

Re-colonialization of Jammu and Kashmir and the Right to Self-determination

Abstract

On 5 August 2019, India unilaterally ended the autonomous status under Article 370 of Jammu and Kashmir (J&K) established under the terms of the Instrument of Accession by the Ruler of J&K. To change the demographic composition of J&K, Article 35A was also abolished and new domicile rules were introduced paving the way for non-Kashmiri Indians to settle permanently in J&K. Under the Jammu and Kashmir Reorganisation Act 2019, Kargil and Leh districts were cut from Jammu and recategorized as Union Territory of Ladakh and the state of J&K was relegated to a Union Territory directly governed by the central government. On 5 May 2022, a delimitation report was published giving more seats to Hindus compared to Muslims against the population criterion. I argue that India had started re-colonisation of J&K since October 1947. Eliminating its autonomous status in August 2019 was not the starting but a tipping point of the re-colonialization. After decolonialisation of British India in August 1947, major Indian states such as Hyderabad; Junagadh and J&K were given the option to join India or Pakistan. India saw this as a 'grave threat' to her organic unity and invaded Hyderabad on 13 September 1947; J&K on 27 October 1947 and Junagadh on 9 November 1947. I argue that India secured accession from the Ruler of J&K under compelling circumstances and on the condition that a free and impartial plebiscite would be held to ascertain the wishes of Kashmiri people. Since 1947, the pledge of plebiscite did not materialise. As freedom from colonialism has become a jus cogens, I argue that UN and its members have erga omnes obligations to respect and support the right to self-determination of the Kashmiri people.

Key words

Organic unity; accession; self-determination; re-colonialization; settlers colonialization; Article 370; Article 35A; plebiscite and human rights.

Jammu and Kashmir (J&K) has been a cause of tension between India and Pakistan since partition of British India (i.e. the Indian sub-continent) on 15 August 1947. They have fought three wars (1948-49; 1965 and 1971) and military skirmishes such as Siachin (1975); Kargil (1998) and the Indian surgical strikes of 26 February 2020.¹ On 1 January 1948, India reported the dispute to the United Nations

¹ See, European Foundation for South Asian Studies, 'Indo-Pak Relations – A brief history' <<https://www.efsas.org/topics/indo-pak-relations.html>> accessed 8 April 2022; BBC News, 'Balakot: Indian air strikes target militants in Pakistan' 26 January 2019 <<https://www.bbc.co.uk/news/world-asia-47366718>> accessed 24 March 2022. See also for a good historical background, K Alan Kronstadt, 'Kashmir: Background, Recent Developments and US Policy' Congressional Research Service (13 January 2020) <<https://www.everycrsreport.com/reports/R45877.html>> accessed 3 May 2022.

claiming that rebels from Pakistan has entered J&K.² The United Nations Security Council (UNSC) has passed eighteen resolutions; recognised the right to self-determination of Kashmiri people to be exercised through a fair and impartial plebiscite but the promise has not been materialised since. Article 370 of the Indian constitution 1949 gave special and autonomous status to Jammu and Kashmir (J&K) under the terms of the Instrument of Accession of October 1947 by the Ruler of J&K. On 5 August 2019, India unilaterally abolished Article 370 putting J&K under direct rule by the central government. Article 35A of the constitution reserved the right of permanent settlement in J&K to Kashmiris only but India, like Article 370, abolished it. New domicile rules were introduced allowing non-Kashmiri Indians to permanently settle in J&K. The aim of these legal measures seems to affect demographic change in J&K. Under the Jammu and Kashmir Reorganisation Act 2019, Jammu was dismembered as Kargil and Leh districts were cut from Jammu and recategorized as a separate Union Territory of Ladakh. The status of the state of J&K was downgraded to a Union Territory directly governed by the central government rather than its own state legislature and Executive. On 5 May 2022, new electoral constituencies were crafted through the delimitation commission giving more seats to Hindus compared to Muslims violating the population criterion. Human rights violations were reported under the oppressive regime of the Hindu Ruler, Hari Singh.³ Human rights violations continued after independence in 1947 as well but in recent years, the nature and scale of human rights violations, discussed below, has become alarming.⁴

This article argues that India has re-colonialised J&K and the people of J&K have the right to self-determination. As self-determination has acquired the status of a *jus cogens*, the international community has *erga omnes* obligations to assist Kashmiris in the realisation of their right to self-

² India's letter to the UN Security Council, S/628 1 January 1948.

³ On the oppressive rule of the Maharajah, see Alice Thorner, 'The Kashmir Dispute' (1949) 3(1) *Middle East Journal* 173; Lok Sabha (Lower House of Indian Parliament) Eminent Parliamentarians Monograph Series, *Sheikh Mohammad Abdullah* (Lok Sabha Secretariat 1990) 4-5; Alastair Lamb, *Incomplete Partition: The Genesis of the Kashmir Dispute 1947-1948* (Oxford 1997) 115-138 and Victoria Schofield, *Kashmir in the Crossfire* (I.B. Tauris 1996) 133.

⁴ For gross and systematic violations of human rights in J&K since 1990; see the following: Human Rights Watch and Physicians for Human Rights, *The Human Rights Crisis in Kashmir: A Pattern of Impunity* (Human Rights Watch 1993) 13; Asia Watch/PHR report, *The Crackdown in Kashmir: Torture of Detainees and Assaults on the Medical Community* (Was 1993); and in Asia Watch, *Kashmir Under Siege* (Human Rights Watch 1991); Human Rights Watch & Physicians for Human Rights, *Rape in Kashmir: A Crime of War* (Human Rights Watch 1993) 3; Amnesty International, *India: Torture, Rape and Deaths in Custody* (London 1992) 21; Asia Watch, *Kashmir Under Siege* (Human Rights Watch 1991) 73; Human Rights Watch & Physicians for Human Rights, *Rape in Kashmir: A Crime of War* (Human Rights Watch 1993) 3; Human Rights Watch and Physicians for Human Rights, *The Human Rights Crisis in Kashmir: A Pattern of Impunity* (Human Rights Watch 1993) 13; Amnesty International, *India: Impunity must end of Jammu and Kashmir* (April 2001) 5; Amnesty International, *India: Summary of human rights concerns in Jammu and Kashmir* (January 1995) 5 where it states: 'All three special laws in force in the state assist the government in shielding the perpetrators of human rights violations from prosecution, and encourage them to act with impunity'.

determination, i.e. to associate or integrate with India or Pakistan or be an independent sovereign state.⁵ The re-colonialization thesis is underpinned by four arguments. First, the Indian claim that the Maharaja of J&K acceded to India on 26 October 1947 is false. Second, even if it were accepted for the sake of argument that the Maharaja did accede to India, the accession was obtained under compelling circumstances. Third, irrespective of the false accession claim and the compelling circumstances under which it was obtained, the accession was contingent upon holding a fair and impartial plebiscite to ascertain the wishes of Kashmiri people. Fourth, the post 5 August 2019 unilateral legal measures in contravention of the UNSC resolutions have abolished the facade of self-governance and deprived Kashmiris of their right to economic, social and cultural development.

The article is divided into four sections. Section I briefly sets out self-determination as a jus cogens. This acts as a framework which is applied to determine the re-colonialization of J&K. Section II discusses how India has, by taking unilateral legal measures in contravention of its own constitution and the UNSC resolutions, re-colonialised J&K starting with unravelling the accession story. Section III applies the framework set out in section II to the case of J&K showing how Kashmiris are denied the right to self-governance and gross violations of their human rights. Section IV concludes the discussion.

Section I: The right to self-determination as jus cogens

A decent body of literature is available on the right to self-determination as jus cogens in the context of freedom from colonialism and is not controversial.⁶ A brief discussion, however, is justified to provide context and framework for assessing the case of J&K.

⁵ Under the colonial scheme, Kashmiris were not given a real choice but were asked to accede to India or Pakistan.

⁶ See, e.g., Stefan Oeter, 'Self-determination' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (OUP 2012) 312 vol I; Philip Alston (eds), *Peoples' Rights* (OUP 2001); S J Anaya, *Indigenous Peoples in International Law* (OUP 1996); G Binder, 'The Case for Self-Determination' (1993) 29 *Stanford Journal of International Law* 223; L Brilmayer, 'Secession and Self-Determination: A Territorial Interpretation' (1991) 16 *Yale Journal of International Law* 177–202; A Buchanan, *Justice, Legitimacy, and Self-Determination. Moral Foundations for International Law* (OUP 2004); A Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (CUP 1995); A Cobban, *The Nation State and National Self-Determination* (2nd edn, Collins 1969); James Crawford (eds), *The Rights of Peoples* (OUP 1988); T M Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46; C Gray, 'Self-Determination and the Break-Up of the Soviet Union' (1992) 12 *Yearbook of European Law* 465; H Hannum, *Autonomy, Sovereignty, and Self-Determination* (University of Pennsylvania Press 1990); M R Islam, 'Secessionist Self-Determination: Some Lessons from Katanga, Biafra and Bangladesh' (1985) 22 *Journal of Peace Research* 211; M Koskenniemi, 'The Police in the Temple: Order, Justice and the UN' (1995) 6 *European Journal of International Law* 325; E A Laing, 'The Norm of Self-Determination' (1991) 22 *California Western International Law Journal* 209; M Moore (eds), *National Self-Determination and Secession* (OUP 1998); C Tomuschat (eds), *Modern Law of Self-Determination* (Nijhoff 1993); M Shaw, 'Peoples, Territorialism and Boundaries' (1997) 8 *European Journal of International Law* 478; M

Article 1(2) of the United Nations Charter recognises that ‘friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples’⁷ is essential for international peace and security but it does not confer the right of independence to dependent people.⁸ Article 73 of Chapter XI of the Charter recognises the paramountcy of the interests of the inhabitants of non-self-governing territories and to this end urges ‘to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement’.⁹ Higgins argues that Article 73(b) also, like Articles 1 and 55, falls short of recognising the right to self-determination of dependent people to independence. She argues that the language of Article 76(b), in relation to Trusteeship, comes close to recognising the right to self-determination as we understand it today.¹⁰ Article 76 states that the basic objectives of the Trusteeship system shall be ‘to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples’. Although it was a political project of the UN, self-determination ‘originally had a rather limited and state-based meaning’.¹¹

In 1950s and 1960s, there was greater emphasis on the broad interpretation of self-determination and moral obligation to end colonialism. The General Assembly passed a number of resolutions on holding plebiscites. Examples of this include resolutions in relation to Northern and Southern Cameroons and British Togolands.¹² On 14 December 1960, the General Assembly adopted Resolution 1514 (XV) ‘recognizing that the peoples of the world ardently desire the end of colonialism in all its manifestations’ and ‘believing that the process of liberation is irresistible and irreversible’.¹³ It said

Pomerance, *Self-Determination in Law and Practice* (Nijhoff 1982) and Rupert Emerson, ‘Self-determination’ (1971) 65 *American Journal of International Law* 459.

⁷ Article 1(2). See also Article 55 which uses the same language:

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 for the principle of equal rights and self-determination of peoples, the United Nations shall promote [...].

⁸ Rosalyn Higgins, *Problems & Process: International Law and How We Use It* (Oxford 1994) 112.

⁹ Article 73(b). See also more generally, Rupert Emerson, ‘Self-determination’ (1971) 65 *American Journal of International Law* 459 and Johan D. van der Vyver, ‘The Right to Self-determination and Its Enforcement’ (2004) 10 *ILSA Journal of International and Comparative Law* 421.

¹⁰ *Ibid.*

¹¹ *Ibid.* 113. For the history of self-determination, see A Cassese, *Self-determination of Peoples: A Legal Reappraisal* (CUP 1993) 34-42.

¹² For details, see Higgins (n 6) 114.

¹³ General Assembly Resolution 1514 (XV) 1960.

that 'immediate steps shall be taken, in Trust and Non-Self-Governing Territories or *all other territories which have not yet attained independence*, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance, with their freely expressed will and desire' (emphasis added).¹⁴ In addition to Trust and non-self-governing territories, the right of all other territories was also recognised. Although not a binding treaty, in *Namibia*, the International Court of Justice (ICJ) held that resolution 1514 (XV) was an 'important stage' in the development of self-determination 'which embraces all peoples and territories which "have not yet attained independence"'.¹⁵ The ICJ further said that the court's interpretation of self-determination 'cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law'.¹⁶ The exercise of self-determination by a non-self-governing territory could result in the emergence of an independent sovereign state; free association or integration with an independent state.¹⁷ The General Assembly Resolution 2625 (XXV) has also confirmed these outcomes.

Resolutions 1514 and 2625 also contain provisions protecting the territorial integrity of states which seem to be the negation of self-determination. Resolution 1514 provides that 'All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration [...] and respect for the sovereign rights of all peoples and their territorial integrity'.¹⁸ It further declares that 'partial or total disruption of the national unity and the territorial integrity of a country' is against the UN Charter.¹⁹ Resolution 2526 also does not authorise or encourage:

Any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States *conducting themselves* in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of *a government representing the whole people* belonging to the territory without distinction as to race, creed or colour (emphasis added).

¹⁴ Ibid

¹⁵ *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. Reports 1971, p. 16, para 52.

¹⁶ Ibid [53].

¹⁷ General Assembly passed Resolution 1541 (XV), 15 December 1960.

¹⁸ Ibid [7].

¹⁹ Ibid [6].

Despite the language used in both resolutions, exercising self-determination and maintaining territorial integrity are not contradictory. States conducting themselves in conformity with the Charter, UDHR and Resolutions 1514 and 2625 will respect and grant to people the right of self-determination. Those denying the right of self-determination to people will not be conducting themselves in accordance with the UN Charter, UDHR and Resolutions 1514 and 2625. They cannot seek protection under the shield of territorial integrity. States can rely on territorial integrity principle where people do not have the right to self-determination under the Charter, human rights law and customary law, e.g. Quebec which is discussed below. Furthermore, Resolution 2625 is state specific as it asks states to 'refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country'. In the *Advisory Opinion on Kosovo*, the ICJ held that the 'the scope of the principle of territorial integrity is confined to the sphere of relations between States'.²⁰ In *Western Sahara*, Judge Dillard said that 'it is for the people to determine the destiny of the territory and not the territory the destiny of the people'.²¹ In *Western Saharan*, the ICJ discussed the right to self-determination under the UN Charter and Resolutions 1514; 1541 and 2625 and affirmed [54-49], as in *Namibia*, that all peoples who have not attained independence have the right to self-determination.²² The Canadian Supreme Court, in *Reference Re Secession of Quebec*, held that the 'right of colonial peoples to exercise their right to self-determination by breaking away from the "imperial" power is now undisputed'.²³

There is judicial and scholarly consensus that self-determination as freedom from colonialism is a *jus cogens*. In *Portugal v Austria*, the ICJ said that 'Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an erga omnes character, is irreproachable'.²⁴ In the *Israeli Wall Opinion*, the ICJ held that the 'obligations erga omnes violated by Israel are the obligation to respect the right of the Palestinian people to self-determination'.²⁵ Scholarly consensus also confirms that freedom from colonialism is a *jus cogens*

²⁰ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 403, para 80.

²¹ Separate opinion of Judge Dillard, p 122 in *Western Sahara Occidental, Advisory Opinion*, I.C.J. Reports 1975, p. 12 See also Rosalyn Higgins, 'Judge Dillard and the Right to Self-determination' (1983) 23 *Virginia Journal of International Law* 387.

²² *Western Sahara Occidental, Advisory Opinion*, I.C.J. Reports 1975, p. 12, para 54-59. See also Jamie Trinidad, *Self-determination in Disputed Colonial Territories* (CUP 2018).

²³ *Reference Re Secession of Quebec* [1998] 2 R. C. S. 217, 285.

²⁴ *East Timor (Portugal v Austria), Judgement*, I.C.J. Reports 1995, p. 90, para 29.

²⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I. C. J. Reports 2004, p. 136, para 155. On erga omens, see *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, p. 3, para 33:

entailing obligations erga omnes. For instance, Joseph argues that peoples are entitled to external self-determination when they live under colonial or neo-colonial dominations.²⁶ Nowak argues that the 'special significance and universal recognition of the right to self-determination has led to the qualification of this right as a norm of general international law, often even as jus cogens'.²⁷ He expands this point by arguing that 'at least for the case of colonial peoples, the right of self-determination is today viewed as a peremptory norm of international law'.²⁸

Section II: The Genesis of Kashmir Dispute and Re-colonialization

To appreciate the position of J&K, we would need to dive into the history of J&K without which, in my view, deeper and proper appreciation of the dispute would not be possible.

Decolonisation of British India

The British Empire started collapsing after World War I. World War II and the founding of the United Nations in June 1945 accelerated the process of decolonisation.²⁹ The Government of India Act 1935 laid the foundation of the Federation of India.³⁰ The Act defined the powers, duties and authority of His Majesty the King³¹; the Governor General³² and the method for accession of Indian States with the Federation.³³ 'A State shall be deemed to have acceded to the Federation if His Majesty has signified his acceptance of an Instrument of Accession executed by the Ruler'³⁴ but the accession shall be '*subject always to the terms thereof, and for the purposes only of the Federation*' [emphasis added].³⁵ Rulers were allowed to vary the original Instrument of Accession through a Supplementary Instrument

An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former is the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.

²⁶ Sarah Joseph et al, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd edn, Oxford 2004) 161.

²⁷ Manfred Nowak, *UN Convention on Civil and Political Rights: CCPR Commentary* (2nd edn, N.P. Engel 2005) 8. See also HG Espiell, 'Self-Determination and Jus Cogens' in A Cassese (eds), *UN Law/Fundamental Rights* (Sijhoff & Noorthoff 1979) 167–73; A Cassese, *Self-Determination of Peoples* (CUP 1995) 133–36; EA Laing, 'The Norm of Self-Determination' (1991) 22 *California Western International Law Journal*, 248–52; Robert McCorquodale, 'Self-determination: A Human Rights Approach' (1994) 43 *International and Comparatively Law Quarterly* 857, 858; James Crawford, *Brownlie's Principles of Public International Law* (OUP 2019) 582. See also H Hannum, *Autonomy, Sovereignty and Self-determination: The Accommodation of Conflict Rights* (University of Pennsylvania Press 1996).

²⁸ Ibid 14.

²⁹ Hamid Khan, *Constitutional and Political History of Pakistan* (OUP 2001) 55.

³⁰ Government of India Act 1935, s 5(1).

³¹ Ibid s 2.

³² Ibid s 7.

³³ Ibid s 6.

³⁴ Ibid s 6(1).

³⁵ Ibid s 6(1)(a).

extending the functions of the Federation in relation to their States.³⁶ The Act allowed His Majesty to accept only those Instruments which he considered to be 'proper'.³⁷ In preparation for handing power to the Indian people, various British missions visited India. On 9 February 1946, the British Government sent a Cabinet Mission to India comprising Lord Pethwick-Lawrence; Sir Stafford Cripps and A. V. Alexander, to discuss the constitutional issues with the Viceroy, Lord Wavell and Indian leaders. Under the Cabinet Mission Plan, Muslim majority areas were given to Pakistan and Hindu majority areas were included in India.³⁸ In some areas, the wishes of people were ascertained through referendum, e.g. a referendum was held in July 1946 in the North West Frontier where the people voted in favour of joining Pakistan.³⁹

After the 1935 Act and Cabinet Mission in 1946, on 18 July 1947 the British Parliament passed the Indian Independence Act making 'provision for the setting up in India of two independent Dominions, to substitute other provisions for certain provisions of the Government of India Act, which apply *outside* those Dominions' [emphasis added].⁴⁰ On 15 August 1947, two new Dominions of India and Pakistan were born. The Indian territories included those which were 'under the sovereignty of His Majesty' before 15 August 1947 except those which were 'to be the territories of Pakistan'.⁴¹ Indian states were given the option to join India or Pakistan.⁴² Indian States were defined 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 part of British India'.⁴³ Unlike Provinces, Indian States were not 'annexed by the British Power'.⁴⁴

On 15 August 1947, 'the suzerainty of His Majesty over the Indian States' lapsed and so were 'all treaties and agreements in force' between His Majesty and the rulers of Indian States.⁴⁵ The combined effect of the 1935 and 1947 Acts is that the Indian States acquired independence from the Suzerain Power without passing suzerainty or paramountcy over the Indian States to India or Pakistan,⁴⁶ i.e.

³⁶ Ibid s 6(3).

³⁷ Ibid s 6(4).

³⁸ See Khan (n 27) 60.

³⁹ Aman H Hingorani, *Unravelling the Kashmir Knot* (Sage 2016) 71. There was also a referendum in Sylhet.

⁴⁰ Indian Independence Act 1947, long title.

⁴¹ Ibid s 2(1).

⁴² Ibid s 2(4).

⁴³ Government of India Act 1935, s 311(1).

⁴⁴ Government of India, *White Paper on Indian States* (July 1948) 4.

⁴⁵ Ibid s 7(1) (b).

⁴⁶ This was in line with the Cabinet Mission Plan announced on 10th May 1946: see *White Paper on Indian States* (n 42) 10 and Clyde Eagleton, 'The Case of Hyderabad before the Security Council' (1950) 44 *American Journal of International Law* 279 where Sir Alexander Cadogan is cited responding to the Soviet delegate in the UNSC.

they were sovereign and could decide their fate as they wished.⁴⁷ This was the view of the United Kingdom. On 10 July 1947, Prime Minister Attlee, in the House of Commons, said: 'With the ending of the treaties and agreements, the States regain their independence'.⁴⁸ On 16 July 1947, Lord Listowel, Secretary of State for India, told the House of Lords that 'From that moment [i.e. 15 August 1947] the appointments and functions of the Crown Representative and his officers will terminate and the States will be the masters of their own fate'.⁴⁹ On 25 July 1947; Lord Mountbatten, presiding over a conference of the Rulers and Representatives of the Indian States, said: 'Now, the Indian Independence Act releases the States from all their obligations to the Crown. The States have complete freedom – technically and legally they are independent'.⁵⁰ On 15 March 1948, the Indian Government said: 'There is no desire on our part, in any way, to compel or coerce [independent states] into merger or integration'.⁵¹ In *Madhav Rao*,⁵² the Supreme Court of India held that on 15 August 1947, the British paramountcy ended and J&K, one of the Indian states, became an independent state.⁵³

Independence and accession of Indian states

All states acceded to India or Pakistan except Hyderabad, Junagadh and J&K known as the major states.⁵⁴ India publicly endorsed the British position in relation to major Indian states but her actual policy was the integration of these states into the Union of India:

The Indian Independence Act relieved the States from all their obligations to the Crown and in consequence India's unity was seriously threatened with disintegration. The Government of India sought to avert this *grave threat* by negotiating *constitutional relationship* with the Indian States on the basis of their accession to the Dominion of India on the three subjects of *defence, foreign affairs and communications*. This was no emotional approach nor any expansionist policy, nor power politics. Highly practical reasons of geography, all-compelling defence and internal security requirements and other equally strong considerations rendered India's *organic unification imperative* (emphasis added).⁵⁵

⁴⁷ See Paras Diwan, 'Kashmir and the Indian Union: The Legal Position' (1953) 2 *International and Comparative Law Quarterly* 333, 345.

⁴⁸ House of Commons, Official Report, 439 H.C. Deb. 5s c. 2451.

⁴⁹ House of Lords, Official Report 150 H.L. Deb. 5s c 812.

⁵⁰ *White Paper on Indian States* (n 42) 49.

⁵¹ *Ibid* 26-27.

⁵² *Madhav Rao v Union of India* (1973) 3 SCR 9, p 76.

⁵³ See also Hingorani (n 37) 98.

⁵⁴ *White Paper on Indian States* (n 42) 26.

⁵⁵ Government of India, *White Paper on Hyderabad* (1948) 1.

India embarked on achieving the 'unification imperative' through annexation of the major states followed by integration, i.e. 'their consolidation into viable and sizeable units'.⁵⁶ The annexation of Junagadh; Hyderabad and J&K demonstrate how India averted the 'grave threat' of disintegration and achieved the 'unification imperative'.

State of Junagadh

Junagadh was a Hindu majority state ruled by a Muslim Ruler.⁵⁷ On 15 August 1947, Junagadh acceded to Pakistan which Pakistan accepted. This certainly disappointed India and the people of Kathiawar 'who saw in it a grave threat to their security and their communal peace'. India 'fretted and toyed'⁵⁸ with the use of force against Junagadh which Lord Mountbatten considered, after accession, to be Pakistani territory.⁵⁹ Lord Mountbatten, in his 1948 report to His Majesty the King, wrote that on 17th September I was informed that the members of the Cabinet had decided among themselves that military action was the only answer.⁶⁰ Lord Mountbatten claims that he dissuaded the Cabinet against the use of force. The heads of the three Indian armed forces services were also against the 'Military action in Kathiawar'.⁶¹ Accounts of oppression and terrorism were reported from Mangrol and Babariawad, which were considered parts of Junagadh. Lord Mountbatten said that he 'would have to accept with a good grace their unanimous decision that Indian troops should be sent to occupy Babariawad and Mangrol'.⁶²

On 1 November 1947, Indian forces occupied Mangrol and Babariawad. Sensing the situation, the Nawab fled to Pakistan. On 8 November 1947, the Dewan (Prime Minister) of Junagadh, Sir Shah Nawaz Bhutto, asked India to take over the administration to save the state from administrative breakdown pending an honourable settlement of the accession issue.⁶³ On 9 November 1947, Indian troops entered Junagadh, disarmed the State forces and took control of the State without resistance. Pakistan declared it a breach of international law and a hostile act.⁶⁴ On 20 February 1948,⁶⁵ a referendum was held under control of the Indian forces. The result, as expected, was an overwhelming

⁵⁶ Ibid

⁵⁷ H. V. Hodson, *The Great Divide: Britain – India – Pakistan* (Hutchinson of London 1969) 427.

⁵⁸ Ibid 434.

⁵⁹ Ibid 430.

⁶⁰ Ibid 433 citing the *Report of the First Governor-General of the Dominion of India* 25 November 1948. This report is a consolidation of many fortnightly and monthly reports: see Hodson (n 55) 403.

⁶¹ Ibid 432-33.

⁶² Ibid 437.

⁶³ Ibid 439.

⁶⁴ Ibid 440. See Allen Campbell-Johnson, *Mission with Mountbatten* (Jaico Publishing House 1951) 277 where he uses the word occupation of Junagadh.

⁶⁵ Alastair Lamb, *Kashmir: A Disputed Legacy 1846-1990* (Oxford 1991) 128.

majority vote in favour of acceding to India. Pakistan has called the referendum a farce and continues to claim Junagadh as her territory.⁶⁶

State of Hyderabad

The population of Hyderabad was 85 per cent Hindu but ruled by a Muslim Ruler. It was encircled by Indian Territory.⁶⁷ The Nizam (Ruler) of Hyderabad was keen to remain independent or have an association with India under which he was not to lose autonomy. In the official *White Paper on Hyderabad 1948*, India said that Indian states 'accepted India's policy of integration and democratisation' except the 'Nizam alone refused to march with the times'.⁶⁸ 'India, cannot accept Hyderabad's claim to independence as an independent Hyderabad will be a *grave threat* to the defence, internal security and economy of India' (emphasis added).⁶⁹ On 27 August 1947, the Governor General informed the Nizam that the Government of India 'would not consider any solution other than your signing the Instrument of Accession' and the will of people can be tested later via a referendum.⁷⁰ On 29 November 1947, the Nizam and India signed a Stand Still Agreement for one year with the hope that the issue of accession would be resolved. Dialogue between the Nizam and India failed with the rise of communal disturbance in Hyderabad. On 24 April 1948, Nehru said: 'There are two courses open to Hyderabad – war or accession'.⁷¹ On 25 July 1948, he told a public gathering 'if and when we consider it necessary we will have military operations against Hyderabad State'.⁷² Reacting to Nehru's statement, Mr Winston Churchill said: 'It seems to me that that is the sort of language which really might have been used by Hitler before the devouring of Austria'.⁷³ On 21 August 1948, Hyderabad complained to the UN Security Council under Article 39(2) of the UN Charter:

Hyderabad has been exposed in recent months to violent intimidation, to threats of invasion, and to crippling economic blockade which has inflicted cruel hardship upon the people of Hyderabad and which is intended to coerce it into a renunciation of its independence. The frontiers have been forcibly violated and Hyderabad villages have been occupied by Indian

⁶⁶ Ibid 440, see also P. L. Lakhanpal, *Essential Notes and Documents on Kashmir Dispute* (International Publications 1959) 48 and Schofield (n 3) 154.

⁶⁷ Hodson (n 55) 476; Eagleton (n 45) 288; and V. P. Menon, *The Story of the Integration of the Indian States* (Orient Longmans 1956) 387.

⁶⁸ Ibid 1.

⁶⁹ *White Paper on Hyderabad* (n 53) 7.

⁷⁰ Eagleton (n 44) 291.

⁷¹ Ibid 290.

⁷² Ibid

⁷³ House of Commons, Official Report, 454 H.C. Deb. 5s, c. 1726-1733.

troops. The action of India threatens the existence of Hyderabad, the peace of the Indian and entire Asiatic Continent, and the principles of the United Nations.⁷⁴

On 13 September 1948, India invaded Hyderabad under operation codenamed 'POLO'. Menon, the Secretary for Indian States, said that the 'Police Action'⁷⁵ was taken after a careful consideration 'to restore peace and tranquillity inside the State'.⁷⁶ The Indian Representative in the United Nations Security Council claimed that the Nizam was cooperating with the Indian forces to which the delegate of Argentina sarcastically replied: 'I do not find it difficult to accept this statement. In fact, I am sure it is perfectly true, for it is rather hard to refuse cooperation when it is demanded with a loaded pistol and a foot on your neck'.⁷⁷ The Indian official commission, led by a Hindu Congressman, Pundit Sunderlal, found that between 27000 and 40000 people died in operation POLO.⁷⁸ On 23 November 1949, the Nizam issued a *firman* (decree) accepting the constitution of India, i.e. the Nizam started 'to march with the times'.

State of Jammu and Kashmir

Muslims constituted 85 per cent of the J&K population.⁷⁹ Geographically, it has 540-kilometre-long border with Pakistan⁸⁰ and the main roads to Srinagar were through Pakistani cities such as Sialkot and Rawalpindi.⁸¹ The Kashmiri Muslims expected the Maharaja to accede to Pakistan.⁸² There was anger and resentment among the Kashmiri Muslims since 1930 against the oppressive policies of the Maharajah. Sheikh Mohammad Abdullah had started the 'Quit Kashmir' movement in 1946.⁸³ but as the Maharaja procrastinated in deciding the accession, the Poonch revolt exploded into a full-scale resistance movement. The Maharaja and India accused Pakistan of supporting the rebels but Pakistan denied the allegations claiming that Muslims were joining their brothers in their struggle.⁸⁴ The fighting intensified, the rebels took large parts of the state which later became Azad [Independent]

⁷⁴ Eagleton (n 44) 278. See for a view that UN cannot intervene in Hyderabad dispute, Taraknath Das, 'The Status of Hyderabad during and after British Rule in India' (1949) 43 *American Journal of International Law* 57.

⁷⁵ Menon (n 65) 387

⁷⁶ Ibid 376.

⁷⁷ Eagleton (n 44) 295.

⁷⁸ Mike Thompson, 'Hyderabad 1948: India's hidden massacre' BBC (London 24 September 2013)

<<https://www.bbc.co.uk/news/magazine-24159594>> accessed 28 March 2022.

⁷⁹ Menon (n 66)

⁸⁰ Hodson (n 56) 428.

⁸¹ Thorner (n 3) 173. See also Pitman B Potter, 'The Principal Legal and Political Problems Involved in the Kashmir Case' (1950) 44 *American Journal of International Law* 361, 363 where he says that geographically and economically, Kashmir was an appendage of Pakistan.

⁸² Independence Act 1947, s 2.

⁸³ Menon (n 65) 393, see also *Prem Nath Kaul* (n 106).

⁸⁴ Pakistan Letter to UN Security Council 16 January 1948 S/646.

Kashmir (AJ&K). On 27 October 1947, Indian troops landed in J&K and pushed back the rebels from a number of areas they had taken. India claims that the Maharaja acceded to India on 26 October 1947, J&K became part of India and India was legally responsible for its defence.⁸⁵ On 30 October 1947, Pakistan said that the accession of J&K was 'based on fraud and violence and as such cannot be accepted'.⁸⁶ On 1 January 1948, India reported the dispute to the UN.

There are three main difficulties with the Indian official account of accession of J&K to India: the claim of accession on 26 October is false; was obtained under compelling circumstances and, in any event, was conditional.

False claim of accession

The Indian version of the accession of J&K to India is false, i.e. it did not happen *before* the invasion on 27 October 1947. Accession *after* the invasion goes to its legality.

Initially, the official account of Menon was accepted until historian debunked it. The 'true time-table of events'⁸⁷ of accession given by Menon is smooth but looking at other Indian and British official accounts, the true timetable becomes doubtful. Alastair Lamb, a renowned British historian,⁸⁸ argues that the story of accession is fabricated and even the 'deception was not very professional'.⁸⁹ Lamb has compared Menon's version with personal accounts of key British and Indian officials and concluded that it was not possible that the Instrument of Accession could have been signed *before* the invasion on 26 October 1947. Victoria Schofield, after examining some further evidence, concurs with Lamb's view.⁹⁰

The events of three days – 24-27 October – are crucial. Menon claims that on 24 October 1947, the Government of India received a desperate appeal from the Maharajah for help. On the morning of 25 October, the Defence Committee met, presided over by Lord Mountbatten, and discussed the request of the Maharajah. The request for military aid was not accepted as Mountbatten thought it illegal without an instrument of accession.⁹¹ According to Wolpert, 'Mountbatten ... "considered that it

⁸⁵ Ibid 399.

⁸⁶ Ibid 404.

⁸⁷ Ibid 401.

⁸⁸ Lamb has written the following three key books on Kashmir: Alastair Lamb, *Incomplete Partition: The Genesis of the Kashmir Dispute 1947-1948* (Oxford 1997); Alastair Lamb, *Kashmir: A Disputed Legacy 1846-1990* (Oxford 1991) and Alastair Lam, *Birth of a Tragedy: Kashmir 1947* (Roxford Books 1994).

⁸⁹ Lamb 1997 (n 3) 159.

⁹⁰ Schofield (n 3) 148

⁹¹ Menon (n 66) 399.

would be the *height of folly* to send troops into a neutral State, where we had no right to send them” [emphasis added].⁹² Menon claims that to collect full information, he was sent to J&K. Menon met the J&K Prime Minister, C. M. Mahajan and from his residence they went to the Palace of the Maharajah. Menon relates that ‘after gathering all the information’, he went to the Guest House for a little rest but Mahajan advised that it was not safe to remain any longer in the city so ‘left Srinagar in the first light of the morning of 26 October’. They also advised the Maharajah to leave Srinagar which he did at 2 am. Menon went to the Defence Committee meeting and reported his impression of the situation and necessity of saving Kashmir from the raiders. ‘Lord Mountbatten said that it would be improper to move Indian troops into what was at the moment an independent country, as Kashmir had not yet decided to accede to either India or Pakistan’.⁹³ ‘Soon after the meeting of the Defence Committee [in the morning of 26 October], [Menon] flew to Jammu accompanied by Mahajan’⁹⁴ to see the Maharajah. They woke him up as he was driving all night from Srinagar, relates Menon. The Maharajah composed a letter to the Governor-General and signed the Instrument of Accession. Menon flew back to Delhi and went straight to the meeting of the Defence Committee which was scheduled for the evening of 26 October 1947. After a long discussion, the accession was accepted on the condition of holding a plebiscite after law and order was restored.⁹⁵

H. V. Hodson drew ‘freely’ from Menon⁹⁶ and has accepted his version of events but Lamb and Schofield did not. Lamb accepts Menon’s true timetable of events until the meeting on the morning of 26 October but ‘it is at this point, with the ending of the Defence Committee meeting, that the hitherto established narrative diverges dramatically from the facts they can be determined from other sources of the highest quality’.⁹⁷ Lamb’s attack on Menon’s narrative is based on two pieces of evidence. First, Mahajan has denied the trip to Jammu with Menon on the afternoon of 26 October.⁹⁸ Mahajan states that after meeting Prime Minister Nehru, he went to the house of Defence Minister Baldev Singh where he shaved, took a bath and ‘retired for some much needed rest’.⁹⁹ Mahajan went on to say:

⁹² Stanley Wolpert, *Nehru A Tryst with Destiny* (Oxford 1996) 417.

⁹³ Menon (n 65) 399.

⁹⁴ Ibid

⁹⁵ Menon (n 65) 400

⁹⁶ Hodson (n 55) xii.

⁹⁷ Lamb (n 3) 156.

⁹⁸ Ibid.

⁹⁹ Mehr Chand Mahajan, *Looking Back: The Autobiography of Mehr Chand Mahajan* (Asia Publishing House 1963) 152.

Around dinner time, the Prime Minister sent a message to me that with Mr. V. P. Menon, I should fly to Jammu I frankly informed him that I was not prepared to go to Jammu till I got news from my aerodrome officer at Srinagar that the Indian forces had landed there. Panditji [Nehru] did not insist and said, "You can fly to Jammu next morning" [i.e. on 27 October].¹⁰⁰

Mahajan's account conflicts with Menon's account saying that 'soon after the meeting of the Defence Committee, I flew to Jammu accompanied by Mahajan'.¹⁰¹ The two main players say different things. Interestingly, the Supreme Court of India, in a landmark judgement in *Prem Nath Kaul*, said that 'On October 25, 1947, the Maharaja signed an Instrument of Accession with India which had then become an Independent Dominion'.¹⁰²

The second 'high quality' evidence on which Lamb relies is the diary of Sir Alexander Symon who was a Deputy High Commissioner in New Delhi but in charge of the Mission in the absence of High Commissioner Sir Terence Shone.¹⁰³ Symon said that in the afternoon of 26 October, he called Menon's office for arranging a meeting but Menon said he was about to set out for Jammu. Symon drove to Safdarjung airport but found that Menon was at the Palam airport. Symon rushed to Palam but found that Menon was going back to Delhi because he 'had left it too late for the aeroplane to reach Kashmir before nightfall'.¹⁰⁴ They both went to Menon's residence where Menon told Symon that he would be going to Jammu the following morning, i.e. 27 October. Lamb concludes that the accession did not take place on 26 October. 'There the matter must rest until fresh documents surface to justify a firmer verdict one way or another'.¹⁰⁵

Schofield confirms Lamb's conclusion relying on the same evidence such as contrasting Menon-Mahajan accounts and Symon's diary. She has, however, found a new piece of evidence in the form of the demi-letter from Symon to Sir Archibald Carter in the Foreign Office in London.¹⁰⁶ The demi-letter was dictated at 4 p.m. on 27 October wherein Symon said that he called Menon's office but was told that he had not returned from Jammu. The note confirms that ten aircrafts took Indian troops from Delhi to Kashmir in the morning of 27 October, i.e. troops landed in J&K before the accession.¹⁰⁷

¹⁰⁰ Ibid 152-153.

¹⁰¹ Menon (n 65) 399.

¹⁰² *Prem Nath Kaul v The State of Jammu and Kashmir* 1959 AIR 749, [5].

¹⁰³ Lamb (n 3) 156.

¹⁰⁴ Ibid 157.

¹⁰⁵ Alastair Lamb, *Birth of a Tragedy: Kashmir 1947* (Roxford Books 1994) 103.

¹⁰⁶ Ibid 147.

¹⁰⁷ Preparing ten aircrafts full of troops must have started well before the accession as it is not an easy task to be completed in one day.

Schofield has also doubted the availability of the Maharajah in Jammu early in the day on 26 October as it was not practically possible for the Maharajah to have reached Jammu from Srinagar:

The maharaja left Srinagar 'in the early hours of the morning' of 26 October or, as Mahajan confirms, at 2 a.m. The journey at night in winter by road from Srinagar to Jammu could be expected to take at least sixteen hours. The convoy of cars only reached the Banihal pass 'as first light was beginning to break'. They also made a stop at Kud, a small settlement 60 miles from Jammu. 'The maharaja finally reached Jammu 'the next evening' recalls his son, Karan Singh, and had already gone to sleep before Menon arrived. But Menon states that on the evening of 26 October he was back in Delhi meeting with the Defence Committee. When, therefore, could he have met the Maharaja on 26 October?¹⁰⁸

The evidence suggests that there was no accession on 26 October and J&K was invaded *before* the accession on 27 October, what Mountbatten called the height of folly and illegal.

There is no evidence of the Instrument of Accession itself. The Government of India Act 1935 required that copies of the Accession Instruments shall be laid before parliament and 'all courts shall take judicial notice of every such Instrument and Acceptance'.¹⁰⁹ 'One may well wonder why the Government of India, had it indeed been in possession of a properly signed Instrument, did not publish it as such in the 1948 White Paper; it would certainly have been the documentary jewel in India's Kashmiri crown'.¹¹⁰ Lamb argues that 'fabrication and 'document-laundering'¹¹¹ were used to construct an accession story. He also claims that a pro forma text of the copy began to circulate at the time of the second Indo-Pakistan war in 1965.¹¹²

Compelling circumstances of accession

It is established beyond doubt that accession did not take place on 26 October before landing of Indian troops on 27 October. Let us assume, for the sake of argument that the Maharajah acceded to India on 26 October 1947, was he in a position to give a free consent.

¹⁰⁸ Ibid 148. I have omitted the references from the original quote here.

¹⁰⁹ Section 6(9).

¹¹⁰ Lamb (n 3) 166.

¹¹¹ Ibid 178.

¹¹² Ibid

I argue that the circumstances were such that the Maharajah was not in a position to give a free consent to accession. The local resistance movement, supported by tribal supporters, shook the administrative machinery of J&K. The Maharajah's forces disintegrated. They took town after town and were closing on Srinagar, the capital of Kashmir. In *Kaul*, the Supreme Court of India, said: 'With the progress of the invading raiders the safety of the State was itself in grave jeopardy and it appeared that, if the march of the invaders was not successfully resisted, they would soon knock at the doors of Srinagar itself'.¹¹³ The Maharaja was 'helpless' and 'devastated'.¹¹⁴ On the night of his flight, he told his son, Karan Singh, that Kashmir was lost.¹¹⁵ The Maharajah said that he had 'no option but to ask for help' from India. 'Naturally they cannot send the help asked for by me without my State acceding to the Dominion of India. I have accordingly decided to do so and I attach the Instrument of Accession for acceptance by your Government'.¹¹⁶ Diwan argues that it 'is true that the State acceded to India at a very critical time, when, perhaps, it had no other choice, but to join India and seek her protection'.¹¹⁷ Even India was conscious of the compelling circumstances. India's letter to the UN Security Council of 1 January 1948 states: 'in order to avoid any possible suggestion that India had utilized the State's immediate peril for her own political advantage, the Government of India made it clear that ... its people would be free to decide their future'.¹¹⁸

Conditional accession

Two assumptions need to be made to discuss the legal nature of the accession of J&K to India: that accession took place on 26 October 1947 and that it was given by free consent of the Maharajah. For the sake of argument, I make both assumptions.

The accession of J&K to India was subject to the condition that its future will be determined by the free will of the people of Kashmir. Based on the preparatory history¹¹⁹ and views of key players, I argue that the accession was conditional. Lord Mountbatten had expressed a 'strong opinion that, in view of the composition of the [85 percent Muslim] population, accession should be conditional on the will of the people being ascertained by a plebiscite'.¹²⁰ Accepting the accession, Lord Mountbatten wrote:

¹¹³ *Prem Nath Kaul* (n 106).

¹¹⁴ See Menon (n 65) 398.

¹¹⁵ Schofield (n 3) 145.

¹¹⁶ Sheikh Mohammad Abdullah, 'Kashmir, India and Pakistan' (1965) 43 *Foreign Affairs* 528, 529.

¹¹⁷ Paras Diwan (n 45) 346.

¹¹⁸ Security Council, S/628 2 January 1948, 3.

¹¹⁹ See generally Article 32 of the Vienna Convention on the Law of Treaties 1969 which requires to consider the preparatory history and circumstances under which the treaty was concluded.

¹²⁰ Menon (n 65) 399.

In the special circumstances mentioned by your Highness my Government have decided to accept the accession of Kashmir State to the Dominion of India. In consistence with their policy that in the case of any State where the issue of accession has been the subject of dispute the question of accession should be decided in accordance with the wishes of the people of the State.¹²¹

Sheikh Abdullah, who was released from prison at Nehru's request to garner public support for the Maharajah's accession, says that the 'resulting accession was to be purely provisional and temporary until the will of the people could be ascertained through a referendum'. Prime Minister Nehru said that 'we made *a condition* that the accession would have to be considered by the people of Kashmir. [...]. That pledge we have given, and *the Maharaja has supported* it, not only to the people of Kashmir but to the world' [emphasis added].¹²²

India also accepted the temporary and conditional status of J&K at the United Nations. On 15 January 1948, the Indian delegate, Sir Ayyangar, at the UN Security Council said that 'In accepting the accession [we] informed the Ruler that the accession should be finally settled by plebiscite as soon as peace has 'been restored'.¹²³ Later on that conditional accession was reflected the UNSC resolutions. On 21 April 1948, the Security Council 'noted with satisfaction that both India and Pakistan desire that the question of the accession of Jammu and Kashmir to India or Pakistan should be decided through *the democratic method of a free and impartial plebiscite*' (emphasis added).¹²⁴ It also recommended to India and Pakistan 'to create proper conditions for a free and impartial plebiscite'¹²⁵ and asked India to establish a Plebiscite Administration.¹²⁶ On 13 August 1948 the Commission adopted a resolution stating that 'The Government of India and the Government of Pakistan reaffirm their wish that the future status of the State of Jammu and Kashmir shall be determined in accordance with the *will of the people*' (emphasis added).¹²⁷ On 5 January 1949, the Commission adopted another resolution stating that 'the question of the accession of the state of Jammu and Kashmir to India or Pakistan will be decided through the democratic method of a free and impartial plebiscite'.¹²⁸ Subsequent

¹²¹ Sheikh Mohammad Abdullah (n 114) 529.

¹²² Ibid 330.

¹²³ Sheikh Mohammad Abdullah (n 114) 531.

¹²⁴ Security Council Resolution, 47 (1948) S/726, recital 4.

¹²⁵ Ibid, recital 8.

¹²⁶ Ibid [7].

¹²⁷ UN Commission for India and Pakistan, Interim Report, S/1100 22 November 1948, see part III.

¹²⁸ UN Commission for India and Pakistan, Second Interim Report, S/1196 10 January 1949, para 15.

resolutions of the Security Council reiterated the same method, fair and impartial plebiscite, for resolving the dispute.¹²⁹

The consensus among the key players – the Maharaja; the Indian Government; Lord Mountbatten; Sheikh Abdullah and the UN – was that the accession was temporary and conditional on holding a free and impartial plebiscite.

Studying the situations in Junagadh; Hyderabad and J&K, an interesting pattern of duress and coercion emerges. In Junagadh, a situation was created where the Nawab fled to Pakistan and the Prime Minister was compelled to ask India for help. Hyderabad was invaded and later on it was claimed that the Nizam's Council through the Prime Minister had invited India to take over the administration. The question of duress and coercion was reverberated in the UN Security Council in the form of the remark by the Argentinian delegate. The UNSC President had also raised concerns about coercion. After the Indian invasion, Hyderabad withdrew its representative from the Security Council. The President said that what was needed was to confirm 'whether it was written under some kind of compulsion' by the Nizam.¹³⁰ Coercion seems to be a common pattern in all three cases.

Re-colonialization of Jammu and Kashmir

I argue that India has re-colonialised J&K. *Harvard Law Review* makes a convincing case that it is settlers colonialization.¹³¹ Colonialism is a system of domination by territorial acquisition¹³² whereas settler colonialism aims at permanent occupation of the colonised territory but both intertwine.¹³³ To integrate J&K into India, tactics such as political manoeuvring; use of brutal force and erasing the constitutional status of J&K were employed. Re-colonialization took place over several decades starting with the landing of Indian troops, before accession, on 27 October 1947 in J&K culminating in the merging of J&K with the Indian Union on 5 August 2019 and dismembering and relegating it to the status of Union Territories on 9 August 2019. A brief overview of key events and constitutional

¹²⁹ See Security Council Resolution, 91 (1951) S/2017/Rev. 1 and 122 (1957) S/3779. Pakistan has maintained her position at the UNSC since 1947: see Pakistan's letter to GS and President of UNSC 12 May 2016, S/2016/440. For a good discussion on J&K at the UN, see Brian R. Farrell, 'The Security Council and Kashmir' (2013) 22 *Transnational Law and Contemporary Problems* 343.

¹³⁰ Eagleton (n 44) 296; see also UN Doc. S/1011.

¹³¹ *Harvard Law Review*, 'From Domicile to Dominion: India's Settler Colonial Agenda in Kashmir' (2021) 134, 2530 <<https://harvardlawreview.org/2021/05/from-domicile-to-dominion-indias-settler-colonial-agenda-in-kashmir/>> accessed 4 March 2022.

¹³² *Ibid*; see also Oxford Dictionary Online: 'The policy or practice of acquiring full or partial political control over another country, occupying it with settlers, and exploiting it economically' <<https://www.lexico.com/definition/colonialism>> accessed 25 April 2022.

¹³³ *Ibid* 2531.

developments sheds light on how the re-colonialization took place and the settlers colonialization is underway.

Jammu and Kashmir as integral part of India

On 20 June 1949, Dr Yuvaraj Karan Singh, the son of the Maharajah Hari Singh, became head of the state. On 25 November 1949, Karan Singh repealed the Government of India Act 1935 and accepted the new constitution of India 1949 'in so far as it [was] applicable to the State of Jammu and Kashmir, govern the constitutional relationship between this State and the contemplated Union of India'.¹³⁴ The key articles governing relationship between J&K and India were 35A and 370 which I discuss below.

On 1 May 1951, Karan Singh issued a proclamation for the election of a Constituent Assembly which were held in August and September 1951. Abdullah's Jammu & Kashmir National Conference (JKNC) won all 75 seats whereas Praja Parishad boycotted the elections. Thorner has succinctly captured the tactics as under:

At the close of September 1947 the Maharajah took his first public step toward reconciliation with India by releasing Abdullah, while keeping in jail Chowdhury Ghulam Abbas, the leader of the Kashmir Muslim Conference, an organization sponsored and encouraged by Jinnah. In quick succession all voices in Kashmir pleading for accession to Pakistan were silenced: newspapers were censored or shut down, journalists were interned, and finally the Kashmir State Assembly was prorogued to prevent further criticism of the State Government.¹³⁵

On 8 August 1953, Karan Singh dismissed and arrested Prime Minister Sheikh Mohammed Abdullah. Some 70 individuals were killed in protests following the arrest of Abdullah. Bakshi Ghulam Mohammed, the number two in JKNC was appointed as Prime Minister on 9 August 1953. The treatment of Sheikh Abdullah, a strong voice for self-determination, tells the story of political manoeuvring and manipulation. 'Despite his early support for Indian leader Jawaharlal Nehru, many Indians believed that Abdullah's ultimate aim was independence for Kashmir; therefore, in 1953 he was dismissed and imprisoned'.¹³⁶ Jaleel argues that in 1953, 'months before J&K's Constituent

¹³⁴ A G Noorani, *Article 370: A Constitutional History of Jammu and Kashmir* (Oxford 2012) 78.

¹³⁵ Thorner (n 3) 21.

¹³⁶ Encyclopaedia Britannica, 'Sheikh Muhammad Abdullah' <<https://www.britannica.com/biography/Sheikh-Muhammad-Abdullah>> accessed 3 March 2022. See also: Lok Sabha (Lower House of Indian Parliament) Eminent Parliamentarians Monograph Series (n 3) 8. This monograph claims: 'By early 1953 one could discern visible changes in Abdullah's perception of Kashmir's accession to India and its position within the Indian Union. Till 1953 nobody could doubt the Intentions or the sincerity of his pronouncements on India, its leaders and its policy towards Kashmir'.

Assembly ratified the state's accession to the Indian Union, then J&K Prime Minister Sheikh Mohammad Abdullah was removed and arrested. In another blow to the state's autonomy, New Delhi renamed the positions of Sadre Riyasat to Governor and Prime Minister to Chief Minister while Abdullah was in jail and his party was literally running a campaign for self-determination for J&K under the Plebiscite Front banner'.¹³⁷ Abdullah says that 'I was released from jail on April 8, 1964, following withdrawal of the conspiracy case instituted against me and my associates' when Nehru needed me to talk to Pakistan.¹³⁸ On 6 February 1954, the Constituent Assembly voted to ratify the state of J&K's accession to India and adopted the constitution of J&K on 17 November 1956. Article 3 of the constitution made J&K 'an integral part of the Union of India'. It also defined territories of J&K as comprising 'all the territories which on the fifteenth day of August, 1947, were under the sovereignty or suzerainty of the Ruler of the State'.

The UN Security Council was conscious of constitutional development in J&K and warned against resolving the dispute other than through a fair and impartial plebiscite. Before the adoption of the J&K constitution, Resolution 91 (1951) said:

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 might attempt to take to determine the future shape and affiliation of the entire State or any part thereof would not constitute a disposition of the State in accordance with the above principle [through the democratic method of a free and fair plebiscite].

After the J&K constitution was adopted making J&K an integral part of India, on 24 January 1957, the Security Council reiterated its position in Resolution 91 (1951) and declared:

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,

¹³⁷ Ibid. See also: Kashmir Times, 'THE BETRAYAL WHITE PAPER: ASSAULT ON THE AUTONOMY OF JAMMU & KASHMIR: PAGD' (Srinagar, 27 February 2022) <<http://www.kashmirtimes.com/newsdet.aspx?q=114090>> accessed 4 March 2022.

¹³⁸ Sheikh Mohammad Abdullah (n 114) 533.

would not constitute a disposition of the State in accordance with the above principle [through the democratic method of a free and fair plebiscite].¹³⁹

Resolution 91 (1951) warned that any disposition other than ‘through the democratic method of a free and fair plebiscite’ would not be in conformity with the UNSC resolutions. Resolution 122 (1957), which was adopted two months after the 1956 constitution, stated that any action taken determining the affiliation of J&K with India would be in violation of the UNSC resolution. Here the UNSC was alluding to changes introduced by Article 3 of the 1956 constitution making J&K an integral part of India.

Erosion of Article 370 and self-governance

The state of J&K was given a special and interim status under Article 370 of the Indian constitution. The constitutional relationship of India and J&K was limited, in conformity with the terms of the Instrument of Accession, to three subjects (defence, foreign affairs and communications). Article 370(1)(i) limited the power of Indian parliament to make laws for J&K ‘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’. Article 370(1)(ii) allowed making laws on ‘such other matters in the said Lists’ which the President of India may specify ‘with the *concurrence* of the Government of the State’ [emphasis added].¹⁴⁰ Article 370 also authorised the President of India to ‘declare that [article 370] shall cease to be operative or shall be operative only with such exceptions and modifications’ but for this ‘the recommendation’ of the Constituent Assembly was ‘necessary’. The Supreme Court of India has given authoritative interpretation of Article 370 in a few cases. In the *State Bank of India v Santosh Gupta*, the Supreme Court held:

Article 370 begins with a non obstante clause stating that notwithstanding anything contained in the Constitution [...], the power of Parliament to make laws for the said State shall be limited, in sub-clause (b) (i), to the matters in the Union List and the Concurrent List of the 7th Schedule to the Constitution of India, which in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession. If other matters contained in the said Constitution outside the Instrument of

¹³⁹ Security Council Resolution 122 (1957). See also, Stephen P Westcott, ‘Self-determination and State Sovereignty: The Case of UN Involvement in Jammu and Kashmir’ 127-143 in Jakob R. Avgustin (eds) *The United Nations: Friend or Foe of Self-Determination?* (E-International Relations 2020).

¹⁴⁰ Constitution of India 1949, Article 370(1)(i) and (ii).

Accession in the said Lists are to be extended, then they can be extended only with the *concurrence* of the State [emphasis added].¹⁴¹

The Supreme Court, applying *Kaul*, explained the difference between ‘consultation’ and ‘concurrence’:

Since the Instrument of Accession is an agreement between the erstwhile Ruler of Jammu & Kashmir and the Union of India, it must be respected, in which case if a matter is already provided for in it, it would become applicable straightaway without more, and only consultation with the Government of the State is necessary [...]. However, when it comes to applying the provisions of the Constitution of India which are not so reflected in the Instrument of Accession, they cannot be so applied without the concurrence of the Government of the State, meaning thereby that they can only be applied if the State Government accepts that they ought to be so applied.

Mustafa argues that ‘Article 370 has been described as a tunnel through which the Constitution is applied to J&K’.¹⁴² ‘India has used Article 370 at least 45 times to extend provisions of the Indian Constitution to J&K. This is the only way through which, by mere Presidential Orders, India has almost nullified the effect of J&K’s special status’.¹⁴³ ‘The Centre has used Article 370 even to amend a number of provisions of J&K’s Constitution, though that power was not given to the President under Article 370’.¹⁴⁴

India has also denied the people of J&K self-governance as Governor and/or Presidential Rule is frequently imposed. ‘In Governor’s rule, law-making power, financial power, budgetary sanction’ are transferred to the Governor whereas in a Presidential rule, ‘law-making power is transferred to Parliament, the Budget is also passed by Parliament’.¹⁴⁵ Jaleel argues that ‘the state has been under central rule eight times’.¹⁴⁶ President rule was imposed in J&K on 19 December 2018. On 5 August 2019, the President of India made the Constitution (Application to Jammu and Kashmir) Order

¹⁴¹ *State Bank of India v Santosh Gupta* (2017) SCC 538, [13].

¹⁴² Faizan Mustafa, ‘Explained: What are Articles 370 and 35A?’ *The Indian Express* (New Delhi, 6 August 2019) <<https://indianexpress.com/article/explained/understanding-articles-370-35a-jammu-kashmir-indian-constitution-5610996/>> accessed 4 March 2022.

¹⁴³ *Ibid*

¹⁴⁴ *Ibid*

¹⁴⁵ Muzamil Jaleel, ‘How Governor’s rule and President’s rule set J&K apart from other states’ *The Indian Express* (New Delhi, 14 December 2018) <<https://indianexpress.com/article/explained/how-governors-rule-and-presidents-rule-set-jk-apart-from-other-states-satya-pal-malik-5492730/>> accessed 4 March 2022.

¹⁴⁶ *Ibid*

extending 'All provisions of the Constitution' to J&K. As extending all provisions of the Indian constitution to J&K is beyond the terms of the Instrument of Accession, it required the *concurrence* of the J&K Assembly. On 5 August 2019, there was no elected Assembly in place and the state was under Presidential rule, i.e. the President was in charge. The President cannot concur with his own actions, i.e. to concur with his action as President of India in his capacity as in charge of J&K. On 6 August 2019, the President, on the recommendation of Parliament, issued a declaration under Article 370(3) that 'all clauses of the said article 370 shall cease to be operative'.¹⁴⁷ Now J&K is under the direct rule of Central Indian government. The people of J&K are not governing themselves directly or through their elected representative.

The constitutional changes of 5 and 6 August were followed by the territorial reorganisation and re-categorisation. On 9 August 2019, the Indian parliament passed the Jammu and Kashmir Reorganisation Act 2019. Section 3 of the 2019 Act amputated Ladakh from J&K and recategorized it as a Union Territory of Ladakh consisting of Kargil and Leh districts. The remaining state of Jammu and Kashmir was relegated to the status of a Union Territory. Under Article 239 of the India constitution, 'every Union territory shall be administered by the President acting, to such extent as he thinks fit, through an administrator to be appointed by him' instead of elected government by the people of J&K. Dismembering the state of J&K into two and relegating them to union territories is a serious deprivation of democratic self-government. On 18 February 2021, the UN rapporteurs on freedom of religion and ethnic minorities, in a joint statement, said:

The loss of autonomy and the imposition of direct rule by the Government in New Delhi suggests the people of Jammu and Kashmir no longer have their own government and have lost power to legislate or amend laws in the region to ensure the protection of their rights.¹⁴⁸

On 5 May 2022, under the Jammu and Kashmir Reorganisation Act 2019, a delimitation report was published. Aisha Dutta states:

¹⁴⁷ Constitution of India 26 November 1949 <<https://legislative.gov.in/constitution-of-india>> accessed 4 March 2022.

¹⁴⁸ United Nations Office of the High Commissioner for Human Rights, 'India: UN experts say Jammu and Kashmir changes risk undermining minorities' rights' Geneva (18 February 2021) <<https://www.ohchr.org/en/press-releases/2021/02/india-un-experts-say-jammu-and-kashmir-changes-risk-undermining-minorities?LangID=E&NewsID=26758>> accessed 30 March 2022. See also Nigel Walker, 'Human Rights in Kashmir' House of Commons Library (21 September 2021).

The panel's decisions are politically significant and have met with criticism amongst mainstream parties in the Valley. The [Hindu majority] Jammu region has got more seats relative to its population compared with the [Muslim majority] Kashmir Valley, and this violates the population criterion, is a key contention of these parties. The award of seats based on the 2011 census has meant that Jammu with 44 per cent population will get 48 per cent share in seats, while Kashmir with 56 per cent of population will get only 52 per cent share in seats [...]. The new Assembly seats in the Jammu region have been carved out mostly in Hindu dominated areas.¹⁴⁹

The delimitation will 'reshape the local political dynamics'.¹⁵⁰ The next step after the delimitation would be election. The election results are expected to reflect the demographic change and management through the delimitation. Very conveniently, it will produce the contrived democratic and political legitimacy for the unlawful measures (under the UNSC resolutions and the Indian constitution) taken in the J&K.

Settlers colonialism

India has one perennial fear; the Muslim majority of J&K might one day break away from India if a fair and impartial plebiscite were held. To change the demographic composition of J&K, Article 35A of the Indian constitution was abolished. Part III (Articles 6-8) of the 1956 constitution of J&K defines and provides special rights to the residents of J&K such as employment; land acquisition and settlement as these rights were specified for Kashmiris only.¹⁵¹ Article 35A insulated those J&K laws and

¹⁴⁹ Anisha Dutta et al, 'J&K Delimitation Commission issues final notification, reserves 43 Assembly seats for Jammu, 47 for Kashmir' *The Indian Express* (New Delhi 6 May 2022) <<https://indianexpress.com/article/india/jk-delimitation-commission-final-notification-assembly-seats-jammu-kashmir-7902846/>> accessed 6 May 2022. For the original delimitation report, see <<https://egazette.nic.in/WriteReadData/2022/235556.pdf>> accessed 6 May 2022.

¹⁵⁰ Anuradha Bhasin, 'Bringing the Israeli model to Kashmir' *Al-Jazeera* (Doha, 20 June 2020) <<https://www.aljazeera.com/opinions/2020/6/20/bringing-the-israeli-model-to-kashmir>> accessed 9 May 2022.

¹⁵¹ Full Article 35A is:

"35A. *Saving of laws with respect to permanent residents and their rights:* Notwithstanding anything contained in this Constitution, no existing law in force in the State of Jammu and Kashmir, and no law hereafter enacted by the Legislature of the State: —

- (a) denning the classes of persons who are, or shall be, permanent residents of the State of Jammu and Kashmir; or
- (b) conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects: —
 - (i) employment under the State Government;
 - (ii) acquisition of immovable property in the State;
 - (iii) settlement in the State; or
 - (iv) right to scholarships and such other forms of aid as the State Government may provide,

constitutional provisions from being challenged on the ground of incompatibility with the Indian constitution and 'protects the state's distinct demographic character'.¹⁵² After the abolition of 35A, all Indians can buy immovable property; seek employment and settle as residents of Kashmir. 'Indians can now buy property and land in Kashmir, and drive out the local population'.¹⁵³ 'Kashmiris suspect Hindu nationalist groups of encouraging Hindus to migrate to the state [...] and it would open up the state for outsiders to settle, eventually changing its demographics'.¹⁵⁴ 'In revoking Article 35A, the Indian government unearthed a fear that Kashmiris had been wrestling with since Independence: that India would recruit non-Kashmiri settlers to dilute the region's ethnic and religious makeup'.¹⁵⁵ In May 2020, new domicile rules were introduced removing protection given to the people of J&K. On 18 February 2021, UN Rapporteurs on freedom of religion and ethnic minorities said that these 'legislative changes may have the potential to pave the way for people from outside the former state of Jammu and Kashmir to settle in the region, alter the demographics of the region'.¹⁵⁶ They expressed their concern that the 'number of successful applicants for domicile certificates that appear to be from outside Jammu and Kashmir raises concerns that demographic change on a linguistic, religious and ethnic basis is already underway'.¹⁵⁷

To attract non-Kashmiri Hindus and cultivate a settler desire, an official narrative intertwining history, culture and religion is employed by the state machinery. The official machinery promotes the Hindu pilgrimage – Amarnath Yatra - representing Lord Shiva portraying Kashmir to be historically and culturally a Hindu place. Constitution, law, religion, culture and history are all employed to lure Indians to settle in Kashmir. The use of administrative machinery of the state, i.e. direct rule from the centre and the presence of six hundred thousand military personnel is paving the way for settlement of non-Kashmiris in J&K.¹⁵⁸ *Harvard Law Review* argues:

To sustain their dominion, settler states - with the help of a local administration - will spin narratives of a unique cultural identity, create independent structures of law and order, and

shall be void on the ground that it is inconsistent with or t3Ks away or abridges any rights conferred on the other citizens of India by any provision of this Part."

¹⁵² BBC, 'Article 35A: Why a special law on Kashmir is controversial' (5 August 2019) <<https://www.bbc.co.uk/news/world-asia-india-40897522>> accessed 27 April 2022.

¹⁵³ Hafsa Kanjwal, 'India's settler-colonial project in Kashmir takes a disturbing turn' *The Washington Post* (DC 5 August 2019) <<https://www.washingtonpost.com/opinions/2019/08/05/indias-settler-colonial-project-kashmir-takes-disturbing-turn/>> accessed 10 May 2022.

¹⁵⁴ *Ibid*

¹⁵⁵ *Harvard Law Review* (n 129) 2530.

¹⁵⁶ UN High Commissioner for Human Rights (n 146).

¹⁵⁷ *Ibid*

¹⁵⁸ For an excellent account of the settler colonialism, see the editorial note of the *Harvard Law Review* (n 129).

rely on both military and economic power. Law, in particular, often cements and expands a settler colonial project. The law not only establishes and re-establishes the allocation of land and resources but also controls the distribution of violence in a settler regime.¹⁵⁹

‘The colonial nature of Indian rule over Kashmir has been a long-term phenomenon’ but since 5 August 2019 ‘when even the pretence of autonomy and recognition was given up, and all phenomena constituting coloniality became conspicuous and acute’.¹⁶⁰ The abolition of Articles 370 and 35A on 5 August 2019 ‘may be the tipping point for the settler colonial project in Kashmir, it was in no way the start’.¹⁶¹ Ramahi and Shahshahani argues that ‘despite India’s successful overthrow of British rule, it has created a colonial occupation of its own in Jammu and Kashmir’.¹⁶² ‘This unconstitutional move [the abolition of Article 35A] is the beginnings of a settler colonial project in Kashmir’.¹⁶³

India is also using brutal force against those who raise voice for their rights. India has deployed more than 700,000 forces in J&K and has become one of the most militarized zones in the world.¹⁶⁴ They have been given blanket powers under laws such as Armed Forces (Jammu and Kashmir) Special Powers Act 1990¹⁶⁵ and ‘it grants broad powers to the security forces operating in Jammu and Kashmir and effectively bestows immunity on security forces from prosecution in civilian courts for their conduct, by requiring the Central Government to sanction all prospective prosecutions against such personnel’.¹⁶⁶

Systematic and gross violations of human rights

Gross human rights violations and lack of accountability are reported from J&K. International organisations such as Amnesty International; Human Rights Watch (HRW) and Physicians for Human

¹⁵⁹ Ibid 2531-2532

¹⁶⁰ Nitasha Kaul, ‘coloniality and/as development in Kashmir: Econationalism’ (2021) 128 *Feminist Review* 114-131, 116.

¹⁶¹ *Harvard Law Review* (n 129) 2530.

¹⁶² Zainab Ramahi and Azadeh Shahshahani, ‘Destroying to Replace: Settler Colonialism from Kashmir to Palestine’ VCRSC (10 August 2020) <<https://www.versobooks.com/blogs/4817-destroying-to-replace-settler-colonialism-from-kashmir-to-palestine>> accessed 9 May 2022. See also Anuradha Bhasin, ‘the gradual encroachment on Kashmiri rights and growing prospect of colonisation could set the region on fire’ Al-Jazeera (Doha 20 June 2020) <<https://www.aljazeera.com/opinions/2020/6/20/bringing-the-israeli-model-to-kashmir>> accessed 10 May 2022.

¹⁶³ Hafsa Kanjwal (n 151).

¹⁶⁴ Haley Duschinski et al, *Resisting Occupation in Kashmir* (University of Pennsylvania Press 2018) 2.

¹⁶⁵ See for a detailed discussion Vivek Chadha (ed), *Armed Forces Special Powers Act: The Debate* (IDSA Monograph Series No 7 November 2012)

¹⁶⁶ United Nations 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) 21.

Rights (PHR) have detailed human rights violations in J&K. In its report on *The Human Rights Crisis in Kashmir: A Pattern of Impunity* 1993, HRW and PHR state that to suppress the separatist movement, India has violated human rights and humanitarian law. 'Among the worst of these violations have been the summary executions of hundreds of detainees in the custody of the security forces in Kashmir. Such killings are carried out as a matter of policy'.¹⁶⁷ 'Most detainees taken into custody by the security forces in Kashmir are tortured. Torture is practiced to coerce detainees to reveal information about suspected militants or to confess to militant activity'.¹⁶⁸ The Central Reserve Police Force (CRPF) and the Border Security Force (BSF) have 'engaged in frequent reprisal attacks against civilians, opening fire in crowded markets and residential areas, and burning down entire neighbourhoods'. In its specialised report on *Rape in Kashmir: A Crime of War*, HRW and PHR states that 'there can be no doubt that the use of rape is common and routinely goes unpunished'.¹⁶⁹ Male detainees are also subjected to molestation.¹⁷⁰ 'Soldiers and police use rape as a weapon: to punish, intimidate, coerce, humiliate and degrade'.¹⁷¹ 'Security legislation has increased the likelihood of such abuses by authorizing the security forces to shoot to kill and to destroy civilian property' and protects these forces from prosecution.¹⁷² Amnesty International in its 2001 report said that the 'general climate of impunity in Jammu and Kashmir may be seen both as facilitating and encouraging further violations of human rights by security forces and police in the state'.¹⁷³ The United Nations High Commissioner for Human Rights produced two detailed reports on human rights in J&K and AJ&K. In its 2018 report, the High Commissioner said:

Impunity for human rights violations and lack of access to justice are key human rights challenges in the Indian state of Jammu and Kashmir. Special laws in force in the state, such as the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 (AFSPA) and the Jammu and Kashmir Public Safety Act, 1978 (PSA), have created structures that obstruct the normal

¹⁶⁷ Human Rights Watch and Physicians for Human Rights, *The Human Rights Crisis in Kashmir: A Pattern of Impunity* (Human Rights Watch 1993) 13.

¹⁶⁸ Ibid 14. For details on torture, see the Asia Watch/PHR report, *The Crackdown in Kashmir: Torture of Detainees and Assaults on the Medical Community* (Was 1993); and in Asia Watch, *Kashmir Under Siege* (Human Rights Watch 1991).

¹⁶⁹ Human Rights Watch & Physicians for Human Rights, *Rape in Kashmir: A Crime of War* (Human Rights Watch 1993) 3. See also Amnesty International, *India: Torture, Rape and Deaths in Custody* (London 1992) 21.

¹⁷⁰ Asia Watch, *Kashmir Under Siege* (Human Rights Watch 1991) 73.

¹⁷¹ Human Rights Watch & Physicians for Human Rights, *Rape in Kashmir: A Crime of War* (Human Rights Watch 1993) 3.

¹⁷² Human Rights Watch and Physicians for Human Rights, *The Human Rights Crisis in Kashmir: A Pattern of Impunity* (Human Rights Watch 1993) 13. -

¹⁷³ Amnesty International, *India: Impunity must end of Jammu and Kashmir* (April 2001) 5. See also Amnesty International, *India: Summary of human rights concerns in Jammu and Kashmir* (January 1995) 5 where it states: 'All three special laws in force in the state assist the government in shielding the perpetrators of human rights violations from prosecution, and encourage them to act with impunity'.

course of law, impede accountability and jeopardize the right to remedy for victims of human rights violations.¹⁷⁴

In its 2019 report, the High Commissioner highlighted 'serious human rights violations and patterns of impunity' in J&K.¹⁷⁵ In 2020, the Human Rights Watch reported that 'Hundreds of people remained detained without charge in Jammu and Kashmir under the draconian Public Safety Act'.¹⁷⁶ 'The security forces also continued to use shotguns firing metal pellets to disperse crowds, despite evidence that they are inherently inaccurate and cause injuries indiscriminately'.¹⁷⁷

Section III: Kashmiris as colonised people

These historical facts demonstrate that the UK left the British India on 15 August 1947. The state of J&K got its independence as well. The Ruler of J&K and the mainstream political party of Abdullah were in favour of independent Kashmir but the UK did not leave much choice to the Indian states, i.e. they were to join India or Pakistan depending mainly on geography and religion of the people as per the provisions of the 1947 Independence Act. India and Pakistan also accepted the legal plan and started vying for states such Hyderabad, Junagadh and J&K. The Ruler of Hyderabad took its dispute with India to the UNSC. India took its dispute with Pakistan over J&K to the UNSC as well. The UNSC endorsed the right of self-determination of Kashmiri people but in the limited sense envisaged by the colonial power, i.e. to join India or Pakistan. The right to self-determination should have included independence but the UK, India, Pakistan and the UNSC all confined it to the binary choice.

Jammu and Kashmir remained independent from 15 August 1947 to 26 October 1947. Since 27 October 1947, India has taken over J&K. The original idea of India was to retain J&K at any cost as it considered it integral to its organic unity. To woo the ruler and mainstream political party, promises of plebiscite were made but were never intended to be honoured. Jammu and Kashmir was given special status under Article 370 of the Indian constitution but it was abolished on 5 August 2019. During the life time of Article 370, from 1950 to 2019, large scale human rights violations took place and direct rule and governor rule were imposed multiple times. On 5 August 2019, Indian took drastic

¹⁷⁴ United Nations 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) 4-5. For a good analysis of the Act, see Devyani Srivastava, 'Rights-based Critique of AFSPA' in Vivek Chadha (ed), *Armed Forces Special Powers Act: The Debate* (IDSA Monograph Series No 7 November 2012) 64-78.

¹⁷⁵ United Nations High Commissioner for Human Rights (n 159) 7.

¹⁷⁶ Human Rights Watch, 'India: Events of 2020' <<https://www.hrw.org/world-report/2021/country-chapters/india>> accessed 30 March 2022.

¹⁷⁷ Ibid

unconstitutional step and stripped J&K of its special autonomous status. On 6 August 2019, direct rule by the Central Government was imposed. On 9 August 2019, J&K Reorganisation Act was passed. Under this law, Jammu was dismembered and a separate Union Territory with Hindu majority was carved out. The legal status of J&K was downgraded from the status of a state to the status of a Union Territory. New domicile rules were introduced paving the way for and encouraging the non-Kashmiri Indians to permanently settle in J&K. This will change the demographic landscape by turning the Muslim majority into minority. Once non-Muslim majority is acquired, India might organise a plebiscite on the style of Junagadh. On 5 May 2022, new electoral constituencies were announced by the delimitation commission but were carved out in such a way to contrive election results favour of Hindus. India has also deployed over 700,000 security forces in J&K. All these measures were taken without consultation or concurrence with the legislature of J&K. These measures contravene the Indian constitution; the J&K constitution; the Instrument of Accession and are against UNSC resolutions. The people of J&K are deprived of their right to self-governance.

The above historical facts and legal measures demonstrate that the people of J&K are deprived of self-governance and have no control over their territory and natural resources. They cannot freely pursue their economic, social and cultural development. There is steady rise in the oppression and exploitation of Kashmiri people. Their fundamental rights and freedoms are violated with impunity. They have also no access to effective remedy. The people of Kashmir have lost hope and seem disappointed with India, Pakistan and the UNSC. India and Pakistan are using their proxies to promote their cases of accession but voices of independent J&K are growing. For any meaningful self-determination, the people of Kashmir should be given the third option as well, i.e. an independent and sovereign Kashmir in line with the General Assembly Resolutions 1541 and 2625. As the right to self-determination has acquired the status of a jus cogens, the international community has erga omnes obligations to assist the people of Kashmir to determine their status through a free and impartial plebiscite with three options: to have free association or integrate with India or Pakistan or be an independent sovereign state. without the third option, the exercise of the right to self-determination would be meaningless.

Section IV: Conclusion

After independence, India pursued its policy of organic unification to avert the grave threat of disintegration. All states joined India or Pakistan except Hyderabad; Junagadh and J&K. Hyderabad was invaded on 13 September 1947 and in 1949 its Ruler acceded to India under compelling circumstances. On 1 November 1947, India invaded Mangrol, part of Junagadh. On 9 November 1947,

Junagadh was invaded. A plebiscite was held on 20 November 1948 which resulted in favour of accession to India. Jammu and Kashmir was invaded on 27 October 1947 *before* the accession. A conditional accession was obtained under compelling circumstances from the Maharajah and under Article 370 an interim constitutional relationship was established with the Union of India in conformity with the terms of the Instrument of Accession. The condition of holding a free and impartial plebiscite has not been honoured. The limited autonomy under Article 370 has been systematically eroded over decades ending in its total abolition on 5 August 2019. Self-governance was frequently discontinued through Governor and Presidential Rule but on 9 August 2019 the status of J&K was relegated to a Union Territory replacing self-governance by direct rule through the Central Government. To change the demographic composition of J&K, i.e. to turn it into a non-Muslim majority state, Article 35A was abolished giving non-Kashmiris the right to settle in Kashmir. New domicile rules were also introduced allowing non-Kashmiri Indians to acquire permanent residence in J&K. Kashmiris are deprived of self-governance. Their territory dismembered and recategorized. Human rights of Kashmiris are violated on a large scale. They are oppressed and exploited. They are not allowed to develop economically, socially and culturally. As self-determination is a *jus cogens*, the international community has *erga omnes* obligation to assist Kashmiris in the realisation of their right to self-determination: to associate or integrate with Indian or Pakistan or be an independent sovereign state.