Azad Jammu and Kashmir Interim Constitution (Thirteenth Amendment) Act, 2018”, 2 June 2018, Ch-1.

<sup>256</sup> *Ibid*, art. 31 to 42, 47, 50 A, 53.

<sup>257</sup> *Ibid*. art.52-C.

to foreign affairs, defence and currency.<sup>258</sup> As per article 31(4) in 22 subjects, the AJ & K Legislative Assembly has the powers to make laws with the consent of Govt, of Pakistan.<sup>259</sup> In Para 150 it was observed that National Commission for Human Rights has no jurisdiction over AJ & K, this concern is self-contradictory because in the preceding para it was observed that Govt, of Pakistan has direct control over AJ & K, and in this para, concern was shown on the jurisdiction of Pakistani commission in AJ & K. AJ & K is not a constitutional part of Pakistan and only those laws of Pakistan are applicable in AJ & K, that AJ & K Assembly adopts or with modifications pass. Moreover, AJ & K legislative assembly passed the act for the establishment of the Azad Kashmir Human Rights Commission in 2020. The concern showed in para 151 and 152 the constitutional provision not to propagate against the ‘ideology of accession to Pakistan’ and election laws of disqualification on not submitting a declaration to accept this ideology.<sup>260</sup> There are two dimensions of this concern, first, the constitution of AJ & K was passed by the elected representatives of AJ & K and no one can impose any restriction on them on any legislation for their people. The second dimension is according to international law and UNSC Resolutions, the UNCIP resolution of 5<sup>th</sup> January 1949, gives only two options to Kashmiris for their future determination either to join India or Pakistan.<sup>261</sup> Practically, the political parties that believe and propagate the ideology of Independent Kashmir like “Jammu Kashmir Liberation Front” (JKLF)<sup>262</sup>, “Jammu Kashmir Liberation League”, etc are not only working in AJ & K

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<sup>258</sup> Government of Azad Jammu and Kashmir, “Azad Jammu and Kashmir Interim Constitution (Thirteenth Amendment) Act, 2018”, 2 June 2018. *Art. 31 (3) , Third Schedule Part ‘A’*.

<sup>259</sup> *Ibid. Art. 31 (4) , Third Schedule Part ‘B’*.

<sup>260</sup> Office of the United Nations High Commissioner for Human Rights. Update of the Situation of Human Rights in Indian –Administrated Kashmir and Pakistan- Administrated Kashmir from May 2018 to April 2019, 8 July 2019, Paras.150..

<sup>261</sup> Resolution adopted at the meeting of the United Nations Commission for India and Pakistan on 5 January, 1949, (Document No. 5/1196 para. 15, dated the 10<sup>th</sup> January, 1949), Para 1.

<sup>262</sup> JKLF March Towards LoC Today ,DAWN News , October 04, 2019, <https://www.dawn.com/news/1508866> ( accessed on May 15, 2020).

but also involved in the decision making and attending the meetings of political parties.<sup>263</sup> In AJ & K, the election commission is legally empowered for the registration of political parties, in the last elections which were held in 2016, six political parties that do not believe in the ideology of accession to Pakistan were registered and got election symbols. These parties were Jammu Kashmir Liberation League, JKLF, People's National Party UK, Kashmir Freedom Movement, Jammu Kashmir National Liberation Front, and Kashmir Freedom Front.<sup>264</sup> Para 156 and 157 about the claim of nationalist parties that they are facing threats and arrests for political activities, but the report had not indicated any neutral source. Para No. 158 and 159 are about permission from the ministry of Kashmir affair or council for publishing in media channels and censorship which is not correct. After the 13<sup>th</sup> amendment, GoAJ&K has powers to issue no objection certificates and register media houses. The registration procedure and forms are available on the web page of the information department of GoAJ & K.<sup>265</sup> The government issues advertisements to the newspapers through a general policy and uniform criteria irrespective of their ideological affiliation. The concern shown in paragraph No.166 was addressed through article 52-C of the AJ&K Interim Constitution Act. The concerns about freedom of religion or belief in paragraphs 171 and 172 about the 'Ahmadiyya community" and blasphemy laws are out of context. The definition of Muslims or Christians or Jew should be seen in their religious books and every faith had defined some criteria for its believers. Islam also provides criteria to become Muslim and if someone is not fulfilling those criteria could not be treated as

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<sup>263</sup>"AJK Premier urges unanimous narrative to respond situation in Valley", The Dawn, December 16,2019, <https://www.dawn.com/news/1522496/ajk-premier-urges-unanimous-narrative-to-respond-to-situation-in-valley> (accessed on May 06,2020).

<sup>264</sup> Election Commission of AJK, <https://ec.ajk.gov.pk/source/List-of-Political-Parties-Aug2016.pdf> (accessed on May 06,2020).

<sup>265</sup>Information Department Azad Govt. of State of Jammu and Kashmir, <http://www.pidajk.gok.pk/forms.php> (accessed on 15 May 2020).

Muslim. The definition of Muslim and Non-Muslim provided in the constitution is very clear

“ ‘**Muslim**’ means a person, who believes in the unity and oneness of Almighty Allah, in the absolute and unqualified finality of the Prophethood of Muhammad (peace be upon him), the last of the prophets, and does not believe in, or recognize as a prophet or religious reformer, any person who claimed or claims to be a prophet, in any sense of the word or of any description whatsoever, after Muhammad (peace be upon him);”

“ ‘**Non-Muslim**’ means a person, who is not a Muslim and includes a person belonging to the Christian, Jew, Hindu, Sikh, Buddhist or Parsi community, a person of the *Qadiani* group or the Lahori group (who call themselves ‘Ahmadis’ or by any other name), or a Bahai, or any person who does not fulfill the requirements of a Muslim;”<sup>266</sup>

However there is no discrimination in these laws based on faith, these Ahmadis are also enjoying all fundamental rights like Muslims. Regarding blasphemy laws, it must be understood that Islamic laws are divine laws and it is not in the legal capacity of any legislature to amend or repeal these laws. Paragraphs No 173 to 180 are about enforced disappearances in Azad Kashmir, the constitution of AJ & K, provides a legal mechanism and no one could be detained in violation of this provision. The constitution provides:

“(4) No law providing for preventive detention shall be made except to deal with persons acting in a manner prejudicial to the integrity, security or defense of Azad Jammu and Kashmir or Pakistan or any part thereof, or public order, or the maintenance of supplies or services, and no such law shall authorize the detention of a person for a period exceeding three months unless the Review Board has, after affording him an opportunity of being heard in person, reviewed his case and reported, before the expiration of the said period, that there is, in its opinion, sufficient cause for such detention, and, if the detention

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<sup>266</sup> Azad Jammu and Kashmir Interim Constitution (Twelfth Amendment) Act, 2018.

is continued after the said period of three months, unless the Review Board has reviewed his case and reported, before the expiration of each period of three months, that there is, in its opinion, sufficient cause for such detention.<sup>267</sup>

The review board is independent and is not under the influence of Govt. or law enforcement agencies. These three member boards will be appointed by the chief justice of AJ & K Supreme court from the serving or retired judges of the High Court or Supreme Court. To date, not a single case of enforced disappearances was reported in AJ & K. In the first report, it was recommended that a commission of inquiry to investigate human rights violations should be considered. The GoA&K had welcomed this and invited the commission to visit AJ&K.<sup>268</sup>

The concerns about the human rights situation in Azad Jammu and Kashmir as mentioned in the reports of OHCHR are not grave or systematic. The major constitutional and administrative issues have been addressed through the 13<sup>th</sup> amendment however some improvements are required. The AJ & K Assembly should have powers to legislate on all subjects except defense, foreign affairs, communication, and currency. After 9/11 the scope of terrorism has been increased in the legislations of all countries, it should be redefined. The role of Govt. of AJ&K should be redefined as the Govt. of the base camp for the liberation of occupied parts of the state.

#### **4.13 Human Rights Situation in Gilgit Baltistan (GB)**

Some human rights concerns in the report of UNOHCHR about GB are the same as about AJ & K and have been discussed in the above section. GB was liberated by the local people in 1947 and at that time it was part of the state of Jammu and Kashmir. Before analyzing the human rights concerns about GB, it should be kept in mind that

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<sup>267</sup> Interim Constitution of Azad Jammu and Kashmir, art4(4).

<sup>268</sup> AJK PM Seeks UN Fact Finding Mission on Kashmir, The Nation, April 22, 2019, [www.nation.com.pk](http://www.nation.com.pk). (accessed on May 10,2020).

GB is not part of the AJ & K and it is the part of the erstwhile state of Jammu and Kashmir, like other administrative units of the state it is also a disputed territory according to UNSC resolutions, international law, and constitution of Pakistan. People of AJ&K are enjoying fundamental rights, democratic systems of governance, and economic social, and political rights for a long period but the position of GB is not the same. GB is not a constitutional part of Pakistan, nor is it a province or having a status like AJ & K or HIOJK. This ambiguity of status is the main reason for the dissatisfaction of the people of GB. The administrative affairs of GB are under the administration of Pakistan through the Karachi agreement, the detail has been discussed in Ch-I.

“The Gilgit-Baltistan (Empowerment and Self-Governance) Order 2009”<sup>269</sup>, is enforced in GB, but this order did not address the grievances of the local people. The legal question arises in which legal capacity Pakistan can enforce any law in this disputed territory. Although GB is not a constitutional part of Pakistan and article 257 of the constitution of Pakistan provides the relationship between the people of Jammu and Kashmir and Pakistan after the determination of future status. The State of Jammu and Kashmir is not included in article 1(2)(d) of the constitution, which provides that,

2) the territories of Pakistan shall comprise.....

(d) Such states and territories as are, or may be included in Pakistan, whether by accession or otherwise.<sup>270</sup>

However the Govt. of Pakistan issues orders based on article 258 which provides, “Subject to the Constitution, until [Majlis-e-Shoora (Parliament)] by law otherwise provides, the President may, by Order, make provision for peace and good government of any part of Pakistan not forming part of a Province”<sup>271</sup>. This constitutional provision

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<sup>269</sup> The Gilgit-Baltistan (Empowerment and Self-Governance) Order 2009, “Gilgit-Baltistan Legislative Assembly,” <http://gbla.gov.pk/page/history#GBselfGOrder2009> (accessed March 10, 2020).

<sup>270</sup> Constitution of Islamic Republic of Pakistan 1973, Article 1(2)(d).

<sup>271</sup> *Ibid.*, Article 258.

is not about the AJ & K and GB, which are disputed areas, and article 257 of the constitution expressly provides the nature of relationships of these areas with Pakistan. The research shows that ‘The Karachi Agreement of 1949’<sup>272</sup> and the decisions of the Supreme Court of Pakistani<sup>273</sup> empower the Govt. of Pakistan for legislative and administrative control of GB.<sup>274</sup> The concerns in OHCHR reports about the human rights situation in GB are mainly political and related to the legal status of the area. The legal status of GB is ambiguous, it is not the province of Pakistan but its legislative assembly is not empowered to make a constitution for this area like AJ & K. The GB order 2009 did not empower the people or elected representatives of GB to frame the constitution. GB council is a forum of discussion and the members elected from GB have no powers to decide about their area, it has equal membership of 6 nominated members by Prime Minister Pakistan and 6 elected by the legislative assembly of GB.<sup>275</sup> The council has both legislative and executive powers, which is a violation of the principle of the tracheotomy of powers.<sup>276</sup> The members of the council enjoy impunity and are not answerable in any forum. The Chairman Council, In-charge minister, and the staff of the council are not answerable in any court of law, because these are the citizen of Pakistan and beyond the jurisdiction of the courts of GB.<sup>277</sup> The GB has no equitable share in revenues, dispersion, rights on natural resources, lack of representation in federal bodies, and not any constitutional protection.<sup>278</sup> There is a need for a constitutional framework for GB, to address the issues of human rights.

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<sup>272</sup> *Karchi Agreement of 1949.(Ch-1).*

<sup>273</sup> Messrs MASTER FOAM (PVT.) LTD. and 7 others Versus Government of Pakistan through Secretary, Ministry of Finance and others, PLD 2005 SC 373..

<sup>274</sup> Muhammad Idrees Abbasi, “ *The Internal Aspects of the Right to Self Determination and International Obligations of Human Rights: The Case of Azad Jammu and Kashmir and Gilgit Baltistan*,”(Ph.D. diss., IIU Islamabad, 2019), 63-65.

<sup>275</sup> *Gilgit Baltistan Order 2009, order 20.*

<sup>276</sup> *Ibid., Third and Fourth Schedule.*

<sup>277</sup> Office of the United Nations High Commissioner for Human Rights. Update of the Situation of Human Rights, 55.

<sup>278</sup> *Ibid, 65-71.*

## Conclusion

Jammu and Kashmir is a disputed territory divided into three administrative units. Pakistan is administering GB and AJ & K whereas a major portion of the state is under the illegal occupation of India and is in a state of war. IHRL is applicable in Pakistani administrated areas, and both IHRL and IHL are applicable in IIOJK. In Pakistani administrated areas there is not any evidence of systematic and gross human rights violations and there is not any case of killings or sexual violence by governing power. In these areas there is not any resistance against the governing state (Pakistan) however, there are some constitutional and administrative issues that should be addressed. The position of AJ & K is better than GB due to the democratic process, supreme court, executive, and financial powers. The situation in the Indian occupied part is very alarming. There is an armed resistance and people are struggling for liberation from the occupation of India. It was observed that India is violating all Jus Cogens norms and committing crimes against humanity and war crimes. The occupier (India) had provided blanket impunity to its armed forces on these violations. Instead of prosecuting the perpetrators of these crimes, the Govt. is awarding them promotions and medals. After 5<sup>th</sup> August 2019, the citizenship laws were amended to transfer India's Hindu population to Kashmir to change the demography of this area. India is violating all human rights instruments, laws of war, UNSC resolutions, and even her agreements and constitution. The violation of international law is accountable under international criminal law. International law also provides some forums for the resolution of disputes peacefully as well as by the use of force. The states, as well as individuals, are accountable for the perpetration of serious crimes such as crimes against humanity, aggression, war crimes, the crime of genocide, and violation of jus Cogens. International criminal law is applicable through ICC, international criminal tribunals,

hybrid tribunals, and national courts. The unilateral actions of India regarding the status of Kashmir, human rights violations in IIOJK, violations of the ceasefire line, threats, and hostile attitude towards Pakistan are a threat to international peace and security as well. There are some legal obligations of the UN and the international community to protect the people of Kashmir from the occupation, oppression, and dehumanization by India, and maintain peace and security in the world. The next chapter will be about the international mechanisms and remedies available for the people of Jammu and Kashmir.

## **Chapter V**

# **LEGAL OBLIGATIONS ON GOVERNING STATES AND THE INTERNATIONAL COMMUNITY**

### **Introduction**

States and the international community are legally bound to protect the human rights of the people. There are certain legal obligations on the state to protect human rights as well as respect the IHL during an armed conflict. In the failure of the state on its legal obligation, the international community is obliged to protect people from gross human rights violations and grave breaches of the Geneva Convention. International law had provided different legal mechanisms as well as judicial and non-judicial institutions for the protection of the civilian population. In the situation of international armed conflict like Kashmir, both IHL and IHRL are applicable and their violation is accountable.

The legal consequences of prolonged occupation have been discussed in the first section. The second section of this chapter is about the theoretical context of legal obligations. The third section is about the legal obligations of the states and the fourth is about the legal obligations of the international community. The fifth section is an analysis of the international and national judicial mechanisms and the role of the UN is under discussion in the sixth section. The seventh section provides recommendations for lawfare and the eighth section is the conclusion.

### **5.1 Legal Consequences of Prolonged Occupation of Kashmir**

The ICJ in its advisory opinion on the wall's case also examined the consequences of the illegal occupation, violations of international human rights, and humanitarian law. In the preceding section, the advisory opinion was analyzed with the Kashmir conflict and it was found that both cases have many similarities. The legal consequences arising

from the construction of the wall on the area of occupied Palestine by Isreal are the same as the occupation of India on Kashmir. Isreal had occupied a major area of Palestine and in some areas, Palestinian authority had sovereign powers. Kashmir is divided into two parts, one part is governed by Pakistan which is ready to fulfil its responsibilities whereas the other part is under the occupation of India which is not fulfilling its responsibilities.

### **5.1.1 Legal Consequences for India and Pakistan**

The first obligation of governing states is to respect the right to self-determination of the people of Jammu and Kashmir. Pakistan and India had different positions in Kashmir. Pakistan always supported the right to self-determination of the people of Kashmir and demanded the implementation of UN resolutions on Kashmir.<sup>279</sup> Whereas during the 1947-51 era India was showing commitment to holding a plebiscite to decide the future status of the state, but later on she changed its stance and now claimed Kashmir as her integral part.<sup>280</sup> It is a legal obligation of both governing states to respect the right to self-determination of the people of Kashmir. In the wall's case, the court observed that in the East Timor case it was held that. " the right of the people to self-determination, as it evolved from the charter and United Nations practice, has an erga omnes character".<sup>281</sup> UN resolution 2625<sup>282</sup> also imposed a duty on every state to promote the right to self-determination. Besides, UN resolutions and commitments made by India and Pakistan, both countries are legally bound by international law to respect and promote the right to self-determination of the people of Kashmir. Another

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<sup>279</sup> Zubeida Mustafa, "The Kashmir Dispute and the Simla Agreement," *Pakistan Horizon*, Vol. 25, No. 3, Third Quarter, 1972. 38.

<sup>280</sup> Ministry of External Govt. of India, *Question No.2977 Resolution on POK in Parliament*, 11 March 2020, [www.mea.gov.in](http://www.mea.gov.in). (accessed March 2nd 2020).

<sup>281</sup> *East Timor (Portugal v. Australia)*, Jurisdiction, Judgment, I.C.J Rep. 1995 (June 30), p.102.

<sup>282</sup> G.A. Res. 2625 , A/RES/25/2625, UN Doc. A/8028 (1970) 121.

consequence for the governing country is to respect humanitarian law, as in the wall's case court declared the rules which incorporate obligations are of *erga omnes* character.<sup>283</sup> In the situation of Kashmir people living in the parts of the state under the administration of Pakistan are enjoying all fundamental rights and there is not any movement whereas the part under the occupation of India is in a state of war. People of IIOJK are under oppression and Indian occupational forces are violating international humanitarian law. Respect for the human rights of the people is also a legal obligation of governing states.

### **5.2.2 Legal Consequences for International Community and UN**

In the advisory opinion on the wall's case, the court had also examined legal consequences for other states and the UN resulting from violations of international law by Isreal. The legal consequences of this case are the same as in the Kashmir case, where India is violating international law. The court observed that Isreal had violated certain *erga omnes* obligations, ICJ in Barcelona Traction Case held, "such obligations are by their very nature the concern of all States and, because of the importance of the rights involved, all States can be held to have a legal interest in their protection."<sup>284</sup> The court had further declared that the RSD had an *erga omnes obligation* and Isreal had violated these. The people of Jammu and Kashmir had RSD under international law and UN resolutions, which is *erga omnes* and the international community should impress India to fulfil its legal obligation. The second *erga omnes* obligation in respect of international humanitarian law, the court referred its advisory opinion on the legality of the threat or use of nuclear weapons of 1996 and held,

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<sup>283</sup> *Wall Case*, Par..155.

<sup>284</sup> *Wall Case* .par.155.

a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and elementary considerations of humanity . . . that they are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.<sup>285</sup>

India is also violating this and the International community is bound to protect it. It is the obligation of all states they should not to recognize the illegal occupation of India in Kashmir. In the recent situation of Kashmir, it is also the legal obligation of the international community that they should not recognize the annexation of disputed areas of Kashmir with the Indian Union and also compel India to reverse her illegal actions. One of the basic objectives for the establishment of the UN is to protect the right to self-determination of the people and maintain international peace and security. It is the legal obligation of the UN to implement her resolution on Kashmir through any means provided in the UN Charter and international law.

## **5.2 Theoretical Context of Legal Obligations**

International law provides two types of obligations, one is internal obligations which means obligations of the state with its jurisdiction and the other type is extraterritorial obligations. On the legal obligations of the state on its jurisdiction, there is not any controversy or legal debate. However, legal scholars have different positions on the applicability of international criminal law and the obligations of the international community. Some such as Fernando Teson believe that it is based on popular sovereignty and individual rights.<sup>286</sup> On the other hand according to Michael Walzer, “it is morally justified to send armed men and women across a border for the purpose

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<sup>285</sup>*Wall Case*, para. 157.

<sup>286</sup>Fernando R. Teson, “*Collective Humanitarian Intervention*” (1996) 17(2) *Michigan Journal of International Law*:323-372

of defending an act of solidarity.”<sup>287</sup> Kofi Anan, the Secretary-General UN in his report, “*In Larger Freedom: Towards Development Security and Human Rights for All*” stated that “The protection of human rights is a collective responsibility.”<sup>288</sup> According to the “International Commission on Intervention and State Sovereignty” (ICISS), sovereignty is the responsibility to respect the basic rights and dignity of its population and to respect the sovereignty of other states.<sup>289</sup> Some countries and legal scholars argue that extraterritorial humanitarian intervention is prohibited in the article 2(4) of the UN Charter which states that member states will,

refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.<sup>290</sup>

The intervention is related to the purpose of the UN and one purpose of the establishment of the UN is to “achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all”.<sup>291</sup> Moreover, Ch-VI and Ch.VII of the charter is also providing the mechanism for the resolution of disputes and the basis for extraterritorial interventions. United Nations Security Council (UNSC) is empowered under chapters VI and VII to take remedial actions for international peace and security but mostly the P-5 countries use their veto power because of their involvement or of their strategic allies. The issue was resolved

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<sup>287</sup> Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame, IN: University of Notre Dame Press, 1994), p. x

<sup>288</sup> Kofi Annan, *In Larger Freedom: Towards Development and Human Rights for All* A/59/2005, at 37, para. 140.

<sup>289</sup> The Responsibility to Protect I.1.5 International Commission on Intervention and State Sovereignty (ICISS) December 2001, International Development Research Centre, Ottawa, at 11., 8

<sup>290</sup> UN Charter, art 2(4).

<sup>291</sup> *Ibid*, art.1(3).

through the United Nations General Assembly (UNGA) Resolution No.377 V(A) which is also called the “Uniting for Peace Resolution.”<sup>292</sup>Tenson argues that the basic role of international law is the protection of the human rights of individuals. According to him, customary law permits humanitarian intervention even without express authorization by UNSC. He argues that

there are a number of precedents for humanitarian intervention: India’s 1971 intervention in East Pakistan; Tanzania’s 1979 intervention in Uganda; France’s 1979 intervention in the Central African Republic; US interventions in Grenada in 1983 and Panama in 1989; ECOWAS action in Liberia in 1991 and Sierra Leone in 1997; the US, the UK, and France’s 1991 intervention in northern Iraq to protect the Kurds; the US-led 1992 UN intervention in Somalia; the US-led 1994 action in Haiti; the French-led 1994 intervention in Rwanda; NATO’s 1994 intervention in Bosnia, NATO’s 1999 intervention in Kosovo, and the US-led interventions in Afghanistan in 2001 and Iraq in 2003.<sup>293</sup>

### **5.3 Legal Obligations of Pakistan and India**

The state of Jammu and Kashmir is divided into three administrative parts, three countries Pakistan, China and India are governing different parts of the state. The area under the control of China is uninhabited because of this it shall not be discussed. The human rights situation in the areas under the administration of Pakistan, GB, and AJ & K has been analyzed in chapters II and IV. The areas under the territorial jurisdiction of India are under illegal occupation. Kashmir conflict is an international armed conflict and India is violating international human rights law and humanitarian law. In IIOJK there is a state of war, in this situation, all human rights may not be abrogated or suspended, such as the right to life, inhuman or degrading treatment, the prohibition

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<sup>292</sup>UNGA 5th Session, Resolution 377 A (V) (3 November 1950).

<sup>293</sup> Fernando R. Teson, *A Philosophy of International Law* (Oxford: Westview Press (1998). 219–329, 343–414

against torture, the right to a fair trial, etc.<sup>294</sup> The gross violations of human rights have been discussed in the previous chapter. International law imposes three obligations on the states which are the duty to respect, protect, and fulfill. According to RtoP principles, it is the obligation of the state, “to investigate alleged violations and take further action where appropriate; take appropriate legislative and administrative measures to prevent violations, and provide victims with effective remedies and equal and effective access to justice.”<sup>295</sup> International law did not provide amnesty to any individual for gross human rights violations or international crimes. Indian Govt. failed to respect or protect the human rights of the people of Kashmir. The impunity provided to the occupying forces through various laws and awarding of medals by Govt. to perpetrators shows that the Indian state is involved in crimes against humanity and war crimes. Even the justice system is also militarized and the people of IIOJK could not get any legal remedy. Besides other recommendations, in 2018 the UNOHCHR also recommended the commission of inquiry on these violations but India did not accept this.

#### **5.4 Legal obligations of International Community**

The international community consists of sovereign states, international and regional organizations, and legal institutions. International law imposes some obligations on states as well as these institutions on gross human rights violations during an armed conflict. These legal obligations impose many duties and actions to protect human rights. Article 2(4) of the UN charter prohibits the use of force in another state, “All members shall refrain in their international relations from the threat or use of force

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<sup>294</sup> ICCPR Article 4(1) and (2); International Committee of the Red Cross, “IHL and Human Rights Law”, 29 October 2010; available at: <https://www.icrc.org/eng/war-and-law/ihl-other-legal-regimes/ihl-human-rights/overview-ihl-and-human-rights.htm>. See also International Convention on the Protection of all Persons from Enforced Disappearance, Article 1(2).

<sup>295</sup> UN Doc. A/RES/60/147 (16 December 2005).

against the territorial integrity or political independence of any state, or any other manner inconsistent with the Purposes of the United Nations.”<sup>296</sup> But this charter also allows the use of force in self-defense under article 51 and in case of “any threat to the peace, breach of the peace, or act of aggression”<sup>297</sup> UNSC can use force under Chapter VII of the charter. In a state, where human rights abuses amount to a threat to the peace then humanitarian intervention could be authorized by the UNSC.<sup>298</sup> In 1991 UN imposed a no-fly zone in Iraq under Ch.VII.<sup>299</sup> However international practice is different in several cases the states used force against another state without the authorization of the UNSC on humanitarian grounds. There is a legal debate on sovereignty and humanitarian intervention the majority view and practice show that the concept of state sovereignty is not absolute and the principle of sovereignty is with responsibility is applicable.

The legal obligations of the international community on gross human rights violations in other state or during an armed conflict was discussed in the context of state sovereignty in section 1.8.2. In the previous section, it was observed that India had failed to fulfil its legal obligations to protect the human rights of the people of IIOJK instead of fulfilling its legal obligations Indian state is protecting the perpetrators and providing them impunity. The gross violations of IHL and IHRL are reported by UNOHCHR and international human rights organizations as well. International law and practice show different ways to fulfil these legal obligations, however, humanitarian intervention, the responsibility to protect, and UN mechanisms are more important.

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<sup>296</sup> U.N. Charter, art.2(4).

<sup>297</sup> U.N. Charter art. 39.

<sup>298</sup> C.J. Apperley & Ian Brownlie, Kosovo Crisis Inquiry: Memorandum on the International Law Aspects, 49 INT’L&COMP. L.Q. 878, 894, 904 (2000).

<sup>299</sup> U.N S.C. Res. 688 (Apr. 5, 1991).

### 5.4.1 Humanitarian Intervention

Humanitarian intervention is defined as, “the threat or use of force by a state, group of states, or international organization primarily to protect the nationals of the target state from widespread deprivations of internationally recognized human rights.”<sup>300</sup> NATO has defined humanitarian intervention in a seminar held in November 1999 as, “an armed intervention in another state, without the agreement of that state, to address a humanitarian disaster in particular, caused by the grave and large-scale violations of human rights.”<sup>301</sup> In the seventeenth century, Hugo Grotius defined as, “where a tyrant should inflict upon his subjects such treatment as no one is warranted in inflicting other states may exercise a right of humanitarian intervention.”<sup>302</sup> The history of humanitarian intervention is very old but after WW-II the international community realized the importance of human rights and the protection of human beings from Hitler-type regimes. Henkin observed, “The war against Hitler identified violations of human rights as a major threat to international peace, and they were linked in the rhetoric of the war and plans for the peace. Human rights were prominent in the constitutions of the new nations that began to emerge in the post-war years.”<sup>303</sup>

The concept of state sovereignty and territorial integrity has been discussed in detail in Chapter-I. Humanitarian intervention in another state by one country or coalitions with authorization of the UN or without authorization is still a legal debate among scholars. There are several examples of humanitarian intervention to protect the human rights of the people of other states without the approval of the UNSC. In 1971 India used her

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<sup>300</sup> Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (Philadelphia: University of Pennsylvania Press, 1996), 12

<sup>301</sup> CSS Strategic Briefing Papers, “Humanitarian Intervention: Definitions and Criteria,” 3(1) (June 2000) available at [http://www.victoria.ac.nz/css/docs/briefing\\_papers/Human1.html](http://www.victoria.ac.nz/css/docs/briefing_papers/Human1.html) (accessed on May 10, 2020).

<sup>302</sup> Hugo Grotius, *De Jure Belli ac Pacis*, (Oxford: Oxford University Press, 1925).

<sup>303</sup> Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd ed., (New York, Columbia University Press, 1979).

forces in East Pakistan against Pakistan, Vietnam's intervention in Cambodia in 1978, in 1979 Tanzania used forces against Uganda, US and Allied forces intervened in Iraq in 1991, and Airstrikes by NATO forces in Yugoslavia in 1999.<sup>304</sup> These interventions were without the authentication of the UNSC. On 31<sup>st</sup> July 1994 UNSC adopted a resolution that authorized US-led allied forces to intervene in mass violations of human rights and recognized the gross human rights violation as a threat to international peace.<sup>305</sup>

Five permanent members of the UNSC have veto powers and history shows that these countries use this power in their political and strategic interests by ignoring the human rights abuses in the state. In the cases of the Middle East, Hungary, Kashmir, Palestine, Congo, Korea, Afghanistan, Syria, and Namibia one or other members exercised this power. According to the UN charter, only the UNSC has powers to authorize sanctions or use coercive measures.<sup>306</sup> UNGA has powers to discuss, recommend, or promote but not take any actions.<sup>307</sup> The exercise of veto power by P-5 countries raised much concern among members of the UN and a resolution was adopted by UNGA in 1950 "The Uniting for Peace (UfP) resolution."<sup>308</sup>

*Resolves* that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of

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<sup>304</sup> J. David, "Toward a Modern Doctrine", University of Toledo Law Review, Vol. 23, 1991-1992, pp. 253-294.

<sup>305</sup> Security Council Resolution adopted on 31 July 1994, S/RES/940, 1994.

<sup>306</sup> U.N. Charter art. 42.

<sup>307</sup> U.N. Charter, arts. 11-17, 55.

<sup>308</sup> G.A. Res. 377 (V), (Nov. 3, 1950) (the Uniting for Peace (UfP) resolution).

armed force when necessary, to maintain or restore international peace and security.<sup>309</sup>

This resolution was first invoked in 1950 in the Korea case and used to support the right to self-determination and condemn the acts of occupation and aggression.<sup>310</sup> To date, ten emergency sessions of UNGA were held under this resolution.<sup>311</sup> In IIOJK war crimes, a crime against humanity, genocide, and illegal occupation of India created a situation that is also a threat to international peace and humanitarian intervention is required. Pakistan should raise this issue in UNSC and UNGA for humanitarian intervention.

#### **5.4.2 Responsibility to Protect (R to P)**

Humanitarian intervention by the authorization of the UNSC is a dream due to the veto powers of five countries. Because of this personal interest-based politics and divide in the UNSC thousands of people had faced human rights abuses. In Srebrenica and Rwanda, a human tragedy developed due to the inaction of the UN and UNSC. Due to these tragedies, the international community acknowledged the need to revisit the existing mechanisms of collective security under the UN. The UN Secretary-General in the millennium report identified the issues in consensus on humanitarian intervention and also the possible remedies for the prevention of gross human rights violations.<sup>312</sup> In response to this speech, the Govt. of Canada established the “International Commission on Intervention and State Responsibility (ICISS)”<sup>313</sup> to study the principle of sovereignty and the responsibility of the international community on massive human

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<sup>309</sup> G.A. Res. 377 (V), (Nov. 3, 1950) (the Uniting for Peace (UfP) resolution).

<sup>310</sup> Keith S. Petersen, *The Uses of the Uniting for Peace Resolution Since 1950*, 13 INT’L ORG. 219 (1959).

<sup>311</sup> UN Libraray, Emergeny Special Session, <https://research.un.org/en/docs/ga/quic k/emergency>. (accessed on August 20,2020).

<sup>312</sup> The Secretary-General, *‘We The Peoples: The Role of the United Nations in the Twenty-First Century’*, chap 4, at 48, delivered to the General Assembly, 3 April 2000, UN Doc No A/54/2000 .

<sup>313</sup> International Commission on Intervention and State Sovereignty, *The Responsibility to Protect’*. Commission-Report.pdf.( accessed on August 20,2020),

rights violations in any state. In 2001 ICISS issued the report titled “responsibility to protect” which provides a new framework to address mass human rights violations.<sup>314</sup> This report states that, “the sovereign states have a responsibility to protect their citizens from avoiding catastrophe - from mass murder and rape, from starvation - but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.”<sup>315</sup>

The head of states and Governments adopted the R2P unanimously in September 2005 and now it is widely accepted that states had both collective and individual responsibility to protect the people from ethnic cleansing, crimes against humanity, and war crimes.<sup>316</sup> It was affirmed by this resolution that it is the responsibility of the international community to take peaceful actions to protect the human rights of the population and if the peaceful means will fail then, “we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter”.<sup>317</sup> This had also solved the conflict between human rights protection and state sovereignty.<sup>318</sup> In 2009, UN Secretary-General introduced a three-pillar strategy for R2P in a report, pillar one is the responsibility of the states to protect the human rights of their people, and pillar two is the responsibility of the international community to assist and support the states to fulfill their responsibility to protect human rights and pillar three is the responsibility of the international community to take decisive and timely actions to protect human rights through peaceful means and in case of failure use forceful means as provided in international law.<sup>319</sup> UNSC had referred

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<sup>314</sup> International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*. Commission-Report.pdf.( accessed on August 20,2020),

<sup>315</sup> *Ibid.*

<sup>316</sup> 2005 World Summit Outcome’, UNGA Res. 60/1, 16 September 2005.

<sup>317</sup> *Ibid.*, para 139.

<sup>318</sup> Jennifer Welsh, *‘From Right to Responsibility: Humanitarian Intervention and International Society’*, Global Governance, 2002, Vol. 8 Issue 4, p503.

<sup>319</sup> Ban Ki-Moon, *Implementing the Responsibility to Protect*, A/63/677, 12 January 2009.

the R2P in different resolutions such as in the case of Libya Res.No. 1970<sup>320</sup> and 1973<sup>321</sup>, about cote d'Ivoire Res. 1975<sup>322</sup>, Res. 1996<sup>323</sup> about South Sudan, and 2014<sup>324</sup> about Yemen.

The situation in IIOJK as it was discussed in Ch-IV proves that India had failed to protect the human rights of the people; the second pillar is the assistance of the international community is also exhausted. UNOHCHR, Amnesty International, Asia Watch, Human Rights Watch, and many other international organizations are issuing reports since 1990, but India is not ready to fulfill its responsibility. The third pillar of R2P clearly states,

In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>325</sup>

Instead of prosecuting the perpetrators of genocide, crimes against humanity, ethnic cleansing, and war crimes Indian Govt. is awarding them promotions, medals, and prizes. From 1949 onwards the efforts were made to resolve the Kashmir dispute under Ch-VI by the UN but India always intentionally failed all these processes. Now the international community should exercise its powers under CH.VII of the UN charter.

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<sup>320</sup> UNSC Resolution 1970, 26 February 2011, S/RES/1970 2011.

<sup>321</sup> UNSC Resolution 1973, on the situation in the Libyan Arab Jamahiriya, 17 March 2011, S/RES/1973, 2011.

<sup>322</sup> UNSC Resolution 1975, on targeted sanctions against individuals meeting the criteria set out in resolution 1572 (2004) on arms embargo against Côte d'Ivoire, 30 March 2011, S/RES/1975, 2011,

<sup>323</sup> UNSC Resolution 1996, on the situation of South Sudan,.

<sup>324</sup> UNSC Resolution 2014, on the situation in Yemen, 21 October 2011, S/RES/2014, 2011.

<sup>325</sup> 2005 World Summit Outcome, G.A. Res. 60/1, para.138–40, U.N. Doc.A/RES/60/1.

## **5.5 International and National Judicial Mechanisms**

International law provides legal forums for the resolution of conflict, protection of IHRL, IHL, and accountability of the perpetrators of these crimes. Some states had also introduced the law of universal jurisdiction on international crimes. If states fail to provide justice to victims and punishment to perpetrators international legal mechanisms provide remedies. Although jurisdiction issues are a hurdle in accountability, however, after WWII these judicial institutions and tribunals contributed a lot to the accountability of criminals as well as evolving new principles.

### **5.5.1 The International Court of Justice (ICJ)**

The ICJ was established through Article 92 of the UN charter. This court possesses contentious and advisory jurisdiction. In contentious jurisdiction, the states submit a dispute through consent and the decision is binding. In advisory jurisdiction, UNGA, UNSC, or any organs of the UN refer any legal question to court for advice and this is not binding. The court also has jurisdiction over the treaties having jurisdictional clause, “The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or treaties and conventions in force.”<sup>326</sup> The statute of the court also provides an optional clause, the clause provides,

The States Parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement in relation to any of the States accepting the same obligations, the jurisdiction of the court in all legal disputes concerning: the interpretation of a treaty, any question of international law, the existence of any fact which, if established, would constitute a breach of an international obligation, the nature or extent of the reparation to be made for the breach of an international obligation.<sup>327</sup>

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<sup>326</sup> International Court of Justice, Statute of the Court, art. 36(1).

<sup>327</sup> *Ibid*, art. 36(2).

This article of the statute provides that states can accept the jurisdiction of the court with reservations, both Pakistan and India accepted the jurisdiction with reservations. Pakistan had submitted a new declaration in March 29, 2017.<sup>328</sup> India had submitted the fresh declaration on 27<sup>th</sup> September 2019 and added some new reservations. With relevance to Pakistan and India conflicts and multilateral treaties the two reservations,

“disputes with the government of any State which is or has been a Member of the Commonwealth of Nations and disputes concerning the interpretation or application of a multilateral treaty to which India is not a party; and disputes concerning the interpretation or application of a multilateral treaty to which India is a party, unless all the parties to the treaty are also parties to the case before the Court or the Government of India especially agree to the jurisdiction.”<sup>329</sup>

On the reservation of India with the disputes with the members of commonwealth member countries, ICJ had accepted Indian objection on the jurisdiction in Pakistan.s case against India on aerial Incident of 10 August 1999 in its decision on 21<sup>st</sup> June 2000.<sup>330</sup> The latest dispute between Pakistan and India is the Kulbhushan Sudhir Jadhav Case in which India claimed jurisdiction under Article 36(1) of ICJ statute and Article 36 of the “Vienna Convention on Consular Relations of 1963”<sup>331</sup> Pakistan did not raise the objections to the jurisdiction of the case.<sup>332</sup> India had ratified four multinational treaties that allow the settlement of disputes through ICJ. These treaties

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<sup>328</sup> International Court of Justice, Declarations recognizing the jurisdiction of the Court as compulsory, [https:// www.icj-cij.org/en/declarations/](https://www.icj-cij.org/en/declarations/) in, (accessed on April 18, 2020)

<sup>329</sup> International Court of Justice, Declarations recognizing the jurisdiction of the Court as compulsory, Sr. No.2,7, [https:// www.icj-cij.org/en/declarations/](https://www.icj-cij.org/en/declarations/) in, (accessed on April 18, 2020).

<sup>330</sup> Max Plank Institute, WORLD COURT DIGEST, Aerial Incident of 10 August 1999, (Pakistan v. India), Jurisdiction of the Court, Judgment of 21 June 2000, <https://www.mpil.de/en/pub/publications/archive/wcd.cfm?fuseaction=wcd=aktat&aktat=302030300303.cfm>. (accessed on April 19, 2020).

<sup>331</sup> Vienna Convention on Consular Relations of 1963, art 36.

<sup>332</sup> *International Court of Justice, JADHAV CASE (INDIA v. PAKISTAN), judgment, July 17, 2019, para 67*, [https:// www . icj-cij.org/files/case-related/168/168-20190717-JUD-01-00-EN.pdf](https://www.icj-cij.org/files/case-related/168/168-20190717-JUD-01-00-EN.pdf) , (accessed on April 19, 2020).

are the “International Convention on the Elimination of All Forms of Racial Discrimination”, “the Convention on the Prevention and Punishment of the Crime of Genocide”, “the International Convention on the Elimination of All Forms of Racial Discrimination”, “the Convention on the Elimination of All Forms of Discrimination Against Women” and “the Convention on the Political Rights of Women.”<sup>333</sup> India is blatantly violating all these conventions in IIOJK. Pakistan is the party to the Kashmir conflict and in the UN the Kashmir Case is the Pakistan-India question, has the legal right to file the case against India in ICJ. Even on the violation of the Convention on the Prevention and Punishment of the Crime of Genocide any state party in this convention can file a case against India because ICJ had declared in many cases that it is an erga omnes obligation on all parties of the convention. On this ground, ICJ had rejected the objection of Myanmar against the Gambia that she is not directly affected and not a party in this conflict which was decided in favor of the Gambia on 23<sup>rd</sup> January 2020.<sup>334</sup> India had also ratified the Genocide Convention with a reservation on Article IX, “With reference to Article IX of the convention, the Government of India declares that, for the submission of any dispute in terms of this article to the jurisdiction of the International Court of Justice, the consent of all the parties to the dispute is required in each case.”<sup>335</sup> India was aware of its legal obligations and human rights abuses by her in IIOJK, so she had submitted an amended declaration in ICJ on 27<sup>th</sup> September 2019 after the revocation of the special status of Kashmir and a warning of genocide by India by Genocide Alert. In this newly developed situation, Pakistan or any country can not file a case against India on violations of treaty obligations.

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<sup>333</sup> ICJ, Treaties, <https://www.icj-cij.org/en/treaties> , (accessed on April 19,2020).

<sup>334</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, order, I.C.J.2020 (Jan.23).

<sup>335</sup> United Nations Treaty Collection, Human Rights, Convention on the Prevention and Punishment of the Crime of Genocide of 1948.

The second mode is the advisory jurisdiction of ICJ under Article 96 of the UN charter the UNGA or UNSC or any organ of the UN can approach for an advisory opinion from ICJ which is non-binding. In the context of Kashmir, there could be many questions for an advisory opinion from ICJ, but the most important questions could be the legal consequences of the Indian illegal annexation/ occupation of Kashmir. The advantage of this move is political cum legal. On the political side, it will internationalize the Kashmir conflict and on the legal side in case of success, the issue will be highlighted as the struggle against illegal occupation and for achieving the right to self-determination. This is not a simple process for the advisory opinion first of all diplomatic efforts are necessary to get the support of P-5 countries in the UNSC or the majority of members in the UNGA. On the legal side, there could be a risk of losing the case for this purpose a team of international law experts should prepare the case for ICJ.

### **5.5.2 The International Criminal Court (ICC)**

The ICC was established by the Rome Statute adopted on July 17, 1998, and entered into force on July 01, 2002. This court has jurisdiction over crimes against humanity, war crimes, the crime of aggression, and genocide.<sup>336</sup> The court has jurisdiction over crimes mentioned above but under article 13 of the statute this jurisdiction could be exercised if,

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations, or

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<sup>336</sup> United Nations “*The Rome Statute of the International Criminal Court*,” 1992 Article 5, Part 2 “Jurisdiction, Admissibility and Applicability” <http://untreaty.un.org/cod/icc/statute/rome.htm>

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.<sup>337</sup>

Article 14(a) provides that only a state party can refer a case to ICC as it was referred by Mali, Uganda, Congo, and the Central African Republic. Both Pakistan and India had not signed or ratified the Rome Statute so Pakistan cannot refer to the case of war crimes, genocide, and crimes against humanity by India in IIOJK. Article 14(b) provides the second way that is the case referred by the UNSC under Ch-VII of the UN charter. Kashmir conflict is in the agenda of the UN and there are several UNSC resolutions about its disputed nature but the initiation in UNSC is more political than legal and support of P-5 countries is necessary. The most relevant and feasible option according to Article 14(c) is the initiation of an investigation by the prosecutor under Article 15 which provides,

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.
2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or nongovernmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.
4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without

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<sup>337</sup> United Nations "The Rome Statute of the International Criminal Court," 1992., article 13.

prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.<sup>338</sup>

The prosecutor could initiate the investigation *proprio motu*<sup>339</sup>, upon receiving credible evidence about crimes in the jurisdiction of ICC with approval from the trial chamber.

Article 12 of the statute provides preconditions of the jurisdiction,

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.<sup>340</sup>

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<sup>338</sup> United Nations "The Rome Statute of the International Criminal Court," 1992, art. 15.

<sup>339</sup> Latin term mean the acts perform on its own initiative and without any application.

<sup>340</sup> United Nations , The Rome Statute of the International Criminal Court 1992, Art. 12.

Prosecutor can investigate the case if the crime was committed in the state which had accepted the jurisdiction of the court or if the state is not a party and one of the crimes is committed in the area of the state party. The statute provides, "if at least one element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party to the Statute."<sup>341</sup> A recent example is the Myanmar-Bangladesh case in which Myanmar is not the state party and Bangladesh is a party to the statute, the deportation of Rohingya people from Myanmar to Bangladesh was considered a crime, and the prosecutor was allowed to investigate. Another option for Pakistan is to accept the jurisdiction according to article 12(3) of the charter. Many documentaries prove and report the situation of IIOJK with evidence about the perpetrators of these crimes. Govt. of Pakistan, AJ & K, and indigenous human rights workers and groups should collect data with credible evidence to approach the ICC prosecutor.

### **5.5.3 International Tribunals**

UNSC through resolution No. 827<sup>342</sup> established the "International Criminal Tribunal for the Former Yugoslavia" (ICTY) in 1993. The tribunal has jurisdiction over crimes against humanity, grave breaches of the Geneva Conventions of 1949, serious violations of IHL, genocide, and violations of laws or customs of war in former Yugoslavia since January 1991.<sup>343</sup> This tribunal had charged 161 perpetrators of these crimes and the sentence was awarded to 91 persons.<sup>344</sup> Another tribunal, "International Criminal Tribunal for Rwanda" (ICTR) was established through UNSC resolution

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<sup>341</sup> United Nations, The Rome Statute of the International Criminal Court 1992 Art. 12(2)(a).

<sup>342</sup> UNSC Res. 827, UN SCOR 48th Session, UN Doc. S/Res/827 (1993).

<sup>343</sup> Statute of the International Criminal Tribunal for The Former Yugoslavia, arts.1-8, Statute of the International Criminal Tribunal for the Former Yugoslavia | Icelandic Human Rights Centre (accessed on August 05.2020).

<sup>344</sup> Ibid.

No.955<sup>345</sup> in 1994. This tribunal has the same jurisdiction and procedure as in ICTY. This tribunal had charged 93 persons and 62 were sentenced.<sup>346</sup> Besides these two ad-hoc tribunals “Special Court for Sierra Leone” was established in 2002 by the agreement of the UN and the Govt. of Sierra Leone.<sup>347</sup> This court is an ad-hoc international tribunal as well as a national court, having jurisdiction over serious violations of IHL and Sierra Leone Law, crimes against humanity, violations of common article 3 of GCs, and AP-II of GC.<sup>348</sup> The gross human rights violations and violations of IHL in IIOJK are systematic and comparable with the situation of Former Yugoslavia and Rwanda. An ad –hoc tribunal to prosecute the perpetrators of crimes against humanity, war crimes, genocide, and violations of IHL in IIOJK may be established by the UN.

#### **5.5.4 Universal Jurisdiction**

The concept of universal jurisdiction is the commitment of the states to prosecute individuals of other states who are involved in international crimes. Through this jurisdiction, the national courts may prosecute any individual involved in genocide, war crimes, torture, and crimes against humanity. It is not necessary that the crime is committed in that state or that the defender or the victims belong to that state. This universal jurisdiction is provided in the national laws of the state and many countries had enforced this law. New Zealand introduced the “ International Crimes and International Criminal Court Act 2000”<sup>349</sup> which provides jurisdiction to national courts

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<sup>345</sup> Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, UN SCOR, 49th Session, UN Doc. S/RES/955 (1994), in 33 ILM (1994) 1598, 1600.

<sup>346</sup> United Nations International Residual Mechanism for Criminal Tribunals , The ICTR in Brief, <https://www.un.org/sg/en/global-leadership>. (accessed on August 05,2020).

<sup>347</sup> UNSC Resolution 1315 of 14 August 2000, UN Doc S/RES/1315. The Statute itself can be <https://digitallibrary.un.org/record/420605> (accessed on August 05,2020).

<sup>348</sup> UNSC Resolution 1315 of 14 August 2000, UN Doc S/RES/1315.

<sup>349</sup> International Crimes and International Criminal Court Act 2000..

on crimes against humanity, war crimes, and genocide.<sup>350</sup> In 1993 Belgium enforced the law of universal jurisdiction by which Belgium courts have jurisdiction over crimes against humanity, genocide, and war crimes.<sup>351</sup> Four citizens of Rwanda were convicted of the crime of genocide in Rwanda.<sup>352</sup> In 2003 this law was repealed with the law of extraterritorial jurisdiction<sup>353</sup>, which is similar to the previous law with some amendments.

In 2002 Germany introduced a new “Code of Crimes Against International Law (CCAIL)”<sup>354</sup>, the code provides jurisdiction to German courts on international crimes and these courts tried six Serbs for war crimes and genocide during the conflict in Yugoslavia.<sup>355</sup> In 2000, Canada enforced the “Crimes Against Humanity and War Crimes Act”<sup>356</sup>, the act empowers the courts to prosecute a person who commits, conspires, or attempts crimes against humanity, war crimes, and genocide outside Canada.<sup>357</sup> In the UK the universal jurisdiction law was introduced through the “Geneva

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<sup>350</sup> International Crimes and International Criminal Court Act 2000, Sec.8-11.

<sup>351</sup> Law of 16 June 1993, reprinted in 2 Codes Belges (Bruylant) 240/5 (62d Supp. 1996) and Law of 10 February 1999, reprinted in MONITEUR BELGE, 23 March 1999 at 9286. The Law of 16 June 1993 “concerning the Punishment of Grave Breaches of the international Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto”, was amended by the Law of 19 February 1999 as “Act Concerning the Punishment of Serious Violations of International Humanitarian Law”, and included the international crimes of genocide and crimes against humanity to its jurisdiction, see 38 ILM (1999) 918 for an unofficial translation; (hereafter the “Belgian War Crimes Act”).

<sup>352</sup> Rwandan case (Court of Appeal of Brussels Chambre des mises en accusation), decision of 17 May 1995, in Journal des Tribunaux 1995, 542-3, retrievable at <http://www.icrc.org/ihl-nat.nsf> cit. in Cassese (n 7) 287.

<sup>353</sup> Loi relative aux violations graves du droit international humanitaire, 5 August 2003, Belge (Law Gazette), No. 286, August 7, 2003; unofficial English translation available online in International Legal Materials, vol. 42 (2003), p.1248.

<sup>354</sup> “Völkerstrafgesetzbuch”, (VStGB), of June 30, 2002, published in BGBl I 2254; see 42 ILM 995 (2003) for a commented English version of this code. For the binding German version see homepage of the Max-Planck Gesellschaft at <http://www.mpg.de>.

<sup>355</sup> Ambos and Wirth, “*Genocide and War Crimes in the Former Yugoslavia Before German Criminal Courts*”, in 44 Bochumer Schriften zur Friedenssicherung und zum Humanitären Völkerrecht (2001), 771.

<sup>356</sup> Crimes Against Humanity and War Crimes Act, 2000.

<sup>357</sup> *Ibid*, Sec 6(1), 6(1.1).

Convention Act. of 1957”<sup>358</sup> and several other subsequent legislation.<sup>359</sup> The courts had jurisdiction to prosecute war crimes, torture, and some other serious international crimes. A large number of Kashmir diaspora in European countries should invoke universal jurisdiction against the perpetrators of these crimes in IIOJK.

## 5.6 The United Nations Mechanisms

After the failure of the League of Nations in maintaining international peace and security, the UN was established in 1945. The basic purposes of the UN are

To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.<sup>360</sup>

The UNGA makes recommendations for the protection of human rights and fundamental freedoms but in 1950 “Uniting for Peace” resolution empowers UNGA to take action if UNSC fails to act on aggression, a threat to peace, or a breach of peace. UNSC is responsible for the maintenance of international peace and security and Chapters Vi, VII, VIII, and XII of the UN charter provide different powers to UNSC.<sup>361</sup> Ch VI provides the process of pacific settlements of the disputes<sup>362</sup> whereas Ch-VII empowers UNSC to take non-forcible and forcible measures to maintain peace.<sup>363</sup> The UN charter also provides that the friendly and peaceful relations among nations are

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<sup>358</sup> Geneva Conventions Act 1957 and Geneva Conventions (Amendment) Act 1995.

<sup>359</sup> Criminal Justice Act 1988 s134 , International Criminal Court Act 2001 (ICCA) ,and Taking of Hostages Act 1982 s1.

<sup>360</sup> UN Charter, Art. 1(2,3).

<sup>361</sup> *Ibid*, art.24.

<sup>362</sup> *Ibid*, art.33-38.

<sup>363</sup> *Ibid*, art. 39-51.

based on the principle of self-determination and equal rights of people<sup>364</sup> and UN shall promote, “ universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race; sex, language, or religion.”<sup>365</sup> Chapter X of the charter provides the establishment and functions of the “Economic and Social Council (ECOSOC)”<sup>366</sup>, besides other functions it shall make recommendations for the promotion of respect and observance of fundamental freedom and human rights.<sup>367</sup> ICJ was established by Ch. XIV<sup>368</sup> and article 96 states that UNGA, UNSC, and other specialized agencies can seek an advisory opinion from ICJ.<sup>369</sup> Moreover, article 99 of the charter states that if the UN Secretary-General is of opinion that any situation is creating a threat to international security or peace he can bring the attention of UNSC. There are also charter based and treaty-based bodies to observe and monitor human rights. The more efficient and active human rights body in the UN secretariat is the “office of the United Nations Commissioner for Human Rights(OHCHR)”<sup>370</sup> which was established through UNGA resolution.<sup>371</sup>

The legal obligations, roles, and practices of the UN have been discussed in previous sections. Kashmir is a disputed territory and India has no legal sovereignty over Kashmir. UNSC has passed several resolutions about its disputed nature and it was affirmed that its future status shall be decided through a fair and free plebiscite under UN auspices. The UNOHCHR reports of 2018 and 2019 are exposing war crimes, crimes against humanity, and genocide by Indian forces in IIOJK. UN and the international community should take coercive actions according to CH-VII of the UN

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<sup>364</sup> UN Charter Art. 55.

<sup>365</sup> *Ibid*, Art. 55(c).

<sup>366</sup> *Ibid*, Art. 61-72.

<sup>367</sup> *Ibid*, Art. 62(2).

<sup>368</sup> *Ibid*, Art. 92-96.

<sup>369</sup> *Ibid*, Art. 96.

<sup>370</sup> UNGA Resolution No. 48/141 of December 20, 1993.

<sup>371</sup> *Ibid*.

charter. It is also the legal obligation of the international community not to support India in any manner that helps India to continue its illegal occupation of Kashmir. The ICJ in the Namibia case declared that “The member states of the United Nations; are under obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia and to refrain from lending any support or any form of assistance to South Africa concerning its occupation of Namibia.”<sup>372</sup>

the members of the diaspora.

## Conclusion

During an international armed conflict, the occupying power is responsible to protect the rights of people that are protected in IHRL and IHL. In occupied Kashmir, India has failed to fulfill its legal obligations. This failure of the Indian state to fulfil its legal obligations necessitates the involvement of the international community and other states. The war crimes, genocide, crimes against humanity, and serious violations of Geneva conventions by India in Kashmir legally obliged the international community for humanitarian intervention and act according to the third pillar of R2P. There is a need to prosecute the personnel of Indian forces and Govt. in ICC for these crimes. A criminal tribunal for these international crimes should be established like ICTY and ICTR.

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<sup>372</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Rep. 1971, p. 57, par. 131.

## **Chapter VI**

### **RECOMMENDATIONS**

#### **Introduction**

The Kashmir conflict is the oldest unresolved conflict on the agenda of the UN. There are many reasons for the pendency of this conflict that is political rather than legal. However, inconsistency in the policies, and instead of the lego-political framework the only political framework was adopted, and sometimes this was not in line with the legal aspects of the case. The role of GoAJ & K is also limited to internal administration and proper representation of this Govt. as representative of both parts of Kashmir is not visible in international forums. The people of J&K are the basic party of this conflict whereas Pakistan is the necessary party. Both parties have to perform their role as complementary to each other. India is also a necessary party to this conflict but her role will not be analyzed because of the claim of an integral part and the wish to maintain the status quo. The role of China has increased in recent years and her presence in Ladakh makes her a party in the conflict. The area of Ladakh is unpopulated so the human rights context shall not be discussed, however, after the 5<sup>th</sup> August 2019 situation in Kashmir China, played a key role in the convening of closed-door meetings of UNSC.<sup>373</sup>

#### **6.1 The way forward for Pakistan**

The partition plan of the subcontinent and UNSC resolutions on Kashmir make Pakistan a necessary party to the conflict. India herself made Pakistan a party in the UN through

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<sup>373</sup> “UN Security Council concludes closed-door meeting on Jammu and Kashmir: UN council members think India, Pakistan should refrain from unilateral action, says China”, Gulf News, August 16, 2019, accessed on August 20, 2020, <https://gulfnews.com/world/asia/india/un-security-council-concludes-closed-door-meeting-on-jammu-and-kashmir-1.1565978586197>.

her complaint against Pakistan on January 01, 1948. Pakistan always affirmed that Kashmir is a disputed territory and pledged the right to self-determination of the people of Jammu and Kashmir. The human rights situation in the areas under the control of Pakistan is satisfactory. However, to strengthen the case of Kashmir on legal fronts and accountability for war crimes and grave violations of the Geneva Conventions by Indian forces in IIOJK, the following steps should be taken.

### **6.1.1 Ratification of ICC Statute**

Pakistan had not ratified the ICC statute. To invoke the jurisdiction of the ICC ratification of statute or referral from the UNSC or investigation from the prosecutor is necessary. In the preceding section, the role of ICC has been discussed in detail. There are two options for Pakistan either to ratify the statute of ICC or accept the jurisdiction for specific crimes according to article 12(3) of the ICC statute. There is documentary evidence of involvement in war crimes, crimes against humanity, and genocide against the personnel of Indian forces and Govt. officials. Since August 2019 India is systematically changing the demography of the state and it seems that it will complete its agenda in the next two years. There is a need for a quick response to these attempts of India and Pakistan should ratify the ICC statute, otherwise, the Muslim majority character and indigenous social culture of Kashmir will vanish.

### **6.1.2 Empowerment of AJ & K and GB in Kashmir Conflict Perspective**

AJ & K and GB are under the administration of Pakistan. These two areas are not included in Pakistan according to the constitution and it was also provided that the future relations with these areas shall be decided by the people of J&K after the decision

of accession to Pakistan.<sup>374</sup> In AJ & K there is a complete structure of the parliamentary form of Govt. under a separate constitution.<sup>375</sup> In June 2018 through the 13<sup>th</sup> amendment, the AJ & K Govt was empowered with more financial and administrative authority as well as it had addressed many concerns of the people of AJ & K. But still, there is a need for a constitutional amendment to increase its representative character of the whole state of J&K. The situation in GB is different still there is a constitutional vacuum as well as a need for administrative and judicial reforms. Govt, of Pakistan should facilitate the people of GB for their constitution like AJ & K and a joint forum of AJ & K, GB and IIOJK should be established. This will be helpful for legal warfare on J&K.

### **6.1.3 Projection of Legal Narrative of Right to Self-Determination and Indian Illegal Occupation of Kashmir**

For the last almost seventy years the changing legal narratives on Kashmir had complicated the case and the case of the Indian occupation of J&K was not properly persuaded to counter the Indian illegal claim of bilateralism based on the Simla agreement. According to international law, the Indian occupation of Kashmir since 1947 is illegal and in violation of international law. In chapter II of this dissertation, it is proved that Kashmir is not administrated by India but is illegally occupied. Pakistan should use all legal and political forums the realization to the world that the people of Kashmir are struggling against the forceful belligerent occupation of India since 1947. The struggle in Kashmir is an indigenous war of national liberation and people have the right to use every means against the occupation. The second important legal issue is the struggle for the right to self-determination against the occupation and this right is also

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<sup>374</sup> Constitution of Pakistan, 1973, Art. 257.

<sup>375</sup> AJK Interim Constitution 1974.

acknowledged in international law as well as UNSC resolutions on Kashmir. The RSD is the right of the people of J&K and they are victims of Indian occupation so they should be facilitated to project this case at international forums and capitals of the different countries.

#### **6.1.4 Diplomatic Efforts to invoke R2P and Humanitarian Intervention**

On grave violations of IHL and IHRL, humanitarian intervention as well as pillar three of R2P is applicable. The international practice shows that these interventions were carried out collectively as well as individually by the countries. This principle was applied against Pakistan in 1971 on the assumption of grave human rights violations by India in East Pakistan, which was the territorial part of Pakistan. Since 1989 international organizations are reporting about war crimes, crimes against humanity, and ethnic cleansing by India in IIOJK. Grave human rights violations in IIOJK and ceasefire line violations by India are also a threat to international peace and security. Pakistan has three legal options, first, the UNSC for collective actions against India under Ch.VII of UN statute, second in case of a veto from any country in UNSC, resolution in UNGA, and third being a party to conflict unilateral action against India in IIOJK.

#### **6.1.5 Termination of Kashmir related Bilateral Agreements with India**

Pakistan and India had signed several bilateral treaties such as the “Tashkent Agreement of 1966”, “The Simla Agreement of 1972”, and the “Lahore Declaration of 1999”. India always claims that the Kashmir issue will be resolved through bilateral talks between India and Pakistan according to the Simla agreement and it is not an international issue. Legally this claim is not correct but India had convinced the international community through diplomatic and political efforts. India is continuously violating the Simla agreement concerning Kashmir. In 1984 Indian aggression in

Siachin Glacier and the 2019 unilateral change in the status of IIOJK are violations of this agreement. Now Pakistan has the legal right to revoke the Simla agreement, article 60(1) of VCLT provides, “A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.”<sup>376</sup> Pakistan should terminate all the bilateral agreements related to Kashmir, this will be helpful in the internationalization of this case at legal forums.

### **6.1.6 Observer Status in OIC**

OIC was established in 1969, and had always supported the right to self-determination of the people of J&K and condemned human rights violations in IIOJK through several resolutions. In the Seventh extraordinary conference of foreign ministers in 1994, the Contact Group on Jammu and Kashmir was established.<sup>377</sup> In OIC Turkish Cypriot State and Moro National Liberation Army (MNLA) had observer status.<sup>378</sup> Pakistan should use its diplomacy with OIC countries for the observer status of GoAJ & K as the representative Govt. of the erstwhile state of J&K or the Muttahida Jihad Council like MNLA. This status will provide a way for the representation of Kashmiris in international and regional forums and they can present the case of the right to self-determination and expose the grave human rights violations in IIOJK.

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<sup>376</sup> Vienna Convention on the Law of Treaties 1969, art.60(1).

<sup>377</sup> Ekmeleddin Ihsanoglu, *The Islamic World in the New Century: The Organization of the Islamic Conference* (London: Hurst Publications, 2010), 120.

<sup>378</sup> Organization of Islamic Cooperation, Observers, [https://www.oic-oci.org/page/?p\\_id=179&p\\_ref=60&lan=en](https://www.oic-oci.org/page/?p_id=179&p_ref=60&lan=en) (accessed on August 22, 2020).

## **6.2 Legal Way Forward for Govt. of Azad Jammu and Kashmir and National Liberation Movement**

The official name of the GoAJ & K is the “Azad Government of the State of Jammu and Kashmir”<sup>379</sup> and the declaration of the establishment of this Govt. on October 24, 1947, shows that this Govt. is representing all units of the erstwhile State of Jammu and Kashmir. Although the legislative Assembly of AJ & K had representation from the refugees of IIOJK settled in Pakistan<sup>380</sup> but the representative character is still not completed. Following legal measures are required to promote legal aspects of the conflict and expose human rights violations in IIOJK.

### **6.2.1 Amendment in the Constitution of AJ & K**

The basic purpose of the establishment of GoAJ & K is to struggle for the liberation of the remaining part of the State. It was a war council and came into being due to the struggle of the indigenous people of Kashmir. But after the ceasefire of 1949 subsequent rules of businesses and the Interim Constitution had limited its role to liberated areas of AJ & K. The constitution of AJ & K has been discussed in detail in section 1.6.2. Some amendments in this constitution will benefit the legal standing of the people of Kashmir for the resolution of the conflict. The constitution is interim and it should be an interim constitution for the erstwhile state not only for AJ & K so article 1 should be amended for this purpose. In the article 2 definition clause, the word Azad Jammu and Kashmir should be replaced with the word “Erstwhile State of Jammu and Kashmir” and this should be defined as the state was on 14<sup>th</sup> August 1947. The Azad Jammu and Kashmir Council should be replaced by Jammu Kashmir Council and it should be an upper house as well as a policy framing institution on Kashmir and

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<sup>379</sup> AJK Interim Constitution 1974, Art.2.

<sup>380</sup> AJK Interim Constitution 1974, Art.22(ii)(iii).

responsible for the representation, coordination, and interaction with other states, organizations, and forums about Kashmir. This forum should have equal representation from all the regions of Kashmir, AJ & K, GB, and IIOJK. From IIOJK the representation should be given to valley, Ladakh, and Jammu. Some seats should be reserved for the religious minorities and Kashmiri diaspora. This amendment will increase the status of GoAJ & K as well as it will be implementing the declaration of AJ & K Govt. of October 24, 1947. A plebiscite Administrator could be appointed according to Article 11 of the constitution but this position remains vacant. After the extension of the scope of the constitution a plebiscite administrator should be appointed. Turkish Cypriot State is an example that is recognized only by Turkey and it had established its offices in different countries. A provision should be added in the constitution about the representative of AJ & K Govt. abroad and this will create a non-official diplomatic circle of Kashmir.

### **6.2.3 Acceptance and Implementation of the Geneva Convention of 1949**

According to common article 2(3) of all Geneva Conventions, a non-state party of international armed conflict could accept and implement the GCs. Article 96(3) of AP-I of GC provides that authority

“The authority representing a people engaged against a High Contracting Party in an armed conflict may undertake to apply the Conventions and this Protocol about that conflict utilizing a unilateral declaration addressed to the depositary...”<sup>381</sup>

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<sup>381</sup>Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977..art.96(3).

The Armed Movement “The Plostario Front”<sup>382</sup> of Western Sahara has accepted the GC in 2015.<sup>383</sup> The people of J&K are struggling against Indian occupation and two forums are available for acceptance of GC, one forum is the GoAJ & K, and the second is *Muttahida Jihad Council* which is a joint forum of all organizations carrying out armed struggle in IIOJK.

#### **6.2.4 Enforcement of the Law of Universal Jurisdiction and Litigation under this Law**

The Law of universal jurisdiction should be enforced by the Azad Kashmir Govt. and try the Indian officials who are perpetrators of war crimes, genocide, and crimes against humanity in IIOJK. A large number of Kashmiri diaspora in the UK, Belgium, Germany, and other countries that had enforced this law should file cases against Indian forces. For this purpose, Govt, of Pakistan and GoAJ & K should provide the necessary facilitation and records to the victims.

#### **Conclusion**

The struggle in IIOJK is against Indian illegal occupation and for the right to self-determination of indigenous people of J&K. Govt, of Pakistan has to project the case as the right to self-determination of people and the struggle of indigenous people of Kashmir against the illegal occupation of India. Pakistan should revoke all the bilateral agreements with India to the extent of Kashmir. International legal and political forums should be used by Pakistan and AJ & K to expose Indian illegal occupation and human rights abuses in IIOJK. GoAJ & K should amend its constitution and extend its constitutional application to the erstwhile state of Jammu and Kashmir. The law of universal jurisdiction has been enforced by many counties it should also be enforced in

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<sup>382</sup>The Polisario Front, an armed movement struggling for the independence of Western Sahara, formally accepted the Geneva Conventions and its Additional Protocol I (API).

<sup>383</sup> Geneva Call, “*Geneva Conventions and Armed Movements: an Unprecedented move*”, [www.genevacall.org/fr/geneva-conventions](http://www.genevacall.org/fr/geneva-conventions), August 04, 2015, (accessed on August 22, 2020).

AJ & K, moreover, the Kashmiri diaspora should file suits against the Indian authorities in their countries. The model of the Turkish Cypriot State and Moro National Liberation Front could also be analyzed. GoAJ & K should lead this campaign at international forums. Legal warfare should be consistent, systematic, and well planned accompanied by aggressive diplomacy.

## CONCLUSION

The historical account proved that before the partition of the Subcontinent Kashmir was a princely state and the people of Kashmir are indigenous with the common identity of *Kashmiriat*.

The colonial era was ended to the extent of Pakistan and India, but the people of Jammu and Kashmir are still victims of the unfinished agenda of the partition plan. In 1947 India occupied Kashmir against the will and wishes of the people and in violation of the scheme of the partition plan. The Indian claim that Maharaja Hari Singh had signed the instrument of accession before her military intervention is proved wrong. Moreover, on that day Maharaja has no authority to sign this instrument. The Indian claim of an integral part based on the instrument of accession was also rejected by the UN.

The belligerent occupation of one part of the erstwhile state of Jammu and Kashmir had divided Kashmir into three parts, Pakistani-administrated areas, Indian Occupied Jammu and Kashmir, and Chinese-controlled areas. This occupation started another era for people to struggle as they were struggling against *Dogra* ruler before the partition of the sub-continent. In the legal context, Indian belligerent occupation and further the constitutional coup are illegal, the movement in IIOJK is the national liberation war and the people are struggling for the right to self-determination. Kashmir is not an internal matter of India or a bilateral issue between Pakistan and India the people of Kashmir are a necessary party. India had not the sovereign title to Kashmir and it was never her part it is a disputed territory and Indian occupation is a violation of the territorial integrity and sovereignty of Kashmir.

The people of Kashmir had liberated some parts of the state and established the governments in Azad Kashmir and Gilgit Baltistan. The GoAJ & K is representing the erstwhile state of Jammu and Kashmir and after the illegal merger of IIOJK by India

the government of AJ & K is the only representative Govt. of the whole State. Pakistan had not merged AJ & K and GB into its mainland, and they are administrated by Pakistan through the Karachi agreement and subsequent constitutions approved by the true elected representatives of AJ & K. The people of J&K had the right to self-determination which is guaranteed through UN resolutions on Kashmir and recognized by international law.

It had been established that under international law Kashmir is under the illegal occupation of India. It is a well-established principle of international law that the occupier is the only *de facto* administrator of the area. It is not the permanent acquisition of sovereignty of other states it is temporary, and the people of the occupied area are real sovereigns of their territory. *De facto* or *De Juro* annexation or acquisition of the territory by use of force is illegal and without the exercise of the right to self-determination by the people of the territory the future status could not be finalized. Indian prolonged military occupation of Kashmir did not entitle her sovereign rights. The two important parties Pakistan and India had opposite policies about Kashmir. Pakistan is ready to fulfil its erga omnes obligations of the right to self-determination and admit the disputed nature of the state. Whereas, India is claiming Kashmir as her integral part and a bilateral issue between India and Pakistan which is a clear violation of UNSC resolutions on Kashmir and international law. There are many similarities between Kashmir and Palestine both are occupied areas. The analysis of the advisory opinion of ICJ on the construction of the Wall in Occupied Palestine with Kashmir shows that it is also applicable in the situation of Kashmir.

In the situation of Kashmir, three areas of international law are applicable, one is IHRL which includes UDHR, ICCPR, ICESCR, CAT, CEDAW, International Convention for the Protection of All Persons from Enforced Disappearance, UN resolutions, and

regional conventions. The second area in IHL includes the Hague Convention, Geneva Conventions, UN resolutions, and relevant jurisprudence of international courts. The third area is International Criminal Law which includes the Statute of the ICC, International tribunals decisions, and UN resolutions.

The human rights situation of all the administrative units of the erstwhile state was analyzed through reports and case studies. Furthermore, these were also analyzed with the relevant provisions of IHL and IHRL. It was found that the situation of human rights in the areas under the administration of Pakistan i.e AJ & K and GB is satisfactory; however, there are some issues of constitutional empowerment, powers, or economic resources. The situation in Indian Occupied Jammu and Kashmir is very critical. The Indian forces and state is involved in the violation of *jus cogen* norms and denying from right to self-determination. The indigenous people are struggling against occupation and to suppress this freedom movement India is using military might, lethal weapons, militarized justice, and excessive use of force. The Indian state is committing war crimes, crimes against humanity, genocide, and rape as a weapon of war. The enforced disappearances, identification of unmarked mass graves, use of pellet guns, killings in fake encounters, destruction of property, and many other international crimes have been committed by Indian occupational forces. The state is protecting and appreciating the persons involved in these crimes and had provided blanket impunity to armed forces through different pieces of legislation. After August 05, 2019, India is transferring its population to Kashmir and enforced various rules to change the demography of the state which is a clear violation of the Geneva Conventions. International Law had provided the legal mechanisms for the accountability of these crimes. The gross human rights violations, grave breaches of Geneva Conventions in IIOJK, and ceasefire violations by India are a threat to peace and stability in the world.

There are certain legal obligations on states and the international community to stop these gross violations of human rights. It was established that the Indian state had failed to fulfil its legal obligations. Now it is the responsibility of the international community to intervene according to chapter VII of the UN statute because all the efforts by the UN under Ch, VI, and bilateral efforts have been unsuccessful due to Indian attitude and unilateral actions.

It is concluded that the international community should use force to impress upon India to implement UN resolutions and a free, fair, and impartial plebiscite is the responsibility of the UN. The UN should refer the cases of war crimes to ICC for investigation or an ad hoc tribunal like ICTR or ICTY should be established. Pakistan should revoke all bilateral agreements on Kashmir with India. The AJ & K Govt. had to lead the Kashmir cause at the international level as a representative Govt. of the state and Pakistan should provide all diplomatic, legal, and political support. Karachi agreement between Pakistan and Azad Jammu and Kashmir should be revisited and a new agreement should be signed between these two parties for extension of the scope of AJ & K Govt. The Northern Turk Cypriot and Moro National Liberation Army which have observer status in OIC are guiding models.

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## **APPENDIX -I**

### **DECLARATION OF AZAD KASHMIR GOVERNMENT**

"The Provisional Azad Government, which the people of Jammu and Kashmir have set up a few weeks ago with the object of ending intolerable Dogra tyrannies and securing to the people of the State, including Muslims, Hindus and Sikhs. The right of free self-government has now established its rule over a major portion of the State territory and hopes to liberate the remaining pockets of Dogra rule very soon. In view of these circumstances, it has been reconstituted with Mr. Ibrahim. Bar-at-Law, of Poonch as its provisional head, and its headquarters have been moved to Pallandri in Poonch.

The new Government represents the united will of Jammu and Kashmir State to be free from the rule of the Dogra dynasty which has long suppressed and oppressed the people.

The movement of liberty which has culminated in the formation of the present provisional government has a long history dating from 1929. Thousands of Jammu and Kashmir people, including members of all communities, have suffered death and imprisonment in the cause of this movement. One of its forms was the Quit Kashmir Movement launched in the Kashmir Valley last year.

It will be recalled that Pundit Jawaharlal Nehru as a friend of the suffering people of Indian States went to help this movement at the time but was not allowed to enter the States territory under the order of the Ex-Ruler Hari Singh. The tyrannies perpetrated by the Raja and his officials and his troops on the people increased with the increase in the desire of the people for freedom and self-government.

Recently a prominent Hindu patriot, who wanted to proceed to Karachi and New Delhi to represent the intolerable conditions in the State to our neighboring Dominions of Pakistan and India was arrested by the Ex-Ruler's officials.

The united will of the people has, however, overcome the organized violence of the Ruler's armies. He and his so called Prime Minister have fled from Kashmir and will perhaps soon flee from Jammu as well.

The Provisional Government, which is assuming the administration of the State, is most emphatically not a communal Government. It will include Muslims as well as non-

Muslims in the provisional Cabinet which will serve the people, the temporary purpose of restoring law and order in the State and enable the people to elect by their free vote a popular legislature and a popular Government.

The Provisional Government entertains sentiments of the utmost friendliness and goodwill towards its neighboring Dominions of India and Pakistan and hopes. That both the Dominions will sympathize with the people of Jammu and Kashmir in their efforts to exercise their birthright of political freedom. The Provisional Government is further anxious to safeguard the identity of Jammu and Kashmir as a political entity.

The question of accession of Jammu and Kashmir to either Dominion can only be decided by the free vote of the people in the form of a referendum. The Provisional Government will make prompt arrangements for this and hopes to invite independent observers to see that the question is decided by the free will of the people."

( Sardar Muhammad Ibrahim Khan , *Kashmir Saga Pages 117 to 119*)

## APPENDIX -II

### KARACHI AGREEMENT

#### CIVIL ADMINISTRATION OF THE AZAD KASHMIR AREA

- (i) The Azad Kashmir Cabinet shall formulate policy and generally supervise administration in Azad Kashmir area. Day to day administration shall however, be entrusted to executive officers viz the Heads of Departments who shall also be secretaries to Government for their respective Departments.
- (ii) Besides the Heads of Departments the Azad Kashmir Government will have only the following two Secretaries:

- (1) Secretary, finance Department; and
- (2) Cabinet Secretary.

The Cabinet Secretary besides maintaining record of Cabinet proceedings will be directly responsible to keep the Cabinet well- posted with all matters connected with the plebiscite and for all correspondence with the Plebiscite Administrator.

- (iii) The details of the set up will be as follows:

	Subject	Head of Department- cum Secretary	Minister- in-charge
1.	Law and Order including jails and Police	Commissioner-cum-Chief Secretary	Hon'ble President
2.	Food and Civil	Director of Food and Civil Supplies and Secretary to Government Civil Supplies Departments	Minister for Civil Supplies

3.	Revenue (including Forests, Customs) and Public Works.	Commissioner –Cum-Chief Secretary	Revenue and Fiancé Minister
4.	Finance	Finance Secretary	Revenue and Finance Minister
5.	Rehabilitation	Director of Rehabilitation  Secretary Rehabilitation Department	Minister of Rehabilitation
6.	Medical and health`	Director of Health Services and Secretary Health Department	Minister of Health and Education
7.	Education	Director of Education and Secretary Education Department	Minister of Health and Education
8.	Cabinet and Plebiscite work	Cabinet Secretary	Hon'ble President

- (iv) No one below the rank of Head of Department/ Secretary shall have access to the Ministers and orders to lower staff shall always be communicated through the Head of Department/ Secretary.
- (v) Heads of Departments / Secretaries shall submit all important cases to their Ministers and shall generally keep them fully informed of developments in their respective Departments.
- (vi) Heads of Departments/ Secretaries who are at present located outside Azad Kashmir area may continue to be so located. But they would / meet their Ministers once or twice a week and put up cases on which orders of Ministers have to be obtained.
- (vii) Whenever Heads of Department feels that an order passed by an Hon'ble Minister needs revision, he would bring the case to the notice of the

Commissioner who in his capacity as Chief Secretary to the Azad Kashmir Government, will endeavor to have the matter satisfactorily settled, if necessary, in consultation with the Chief Plebiscite Advisor to the Pakistan Government, who will also be notified by the Azad Kashmir government as the Chief Advisor.

- (viii) Officers loaned to Azad Kashmir Government will be formally appointed as Officers-on-Special Duty with the Chief Plebiscite Advisor and their Services will informally be placed at the disposal of Azad Kashmir Government who would formally appoint them to office by notification in their own Gazette. All correspondence of the Azad Kashmir government with the Secretariat of the Minister without Portfolio, Government of Pakistan, will be through the Chief Plebiscite Advisor.
- (ix) Pending the appointment of a Public Service Commission for Azad Kashmir an ad-hoc Committee consisting of the following may be appointed to recommend future recruitment and promotions in services in the Azad Kashmir Government.
  - (1) Commissioner (Chairman).
  - (2) Judge of Azad Kashmir High Court.
  - (3) The Head of the Department Concerned.
  - (4) Cabinet Secretary as member- Secretary.

## **II. FINANCIAL ARRANGEMENTS.**

- (i) Monies advanced to the A.K Government for specific purposes shall be spent for those projects and no other. The Pakistan Government shall satisfy them that they have been properly spent.
- (ii) Moneys advanced to the A.K Government as general Grants-in-aid shall be given only after the A.K Government has produced a budget statement for the government as whole. In the case of these funds, the Government of Pakistan shall satisfy themselves that the A.K Government spend according to the budget proposals. For the purpose, they may ask for periodical statement of accounts from that Government.
- (iii) The Pakistan Government shall loan the services of an Accounts Officer for employment as Accountant General of the Azad Jammu and Kashmir Government.

**III. Division of functions between the Governments of Pakistan, the  
Azad Kashmir Government and the Muslim Conference.**

**A. MATTERS WITHIN THE PURVIEW OF PAKISTAN  
GOVERNMENT**

- (i) Defense. (Complete control over. A.K. forces).
- (ii) Negotiation with U.N.C.I.P.
- (iii) Foreign Policy of A.K. Government.
- (iv) Publicity in Pakistan and foreign countries.
- (v) Coordination of arrangements for relief and rehabilitation of refugees.
- (vi) Coordination of publicity and all arrangements in connection with the plebiscite.
- (vii) All activities within Pakistan itself with regard to Kashmir such as procurement of food and civil supplies transport, running of refugee camps, medical arrangements etc.
- (viii) **All affairs of the Gilgit and Ladakh areas under the control of the Political Agent at Gilgit.**

**B. MATTERS WITHIN THE PURVIEW OF A.K. GOVERNMENT**

- a. Policy with regard to administration in Azad Kashmir.
- b. General Supervision of administration in the Azad Kashmir area.
- c. Publicity with regard to activities of the A.K. Government and its administration.
- d. Advise to H. M without portfolio with regard to negotiations with U.N.C.I.P.
- e. Development or economic resources of A.K. area.

**C. MATTERS WITHIN THE PURVIEW OF MUSLIM CONFERENCE**

- a. Publicity with regard to plebiscite in A.K. area.
- b. Field work and publicity in the Indian occupied area of the State. Organization of political activities in the A.K and the Indian occupied area of the State.
- c. Preliminary arrangements in connection with plebiscite.
- d. Organization for contesting the plebiscite.
- e. Political work and publicity among Kashmir refugees in Pakistan.

- f. General guidance of the A.K. Government.
- g. Advice to H. M without portfolio with regard to Negotiations with U.N.C.I.P

-Sd-		-Sd-
(Muhammad Ibrahim)	Note:- I agree to this so far	(M.A. Gurmani)
President Azad	as this concerns with the	Minister without
Kashmir Govt.	part regarding the Muslim	Portfolio,
	Conference -Sd-	Government of Pakistan
	(Ghulam Abbas)	
	President All Jammu and	
	Kashmir	

