

## RAPE, IMPUNITY AND JUSTICE IN KASHMIR

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*This article focuses on rape by security forces in the Indian-administered state of Jammu and Kashmir and the question of accountability and justice for sexual crimes committed by State forces in the Kashmir Valley. Moving beyond the 'violence against women' frame, the instrumental use of rape by security forces as a cultural, political and psychological weapon of war is highlighted, as is the denial of institutional justice for the same. The suggestion here is that the question of justice for sexual crimes by state forces in Kashmir must be situated within the overarching context of the abuse of power by executive and military authority, and the unquestioned subversion of local civil and judicial authority. This particular institutional setting and policy it is further argued, justifies the case for international legal intervention in Kashmir. The Indian's state's claim to jurisdiction over the territory of Kashmir is assessed with reference to international law; the universality of the legal principle of self-determination is emphasised, as is the salience of international law regarding sexual crimes by state forces. Drawing upon Kashmir's international legal dimensions in general and its legacy of rape by security forces in particular, the article concludes by advancing a single moral argument for Kashmiri self-determination.*

### I. BACKGROUND

This article focuses on rape by security forces in Kashmir and the question of justice for sexual crimes committed by State forces against Kashmiri women. For reasons of clarity and consistency I use the term 'Kashmir' to refer to the Valley of Kashmir - also the location of the present conflict. The term 'Jammu and Kashmir' is used to connote the Indian-administered state of Jammu and

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Kashmir (IJK). There are two dimensions of the conflict in IJK: the first relates to the competing claims of India and Pakistan regarding territorial jurisdiction over Kashmir; the second concerns the dispute between the Indian State and the people of IJK. This article focuses on the latter.

Kashmir, or the Valley of Kashmir, was part of the former Princely State of Jammu and Kashmir. Princely States were not part of British India<sup>1</sup> and their option upon British withdrawal from the subcontinent was restricted to joining one of the two successor states of India or Pakistan. Without diverging into the dispute between India and Pakistan over the territory of Kashmir, suffice to state here that developments<sup>2</sup> within the former Princely State in 1947 and the signing of a provisional Instrument of Accession by the then ruling monarch Maharaja Hari Singh prompted war between both the newly-established states. Upon cessation of military hostilities a United Nations (UN) supervised ceasefire line or Line-of-Control (LOC) divided the territory of the erstwhile Princely State between Indian-administered Kashmir (comprising the Kashmir Valley, Jammu and Ladakh) and Pakistan (Azad Kashmir, Gilgit and Baltistan). This territorial division of Kashmir achieved militarily by India and Pakistan continues to the present day even though it was never endorsed by the people of Kashmir.

Having acquired control over the territory of Kashmir without the consent of its people, the Indian State reneged on its promise to the United Nations to hold a plebiscite in the erstwhile Princely State in order to ascertain the will of its people.<sup>3</sup> The betrayal was compounded by India's abrogation of IJK's autonomy

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1 Princely States were not governed directly by British colonial authority. They were British protectorates under the control of their respective hereditary monarchs. On the eve of independence in 1947, there were a total of 565 Princely States in the subcontinent.

2 For a fuller discussion regarding developments within the Princely State before its accession to India see CHRISTOPHER SNEDDON, *KASHMIR: THE UNWRITTEN HISTORY* 41-57 (Harper Collins, 2013).

3 On November 2, 1948, Prime Minister Jawaharlal Nehru said: "We have declared that the fate of Kashmir is ultimately to be decided by the people. That pledge we have given, not only to the people of Kashmir but to the world. We will not, and cannot back out of it." Jawaharlal Nehru, broadcast to the nation over All India Radio. In a letter dated September 11, 1951, to the U.N. representative, Nehru wrote: "The Government of India not only reaffirms its acceptance of the principle that the question of the continuing accession of the state of Jammu and Kashmir to India shall be decided through the democratic method of a free and impartial plebiscite under the auspices of the United Nations but is anxious that the conditions necessary for such a plebiscite should be created as quickly as possible." See Arundhati Roy, *They can file a charge posthumously against Jawaharlal Nehru too: Arundhati Roy*, THE HINDU, November 28, 2010.

that it was constitutionally bound to protect.<sup>4</sup> Kashmiri resentment at this dual injustice deepened over the decades, especially in the wake of repeated subversions of local democratic process in IJK by successive central governments in New Delhi. A continuing costly and ruinous India-Pakistan military and nuclear rivalry over Kashmir with nothing to offer its people served to eclipse local Indian tyranny in Kashmir.

By 1989-90 simmering resentment transformed into mass rebellion in favour of Kashmiri independence. IJK witnessed a militant-led armed revolt by Kashmiri Muslims in the Kashmir Valley. The rebellion was the outcome of accumulated popular anger at a history of fraudulent elections, the violation of constitutional provisions protecting Kashmir's autonomy, the stifling of institutional channels of dissent, the suspension of civil liberties, and repression against political dissidents. Kashmir's movement for freedom from Indian rule drew widespread popular support and succeeded in challenging the authority and legitimacy of the Indian State in Kashmir, yet it was greatly compromised by Pakistani support for militant factions associated with the rebellion. The Pakistan dimension transformed an essentially political dispute between the Indian State and the Kashmiri people into a wider India-Pakistan military confrontation in IJK, completely overshadowing its local indigenous origins and international legal dimensions. Pakistan's support for the rebellion was a violation of international law; it was also paradoxical in that instead of achieving its intended objective of wresting control of the Kashmir Valley from India, the Pakistani intervention provided India the opportunity to disclaim all responsibility for the rebellion and in turn represent it as a Pakistan-

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4 Article 370 of the Indian Constitution guaranteed IJK autonomy. Indian jurisdiction in Kashmir was limited to the three areas of defence, foreign affairs and currency. Kashmir had a separate constitution, its own Constituent Assembly and Sadr-e-Riyasat (head of State). Over the decades a series of Presidential orders from the central government abrogated and eroded Article 370 substantively with the result that Kashmir came to be governed from and by New Delhi than by the Kashmiris themselves. From 1954 to 1994, 47 orders were made by the President of India unconstitutionally extending to Kashmir 94 of the 97 entries in the Union List and 260 of the 395 articles of India's constitution. See A.G. Noorani, *Kashmir Question*, DAWN (Karachi), June 14, 2014, <http://www.dawn.com/news/1112545>.

*instigated* conspiracy against the Indian State. Both states continued to engage in a nebulous military confrontation in Kashmir.

Of far graver consequence than the India-Pakistan rivalry over the territory of Kashmir was India's extraordinarily repressive counter-offensive *within* IJK. Unable to stem the tide of popular anger through legal means, the Indian State relied on a policy centred on massive military mobilisation<sup>5</sup> and unrestrained repression to crush the rebellion. Prof William Baker, an academic and human rights scholar who visited the Valley summed up the nature of the Indian counter-offensive:

Consider that the Valley consists of approximately 4000 square miles, and India has more than 600,000 troops crammed into this small area. In point of fact, Kashmir has the dubious distinction of having the largest concentration of occupation forces in the world.<sup>6</sup>

The right to life in IJK was suspended as were the freedoms of speech, assembly and association; judicial reviews of the suspension were disallowed. Security forces embarked on a counter-offensive against the movement's popular base characterised by civilian massacres, illegal detention<sup>7</sup>, extrajudicial

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5 Independent estimates cite a figure of at least 500,000 troops including among others, the Indian Army and paramilitary regiments such as the Border Security Force (BSF) and Central Reserve Police Force (CRPF) and the Special Task Force (STF). See PATANJALI VARADARAJAN, KASHMIR: A PEOPLE TERRORISED EXTRA-JUDICIAL EXECUTIONS, RAPE, ARBITRARY ARRESTS, DISAPPEARANCES AND OTHER VIOLATIONS OF BASIC HUMAN RIGHTS BY THE INDIAN SECURITY FORCES IN INDIAN-ADMINISTERED KASHMIR 5 (Federation Internationale Des Ligues Des Droits De L'Homme, 1993); WILLIAM W. BAKER, KASHMIR: HAPPY VALLEY, VALLEY OF DEATH 43 (Defenders Publications, 1994); HUMAN RIGHTS WATCH, INDIA'S SECRET ARMY IN KASHMIR: NEW PATTERNS OF ABUSE EMERGE IN THE CONFLICT 11(1996); Sumantra Bose, *Kashmir, 1990-2000: Reflections on individual voices in a dirty war*, 43 DEVELOPMENT: JOURNAL OF SID 99 (2000); Sanjay Kak, *Bullet, Ballot, Stone*, CARAVAN, September 1, 2014.

6 BAKER, *id.*

7 Young men who use stone-pelting as a form of protest against the status quo in Kashmir were subject to penal action. "According to reports, hundreds of youth have been arrested by police for their alleged involvement in stone-pelting...Mothers and sisters of arrested youth were seen waiting for hours outside police stations to get their kin released across Kashmir." *Arrest spree: Kashmiri women queue outside police stations*, KASHMIR DISPATCH, March 10, 2013.

killings<sup>8</sup>, enforced disappearance<sup>9</sup>, custodial death, rape,<sup>10</sup> torture<sup>11</sup> and sexual abuse. In his report for Federation Internationale des Droits de L'Homme (FIDH) jurist Patanjali Varadarajan had this to say about the nature of India's counter-offensive upon his visit to Kashmir:

Repression is widespread and palpable...The Indian security forces operate with complete impunity, engaging in acts of repression of innocent citizens. These acts include torture; murder or extra-judicial executions; rape; molestation short of rape; 'disappearances' (in the sense of Latin American *desaparecidos*); arson; arbitrary stops, searches and detentions in public places; violent entry into private premises; and theft. As a result of the conduct of security forces, the medical services and hospitals are in a state of unmitigated crisis. The University of Srinagar, and educational institutions generally, have been affected badly...Contrary to the empty shibboleths which the Government of India employs in this context, the 'rule of law' has broken down completely. The courts are...both unwilling and impotent to stop the excesses.<sup>12</sup>

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- 8 For instance, in March 2000, five men whom the Army identified as foreign terrorists responsible for a massacre of Sikh civilians turned out to be local Kashmiri civilians. In 2006, five bodies unearthed from Sumbal, an hour's drive from Srinagar, turned out to be of local civilians murdered by the Army. See Somini Sengupta, *Indian Army and Police Tied to Kashmir Killings*, N.Y. TIMES INTERNATIONAL EDITION, February 6, 2007, <http://www.nytimes.com/2007/02/06/world/asia/06kashmir.html>. In 2009, in the north Kashmir village of Bomai, the Rashtriya Rifles, a special paramilitary unit for fighting insurgencies, killed two civilians in an act of unprovoked firing. See *Bomai Killing: J-K govt enquiry commission indicts Army*, INDIAN EXPRESS, March 4, 2009, <http://indianexpress.com/article/india/india-others/bomai-killing-jk-govt-inquiry-commission-indicts-army/9>. A local human rights group (the Jammu and Kashmir Coalition of Civil Society) estimates that up to 10,000 people have disappeared since 1989. See Somini Sen Gupta, *id.*
- 10 Both men and women have been subject to rape and sexual abuse. Human Rights Watch documented the rape of women in its 1993 report entitled *Rape in Kashmir: A Crime of War*.
- 11 "Methods of torture include severe beatings, electric shock, crushing the leg muscles with a wooden roller, and burning with heated objects. The Indian government has not made public any investigations into any of the many documented cases of torture, nor has it ever announced that a member of the security forces was prosecuted or punished for torture. Although the government denies that torture is practiced systematically and as a matter of policy in Kashmir, government officials have admitted that torture takes place." HUMAN RIGHTS WATCH, *INDIA'S SECRET ARMY IN KASHMIR* 4 (1996).
- 12 VARADARAJAN, *supra* note 5, at 4.

Noting the grim situation in Kashmir in 2000 and likening it to a dirty war, academic Sumantra Bose summed up the indignity and misery inflicted on the people of Kashmir:

For the ordinary Kashmiri, the last 10 years have been a living hell. Checkpoints, cordon-and-search operations, beatings, humiliating verbal abuse, summary executions, rapes and custodial torture have transformed Kashmir...into one of the most oppressive places on earth. A climate of fear is pervasive. The villages and towns are full of embittered, deeply traumatised people, many of whom have directly suffered unspeakable brutalities, inflicted for the most part by Indian forces and allied militias...<sup>13</sup>

Fifteen years on there was little respite from the repression. In their 2006 report on Kashmir Human Rights Watch noted that:

Indian army and paramilitary forces have been responsible for innumerable and serious violations of human rights in Kashmir. Extrajudicial executions are widespread. Police and army officials have told Human Rights Watch that alleged militants taken into custody are often executed instead of being brought to trial because they believe that keeping hardcore militants in jail is a security risk. Most of those summarily executed are falsely reported to have died during armed clashes between the army and militants in what are euphemistically called encounter killings.<sup>14</sup>

By 2010, armed militancy Kashmir morphed into a people-led mass civic mobilization for freedom from Indian rule. There was however, little change in Indian government policy that continued to rely on coercion and repression.

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13 Sumantra Bose, *supra* note 5, at 100.

14 Human Rights Watch, *EVERYONE LIVES IN FEAR: PATTERNS OF IMPUNITY IN JAMMU AND KASHMIR* 2 (2006).

Kashmir's best-known and widely respected human rights defenders<sup>15</sup> fell victim to violence as did tens of thousands of civilians; approximately 70,000 people are believed to have died in Kashmir.<sup>16</sup> On many occasions, stone-pelting by young people during street protests against India's military occupation prompted unprovoked firing by State forces; in 2010, 122 unarmed Kashmiri young men were killed by security forces during civic protests across the Valley.<sup>17</sup> A massive, coercive military presence backed by repressive legislation is the means by which the Indian State retains tenuous control over Kashmir.

Since 1990 there were frequent reports of rape by security forces in Kashmir. An intrusive and repressive military presence, immunity from prosecution for soldiers guilty of rape and sexual abuse, the weakening of local civilian and judicial authority, an uncritical and compliant national media, fears of retributive violence by perpetrators, social ostracism of rape victims and cultural notions of female 'honour' prevent rape victims from talking about their trauma or pressing charges against the guilty. Legal immunity provided to security forces pre-empts the possibility of independent investigation of sexual crimes or prosecution of the guilty. With the exception of Kashmiri and sections of Indian civil society there is little public debate regarding rape by State forces in Kashmir.

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- 15 Jilil Andrabi, a widely respected Kashmir lawyer and critic of the occupation and its human rights abuses was murdered by the Rashtriya Rifles in 1996; Hriday Nath Wanchoo, trade-union activist and Kashmir's best-known human rights defender was shot dead, allegedly by a Muslim militant requisitioned for the job by the Indian State; Abdul Ahad Guru, eminent surgeon and member of Kashmir's intelligentsia was allegedly murdered by a Hizbul Mujahideen militant. Farooq Ahmad Ashai, well-known orthopaedic surgeon and civic activist was killed by the Central Reserve Police Post (CRPF).
- 16 Independent estimates of Kashmir's death toll range between 60,000 – 70,000. Parvaiz Bukhari, a local journalist cites a figure of 70,000. See Parvaiz Bukhari, *Kashmir 2010: The Year of Killing Youth*, THE NATION, September 22, 2010, <http://www.thenation.com/print/article/154964/kashmir-2010-year-killing-youth>. The Indian Home Ministry quotes a figure of 40,000 dead till 1996. A projection based on this estimate tallies with a total of 60,000 – 70,000 casualties. See ANDHRA PRADESH CIVIL LIBERTIES COMMITTEE ET AL, GRIM REALITIES: OF LIFE, DEATH AND SURVIVAL IN JAMMU AND KASHMIR 4 (2001).
- 17 The killing of 17-year-old schoolboy Tufail Mattoo triggered a cycle of mass protests and further killings of young unarmed protestors by security forces. Almost 60% of those killed were students. See Sheikh Saliq, *2010 Kashmir Unrest: A Recollection of what happened*, THE VOX KASHMIR, September 16, 2011, <http://www.thevozkashmir.com/2011/09/16/2010-kashmir-unrest-a-recollection-of-what-happened/>. See also Parvaiz Bukhari, *id.*

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Most discussions regarding such rape focus on the need to prosecute and punish perpetrators. Important and necessary as both are, the history of rape by security forces in Kashmir, the immunity accorded to security personnel guilty of sexual crimes, and the response of India's higher judiciary to the practice suggest a need to place the issue of sexual crimes by security forces beyond the individual-victim-individual-perpetrator frame. This is not to disregard the trauma and tragedy of individual victims, nor is it to downplay the just and very legitimate struggle of the women of Kashmir to ensure the prosecution of perpetrators. Rather, it is to suggest that the Indian State's practice of, and response to rape by security forces in Kashmir exemplifies an institutionalisation of the sexualisation of repression that cannot be redressed by the very State-system perpetuating it. Such repression, I further argue, constitutes a politically persuasive and ethically legitimate case for a Kashmiri-led tribunal for justice in Kashmir that may only be possible in a Kashmir free of Indian control.

## II. RAPE BY SECURITY FORCES IN KASHMIR

### 1. Rape as an Instrument of Political Repression

Ever since the beginning of the conflict Kashmir has witnessed a remarkably high incidence of violence in general<sup>18</sup> and the rape of Kashmiri women by security forces in particular. Although reliable statistics on rape in Kashmir are hard to come by, existing evidence indicates that the practice is frequent and widespread. In a statement in Kashmir's Legislative Assembly in October 2013, Chief Minister Omar Abdullah admitted to registering more than 5000 cases of rape since the

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18 During the period 1989-2005, almost half the respondents had relocated because of the violence, saying they could not deal with the situation any more. People frequently reported crackdowns, frisking by security forces and round-up raids in villages; during the same period, damage to property and burning of houses was considerable. One in six respondents reported being detained and an extraordinary 76% said they were tortured during detention. See MEDICINS SANS FRONTIERES, *KASHMIR: VIOLENCE AND HEALTH: A QUANTITATIVE ASSESSMENT ON VIOLENCE, THE PSYCHOSOCIAL AND GENERAL HEALTH STATUS OF THE INDIAN KASHMIRI POPULATION 2 & 15*, (2006). The Indian government is yet to enact the Prevention of Torture bill which was introduced to ratify the Convention against Torture. The draft Bill falls short of international standards on several counts. A parliamentary committee has reviewed the bill and submitted its recommendations to the cabinet. For a fuller analysis see Human Rights Watch, *India UPR Submission*, November 2011, <http://www.hrw.org/news/2012/01/03/india-upr-submission>.



1989 armed rebellion against Indian rule began.<sup>19</sup> According to the government, a total of 1,326 rape cases have been registered in the State since 2006.<sup>20</sup> Among the documented cases of rape of women by security forces in Kashmir are Jamir Qadeem (District Sopore, 1990); Anantnag (1990); Chhanpora (Srinagar, 1990); Panzgam (District Pulwama, 1990); Trehgam (District Kupwara, 1990); Kunan Poshpora (District Kupwara 1991); Chak Saidpora (District Pulwama) (1992); Haran (25 kms From Srinagar, 1992); Hyhama (District Handwara, 1994); Gurihakhar (District Handwara); Kangan (District Ganderbal, 1994); Wavoosa (near Srinagar, 1997); Bihota (District Doda, 2001); Pahalgam (2002); Zachaldara (District Handwara, 2004); Shopian (2009); Gujjardara-Manzgam (District Kulgam, 2011).<sup>21</sup> A Medicins Sans Frontieres (2006) empirical study in Kashmir found that the number of people who had witnessed a rape in Kashmir since 1989-1990 was comparably far higher than in other conflict zones such as Sierra Leone, Sri Lanka and Chechnya:

Since 1989 many people had heard about cases of rape (63%). Most had heard about more than five incidents of rape (59.9%). The number

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19 *5125 Rape Cases Registered in J&K since 1989: Govt*, KASHMIR TIMES, October 9, 2013.

20 See Shujaat Bukhari, *Omar apologises for naming rape victims*, THE HINDU, September 30, 2011, <http://www.thehindu.com/news/national/other-states/omar-apologises-for-naming-rape-victims/article2499855.ece>

21 See ASIA WATCH AND PHYSICIANS FOR HUMAN RIGHTS, *RAPE IN KASHMIR: A CRIME OF WAR* 6-14, 87-91, 96-108 (1993); Al Shaheed, *Kashmir: Indian War Crimes against Women*, January 8, 2013, <https://bloodiedrivers.wordpress.com/2013/01/08/kashmir-indian-war-crimes-against-women/>; Al Shaheed, *Kashmir: Rape with Impunity*, June 26, 2013, <https://bloodiedrivers.wordpress.com/2013/06/26/kashmir-rape-with-impunity/>; HUMAN RIGHTS LAW NETWORK, *WOMEN'S RIGHTS IN CONFLICT ZONES: A FOCUS ON INDIA 22* (HRLN, 2010); Saleem Pandit, *Woman Alleges Rape by Army Personnel in South Kashmir, CM says Guilty will be Punished*, THE TIMES OF INDIA, July 22, 2011; Syed Junaid Hashmi, *Conflict Rape Victims: Abandoned and Forgotten*, COUNTERCURRENTS, March 31, 2007; Fahad Shah, *Nearly 40 cops to stop meeting Kulgam rape victim*, THE KASHMIRWALLA, July 23, 2011, <http://www.thekashmirwalla.com/2011/07/nearly-40-cops-to-stop-meeting-kulgam-rape-victim/>. *Kashmir troops held after rape*, BBC NEWS, April 19, 2002, [http://news.bbc.co.uk/2/hi/south\\_asia/1940088.stm](http://news.bbc.co.uk/2/hi/south_asia/1940088.stm); APCLC, *supra* note 16, at 9; Raies Mir, *Rape Molestation has become weapon of war in Kashmir*, SOUTH ASIA HUMAN RIGHTS JOURNALIST ASSOCIATION, <http://www.sahrja.com/content/rape-molestation-has-become-weapon-war-kashmir>; Baba Umar, *Lesson in irony: Gallantry award goes to rape accused*, TEHELKA, August 17, 2012; See also Rita Pal, *Rape in Kashmir: The Forgotten War Crime*, THE HUFFINGTON POST, June 3, 2013, [http://www.huffingtonpost.co.uk/rita-pal/rape-in-kashmir\\_b\\_3372513.html](http://www.huffingtonpost.co.uk/rita-pal/rape-in-kashmir_b_3372513.html).

that had actually witnessed a rape since 1989 was also high (13%) in comparison to other conflict areas. One in twenty (5.1%) had witnessed rape more than five times.<sup>22</sup>

Both security forces and militants are guilty of rape, though rape by the former outstrips the latter in both scale and frequency.<sup>23</sup> In areas of militant presence or activity rape by security forces functions as an instrument of counter-insurgency to neutralise local resistance and destroy the morale of Kashmiri resistance. A report based on women's testimonies from the Kashmir Valley confirmed that women were targeted by security forces both as punishment for their support of the struggle and as a means of breaking the movement itself.<sup>24</sup> The story of Razina Begum in her own words is illustrative:

Razina Begum...whose husband joined the militants...wept uncontrollably as she spoke...about the harassment she has suffered at the hands of the army that has been camping in the village for the last seven years. Because her husband had joined militancy, the army men of the camp had an excuse ready for raiding her house at odd hours and calling her to the camp whenever they pleased...On 29 October 2000, there was a cordon and search operation in the village by the 15 Bihar Regiment...one woman from the village was picked up and taken away to the camp. On 30 October 2000, about twenty women with a few men from Bihota went to try and get her released. These women were in turn detained for four to five hours and sexually assaulted and molested. They were released only at 8 pm on 30

22 MEDICINS SANS FRONTIERES, *supra* note 18, at 15 and 24.

23 Shah Abbas, *Men in uniform outnumber militants in rapes, molestations: Government*, KASHMIR LIFE, October 8, 2013, <http://www.kashmirilife.net/men-in-uniform-outnumber-militants-in-rapes-molestationsgovernment-44633/>. In view of the criticism that crimes by State forces are paid greater attention than similar crimes by militants, this paper endorses Patanjali Varadarajan's argument that the focus of human rights is the State; the State violates human rights; militants violate law. See VARADARAJAN, *supra* note 5, at 28.

24 RITU DEWAN ET AL, WOMEN'S TESTIMONIES FROM KASHMIR: THE GREEN OF THE VALLEY IS KHAKI 21 (1994). In the immediate aftermath of the rebellion, the highest incidence of rape was reported from Kupwara, deemed a militant stronghold by the authorities. Sukhmani Singh, *Protectors or Predators?*, THE ILLUSTRATED WEEKLY OF INDIA 35, September 30 (1990).

October. After that we went in a delegation to the Deputy Commissioner and the Senior Superintendent of Police, Doda. There were more women than men in the delegation... our complaint reached as far as the Home Ministry [but] nothing happened.<sup>25</sup>

The response of government authorities to allegations of rape by security forces in Kashmir is, at best, muted. Such allegations have often prompted official denial rather than investigation or prosecution. For instance the allegation of mass-rape at the twin villages of Kunan Poshpora, Kupwara district, north Kashmir on 23-24 February 1991 by soldiers of the Rajputana Rifles (RR) was initially denied by government authorities. State denial was followed by a Press Council of India report<sup>26</sup> exonerating the Army of any wrong doing. Twenty-four years later, at a public event, S.M Yasin, the first local government official to have visited Kunan Poshpora after the alleged mass-rape, recalled the testimony of a woman who was kept under jackboots by the army men while her daughter and daughter-in-law were being gang-raped; he also recounted being warned about being on the army's hit list and offered incentives by way of cash and promotion in return for altering his report on the alleged rape that indicted security forces.<sup>27</sup> Human Rights Watch noted the unseemly haste with which the truth about Kunan Poshpora was buried:

The committee's eagerness to dismiss any evidence that might contradict the government's version of events indicated that it was

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25 Testimony of Razina Begum *in* APCLC ET AL, *supra* note 16, at 19.

26 Among others, the Press Council of India team included George Verghese whose father was a colleague of the then Army Chief S.F. Roderigues. Mr. Rodrigues complained to the former about what he perceived as a propaganda war against the Army. On the Army's complaint, the Press Council of India (PCI) constituted a committee to look into the Army's alleged human rights abuses in Kashmir. In June 1991 Mr Verghese flew in a government Air Force chopper to Kunan Poshpora. They stayed in the quarters of the brigade alleged to have committed the offence and took along with them a local police station recruit. In its report, the PCI gave a clean chit to the Army. See Prashant Jha, *Unravelling a 'mass rape,'* THE HINDU, July 8, 2013, <http://www.thehindu.com/todays-paper/tp-opinion/unravelling-a-mass-rape/article4893078.ece>

27 *Kashmir officer 'threatened' over rape report*, AL JAZEERA ONLINE, February 25, 2014, <http://www.aljazeera.com/news/southasia/2014/02/kashmir-officer-threatened-over-rape-report-201422417183993666.html>

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far more concerned about countering domestic and international criticism than about uncovering the truth.<sup>28</sup>

In instances where rape survivors managed to initiate legal action against the alleged perpetrators, State authorities step in to subvert the course of justice. A case in point was the alleged rape and murder of two young women in the town of Shopian in 2009 upon which State personnel manipulated and distorted crucial ocular evidence, and facilitated the destruction of vital forensic evidence.<sup>29</sup> Another example of State-led stonewalling of judicial process was the Kunan Poshpora case that was re-opened in 2013. Victims' quest for justice was repeatedly thwarted and stonewalled by the administration, police and local courts.<sup>30</sup> Furthermore, State authorities are also known to restrict public knowledge of rape by security forces through forced isolation of the victim. For instance, in an allegation of rape by two army men at Gujjardoga hamlet in Manzgam district of South Kashmir in 2011, Army authorities declared the complainant Ruqaiya Bano mentally unfit. The entire village was subject to undeclared curfew with extra paramilitary deployment around it; Ruqaiya's house was placed under a round-the-clock vigil and no civil or media person was allowed to enter the premises.<sup>31</sup>

On its part, the Central government has never made public any prosecution or punishment of security personnel guilty of sexual crimes against women in Kashmir. Indeed, of all the crimes committed by security forces in Kashmir the

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28 ASIA WATCH AND PHYSICIANS FOR HUMAN RIGHTS, *supra* note 21, at 8.

29 For an independent analysis on the Shopian rape case see UMA CHAKRAVARTY ET AL, SHOPIAN: MANUFACTURING A SUITABLE STORY, (Independent Women's Initiative for Justice, 2009).

30 *Govt Misleading Court Over Kunan Mass Rape Incident: JKCCS*, KASHMIR LIFE, September 18, 2013, <http://www.kashmirilife.net/govt-misleading-court-over-kunan-mass-rape-incident-jkccs-42555/>. See also Muzammil Jaleel, *Konan Poshpora mass rape: 22 years on, state still out to scuttle probe*, THE INDIAN EXPRESS, July 11, 2014, <http://archive.indianexpress.com/news/konan-poshpora-mass-rape-22-years-on-state-still-out-to-scuttle-probe/1140570/>

31 See Muzammil Jaleel, *Kulgam rape threatens to push Valley to brink, gets state moving*, INDIAN EXPRESS, July 23, 2011, <http://indianexpress.com/article/news-archive/web/kulgam-rape-threatens-to-push-valley-to-brink-gets-state-moving/99/>. See also *Restrictions on Manzgam village*, GREATER KASHMIR, July 26, 2011.

rape of women has drawn little response in terms of investigation and prosecution.<sup>32</sup> Human Rights Watch highlighted this trend in their report on rape by security forces in Kashmir:

Despite evidence that army and paramilitary forces were engaging in wide-spread rape, few of the incidents were ever investigated by the authorities. Those that were reported did not result in criminal prosecution of the security forces involved.<sup>33</sup>

Disturbing as the lack of institutional response to sexual crimes by security forces against women in Kashmir is, it must not be attributed to institutional indifference or gender-blindness. Rather, rape by security forces is invested with a multiple instrumentality in Kashmir: it is used simultaneously as a political instrument of power and retribution against Kashmiri rebels *and* as a cultural weapon of humiliation against Kashmiri women and the community at large. In other words, Kashmiri women are raped both by way of State retaliation against Kashmiri militants and civilian Kashmiri men, and as a means to inscribe subordination on the larger community through the sexual dishonour of women. The sexualised edge of the Indian counter-offensive in Kashmir thus goes well beyond individual subjection: sexual crimes against civilian Kashmiri women are a means to crush the dignity, autonomy and integrity of Kashmiri society; they are part of a methodology of State repression centred on the suppression of Kashmiri resistance. For precisely this reason the *political* salience of rape cannot be overstated. As Human Rights Watch noted in their report on Kashmir:

The central element of rape is power. Soldiers use rape as a weapon: to punish, intimidate, coerce, humiliate and degrade.<sup>34</sup>

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32 ASIA WATCH AND PHYSICIANS FOR HUMAN RIGHTS, *supra* note 21, at 3. More than two rape or molestation cases have been reported in Jammu and Kashmir per day over the last 24 years but the conviction rate in these cases during the period has been a dismal 3.26 per cent. Security forces were the accused in 70 cases. *Dismal conviction rate in cases of rape, molestation in J & K*, ZEE NEWS, October 8, 2013, [http://zeenews.india.com/news/jammu-and-kashmir/dismal-conviction-rate-in-cases-of-rape-molestation-in-jandk\\_881930.html](http://zeenews.india.com/news/jammu-and-kashmir/dismal-conviction-rate-in-cases-of-rape-molestation-in-jandk_881930.html).

33 During their visit to Kashmir Rights Watch documented fifteen individual cases of reported rape by forces of the Indian Army and the Border Security Force (BSF). ASIA WATCH AND PHYSICIANS FOR HUMAN RIGHTS, *supra* note 21, at 6.

34 HUMAN RIGHTS WATCH, *supra* note 14, at 3.

Backed by Parliament, legislative decree and Army command; buttressed by a compliant and uncritical media, and a misinformed and uncaring Indian public opinion; aided by a partly-neutralised and partly-proxy police, judiciary, and successive client regimes in Kashmir, executive orders in New Delhi continue with a profoundly illegitimate status-quo in Kashmir. Indeed, there seems little hope of dislodging a 'national' consensus around the privileging of executive and military power in Kashmir that is not a political abstraction but a material means to inscribe subjection on a garrisoned local population. Sexualised repression functions as a potent means to reinforce the overarching political equation of power and dominance over the Kashmiri people.

## 2. Rape as a Cultural Weapon of War

Over the decades, deeply internalised ideas of unitary nationhood were used to normalise State violence against ethnic minorities in India. As a matter of policy, security force recruits in Indian conflict zones are drawn from groups other than the local population they police;<sup>35</sup> their internalisation of nation-state worship and their selective deployment in regions peopled by 'other' ethnic minorities facilitated militarized modes of governance.<sup>36</sup> In the particular context of Kashmir where an ethnic Muslim minority population is subject to the repressive dominance of a predominantly Hindu State, the sexual appropriation of Kashmiri women by State security forces exploits the cultural logic of rape whereby the sexual dishonour of individual women is coterminous with the subjection and subordination of Kashmiri men and the community at large. As Human Rights Watch put it:

Rape is used as a means of targeting women whom the security forces accuse of being militant sympathisers; in raping them, the security forces are attempting to punish and humiliate the entire community.<sup>37</sup>

35 After 1947 the ban on Kashmiri Muslim recruitment to the Army imposed by erstwhile Maharaja Hari Singh continued. In 1952-53 Kashmir's first Chief Minister Sheikh Abdullah discovered a secret circular that directed recruitment officers not to enlist Muslims in the Army. During India's 1999 conflict with Pakistan at the Kargil heights, Major General V.N. Budhwar wanted Muslim villagers resident along the Line-of-Control in Turtok to be evicted. Omar Khalidi, *Khaki and Ethnic Violence in India: Armed Forces, Police and Paramilitary During Communal Riots*, in *THREE ESSAYS COLLECTIVE* 18 (2010).

36 Suvir Kaul, *Indian Empire (and the case of Kashmir)*, *ECONOMIC AND POLITICAL WEEKLY OF INDIA* 71, March 26, 2011.

37 HUMAN RIGHTS WATCH, *supra* note 14, at 1 and 3.

Proxy political defeat through sexual means has been further inflicted by forcing family members to witness the rape of women; sexual humiliation a means to shame, degrade and demoralise family and the community at large. As Prof. William Baker, quoted above, testified at the 52<sup>nd</sup> United Nations Commission on Human Rights:

Rape in Kashmir is not the result of a few indisciplined soldiers, but rather an active strategy of Indian forces to humiliate, intimidate and demoralise the Kashmiri people. This is evidenced by the fact that a number of the raped women I interviewed had been raped in front of their own families, their own husbands, and their own children.<sup>38</sup>

In a context where the cultural codes of rape go well beyond individual victims, sexual crimes against women are a means to re-inscribe the overarching equation of political power and dominance over a recalcitrant ethnic minority. Rape thus functions as a particularly potent counter-offensive weapon in the armoury of security forces in Kashmir. As Justice Bahauddin Farooqi, a former Chief Justice of the Jammu and Kashmir High Court noted in his report on the human rights crisis in Kashmir:

It is hard to escape the conclusion that the security forces who are overwhelmingly Hindu and Sikh, see it as their duty to beat an alien population into submission.<sup>39</sup>

The absence of a prompt or proper institutional response to rape allegations by security forces in Kashmir is a measure of official complacency anchored in the impunity granted to State forces for sexual crimes against women. Both serve to normalise modes of governance contemptuous of women's sexual integrity and of judicial process and justice. Further, the Indian State's attempt to situate rape by security forces within an individual-soldier-cum-individual-victim frame tends

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38 Prof. William W. BAKER, *The Sealed Valley of Kashmir*, TESTIMONY AT THE 52<sup>ND</sup> UNITED NATIONS COMMISSION ON HUMAN RIGHTS, <http://www.kashmiri-cc.ca/quarterly/kq2-3/SEALDVA.htm> (link missing, article on file with author).

39 JUSTICE BAHAUDDIN FAROOQI, *KASHMIR CRIES FOR JUSTICE* 76 (Institute for Kashmir Studies, 1994).

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to deflect public attention away from its systemic and systematic use as a counter-offensive weapon of war in Kashmir. Writing of the abuse of Iraqi civilians by United States forces, Jacqueline Rose noted that acts of violence by United States forces whose intent was to disgrace and humiliate civilians were explained away as individual aberrations rather than being acknowledged as a systemic abuse of power that they were:

Faced with the disclosure of such misdeeds...the state will rush to return them to the citizen precisely as 'individual disgrace'.<sup>40</sup>

Much like in Iraq, rape by Indian security forces in Kashmir cannot be explained away as 'rare' albeit "regrettable excesses" as claimed by military authorities.<sup>41</sup> Nor should documented acknowledgement by individual soldiers that they "followed orders" to rape women in Kashmir be ignored.<sup>42</sup> Both reflect official acquiescence and tolerance, if not implicit consent for the practice. The institutional response to sexual crimes by State forces raises grave questions regarding the legality of the State and the question of justice for victims of sexual crimes in Kashmir. A brief overview of the same is in order.

### III. RAPE BY SECURITY FORCES: AFSPA AND THE INSTITUTIONAL RESPONSE

Women in Kashmir are now facing a rising inner crisis, how to speak up publicly and in court...Most women who have suffered from sexual assault often fear retribution by government authorities...or their attackers.<sup>43</sup>

#### 1. The Executive

The institutional response to rape against women by security forces must be framed with reference to the legislative context in Kashmir. In 1990, Kashmir was declared a "disturbed"<sup>44</sup> area by virtue of which it became subject to the

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40 JACQUELINE ROSE, *THE LAST RESISTANCE* 163 (Seagull Books, 2008).

41 See Human Rights Watch, *supra* note 14, at 17.

42 Human Rights Watch, *supra* note 14, at 10-11 and Human Rights Watch, *THE HUMAN RIGHTS CRISIS IN KASHMIR: A PATTERN OF IMPUNITY* 100, (1993).

43 Aliya Bashir, *Kashmir: Obstacles continue for women reporting rape*. WOMEN NEWS NETWORK (WNN), July 21, 2011, <http://womennewsnetwork.net/2011/07/21/kashmir-obstacles-women-rape/>



provisions of the Armed Forces Special Powers Act (AFSPA). This particular piece of legislation (in force in India's North-East since 1957) arms the State with extraordinary powers. It allows the security forces untrammelled power in "disturbed" areas without the safeguards applicable in states of emergency<sup>45</sup>: the right to life is suspended and security forces have the right to shoot to kill civilians; arrest or detain civilians without warrant; enter and search homes, and destroy homes and property. Members of security forces guilty of such abuse are accorded impunity from prosecution in a criminal court. Any Kashmiri who wishes to move court against security forces for abuses committed under AFSPA must first seek the permission of the Central government that is almost never forthcoming. In its 54 year-old history not a single member of the security forces has been prosecuted for murder, rape, and the destruction of property including the burning of villages.<sup>46</sup> By shielding security forces from public accountability the AFSPA perpetuates a gross abuse of power by State forces. A member of Kashmir's State Human Rights Commission described the legislation as "hated" and "draconian."<sup>47</sup>

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44 The Central government and the State Governor have the power to declare a state 'disturbed' if in their opinion the whole or any part or a State is such a condition as to require the use of armed force in aid to civil power. The declaration of an area as 'disturbed' is not subject to judicial review. Once an area is declared as disturbed, members of the armed forces are legally empowered to, among others, shoot to kill, search homes and destroy property, arrest civilians without warrant, prohibit peaceful public assembly. In 1990, Jammu and Kashmir was declared a disturbed area. The President issued a Proclamation on the 8th of July 1990 under Article 356 of the Constitution, in relation to the State of Jammu and Kashmir declaring *inter alia* that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament. Parliament has, under Article 357(1)(a) of the Constitution, now conferred on the President, the powers of the Legislature of the State of Jammu and Kashmir." See Jammu and Kashmir Disturbed Areas Act, 1992; Jammu and Kashmir State Legislature (Delegation of Powers) Act, 1992.

45 The President is entitled to declare a state of Emergency upon the advice of the cabinet upon which the Constitution transforms the State from federal into unitary form. The powers of the central government increase and citizens' Fundamental Rights under Article 19 are suspended including the freedom of speech, and expression, the right to peaceful assembly, the freedom of equality before law, the freedom of movement of across Indian territory and the freedom to practice and propagate religion. The right to challenge the suspension of the above-mentioned rights is suspended. See Free Law Project, *Constitution of India: Fundamental Rights During Emergency*, <http://lawprojectsforfree.blogspot.in/2010/08/constitution-of-india-fundamental.html>. See also The Constitution (44th Amendment) Act, 1978.

46 Sanjoy Hazarika, *An abomination called AFSPA*, THE HINDU, February 12, 2013.

47 Aarti Dhar, *U.N. asks India to Repeal AFSPA*, THE HINDU, March 31, 2012.

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The immediate outcome of placing security forces above the law in Kashmir was the neutralisation and subordination of two crucial civilian institutions responsible for the maintenance of law and order, and the enforcement of the rule of law, namely, the police and the judiciary. It would not be improper to presume that this was in fact the desired objective of AFSPA and of the executive authorities who crafted this piece of legislation.<sup>48</sup> The extralegal privileging of military power could only be at the cost of local civilian institutions such as the police.

## 2. The Police

The impunity of action that security forces enjoy in Kashmir subverted the normal law enforcement machinery centred on the police, destroyed the professional integrity and autonomy of the local police, and converted it into an appendage of security forces. The subordination of the police to military authority constantly frustrates rape victims from seeking legal recourse. Complaints or First Information Reports (FIRs) related to rape by security forces are not accepted or filed by the police. An FIR is the first step towards judicial recourse for victims and its non-acceptance pre-empts precisely this possibility. In his study of impunity for security forces in Kashmir, Ashok Agrwaal, a legal scholar, noted that in numerous cases of human rights abuse, including rape by security forces, the police refused to register complaints claiming they were under instruction not to undertake any action on complaints against security forces.<sup>49</sup> The neutralisation of the police thus achieved subverted due process and extinguished the possibility of justice for victims.

Among the most egregious examples of the subversion of police authority facilitated by the AFSPA was the mass-rape of women in the twin villages of

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48 Paul Brass noted the Indian Constituent Assembly's "fear of disorder" and its latent distrust of populations and politicians used to justify extensive emergency provisions in the Constitution - including the imposition of Central rule on a legitimately elected state government not sufficiently deferential towards the Centre. See Paul Brass, *India, Myron Weiner and the Political Science of Development*, ECONOMIC AND POLITICAL WEEKLY OF INDIA, 3031, July 20, 2002.

49 Ashok Agrwaal, *Paradigm of Impunity: Two Months in the Life of the 20 Grenadiers*, ECONOMIC AND POLITICAL WEEKLY OF INDIA 1815, May 19, 2007.

Kunan Poshpora. Police investigation<sup>50</sup> into the crime never commenced because the police officer assigned to the case was on leave at the time and was subsequently transferred by his superiors; the case was subsequently closed by the Director, Prosecution on the ground that the perpetrators were untraceable.<sup>51</sup> After a visit to Kunan Poshpora, Justice Bahauddin Farooqi, former Chief Justice of the J&K High Court, quoted earlier, noted that:

In his 43 years on the bench, he had never seen a case in which normal investigative procedures were ignored as this one.<sup>52</sup>

With its autonomy and integrity undermined for over two decades by successive client regimes aligned with New Delhi, the police often functions as an accomplice in crime by security forces. For instance, in the wake of a mass public outcry in Kashmir against the rape and murder of two young women in Shopian (2009) in close proximity to a paramilitary and army camp, the police were indicted for deliberate tampering and the destruction of evidence at the crime scene:

Men in uniform tampered with evidence, some policemen were seen washing the signs, the rock where the bodies were found disappeared and tyre marks removed; crucial evidence was destroyed lest the tell tale signs point an accusing finger; the police took more than a week after the crime to register an FIR.<sup>53</sup>

In similar fashion, upon an allegation of rape by security forces in Kulgam (2011) the local police prevented people from meeting the rape victim. After the victim had filed a complaint of rape by security forces at the local police station her house was placed under police custody with around 40 policemen preventing anyone from entering the premises. The victim was subsequently declared ‘mentally unfit’ by the police and the case quietly buried.<sup>54</sup>

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50 FIR No. 10 (1991) was lodged at Trehgam against security forces.

51 ASIA WATCH AND PHYSICIANS FOR HUMAN RIGHTS, *supra* note 21, at 7.

52 Barbara Crossette, *India Moves Against Kashmir Rebels*, THE NEW YORK TIMES, April 7, 1991, <http://www.nytimes.com/1991/04/07/world/india-moves-against-kashmir-rebels.html>.

53 UMA CHAKRAVARTY ET AL, *supra* note 29, at 3.

54 Saima Bhat, *Rape is the outcome of treating Kashmiris as slaves*, THE KASHMIR WALLA, April 7, 2012, <http://www.thekashmirwalla.com/2012/04/rape-is-the-outcome-of-treating-kashmiris-as-slaves/>.

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Much like the local police, the corrosive effect of AFSPA extended to Kashmir's judiciary in ways that protected and advanced the extra-legal power of security forces.

### 3. The Judiciary

The judiciary is a key institution capable of restraining the abuse of power by public authorities and ensuring due process. In the case of Kashmir (and indeed other conflict zones within India) the local judiciary is unable to function normally because of the privileging of security forces by the executive. Kashmir's courts are rendered incapable of ensuring due process to rape victims because court orders are routinely ignored or flouted by security forces.<sup>55</sup> As one of the earliest reports on the Kashmir crisis noted:

The courts in Kashmir are mute spectators to the reign of repression, unable (sometimes unwilling) to exercise any restraint on the administrative and security authorities. The judicial process exists on paper alone. In practice it may be subverted, ignored or threatened at will by the authorities.<sup>56</sup>

The sustained subversion of the judiciary and of judicial process corroded the civilian criminal system. A neutralised and impotent local police deferred to military authority than to court orders:

The police explicitly said irrespective of what the courts might say, their instructions were very clear: they [the police] were not to investigate or take any action on complaints against security forces.<sup>57</sup>

On its part, a deeply compromised comprador local client regime issued instructions to the police not to comply with High Court rulings without

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55 See section *Undermining the Judiciary*, in HUMAN RIGHTS WATCH, BEHIND THE KASHMIR CONFLICT, (1999), <http://www.hrw.org/reports/1999/kashmir/judiciary.htm>.

56 VARADARAJAN, *supra* note 5, at 20.

57 Ashok Agrwal, *Paradigm of Impunity: Two Months in the Life of the 20 Grenadiers*, ECONOMIC AND POLITICAL WEEKLY OF INDIA 1815, May 19, 2007.

informing the security forces first.<sup>58</sup> Habeas corpus petitions were routinely ignored; court directives circumvented and people, especially youth, hauled off to interrogation centres.<sup>59</sup> A report on Kashmir's judiciary by the Yale Law School in 2009 noted that litigants routinely petition the Kashmiri court system to respond to claims against security forces for human rights abuse including rape yet lawyers could not recall a single case in which security forces were prosecuted and convicted for abuse.<sup>60</sup> In its report on Kashmir, Amnesty International noted the large number of pending habeas corpus petitions; the failure of State authorities to act on the orders of the High Court and their ability to circumvent judicial process in ways that rendered the option of judicial remedy redundant.<sup>61</sup> With the subversion of judicial authority backed by legislation (AFSPA) Kashmir's courts fail to provide justice to victims of abuse.<sup>62</sup>

Kunan Poshpora is a telling example of the wilful obstruction of the course of justice for rape victims by State authorities. According to Harsh Mander, an Indian scholar-activist, Kunan Poshpora was the single largest case of mass sexual violence in independent India.<sup>63</sup> Ever since the re-opening of the case on the orders of the State Human Rights Commission (SHRC) in June 2013, the police failed to record statements from the victims, witnesses or the accused security personnel; the Army and the Superintendent of Police on the other hand sought an extension of time to provide the required information. According to the Jammu and Kashmir Coalition for Civil Society (JKCCS), a Kashmiri civil society organisation representing the victims, the government was misleading the court over the rape

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58 HUMAN RIGHTS WATCH, *BEHIND THE KASHMIR CONFLICT: ABUSES BY INDIAN SECURITY FORCES AND MILITANT GROUPS CONTINUE* (1999).

59 Freya Manecksha, *Tortuous Road to Justice in Kashmir*, *ECONOMIC AND POLITICAL WEEKLY OF INDIA* 29, August 6, 2011.

60 ALFRED K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC, *THE MYTH OF NORMALCY: IMPUNITY AND THE JUDICIARY IN KASHMIR* 15 (Yale Law School, 2009).

61 AMNESTY INTERNATIONAL, *A 'LAWLESS' LAW: DETENTIONS UNDER THE J&K PUBLIC SAFETY ACT 19* (ASA 20/001/2011, 2011)

62 ALFRED K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC, *supra* note 59, at 6-23.

63 Harsh Mander, *Night of Horror*, *THE HINDU*, July 9, 2013, [http://www.thehindu.com/opinion/columns/Harsh\\_Mander/night-of-horror/article4862902.ece](http://www.thehindu.com/opinion/columns/Harsh_Mander/night-of-horror/article4862902.ece)

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incident and showing disrespect to the victims.<sup>64</sup> The misery and anguish of the men and women of Kunan Poshpora was captured by a civil society delegation that visited Kunan Poshpora in 2013:

Many women wept wordlessly. An old man whose aged mother was raped and who became permanently disabled by the torture he suffered, cried out: 'When one woman was raped in Delhi, all of India lit candles in her memory for 15 days. But where is the justice for us?'... [In their interaction with the delegation] women in Kunan Poshpora spoke of 15 hysterectomies, the difficulties in getting their daughters wed, and the way memories of that night corroded their marriage and their lives. 'Without justice, what is the point of living?' lamented a village headman. 'Twenty-two years have passed since that terrible night...Until today not a single person has been punished. How can we live?'<sup>65</sup>

This is not to suggest that courts are entirely dysfunctional; nor is it to understate the extraordinary determination and courage of lawyers attempting to secure justice for victims of human rights abuse. Rather, it is to underline the formidable obstacles placed by State authorities in order to impede or derail the course of justice for victims of sexual abuse by security forces. A delegation of lawyers from the Netherlands branch of the NGO Lawyers without Borders (LwB) had this to say upon their visit to Kashmir:

In a climate in which the role of the judiciary is collapsing, the lawyers are faced with [a] permanent atmosphere of intimidation and menace. Since 1990 six lawyers were killed and many of them are confronted with attempts aimed at them personally or at their offices. Recently a lawyer who had filed a collective complaint with a view of defending detainees rights disappeared and his body was found in a river a few days later. Almost all the lawyers the delegation met explained they

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64 See *Government Misleading Court Over Kunan Poshpora Mass Rape Incident: JKCCS*, KASHMIR LIFE, September 18, 2013, <http://www.kashmirlife.net/govt-misleading-court-over-kunan-mass-rape-incident-jkccs-42555/>

65 Harsh Mander, *supra* note 62.

are regularly arrested because of the simple reason of doing their work...Cases brought to court are not tried or by all means frustrated. Dossiers disappear and families of victims are threatened, even arrested.<sup>66</sup>

The judiciary nevertheless remains an institutional restraint against the abuse of power by security forces and for precisely this reason the latter seeks to align or neutralise the legal regime in ways that augment its agenda of unrestrained repression.

The trial and prosecution of security forces accused of rape is, as mentioned already, contingent on the sanction of the Central government. A women's investigative team noted that in the past two decades, sanction was accorded in a miniscule number of cases; till date no culprits have been convicted or punished.<sup>67</sup> Moreover, allegations of rape by security forces are not adjudicated in civilian courts. The accused have the option to face trial in a civilian or a military court; they invariably opt for the latter where trial proceedings are neither public nor transparent, and punishments mild. In cases where perpetrators are tried under military courts, the punishment, if any, is inconsistent with the gravity of the crime. A report on women's rights in India's conflict zones noted that members of security forces accused of rape enjoyed the protection of military courts rather than receiving punishment.<sup>68</sup> Moreover, a general climate of fear, intimidation and repression produced by a formidable military occupation makes rape victims, especially from rural areas, unwilling to depose before a military court of enquiry.<sup>69</sup>

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66 *Press Statement by IKV/Lawyers without Borders delegation to Kashmir upon their visit to Kashmir*, (The Hague, The Netherlands, June 7, 2004). Grateful thanks to Marjan Lucas for the information. Justice Bilal Nazki and Justice Bashir Ahmed Khan were transferred after they both issued orders that were contrary to the government position regarding the murder of Jalil Andrabi – one of Kashmir's most eminent lawyers and human rights defenders – by security forces

67 Chakravarty et al, *supra* note 29.

68 ASIA WATCH AND PHYSICIANS FOR HUMAN RIGHTS, *supra* note 21; Human Rights Law Network, *supra* note 21.

69 As a Kashmiri lawyer remarked: "Under these circumstances, which poor, illiterate Kashmiri will be able to depose before a court-martial? She will be afraid that the authorities will repeat the crime." Sukhmani Singh, *supra* note 24, at 36.

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The trial and prosecution of security forces in civilian courts is an essential pre-requisite for justice. In February 2012, in a progressive verdict, the Supreme Court ruled against the Army's invocation of AFSPA in response to the charge sheeting of eight Army officers guilty of murdering five civilians in Pathribal, Kashmir. In this particular instance, an investigation by the Central Bureau of Investigation (CBI) - an agency under the central government - contended it had sufficient evidence to show the killings were "cold-blooded murders and the accused officials deserved to be meted out exemplary punishment."<sup>70</sup> Arguing that sanction from the central government was not necessary in this case as the victims were civilians, the CBI filed charges against the eight army officers in the local courts in Jammu and Kashmir. In response the army invoked provisions of the AFSPA claiming Army officers were exempt from trial in civilian courts. In its ruling on the case, a Supreme Court bench comprising Justices B. S. Chauhan and Swatanter Kumar opined that:

You go to a place in exercise of AFSPA, you commit rape, you commit murder, then where is the question of sanction? It is a normal crime which needs to be prosecuted, and that is our stand.<sup>71</sup>

In April 2012 however, in complete contradiction to its earlier ruling on the Pathribal murders, India's Supreme Court allowed military authorities eight weeks to court-martial the aforementioned officers allegedly responsible for the killings. Judicial sanction for a court-martial foreclosed the possibility of a trial of security forces in a civilian court of law. The army took over the case from the court of the Chief Judicial Magistrate, Srinagar and the case against the charge-sheeted soldiers was subsequently closed with the army claiming there was no prima-facie evidence against the soldiers.<sup>72</sup> The judicial verdict for Pathribal served to entrench the culture of impunity underpinning the AFSPA. Amnesty International noted that the second Supreme Court ruling reinforced the immunity

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70 Suchitra Vijayan, *Military justice in a political season*, THE HINDU, November 18, 2014, <http://www.thehindu.com/todays-paper/tp-opinion/military-justice-in-a-political-season/article6609776.ece>

71 Krishnadas Rajagopal, *Cannot invoke AFSPA in rape, murder: SC to Army*, THE INDIAN EXPRESS, 4 February 2012.

72 Suchitra Vijayan, *supra* note 70.



from prosecution in all cases of crimes by security forces in Kashmir.<sup>73</sup> By endorsing military trials of soldiers charged with rape, India's highest court extinguished the possibility of prosecuting perpetrators in civilian courts, thereby denying even a modicum of justice for rape victims. In January 2013, a government instituted panel headed by a former Chief Justice of India, Justice J.S. Verma recommended that security forces be brought under the purview of ordinary criminal law instead of Army law in cases involving sexual crimes against women. The government ignored the recommendations of its own panel.

With little possibility of the revocation of the political consensus around AFSPA, India has little to offer to Kashmir by way of legal justice. Criticism and protest by Kashmiri and sections of Indian civil society against AFSPA or judicial betrayal is no match for the far greater influence wielded by India's mainstream media on public policy and opinion.

#### **4. The Media**

The media is a crucial institution towards shaping public opinion regarding public policy. With few exceptions, the mainstream media's line on Kashmir has dovetailed with State and security narratives: security forces are privileged, as are State arguments centred on national security and sovereignty.<sup>74</sup> The absence of a critical media makes it extremely difficult if not altogether impossible to create an informed and critical public opinion regarding the situation in Kashmir. As a result of the media's self-imposed censorship the human implications of legislatively-backed impunity for security forces, and the denial of liberty and justice in Kashmir is not a subject of public debate or analysis in India. Persistent media representations of Kashmir as an issue between the (legitimate) Indian State and (illegitimate) Pakistan-sponsored terror, together with the characterisation of the Kashmiri people as disloyal traitors in league with Pakistan has served to insulate and misinform Indian public opinion from the reality in Kashmir. An

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73 See Amnesty International, *India: Pathribal ruling a setback for justice in Jammu and Kashmir*, May 01, 2013, <https://www.amnesty.org/press-releases/2012/05/india-pathribal-ruling-setback-justice-jammu-and-kashmir/>

74 For a fuller analysis of this point see Teresa Joseph, *Kashmir, Human rights and the Indian Press*, 9(1) CONTEMPORARY SOUTH ASIA, (2000).

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analysis on Press reporting on Kashmir concluded that:

In the context of Kashmir, the Press has failed to play its role as the watchdog of democracy, as it has by-and-large collaborated with the government in not revealing actual occurrences in the Valley...by its continued reiteration of the official version of events in Kashmir, the Indian Press has helped only to increase the sense of alienation among the people of Kashmir, and to keep the general public ignorant of what is really happening in the Valley.<sup>75</sup>

The role of the media is particularly telling with reference to allegations of rape by security forces against women in Kashmir where it has often displayed unseemly haste in exonerating security forces from charges of rape. Among the most egregious examples of Press bias towards security forces were the conclusions of a two member all-male Press Council of India team that travelled to Kunan Poshpora (see above) in 1991 at the invitation of the Army to investigate charges of mass rape by security forces. Without interacting with any victim, the Press Council team rejected all findings by independent sources, declaring the rape allegations against security forces as “baseless”, “a hoax” and “a dirty trick to frame the army.”<sup>76</sup> The conclusion was based on the fluctuating number of victims; inconsistencies in some of the testimonies of some villagers interviewed by the team; and villagers having signed an NOC (no objection certificate) after the army operation;<sup>77</sup> it was later discovered that the NOC submitted by Army authorities did not bear the name or signature of any witness.<sup>78</sup> By absolving security forces of any wrongdoing, the Press Council of India simultaneously exonerated the Indian State for its extra-legal sexualised counter-offensive in Kashmir. It also revealed the extent to which independent non-state watch-dog institutions are willing to play hand-maiden to the State they are meant to question and critique.

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75 *Id.*

76 Amiya Rao, *I am the Judge and I am the Jury, Report of the Press Council on Kashmir*, ECONOMIC AND POLITICAL WEEKLY 2857, December 14, 2014.

77 Rita Manchanda, *Press Council Report on Army in Kashmir*, ECONOMIC AND POLITICAL WEEKLY OF INDIA 1899, August 17, 1991.

78 Prashant Jha, *Unravelling a mass rape*, THE HINDU, July 8, 2013, <http://www.thehindu.com/todays-paper/tp-opinion/unravelling-a-mass-rape/article4893078.ece>

Uncritical media endorsement of government policy in Kashmir serves to legitimise the denial of rights and liberty in Kashmir<sup>79</sup> and helps maintain the status quo.

As we have seen, the key institutions responsible for the protection of citizens (security forces), the enforcement of law and order (police), the enforcement of citizens' rights and the rule of law (judiciary), and for questioning public policy in Kashmir (media) are either neutralised, compromised and/or unwilling to question or oppose the status quo in Kashmir. On the contrary, as the above evidence indicates, there exists institutional endorsement of State policy. The question of 'justice' for rape by security forces in Kashmir must therefore be situated within this overarching context

#### **IV. BEYOND THE STATE: INTERNATIONAL LAW IN KASHMIRI COURTS**

The possibility of securing justice from the courts of a State that has legalised suspension of the right to life, and accorded impunity to what international law recognises as war crimes and crimes against humanity (see below) is at best remote, if not altogether impossible. Moreover, the crime of rape by State security forces in Kashmir is a *systemic* crime that can hardly be tried by the very State-system that committed them. As Catherine MacKinnon argued, the power to act against these crimes lies exclusively in the hands of those who commit them.<sup>80</sup> The Kashmiri people therefore rightfully feel that justice for Kashmir's grave, gross and unconscionable human rights tragedy should move beyond the Indian legal system into the ambit of international law. Understandable and legitimate as Kashmiri sentiment is, it is nevertheless also the case that the contemporary state-centric, legal order (read the United Nations) has seldom expressed support or sympathy for Kashmir's struggle against Indian tyranny; nor has the UN censured India for her post-1990 abuse of power in a territory whose status the United Nations itself acknowledges as disputed and unresolved. What then, may be

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79 For a fuller analysis regarding this point see Balraj Puri, *Kashmir problem thrives on denial of human and democratic rights*, ECONOMIC AND POLITICAL WEEKLY OF INDIA 794, April 3, 1999.

80 Catherine A. MacKinnon, *Crimes of War, Crimes of Peace*, in ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 93 (Steven Shute & Susan Hurly eds., 1993).

plausible ethical and legal grounds to forward and advance Kashmir's struggle for justice?

International law is of vital importance to Kashmir's struggle for justice against crimes committed against the Kashmiri people by State security forces, and to the Kashmiri demand for self-determination.<sup>81</sup> Indeed as jurist A.G. Noorani noted:

It is the international aspect which has been completely overlooked in the entire discussion. Article 370 was adopted 1949 when India had publicly affirmed its commitment to hold a plebiscite in Kashmir. It discarded that commitment. But Article 370 which embodies it survives still and cannot be abrogated.<sup>82</sup>

It is therefore both just and legitimate on the part of the Kashmiri people to seek the support and protection of international law in a context that lends itself to three prudential arguments for international legal intervention in Kashmir, and a single moral argument for Kashmiri self-determination.

First, with reference to international law, India's claim to jurisdiction over Kashmir is, at best, tenuous. There exist several discrepancies with regard to the

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81 With reference to international law Kashmir's case for self-determination is exceptionally strong. Kashmir is a clearly defined geographic territory; has a long history of autonomous self-governance; a distinct language, culture, traditions, cuisine and folklore; there are Kashmiri political parties with the will and capacity to govern; resistance to feudal oppression by the erstwhile Maharaja Hari Singh during the colonial period morphed into resistance against Indian rule since 1947; there have been major uprisings in 1953, 1964, 1988-90 and 2010. For a fuller analysis, see section on Kashmir in K. Parker, *Understanding Self-determination: the Basics*, in *IN PURSUIT OF THE RIGHT TO SELF-DETERMINATION*, 67-68 (Y.N. Kly & D. Kly, eds., Clarity Press, 2001).

82 A.G. Noorani, *Kashmir Question*, DAWN, June 14, 2014, <http://www.dawn.com/news/1112545>. In the same article Noorani also notes that "An order of 1954 adds an overriding proviso to Article 253: 'provided that after the commencement of the Constitution (application to Jammu and Kashmir) Order, 1954, no decision affecting the disposition of...Jammu and Kashmir shall be made by the government of India without the consent of the government of [the former]'. Thus Kashmir's future is yet to be decided even according to India's Constitution. Kashmir's Constituent Assembly is gone. So is the idea of a plebiscite. But this proviso still exists reminding us of the pending dispute. Article 370 can be dealt with properly only...with due respect for the will of the people."

Instrument of Accession signed by Kashmir's Maharaja Hari Singh in 1947 with the Indian State. International law deems the Instrument of Accession invalid since Hari Singh was not in control of his territory and therefore lacked the authority to sign such a document.<sup>83</sup> Further, the Accession was made under duress and coercion that, according to the Article 52 of the Vienna Convention on the Law of Treaties, renders it invalid;<sup>84</sup> there is evidence to suggest Indian troops were already in Kashmir before the Maharaja had signed the Accession Treaty thereby raising serious concerns regarding the legality of Accession.<sup>85</sup> Finally, there remain doubts as to whether the Instrument of Accession was ever signed: international law stipulates that every treaty entered into by a member state of the United Nations must be registered with the UN Secretariat; India has never presented or registered the Instrument of Accession with the United Nations. For all these reasons, Kashmir's accession to India may be legally questionable if not invalid.<sup>86</sup>

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83 See Christopher Sneddon, *supra* note 2. Presenting historical evidence regarding events between Partition on August 15, 1947 and Maharaja Hari Singh's accession to India on October 26, 1947 Sneddon underscored the Maharaja's lack of control over his territory especially in terms of the rebellion of the Muslims of Poonch within his kingdom against him, and a massacre of Jammu Muslims by Hindu right-wing elements including, possibly, his own forces. The evidence indicates that it was the people of Jammu and Kashmir themselves who began the Kashmir dispute rather than Pushtun tribesman from Pakistan that India has repeatedly claimed in order to strengthen its position on Kashmir. Sneddon, *supra* note 2, at 37-63.

84 "India stated that it would not withdraw its military from Kashmir until Maharaja Hari Singh signed the Instrument of Accession clearly proving duress. The International Court of Justice has stated that there 'can be little doubt, as is implied in the Charter of the United Nations and recognized in article 52 of the Vienna Convention on the Law of Treaties, that under contemporary international law an agreement concluded under the threat or use of force is void.'" Parasaran Rangarajan, *A Kashmiri Equation*, 1(6) INTERNATIONAL JOURNAL OF RESEARCH 50 (2014).

85 The timing of the signing of the Instrument of Accession by Maharaja Hari Singh, upon which rests part of the Indian claim to Kashmir, is far from clear. India claims the Maharaja signed the Instrument prior to the arrival of Indian troops in the Valley. However there is evidence to suggest this was not the case. For an analysis contesting the official Indian version of events leading up to the signing of the accession, see ALISTAIR LAMB, *KASHMIR: A DISPUTED LEGACY 1846-1990*, 134-139 and 151-154 and generally Chapter 7 (Oxford University Press, Karachi, 1993).

86 Unless otherwise stated, all information in this para from Vikas Kapur and Vipin Narang, *The Fate of Kashmir: International Law or Lawlessness?*, 3(1) STANFORD JOURNAL OF INTERNATIONAL RELATIONS (2001), [https://web.stanford.edu/group/sjir/3.1.06\\_kapur-narang.html](https://web.stanford.edu/group/sjir/3.1.06_kapur-narang.html)

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Second, although the dominant concept of self-determination centred on anti-colonial struggles and the establishment of independent post-colonial nation-states, the legal principle of self-determination as a human right of *all* peoples guaranteed in the International Covenant on Civil and Political Rights<sup>87</sup> always had deep resonance among oppressed peoples within post-colonial nation-states. In 1975, the International Court of Justice ruled that the right to self-determination was a right held by people rather than by governments alone.<sup>88</sup> India has argued that the right to self-determination applies only to peoples under foreign/colonial domination, not to sovereign states. Such a narrow, conservative and self-serving argument may help maintain its occupation of Kashmir yet it is at complete odds with the wider and politically and ethically just concept of self-determination anchored in international law, and on the principle of popular consent, rather than on States' claims to sovereignty.<sup>89</sup>

Further, paragraph 4 of the 1993 United Nations Vienna Declaration embodied a distinct shift in international law in terms of the recognition of the rights of individuals within States, and the duty of States to uphold universally accepted and binding human rights standards within their territory. In doing so, the Declaration diluted the older, conventional concept of sovereignty wherein only States, not individuals were the subject of international law. The Declaration further affirmed self-determination as a human right of all peoples and underlined the importance of the effective realisation of this right for peoples denied it.<sup>90</sup> In other words, contemporary international law rejects the use of sovereignty as an argument for evading State accountability for crimes committed by State personnel

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87 "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." The International Covenant on Civil and Political Rights, Part I, Article 1, 1966.

88 *Western Sahara*, Advisory Opinion, 1.C.J. Reports 1975, p. 12, [www.icj-cij.org/docket/files/61/6195.pdf](http://www.icj-cij.org/docket/files/61/6195.pdf)

89 Karen Parker noted that out that "Kashmiri self-determination is also defended by the principle that the determination of the political future of a colonised people made either by the colonial power itself or a 'ruler' established by the colonial power is repugnant to the process of decolonization and the principle of self-determination." Karen Parker, *supra* note 78, at 12.

90 United Nations Human Rights, Office of the High Commissioner for Human Rights, *Vienna Declaration and Programme of Action adopted by the United Nations World Conference on Human Rights*, paras 1 and 4, (Vienna, June 25, 1993.)

against a (Kashmiri) people; it also does not recognise sovereignty as a valid ground for denying any people the right to self-determination.

Third, the significance of international law with reference to sexual crimes by State personnel cannot be overstated. Rape is recognised as a crime of war in various international statutes, courts, tribunals and judicial rulings.<sup>91</sup> International human rights law affirms rape as a crime mandating criminal prosecution. Article 5(g) of the Rome Statute of the International Criminal Court and Article 3(g) of the Statute of the International Criminal Tribunal on Rwanda (ICTR) list rape against civilian women during domestic armed conflict as a war crime and a crime against humanity. In 1998, the founding instrument of the ICC, the Rome Statute, was put to vote and adopted by 120 State parties. India abstained from voting and is not party to the ICC. Among its objections to the Statute were the two conditions [Article 17(1) (b)] under which the International Criminal Court has jurisdiction to intervene in a country, namely, (a) the country in question is either unwilling to prosecute the crime, or shielding its perpetrators from accountability for ICC-defined crimes or (b) if the country in question is unable to investigate or prosecute ICC crimes because its legal system has collapsed. As we have seen, the evidence indicates that Indian State authorities are unwilling to allow the investigation and/or prosecution of security forces guilty of rape in Kashmir. India's rejection of international legal standards stems from a fear of international exposure and indictment of the failure of its domestic judicial system. Lacking commitment or sincerity towards the twin principles of protecting citizens' human rights and ensuring justice for victims of the abuse of public power and authority, India takes refuge in statist and congealed arguments around sovereignty to justify its amoral and self-serving rejection of the ICC. As Usha Ramanathan noted:

India's resistance to accepting the inherent jurisdiction of the ICC is explained, in part, by anxieties about how investigation, prosecution

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91 Such as Security Council Resolution 808 (1993); Security Council Resolution 1315 (2000); Security Council Resolution (2000); the International Criminal Tribunal for the former Yugoslavia (ICTY, 1993); International Criminal Tribunal for Rwanda (ICTR, 1994); The United Nations Special Court for Sierra Leone (SCSL, 2002); Rome Statute of the International Criminal Court (2002).

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and criminal proceedings in the Indian system may be judged by an international court.<sup>92</sup>

If the Indian judicial system falls short of delivering justice for war crimes and crimes against humanity in Kashmir, international law remains the sole legal recourse for a people denied justice for decades. More specifically, the demand to invoke international law is entirely justifiable in a situation where all domestic channels for legal redress for sexual crimes against Kashmiri women by State security forces remain blocked.

Finally each of the above arguments for international legal intervention in Kashmir advance a single moral argument for Kashmiri self-determination. This argument is not about numbers. Rather, it focuses on the *nature* of the crime to assert that sexual crimes committed by State-funded and employed security forces against Kashmiri women are crimes whose purpose was not the curbing of political dissent, for self defence, or the defence of territory – all of which are the normative justifications for States’ monopoly over violence. Rape by state security forces is a violation of the Laws of War crafted by modern States in the 20<sup>th</sup> century; it is, in equal measure, a crime of commission committed with impunity against a (Kashmiri) people by a State system.<sup>93</sup> Whether a State that has legalised criminality is a legitimate State may be of interest to India and concerned Indian citizens. However, since the focus here is on Kashmir, it may further be argued that the gravity of rape by security forces is of an entirely different *order* not so much because of its scale or magnitude but because the *nature* of this particular crime violates “the order of mankind” in ways that are an affront to the moral code of

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92 Usha Ramanathan, *India and the ICC*, 3 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 627, 627-634 (2005).

93 According to a Wikileaks report the International Committee of the Red Cross (ICRC) confirmed that Indian security forces were using electrocution, physical beatings and sexual interference against hundreds of detainees in Kashmir. The view of the ICRC was that India condones torture and that detainees were not Islamist insurgents of Pakistan-backed militants; they were civilians believed to have information about the insurgency. Nick Allen, *Wikileaks: India Systematically torturing civilians in Kashmir*, THE TELEGRAPH, December 17, 2010, <http://www.telegraph.co.uk/news/worldnews/wikileaks/8208084/WikiLeaks-India-systematically-torturing-civilians-in-Kashmir.html>.



humanity, and to the inalienable dignity of the human person.<sup>94</sup> Kashmir's ledger of rape, sexual abuse and sexual torture by Indian security forces symbolises the Indian State's disregard for human life and human dignity, and more specifically, its contempt for the humanity and dignity of the Kashmiri people. For this reason, and this reason alone, the people of Kashmir can no longer consider a future under Indian jurisdiction.<sup>95</sup>

As a people who have historically been at the receiving end of cruelty, injustice and oppression, whose memory is replete with unanswered pleas for protection and justice; as a people who were accusers, never the dispensers of justice; were the accused, never the prosecutors; the Kashmiri people have a right to sit in judgement over crimes committed against them. It is only right and proper that justice for sexual crimes against Kashmiri women by Indian security forces is done, and *seen* to be done, on Kashmiri soil, by Kashmiri judges, in Kashmiri courts, using international law, in a Kashmir free of Indian control.

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94 See HANNAH ARENDT, *EICHMANN AND THE HOLOCAUST* 97 (Penguin, 1966)

95 I am deeply indebted to Hannah Arendt whose ideas in her above-mentioned book I have drawn upon.