



From Response to Responsibility: Post-August 5 Condition of IOJK and International Community

Sardar M. A. Waqar Khan Arif

University of Kotli, Azad Jammu and Kashmir,

Email: sardarwaqarkhan@gmail.com

IJKS: Vol.3 – No. 1/2021

provides a forum for scientific exchange and public dissemination of up-to-date scientific knowledge on the Kashmir conflict, The IJKS is an independent, peer-reviewed, open-access journal.

The IJKS

The topics on which we concentrate—Kashmir conflict and violence—have always been central to various disciplines. Consequently, the journal encompasses contributions from a wide range of disciplines, including international affairs, political studies (geopolitics, political economy and other dynamics, diplomacy and public advocacy, law-based approaches, governance and economy (including micro and macroeconomics), self-determination, and other solidarity rights public international law (including human rights and humanitarian laws and intergovernmental organizations), criminology, economics, education, ethnology, history, political science, psychology, social anthropology, sociology. All articles are gathered in yearly volumes, identified by a QR Code in print volume with article-wise pagination. For more information, please visit www.prf.org

Suggested
Citation:

APA: Arif, K., Sardar. (2021). From Response to Responsibility: Post-August 5th Condition of IOJK and International Community. International Journal of Kashmir Studies, 5, 1-30.

Harvard: Arif, waqar, Sardar, 2021. Identity, From Response to Responsibility: Post-August 5th Condition of IOJK and International Community. International Journal of Kashmir Studies, 5: 1-30.



From Response to Responsibility: Post-August 5th Condition of IOJK and International Community

Sardar M. A. Waqar Khan Arif

Abstract

The legal status of Jammu & Kashmir has been significantly altered as India stripped it of its special status. The revocation of Article 370 sent shockwaves throughout the international community. Various states have repeatedly condemned the gross human rights violations in Kashmir, while China has urged Pakistan and India to ease tensions. In the backdrop, the valley has been arrested in force and fear since 1947. The Indian security forces as an occupying entity in Jammu & Kashmir have often clashed with civilians who have been picked up from their homes, forcefully relocated, or imprisoned without following the due process of law. The agreements agreed upon between Pakistan and India to solve the Kashmir dispute i.e., Simla Agreement and Lahore Declaration have been disregarded by India. The constitutional relationship of Jammu & Kashmir with India has also been overhauled arbitrarily. Legally, as per Section 7 of the Indian Independence Act (1947), the instrument of accession was to be solely ratified by the people of the disputed state through a referendum; however, to date, no referendum has taken place through the United Nations Security Council (UNSC) has repeatedly passed resolutions on the subject. To secure the rights of the people of Kashmir, there is an immediate need to take extraordinary measures by the international

community; as the annihilation of the people of Jammu & Kashmir by Indian forces must be stopped before it is too late. In this context, this paper argues that the UN must take emergency measures to save the lives of the Kashmiri people and to help them attain the right to self-determination for the people of Jammu & Kashmir as promised under the UN Resolutions. Analyzing the authenticity of post-August 5, legislation regarding Jammu & Kashmir, India has been identified as an occupying power and it must comply with the provisions of International Law. Finally, it is concluded that the international community must take steps for ensuring the promotion of basic rights of people Jammu & Kashmir and towards the fulfillment of all obligations as promised by the UNSC.

Keywords: Legislation in Jammu & Kashmir, Occupation, UN Resolution, Human Rights Violation, International Community.

Introduction

The state of Jammu and Kashmir, with an 80% Muslim population, was one of the princely states before the Partition of India in 1947. Geographically, it consisted of five regions, namely Kashmir Valley and Poonch with 90% Muslim majority, Jammu with 59% Hindu majority, Gilgit region predominantly Muslim, Ladakh overwhelmingly Buddhist, and Baltistan a Muslim majority.¹ In 1946, the Cabinet Mission Plan issued a statement that “paramountcy can neither be retained by the British Crown nor transferred to the new government” (paragraph 14). Under article 7 of the Indian Independence Act, 1947, the paramountcy was disposed of providing, “the suzerainty of His Majesty over the Indian States lapses”.² Under the said Act, two new dominions; Pakistan and India were established in August 1947. All the princely states were given a choice of accession to either of these new dominions.³ The state of

¹ James D. Howley, “Alive and Kicking: The Kashmir Dispute Forty Years Later,” *PSILR*, Vol. 9 No.1 (1991).

² Indian Independence Act, (1947).

³ Matthew J. Webb, “Escaping History or Merely Rewriting It? The Significance of Kashmir’s Accession to its Political Future,” *Contemporary South Asia*, (2012).

Jammu & Kashmir did not accede to either dominion, though it was claimed by India that the Instrument of Accession was signed by Maharaja Hari Singh but no documentary proof is available in this regard. Due to uncertainty in the region, a revolt began in Jammu and Poonch especially when Muslims were asked to leave their homes. In this respect, while reporting one such incident of revolt, Ian Stephens, former editor of the prestigious newspaper *The Statesman*, writes that: "... about half a million or so had almost totally disintegrated in the Autumn of 1947. About 200,000 simply vanished, being presumably butchered or killed by epidemics and exposure while seeking to get away; the rest had fled into Pakistani Punjab."⁴

As a result, the Maharajah requested India for military aid. In return, he was required to sign an instrument of accession of the State of Jammu & Kashmir. The Maharaja tried to accede for autonomy, however, the legal validity of accession is debatable and contested by various Scholars.⁵ On January 01, 1948, India took the matter to the UN for the solution. Subsequently, the UN formed the United Nations Commission of India and Pakistan (UNCIP) and issued various resolutions on the subject. In all those resolutions right of self-determination of the people of the State of Jammu & Kashmir was well recognized. These UN resolutions called for an UN-administered plebiscite.

The political discourse and power dynamics in Kashmir have changed after the abrogation of Article 370 by the Indian Government. The curfew was imposed effectively throughout the valley. There was an indefinite communications blackout with no possibility of using the internet or telecommunications.⁶ Restrictions were imposed on the locals and their rights were breached including

⁴ Ian Stephen, "Horned Moon," London: Chatto and Windus, (1953), p. 138.

⁵ Fozia N. Lone, "The Creation Story of Kashmiri People: The Right to Self-Determination," *The Denning Law Journal*, (2009), pp. 1-26.

⁶ Jefferson Gettleman and Suhasini Raj, India Revokes Kashmir's Special Status, Raising Fears of Unrest, (New York Times, 5th August, 2019), Online available at: <https://www.nytimes.com/2019/08/05/world/asia/india-pakistan-kashmir-jammu.html> (Last accessed: December 30, 2020).

freedom of movement and freedom of assembly. There were further infringements of civil, political, economic, social, and cultural rights. It is important to note that the presence of the military in large numbers is enough evidence for proving that IOJK is the highest militarized region around the globe.⁷ The valley witnessed coercive measures, killings, debilitating pellet injuries, unlawful detention and torture, sexual violence, enforced disappearances, etc. Members of civil society and international humanitarian agencies have documented and campaigned against some of the gravest forms of human rights violation in Kashmir.⁸ Such violations have been highlighted in the UN's report of July 2019. Indeed, the prolonged nature of occupation reflects an alarming situation in Kashmir.⁹ The indefinite curfew imposed in Kashmir in aftermath of Article 370 is an extension of a de-facto State of Emergency, with the consequence of placing more restrictions and shackles on Kashmiri people's basic rights; and the Indian Government's actions and orders seek to 'normalize' this very status quo.¹⁰

To understand the overall scenario of Kashmir's renewed occupation, this paper is divided into seven sections. The first section is introductory whereas the second highlights gross human rights violations in IOJK. Section three provides an analysis of post-5th August legislation and its effects; section four addresses prolonged occupation and obligations of occupying powers under international law; section five addresses responsibilities of the international community; and section six discusses a summary of the recent report about human rights in Jammu & Kashmir from August 2020 to January 2021. The final section is the concluding one.

⁷<https://www.moneycontrol.com/news/india/boxed-inside-kashmir-valley-with-130-security-civilian-ratio-4303011.html> (Last accessed: December 30, 2020).

⁸https://www.ohchr.org/Documents/Countries/PK/KashmirUpdateReport_8July2019.pdf(Last accessed: December 30, 2020).

⁹ Report of Amnesty International titled: "Impunity must end in Jammu and Kashmir", (April, 2001).

¹⁰ Report titled: 120 Days: 5th August to 5th December, published by Association of Parents of Disappeared persons (ADPD), (2019), p. 10.

Gross Human Rights Violations in IOJK

Gross human rights violations are committed in Jammu & Kashmir. It is the responsibility of the international community to protect civilians and to take special measures to stop these violations in Jammu & Kashmir. Violations that occurred have been listed below:

i. Reported Killings in IOJK

In 2019, more than 300 people were killed including members of armed forces and civilians. As per available reports, at least more than two hundred people were killed during the first six months of 2020 in Jammu & Kashmir. As a result of the outbreak of violence, many civilians were killed. Gross human rights violations were committed in this respect.¹¹

Table No. 1: Jammu & Kashmir Statistics from August 5, 2019, to June 30, 2020

Sr. No.	Human Rights Violations	Total Number
1	Total killed	352
2	Freedom fighters killed	196
3	Civilians killed	75
4	Indian occupying forces Killed	81
5	Total arrested	16,000-17,000
6	PSA detainees	662
7	Total cordon and search operations (CASO)	128
8	Houses damaged	800
9	Internet snapped	From August 5, internet

¹¹ Report titled: "Six Monthly Review of Human Rights Situation in Indian administered Jammu & Kashmir (January to June 2020), published by Jammu Kashmir Coalition of Civil Society & Association of Parents of Disappeared Persons, (July 1, 2020), p. 6.

		was completely suspended for 175 days, later only 2G service was restored and after February 15, 2Ginternet was again suspended at least 60 times.
--	--	--

Source: Report titled: Kashmir's Statehood Abrogated: Legal Fact-finding Report, jointly published by Institute of Policy Studies (IPS), Islamabad Legal Forum for Oppressed Voices of Kashmir (LFOVK), 4th August, (2020), p5.

ii. Destruction of Property and Search Operations

In line with human rights violations, collateral damage was reported in Jammu & Kashmir. It includes firing at houses, destruction of vehicles and animal shelters. During the last months of 2019 and at the beginning of 2020, Cordon and Search Operations (CASO) continued in J&K. Even during the COVID-19 pandemic various such operations were reported. in Pulwama, Kulgham, Shopian, and Anantnag districts of Jammu & Kashmir. Violent attacks and encounters had been recorded in the southern part of Kashmir, Baramulla, Kupwara, and north. These, among a few other districts, remained the worst affected areas in Kashmir.¹²

iii. Arrest and Detentions in IOJK

Under the following laws arrests and detention of the people in Jammu & Kashmir have been taking place:

Arrest and Detentions under Public Safety Act (PSA): In terms of arbitrary detentions, many cases were reported. Such detentions include arbitrary and administrative arrests in a widespread manner. The people targeted were civilians, politicians, civil society groups and children. During detention, it has been found that gross human rights violations were committed, and acts

¹² Report titled: "Six Monthly Review of Human Rights Situation in Indian administered Jammu & Kashmir (January to June 2020), published by Jammu Kashmir Coalition of Civil Society & Association of Parents of Disappeared Persons, (July 1, 2020), p. 610.

of violence, torture and inhuman treatment were recorded. Many of the victims have experienced cruel and degrading treatment during detention.¹³

It is important to note that politicians and administrators were arrested under PSA in terms of preventive detention. Although preventive detention is allowed by various laws, it has certain limitations/requirements to be fulfilled. Under international law, an arbitrary and administrative arrest is prohibited. Such detentions were carried out under the Public Safety Act (PSA), 1978, especially during the post-5th August era. According to one report, more than 3000 people were arrested under PSA.¹⁴ Numerous reports also claim that even children have been detained under the PSA.¹⁵ Before August 5, 2019 at least 144 children were arrested and also released on August 5, as indicated by the Department of State Police.¹⁶

i. Arrests and Detentions under UAPA

Arrests have also been made under the Unlawful Activities Prevention Act (UAPA). This law is a tool to curb dissenting and opposing views. As per provisions of UAPA, anyone can be arrested and declared a terrorist. It also empowers National Investigation Agency (NIA) and other similar agencies to investigate cases. An example in this regard is of two Kashmiri journalists who were investigated under UAPA and the Jammu & Kashmir police filed cases against them: Under section 13 of UAPA and section 5 of IPC they were taken into custody. Such acts amount to the violation of freedom of expression and press.¹⁷

¹³ Report of Amnesty International titled: Tyranny of a Lawless Law, (2019).

¹⁴ Report titled: 120 Days: 5th August to 5th December, published by Association of Parents of Disappeared persons (ADPD), (2019), p. 15.

¹⁵ Devjot Ghoshal and Alasdair Pal, Thousands detained in Indian Kashmir crackdown, official data reveals, Online available at: <https://in.reuters.com/article/india-kashmir-children/nine-year-old-among-nearly-150-children-briefly-held-in-kashmir-court-probe-idINKBN1WG472> (Last accessed: December 30, 2020).

¹⁶ Adil Akzher and Anathakrishna G, 144 minors were detained, Jammu & Kashmir admits to top court, Online available at: <https://indianexpress.com/article/india/144-minors-were-detained-jk-admits-to-top-court-6046447/> (Accessed: January 1, 2021).

¹⁷ Report titled: "Six Monthly Review of Human Rights Situation in Indian administered Jammu & Kashmir (January to June 2020), published by Jammu Kashmir Coalition of Civil Society & Association of Parents of Disappeared Persons, (July 1, 2020), p. 11.

ii. Presence of Military troops and Use of Excessive Force in IOJK

Under international law, the only necessary force can be used. However, excessive force has always been used against civilians in Jammu & Kashmir. In Budgam and Nasrullapura, forces including J&K police and Central Reserve Police Force (CRPF) have attacked civilians and raided villages.¹⁸ The presence of military troops in large numbers is also questionable in this respect.

iii. Internet Siege and Communication Blockade in IOJK

It is important to note that the internet blockade was started in August 2019 for 175 days and the curfew in Kashmir is the largest communication blockade in the world. Access to the internet and other technological sources was denied. A huge internet siege has been reported in J&K under which digital access and internet access have been completely denied at all levels.¹⁹

iv. Problems for Livelihood, Health, and Education

The livelihood of the people has been affected due to curfew and shutdown. More than 500,000 people have lost their jobs due to shutdowns; the consequences of which are very severe.²⁰ In terms of education, schools, colleges, and universities were locked because of the curfew. Many students were unable to attend college, school, or university. There is a huge academic loss marked by the shutdown. Similarly, in the health sector, people have suffered a lot. No facilities were being provided to the patients in the hospitals. As per Kashmir's 2019 mental health report, often young and teenagers have suffered, who were subjected to torture and abuse, in the form

¹⁸ Report titled: "Six Monthly Review of Human Rights Situation in Indian administered Jammu & Kashmir p14.

¹⁹ Report titled: Kashmir Internet Siege, published by Jammu Kashmir Coalition of Civil Society, 05-08-2019.

²⁰ Kashmir Chambers of Commerce and Industry (KCCI) estimates

of acute reaction to stress and post-traumatic stress disorder (PTSD).²¹

The right to access to justice has also been denied and a number of cases remained pending.²² Because of the lockdown, freedom of expression, speech, social participation, and assembly were restricted. It has left a devastating impact on the lives of people. The above-mentioned cases of gross human rights violations are significant for consideration by the international community. It is the need of the hour to protect Kashmiris and their rights.

Analysing Post-August 5, 2019 Legislation

The President of India introduced Order C.O 272 on August 5, 2019, in parliament unilaterally. Article 370 and 35-A of the Indian Constitution were amended. Following changes made in the Constitution of the Republic of India are important for consideration:

- a. All references to the ‘Government of Jammu & Kashmir’ would henceforth be construed as references to the ‘Governor of Jammu & Kashmir’;
- b. All references to the ‘Constituent Assembly of Jammu & Kashmir’ shall be construed as references to the ‘Legislative Assembly of Jammu & Kashmir. The Constitutional Order 1954 (Applicable to Jammu & Kashmir) was superseded with immediate effect.

This Act of the Indian Government has changed legal and political dimensions of J&K.²³ The abrogation of Article 370 and 35A has serious legal consequences as new legislation empowers Lieutenant General and limits the autonomy of Jammu & Kashmir. Section 96

²¹ Musthujab Makkolath. *Imprisoned Resistance: 5th August and its aftermath* October (2019).

²² Jammu & Kashmir Bar Association estimates

²³ Report titled: *Kashmir: A case of Prolonged Occupation*, published by Legal Forum for the Oppressed Voices of Kashmir, p. 11.

of the Jammu & Kashmir Reorganization Act 2019 ordered the application of 37 central laws envisaged in the Concurrent List to the newly formed Union Territories (UTs). The order notifies changes in the Jammu & Kashmir Civil Services Decentralization and Recruitment Act (hereafter, Civil Services Act), which defines domicile for employment in the region. With the abrogation of Article 370, a total of 106 central laws are effective in the Union Territory of Jammu and Kashmir. These include the Prevention of Corruption Act, the National Commission for Minorities Act, and the Land Acquisition Act.

Jammu & Kashmir Reorganization (Adaptation of State Laws) Bill 2019

It states that Jammu & Kashmir will be split into two union territories namely, Jammu & Kashmir and Laddakh. These would have their own legislative assemblies. However, the Indian parliament may extend federal/central laws to Jammu & Kashmir subject to article 93.²⁴ It is important to note that jurisdiction of other subjects has been extended, such as the Indian Penal Code and CrPC. Another development is specific to the right to information that replaced the previous Information Act of 2009. In Jammu & Kashmir, various organizations have highlighted that such territories do not have human rights commissions and there are chances of violations of human rights a large scale. This alarming situation is highlighted by Commonwealth Human Rights Initiative²⁵ and United Nations Human Rights Commission (UNHRC). Gross human rights violations may be committed even to children and women without oversight and monitoring.²⁶

²⁴ The Jammu & Kashmir Reorganization Bill, No. XXIX (2019)

²⁵ Venkatesh Nayak, "MHA confirms restrictions in Jammu & Kashmir are only in the mind: RTI reveals it has no papers about shutdown orders even as Kerala High Court says internet access is a fundamental right," CHRI, 6 October, (2019). Online available at: <https://www.humanrightsinitiative.org/blog/mha-confirms-restrictions-in-jk-are-only-in-the-mind-rti-reveals-it-has-no-papers-about-shutdown-orders-even-as-kerala-high-court-says-internet-access-is-a-fundamental-right> (Accessed: January 1, 2021).

²⁶ Prashasti Awasthi, "Awasthi, Centre To Wind Up Human Rights And Information Commission In Jammu And Kashmir," *The Logical Indian*, October 25, (2019), <https://thelogicalindian.com/news/jammu-kashmir-human-rights-shutdown> (Accessed: January 1, 2021).

Domicile Certificate (Procedures) Rules, 2020

The Ministry of Home Affairs has introduced a new domicile rule under Section 96 of the Jammu & Kashmir Reorganization Act, 2019.²⁷ The focus is on the permanent residence of people in the territory. The citizenship directions of the Indian government will be followed for the issuance of Domicile Certificate (DC).²⁸ The new law covers four key areas, i.e. (i) who is eligible for DC and what rights entail; (ii) who will be competent authority to issue the DC; (iii) the time frame of its issuance, and (iv) the penalty awarded to the concerned official who fails to issue it within the time frame allotted.²⁹ As per new legislation, anyone can apply for a Domicile Certificate, such as migrants, central employees, members of Indian armed forces personnel. Even they can buy or sell land and apply for employment.³⁰ It is important to note that before the legislation of new laws, there were specific/limited seats reserved for central government employees.³¹ The people in Jammu & Kashmir are required to convert their Permanent Residence to a new Domicile Certificate. However, outside Jammu & Kashmir, people have easier way to apply for citizenship in union territories. There is a requirement of proving residence for 15 years or education of 7 years. The children of people who have served for 10 years in the region may also apply. The concerned Tehsildar has been empowered to furnish Domicile Certificate within 15 days; otherwise, he is required to face a penalty amounting to 50,000 rupees.³² As per Section 60 of the Jammu & Kashmir Reorganization Act 2020, the seats have been increased.³³

²⁷ Hamid Rather, "Kashmir 'Pushed' to Pre-Hari Singh Era Due to New Domicile Rules?" *The Quint*, April 21, (2020), <https://www.thequint.com/voices/blogs/jammu-kashmir-abrogation-article-370-new-domicile-rules-pre-raja-hari-singh-era-rights> (Accessed: December 25, 2020).

²⁸ "What does the Domicile Law Mean for Kashmir?", AlJazeera, June 13, (2020), <https://www.aljazeera.com/programmes/thestream/2020/06/domicile-law-kashmir-200610143308394.html> (Accessed: January 1, 2021).

²⁹ Shakir Mir, "Jammu & Kashmir Govt's New Domicile Certificate Rules a Move to Undercut Resistance from Kashmiri Officials?", *The Wire*, 19 May, (2020), <https://thewire.in/law/kashmir-domicile-certificate-rules> (Accessed: January 1, 2021).

³⁰ Mudasar Ahmad and Pallavi Sareen, "New Domicile Law Opens Jammu & Kashmir State Jobs for Outsiders, Lowest Grade Jobs Reserved for Locals," *The Wire*, 1 April, (2020), <https://thewire.in/government/jk-domicile-law-jobs-centre> (Accessed: December 30, 2020).

³¹ Jammu & Kashmir Grant of Domicile Certificate Procedure Rules, (2020).

³² Jammu & Kashmir Grant of Domicile Certificate Procedure Rules, (2020).

³³ Azaan Javaid, "Modi govt redefines Jammu & Kashmir domicile rule, extends it to those who have lived in UT for 15 yrs," *The Print*, April 1, 2020, <https://theprint.in/india/modi-govt-redefines-jk-domicile-rule-extends-it-to-those-who-have-lived-in-ut-for-15-yrs/392596> (Accessed: January 1, 2021).

In this context, such rules have been criticized and condemned by the international community, legal scholars, civil society, and individuals. With the demographic changes, the Muslim majority will be converted into a minority within Jammu & Kashmir which is in violation of the provisions of international law. Under article 7 of the Rome Statute, 1998, amounts to a crime of aggression. Under Article 8(2)(b)(viii) of the Act, such an attempt amounts to a war crime. It is also in violation of the Geneva Conventions of 1949.

Other New, Amended, and Repealed Laws Post August 5, 2019

The other amended laws post-August 2019 are as follows:

Jammu & Kashmir Education Investment Policy 2020

According to the new Education Policy 2020,

The government intends to give due preference to reputed players in the field of education willing to set up universities in Jammu & Kashmir. The government will facilitate allotment of land in union territories from the specified available land bank and will coordinate with the concerned departments for required approvals and clearances to facilitate the process of setting up educational institutes. Now private investors from outside J&K will be incentivized to set up educational institutions.³⁴

The other laws which were repealed due to abrogation include media laws and real estate laws.³⁵

³⁴ Report titled: "Six Monthly Review of Human Rights Situation in Indian administered Jammu & Kashmir (January to June 2020), published by Jammu Kashmir Coalition of Civil Society & Association of Parents of Disappeared Persons, (July 1, 2020), p. 15.

³⁵ Report titled: "Six Monthly Review of Human Rights Situation in Indian administered Jammu & Kashmir, p. 16.

Table No. 2: Pre-Abrogation and Post Abrogation of Article 370 and 35-A

S.No	Pre-Abrogation	Post-Abrogation
1	Special Powers exercised by Jammu & Kashmir Assembly	No Special Powers
2	Dual Citizenship	Single citizenship
3	Separate flag for Jammu & Kashmir	No two flags
4	Article 360 (Financial emergency) is not applicable	Center can Declare financial emergency under article 360
5	No reservations for minorities such as Sikhs and Hindus	Minorities will be eligible for 16% reservation
6	Indian citizens from other states cannot buy land in Jammu & Kashmir	People from other states can now purchase land in Jammu & Kashmir
7	Duration of Assembly is 6 years	5 years Duration
8	If a woman from Jammu & Kashmir marries out of state, she would lose the citizenship of that state	If a woman marries out of state or country, she will still retain all her rights and citizenship
9	Central laws will not directly apply	Central laws will directly apply
10	Police will be managed by Jammu & Kashmir administration	Police will be managed by Center

The next section is specific to the case of prolonged occupation as Jammu and Kashmir have been under Indian occupation since 1947. It provides an analysis of the definition and obligations of the occupying powers under international law.

Prolonged Occupation and Obligations of the Occupying Powers

As prolonged occupation exists in Jammu & Kashmir, this section highlights the phenomenon of prolonged occupation and the impression of violations of the provisions of international law. It also analyses the obligations of the occupying powers under international law.

i. Prolonged Occupation

There is no specific definition of occupation in international law. However, the relevant provisions of Hague Regulations and Additional Protocol-I of 1977 are discussed here. The legal basis of the term occupation can be derived from these provisions. The purpose of the Geneva Conventions of 1949, Additional Protocols of 1977, and provisions of Hague Regulations create balance among the occupying powers, the occupied people, and the Civilians. Article 42 of Hague Regulations provides that: “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”³⁶

Thus, the criteria developed by international law is that effective control must be established and exercised. From the definition, it can be deduced that occupation is a temporary phenomenon whereas in the case of Jammu & Kashmir prolonged occupation exists. Under provisions of the said laws even during the occupation, the occupying powers are required to follow the law in letter and spirit.

ii. Breach of the Provisions of International Law

The provisions reflect that occupation must be temporary in nature and in case of necessity it can take place. Occupation is permitted only as an exceptional case and it can be there for temporary purposes only. In the case of Jammu & Kashmir, people are

³⁶ Article 42 of Hague Regulations, (1907).

struggling for the exercise of their right to self-determination (RSD). The RSD is well recognized under international law and is a basic human right that cannot be snatched away in any context.

Legal scholars, in their assessments, hold that India's prolonged occupation in IOJK amounts to violation of the provisions of International Humanitarian Law (IHL), International Law of Occupation (ILOC), International Criminal Law (ICL), and International Human Rights Law (IHRL). The actions of the military in IOJK amount to a breach of peremptory norms of international law. India has occupied Jammu & Kashmir merely on the basis of repression and control through systematic abuse of Kashmiri rights. These abuses include prolonged occupation, unlawful killings, restrictions on movement and assembly, forced disappearances, and arbitrary arrests.³⁷ All such acts are violations of provisions of international law.

Obligations of the Occupying Powers under International Law

Under international law, the occupying powers are required to follow the law in all cases. The occupying powers are required to take all measures in order to ensure and restore the maintenance of public order and safety in occupied territory.³⁸ The occupying power may modify certain laws in connection and make laws in conformity with the Geneva Conventions of 1949 in an occupied territory.³⁹ In all circumstances benefit of the occupied/local people and civilians is significant for consideration by the occupying power. The occupying powers do not have sovereign power over the territory, but it is administrative power. The occupying powers are required to administer an occupied territory subject to the provisions of international law. The other obligations and prohibitions on the occupying powers include: “the obligation to provide basic needs of protected population; the obligation to facilitate humanitarian aid by

³⁷ Report titled: Kashmir" A Case of Prolonged Occupation, Published by Legal Forum for the Oppressed Voices of Kashmir, p. 14.

³⁸ Article 43 of The Hague Regulations, (1907).

³⁹ Article 64 of Geneva Convention-IV, (1949).

third actors; the strict prohibition on transferring your own population into the occupied territory; the strict prohibition on forcible transfer of the protected population, while allowing for temporary evacuation for military operations; the obligation to respect private property and the destruction of property is prohibited except where rendered absolutely necessary for military operations”.

The rules of IHL apply in terms of the protection of the rights of the civilians. GC-IV specifically relates to civilians. In certain circumstances, the provisions of IHL and IHRL apply in a parallel manner.⁴⁰ Any kind of destruction of property by the occupying power is prohibited unless for military operations. Holy places, schools, hospitals etc. cannot be targeted.⁴¹ The civilians have right to access to justice in all circumstances. The occupying powers are required to respect this right as established by Geneva Conventions on the occupied people.⁴² Under the provisions of IHL, transfer or deportation of people to other places is prohibited.⁴³ Children cannot be denied care and education and their status and institutions must be protected by the occupying power.⁴⁴ The occupying power is not allowed to make demographic changes in occupied territory by use of force or by relocating civilians to other places; however, post-August, 2019 the acts of the Indian government amount to a violation of these provisions of IHL. Medical supplies and basic necessities including food, clothing, and shelter cannot be denied and must be provided by occupying power to the civilians. The religious worship or visit to worship places cannot be prohibited.⁴⁵

As per article 1 of International Covenant on Civil and Political Rights (ICCPR), 1966 and International Covenant on Economic, Social, and Cultural Rights (ICESCR), 1966 the RSD of the Individuals is well recognized. The occupying powers are required

⁴⁰ Arts. 47–78 of Geneva Convention-IV, (1949) and Arts. 63, 69, 72–79 of Additional Protocol-I, (1977).

⁴¹ Article 53 of Geneva Convention-IV, (1949).

⁴² Articles 47, 54 and 64-75 of Geneva Convention-IV, (1949).

⁴³ Article 49 of Geneva Convention-IV, (1949) and Rule 130 of the 2005 ICRC customary IHL study

⁴⁴ Article 50 of Geneva Convention-IV, (1949).

⁴⁵ Articles 55 and 58 of Geneva Convention-IV, (1949). Article 69 of Additional Protocol-I, (1977).

to respect, promote, protect and fulfill the RSD of the people. In Jammu & Kashmir, the RSD of the people has been recognized in UN resolutions. The occupying powers in occupied territory have IHL as well as human rights obligations as marked by the International Court of Justice (ICJ) in its Advisory opinion concerning Palestine's territory;⁴⁶ Indian Government has same obligations regarding J&K. The European Union (EU) has also defined duties on EU member states regarding non-assistance in the occupation and non-recognition of annexation of territory. The member states have obligation to put an end to the occupation (if any) and in case of violation, sanctions can be imposed by another state through intervention.⁴⁷

The situation in IOJK is quite alarming and this prolonged occupation must be put to an end as India exercises effective control over there. The presence of military troops in large numbers (approximately 900, 000) and implementation of central laws without the consent of the locals and their representatives is in violation of the provisions of international law. It is argued that in this context, the international community must play an effective role in the solution.⁴⁸ Though India is not a party to Hague Regulations, it does not mean that obligations are not there. These obligations are widely accepted by State parties and even those who have not ratified, are bound by these obligations as such obligations have the force of Customary International Law (CIL).⁴⁹ The next section discusses the role and responsibilities of the international community for the resolution of the Kashmir dispute.

⁴⁶ Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), 9 July, (2004).

⁴⁷ European Parliament, Directorate General for External Policies, Occupation/annexation of a Territory: Respect for International Humanitarian Law and Human Rights and Consistent EU Policy, (2015).

⁴⁸ Muhammad Oves Anwar, Sovereign Title, Occupation and War Crimes: An International Law Perspective on Kashmir, 16 October, (2019).

⁴⁹ Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), 9 July, (2004).

Role and Responsibilities of International Community

Though the UN has played its role in the resolution of the Kashmir dispute through resolutions still the matter is unresolved. In this respect, this section explains the role of the international community and its responsibilities.

i. Role of International Community

The situation in IOJK is quite alarming. In this context, various international organizations have highlighted the issue. The Geneva Watch has published a report indicating that there is a possibility of genocide in IOJK. The UNHCR has highlighted grave breaches and violations in IOJK. The UN Secretary-General has also given statements and urged India to stop curfews and blockades in IOJK. Amnesty International has also highlighted and condemned gross human rights violations in IOJK.⁵⁰

As far as the abrogation of articles 370 and 35A are concerned, the spokesperson of the UN has stated that the latest restrictions imposed in IOJK are deeply concerning and "will exacerbate the human rights situation".⁵¹ However, UN Chief Antonio Guterres has asked Pakistan and India to maintain peace in the region and asked for maximum restraint.⁵² A joint communication was issued by the UN experts on arbitrary detention; enforced/involuntary disappearances; extrajudicial, summary or arbitrary executions; freedom of opinion and expression; freedom of peaceful assembly and of association; and human rights advocates regarding the restrictions imposed on August 20, 2019. The violations of right to life and other basic human rights have been condemned. Through

⁵⁰ Conference Report titled: "Kashmiri Freedom Struggle - A Full Spectrum Review after Illegal Indian Annexation on 5th Aug" Organized by Center for Global & Strategic Studies (CGSS), Islamabad in collaboration with University of the Punjab, Lahore on October 8, (2019).

⁵¹ <https://www.bbc.com/news/world-asia-india-49273999> (Accessed: January 2, 2021).

⁵² <https://www.tribuneindia.com/news/nation/un-chief-recalls-simla-agreement-appeals-to-india-pak-for-restraint/815426.html> (Accessed: December 30, 2020).

press release dated August 22, 2019, India was urged to end curfew and communication blockade in Jammu & Kashmir.⁵³

In this regard, the UN High Commissioner, Michelle Bachelet, has expressed deep concern on the situation of Jammu & Kashmir in her opening address on 9th September 2019 at the 42nd UN Human Rights Council in Geneva.⁵⁴ On 27th September 2019, Pakistan's Prime Minister Imran Khan, in his speech before the UN General Assembly in New York, castigated India for its crackdown on innocent Kashmiris.⁵⁵

ii. Responsibilities of International Community

Under the provisions of international law, it is well established that all people are born free and equal in their dignity and rights. The RSD and other rights are also protected. The international community has a responsibility in connection to the resolution of the Kashmir conflict/dispute. It is argued that the international community can play an effective role in the resolution of the Kashmir dispute by taking special and progressive measures. The responsibilities in this regard are as follows:

- i. It must play an effective role in the implementation of UN Resolutions on Kashmir.
- ii. It must play an effective role in the protection of people in Jammu & Kashmir who are under prolonged occupation.
- iii. Special efforts are needed by member states to take special measures in order to control the current situation.
- iv. The UN peacekeeping mission may be recommended in Jammu & Kashmir as in other countries.

⁵³ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24909&LangID=E>

⁵⁴ <https://news.un.org/en/story/2019/09/1045862> (Accessed: January 2, 2021).

⁵⁵ <https://www.nytimes.com/2019/09/27/world/asia/khan-modi-united-nations.html> (Accessed: December 30, 2020).

- v. To ensure that the people of Jammu and Kashmir be able to freely express their will about the resolution of the problem.
- vi. There is a need to take special steps for repealing draconian laws like PSA, 1978 and Armed Forces Special Powers Act, 1990 imposed in Jammu and Kashmir.
- vii. There is a need to take steps to demilitarize Jammu & Kashmir.
- viii. The international community must play its effective role in considering the aspirations of the people of Jammu & Kashmir through open communications and dialogue; for the enforcement of law in its true sense and for the domestication of the provisions of international law in India.
- ix. The ICJ and other similar forums may initiate cases against the occupying powers in IOJK who are committing grave breaches, crimes against humanity, and war crimes.
- x. Currently enforced laws are required to be reviewed and illegal safeguards provided under such laws must be checked and human rights violations be prevented in IOJK.
- xi. The will of Kashmiris may be taken into consideration. Anything contrary to the wishes of the people must not be implemented.
- xii. The Indian government cannot commit such gross human rights violations without them having to face any consequences.
- xiii. The numerous instances of alleged killings, tortures, rapes, and vandalism committed by the armed forces call for an investigation and those responsible for such actions assigned.

Contemporary Situation of Human Rights in Jammu & Kashmir: August 2020-January 2021

A report has highlighted the current situation of human rights in J&K that since August 4, 2019, systematic violations continue in J&K. The right to health, education, employment, and other human rights have been violated. The violation of 33 basic human rights has been identified in the August 2020 report.⁵⁶ Under Section 144 of CrPC, freedom of assembly is prohibited and detentions continue. Most of the people are under preventive detention. As far as employment is concerned, due to lockdown unemployment is 16.6 percent.⁵⁷ Women have suffered a lot and domestic violence has increased at length.⁵⁸ As per the report civilians' rights to life, liberty, and property are being violated. According to statistics developed by the South Asia terrorism portal (SATP) at least 15 civilians' fatalities are there since August 2020.⁵⁹ The other acts include Harassment of civilians by government forces and destruction of property.

Violations of Civil and Political Rights

Following civil and political rights have been taken away in J &K:

Arrests and detentions

The union minister of the state of Home Affairs, G. Kishan Reddy, has answered a question that 183 persons remained under detention in Jammu & Kashmir as of February 2021. Mr. Altaf Ahmed Wani (former member of the Legislative Assembly) was not allowed to

⁵⁶ Report titled: Human Rights in Jammu and Kashmir: Mid-Term Report August 2020-January 2021, published by The Forum for Human Rights in Jammu and Kashmir, (2021), p. 4.

⁵⁷ Centre for Monitoring the Indian Economy (CMIE), Unemployment rate in India, <https://unemploymentinindia.cmie.com/kommon/bin/sr.php?kall=wshowtab&tabno=0002>. (Accessed: February 15, 2012).

⁵⁸ Jammu & Kashmir Police website, 'Women Police Stations', <http://www.jkpolice.gov.in/Women-Police-Stations>. (Accessed: February 15, 2012).

⁵⁹ South Asia Terrorism Portal, 'Fatalities Data sheet- Jammu & Kashmir, 2020', <https://www.satp.org/datasheet-terrorist-attack/fatalities/india-jammukashmir>. (Accessed: February 13, 2012).

travel until March 2021.⁶⁰ At least 33 politicians were denied traveling and boarding.⁶¹

Ban on Gatherings

Though, as mentioned in the August 2019-July 2020 report, it is important to note that the Supreme Court laid out specific guidelines under which a Section 144 order could be imposed in its judgement in *Anuradha Bhasin v Union of India*, requiring that Section 144 orders be reasoned, published and invoked only in urgent cases of perceived danger. However, restrictions continue at different incidents. Freedom of assembly was restricted in institutions as well.⁶²

Mental Health and Healthcare System during Covid-19

The shortcomings in healthcare infrastructure have affected lives of the people.⁶³ In relation to suicides in Jammu & Kashmir, 390 cases have been reported in 2020. This number has increased to 284 in 2019.⁶⁴ Due to high levels of depression and anxiety, unemployment rate has also increased in J & K.⁶⁵ According to a study in the *Journal of Psychology and Psychotherapy* “Unemployment increases the psychological toll on families and can also increase stress and other negative effects of families which can exacerbate

⁶⁰ *The Wire*, ‘Former National Conference MLA Prevented From Boarding Flight To Dubai’, November 14, 2020, <https://thewire.in/rights/former-national-conference-mla-altfa-kuloo-prevented-flight-dubai>. (Accessed: February 13, 2012).

⁶¹ *The Free Press Journal*, ‘33 in list of Jammu & Kashmir leaders barred from flying abroad’, November 14, 2020, <https://www.freepressjournal.in/india/33-in-list-of-jk-leaders-barrd-from-flying-abroad>. (Accessed: February 15, 2012).

⁶² *Greater Kashmir*, ‘10th, 12th exams: DM Baramulla imposes restrictions under section 144 CrPC around test centres’, September 19, 2020, <https://www.greaterkashmir.com/news/latest-news/10th-12th-exams-dm-baramulla-imposes-restrictions-undersection-144-crpc-around-test-centres/>. (Accessed: February 12, 2012).

⁶³ Report titled: Human Rights in Jammu and Kashmir: Mid-Term Report August 2020-January 2021, published by The Forum for Human Rights in Jammu and Kashmir, (2021), p. 31.

⁶⁴ Zeenish Imroz, ‘Crisis Teams can counter surging suicides in Kashmir, Psychiatrist says’, *The Kashmir Observer*, November 10, 2020, <https://kashmirobsvr.net/2020/11/10/crisis-teams-can-counter-surging-suicides-in-kashmir-psychiatrist-says/>. (Accessed: February 12, 2012).

⁶⁵ Centre for Monitoring the Indian Economy (CMIE), Unemployment Rate in India, <https://unemploymentinindia.cmie.com/kommon/bin/sr.php?kall=wshowtab&tabno=0002>. (Accessed: February 12, 2012).

one's overall mental health".⁶⁶ The *Ayushman Bharat National Health Insurance*, an online health insurance scheme was introduced but majority was unable to avail it because of communications blockade.⁶⁷ The travel of the patients has been barred on various occasions in different capacities.⁶⁸ The healthcare system was disturbed due to Covid-19 and it has left shocking effects on the lives of people in relation to health.⁶⁹

Employment

The rate of unemployment in Jammu & Kashmir is almost twice the all-India rate. Restrictions were strictly imposed on various groups and workplace environment had been disturbed due to curfews. These groups include university employees, forest corporation employees, village defense committee members, teachers, engineers, home guards, hospital workers, daily wagers, and non-migrant Kashmiri pandits.⁷⁰

Media and Press

After the release of the new media policy in May 2020, the use of psychological scare tactics on media personnel through physical assault,⁷¹ summons and harassment under various charges, administrative seizure of assets during raids, sealing of newspaper

⁶⁶ Mushtaq Ahmad Bhat, Dr. Jyotsna Joshi, 'Impact of Unemployment on the Mental Health of Youth in the Kashmir Valley', *Journal of Psychology and Psychotherapy*, (2020) Volume 10, Issue 4, <https://www.longdom.org/open-access/impact-of-unemployment-on-the-mental-health-of-youth-in-the-kashmir-valley-53863.html>. (Accessed: February 12, 2012).

⁶⁷ Kamala Thiagarajan, 'Why Doctors And Medical Journals Are Fighting Over Health Care In Kashmir', NPR, August 30, 2019, <https://www.npr.org/sections/goatsandsoda/2019/08/30/755853835/why-doctors-and-medical-journals-are-fighting-over-health-care-in-kashmir>. (Accessed: February 13, 2012).

⁶⁸ Report titled: Human Rights in Jammu and Kashmir: Mid-Term Report August 2020-January 2021, published by The Forum for Human Rights in Jammu and Kashmir, (2021), p. 29.

⁶⁹ *Kashmir Times*, 'No health institution of Kashmir upgraded to IPHS Level: CAG', September 30, 2020, <http://www.kashmirtimes.com/newsdet.aspx?q=105243>. (Accessed: February 13, 2012).

⁷⁰ Report titled: Human Rights in Jammu and Kashmir: Mid-Term Report August 2020-January 2021, published by The Forum for Human Rights in Jammu and Kashmir, (2021), p. 38.

⁷¹ *Kashmir Times*, '3 Journalists Thrashed By Police Near Encounter Site In Pulwama', 16 September 2020, <http://www.kashmirtimes.com/newsdet.aspx?q=104836>. (Accessed: February 12, 2021).

offices, illegal detentions, withdrawing advertising and militant hit-lists of journalists alleged to be on the Indian government payroll.⁷²

Conclusion

From the above discussion and data analysis, it is concluded that human rights violations in Jammu & Kashmir continue to date. In the post-August 5 scenario, the acts of insurgency, preventive detention, illegal detention and arrests, denial of a speedy and fair trial, and ignoring the political, economic, and socio-cultural rights of the Kashmiris are all violations of the provisions of international law.

The PSA and UAPA are in full force in Jammu & Kashmir and under such laws gross human rights violations have been committed. Indeed, the occurrences of August 5, 2019, began a process of demographic changes in the valley. The arrests and detentions without any legal justification violate the norms of international law. While implementation of laws and changes in previous laws have affected the public at large; for instance, a new domicile policy will reduce the Muslim population within J&K. Similarly, land rights of the people are being violated.

The ban on connectivity and imposition of curfews has profound negative implications for public health, causing trauma and stress among the residents of J&K. The impunity of armed and other forces in the name of 'maintain law and order' must be stopped by the international community and the provisions of international law must be practiced in letter and spirit.

The RSD of the Kashmiri people has been recognized by the UN; however, the implementation of RSD is still a big challenge. The use

⁷² Azaan Javaid 'FIR against website for accusing Kashmir journalists & activists of being on 'Indian payroll', *The Print*, October 4, 2020, <https://theprint.in/india/fir-against-website-for-accusing-kashmir-journalists-activists-of-being-on-indianpayroll/516290/>; *Kashmir Times*, 'FIR Against URL Handler for Propaganda Posts: Police', October 4, 2020, <http://www.kashmirtimes.com/newsdet.aspx?q=105325>. (Accessed: February 13, 2021).

of excessive force and violations of human rights in Jammu & Kashmir have attracted the attention of the international community. The international community now more than ever must play an effective role in the resolution of the Kashmir dispute. Special measures may be taken for the implementation of RSD as recognized by the UN. The blatant abuse of power, the violent aggression, and extreme forms of abuse (physical, sexual, and emotional) unleashed on the Kashmiri people has caused deep and destructive trauma that may take generations to heal.