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The Armed Forces Special Powers Act, 1990 In Conflict with Article 6 of the ICCPR; It's About Ethics and Not Pseudo-Nationalism

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ABSTRACT

By confounding the current dynamics related to the legality and proportionality of AFSPA, this piece offers an invitation to look beyond the archetypical enigma that dominates the global headlines, in order to unveil the struggles for right to life and liberty. The representation of the oppressed voices is crucial to breaking the hegemonic narrative of the oppressor and hence there should be representation at every stage. One should not question the very existence of Kashmiris instead one should understand them as we grow together not by force but by peaceful representation and co-existence. The broad argument of this essay is honest and analytical as it tries to examine the recourses, if any, the people of Kashmir has under both the domestic laws and international laws.

This annotation will try to provide a holistic view of the means adopted by New Delhi to shun the people of Kashmir to speechlessness at the backing of a national legislation, i.e. the Armed Forces Special Powers Act, 1990 in Part I. Part II attempts at drawing the parallels in order to highlight the unconditional support offered by various committees in reviewing AFSPA as it represents tyranny, bloodbath and disproportionate use of force. Part III tries to dwell into the various aspects of the AFPSA to provide a better account as to if it's a national necessity or a tool legalizing human rights violations. Part IV highlights the application of AFSPA being inconsistent with various provisions of ICCPR, which views right to life as a supreme virtue from which no derogation is permitted. Part V outlines the series of events, which explain the paradoxical conundrum of AFSPA being used as a tool to counter dissent and accordingly explores the potential remedies that can help in achieving peace in the region.

I. INTRODUCTION

For many years, India has been combatting terrorism and countering insurgency activities in various parts of the country and in order to denude the struggles of right to self-determination that remains hidden underneath, a draconian legislation i.e. The Armed Forces Special Power Act, has been implemented to legitimize the human rights violations. AFSPA, being a

¹ Author is a student at National Law Institute University, Bhopal, India.

parliamentary legislation is implemented in areas that are considered to be disturbed. For the first time it was implemented in Assam and Manipur in 1958 when the hostilities began as people wanted to form a separate nation and the cry for self – determination had engulfed the region. Later on in the year 1990, AFSPA was implemented in J&K when the terrorist activities had started increasing manifolds and the state was in utmost chaos. With certain rights flowing unconditionally from the dignity of the human person, the language of the draconian legislations resonates more closely to the idea of state sovereignty than to the fundamental notions of humanity and morality. Some human rights conventions and treaties, such as right to life and self-determination cut against the universal notions of brute force to uphold the ideals of state sovereignty for the simple reason that imaginary threats to the integrity of the state cannot supersede the individual freedom and the notions of a dignified life in any manner. AFSPA gives the armed forces complete impunity to carry out its activities without being held accountable and accordingly certain crimes like right to shoot on mere suspicion, right to search and seize without obtaining a warrant remain an abominable paradox to the right to life and liberty of the victims.²

The army at times has jeopardized the inherent fundamentals of human responsibility by resorting to the cutthroat human rights abuse including hostage- taking, targeted killings and indiscriminate attacks against civilians.³ If incidents like custodial deaths, torture, mass rape, enforced disappearances, and extra judicial executions continue to remain a seemingly absurd synonym of such legislation, then the entire judicial system has fallen and democracy has failed. The civilian to military ratio in Kashmir is 15:1, making it the highest militarized zone in the world, stresses upon the very fact that the quality or content of such a legislation is not fundamental to the rule of law and the governing structure of the constitution.⁴ On Feb 23, 2006, the Indian Army killed 4 young boys including an 8 year old in Handwara while they were playing cricket, on the mere suspicion of them being the over ground workers and assisting the militants in the valley.⁵ This explains the tyranny and pinpoints the error of having such an unwarranted method of use of force. In a similar vein, a system is said to have failed when the rule of law doesn't exist and the extraordinary severity by law-abiding agencies is used as an excuse to identify the same with pseudo – patriotism. Therefore to hide the evidences of the

² The Armed Forces (Special Powers) Act - Repressive Law,” *Combat Law: The Human Rights Magazine*, vol. 2 (1), April/May, 2003.

³ Human Rights Watch (HRW), “The human rights crisis in Kashmir”, June 1993. See at: <https://www.hrw.org/sites/default/files/reports/INDIA937.PDF>; HRW.

⁴“Do you need 700,000 soldiers to fight 150 militants?": Kashmiri rights activist Khurram Parvez”, *Scroll.in*, 21 June 2016.

⁵ "Everyone Lives in Fear": Patterns of Impunity in Jammu and Kashmir, Sep. 11, 2006, HUMAN RIGHTS WATCH.

crime and maintain the paradox of Kashmir being in a state of undeclared emergency, the two measures of AFSPA that are central to this discourse are:

- i. The permission and sanction of the central government is a must requirement before initiating a legal proceeding or suit against any member of the Armed Forces.⁶
- ii. The armed forces are tried in a military court or tribunal, the hearing of which is never made public and accordingly becomes an effective safeguard in impeding justice.⁷

II. EXPERT RECOMMENDATION ON STATUS OF AFSPA

AFSPA is a symbol of oppression, tyranny, and bloodbath and has reduced Kashmir to an open-air prison with people having no control over their lives⁸, therefore many committees have been set up to view and assess the same. The BP Jeevan Reddy committee was set up to review AFSPA and stated, “The act is too sketchy, too bald and quite inadequate in several particulars” and recommended that it should be repealed in the interests of justice and good conscience.⁹ The main finding of the committee was that there has to be a system of checks and balances to ensure that the armed forces do not unnecessarily use their powers to suppress, horrify and marginalize the people and accordingly give due recognition to the basic fundamentals of human dignity in the conflicted territories.

The report of the Second Administrative Reforms Commission (2007), headed by the former Union Minister Dr. M. Veerappa Moily, recommended the repeal of the AFSPA as it has been very discriminatory and has displaced the civilian population on their own will and rates without being held accountable. The main recommendation of the committee was to set up a grievance cell to ensure that the perpetrators of human rights violation are punished and held accountable for their actions. “There is an imminent need to review the continuance of the AFSPA and AFSPA-like legal protocols in internal conflict areas as soon as possible.”¹⁰ In 1997, the UN Human rights committee has expressed its discontent with AFSPA being arbitrary and draconian in nature especially in conflicted areas or areas described as ‘disturbed’. Therefore there is an immediate need to review AFSPA as it puts the entire population at an imminent threat of life and liberty.¹¹

⁶ THE ARMED FORCES (JAMMU AND KASHMIR) SPECIAL POWERS ACT, 21 of 1990, § 7, (India).

⁷ Armed Forces Special Powers Act: A study in National Security tyranny’ (South Asian Human Rights Documentation Centre) accessed 13 July 2017.

⁸ ‘Briefing: The Armed Forces Special Powers Act: A Renewed Debate in India on Human Rights and National Security’ (Amnesty International India, September 2013).

⁹ Government of India, Ministry of Home Affairs, Report of the Committee to review the Armed Forces (Special Powers) Act, 1958 (2005) 71 Second Administrative Ref, “Recommendations,” Part IV, Report of the Committee to Review the AFSPA, 2005, p. 74.

¹⁰ R. Suryamurthy, “Moily Panel for Repeal of AFSPA,” *The Tribune*, June 25, 2007.

¹¹ UN Human Rights Committee, “Concluding Observations of the Human Rights Committee: India,” paras. 18,

III. THE ARMED FORCED SPECIAL POWERS ACT, 1990: DEBUNKING THE MYTH

When an inhuman legislation injures an individual, the *raison d'être* can be found in the delusional columns of state- sovereignty. What if the same legislation injures 1.2 million people on a daily basis, then the contradiction of such a legislation being a national necessity or a tool legitimizing human rights violations gives rise to a conundrum envisaging multiple components of the dispute.

(A) Guidelines

Section 3 of the act gives the Governor of the state the special authority to declare a particular state or territory, wholly or partly, as disturbed. The Governor can reflect the same in the official gazette if he/she deems fit that the use of the armed forces is extremely important to ward off the danger that may arise in a disturbed area and at the same time ensure a particular territory is peaceful and law and order situation prevails.¹²

(B) Use of force

If the armed force is of the opinion that it is necessary for the maintenance of public order, he or she can, after giving the requisite warning use force even to the extent of causing death of any individual in an attempt to ward off the danger. If the individual does something, which is in contravention to the law, like being a part of an unlawful assembly or carrying weapons etc., the army can act within the limits of its authority and use force to ensure that law and order is maintained.¹³

(C) Arrest on mere suspicion

A military officer can arrest, without warrant, any person who he/she believes to have committed a cognizable offence or has reason to believe on the basis of a mere suspicion that a person is likely to commit such a cognizable offence.¹⁴ Any officer can exercise his/her powers to the effect of making an arrest and soon after the arrest is made, the alleged offender is to be handed over to the office-in-charge of the nearest police station within a suitable time frame for the proceedings to be initiated in a lawful manner against the alleged accused,¹⁵ which doesn't happen after the arrest or hostage taking is done by the armed forces.

19, 21.

¹² THE ARMED FORCES (JAMMU AND KASHMIR) SPECIAL POWERS ACT, 21 of 1990, § 3, (India).

¹³ THE ARMED FORCES (JAMMU AND KASHMIR) SPECIAL POWERS ACT, 21 of 1990, § 4(a), (India).

¹⁴ THE ARMED FORCES (JAMMU AND KASHMIR) SPECIAL POWERS ACT, 21 of 1990, § 4(c), (India).

¹⁵ Cognizable offences are those in which police is empowered to register a first information report, i.e. most serious offences.

(D) Enter and Search

A military officer or a personnel can enter and search, any premise, without any warrant if he/she deems fit in order to make an arrest or recover any individual who has been wrongfully restrained or confined and recover any ammunition that is alleged to be unlawfully kept in the premises. While doing so, the armed forces can use force if anything holds them back from exercising their powers and any casualty that arises in the aftermath having using sufficient force would not be to their accord, i.e. the army wont be held accountable for the same.¹⁶

(E) Complete Impunity

No suit or proceedings shall be initiated against any member of the armed forces without the prior approval or sanction of the Central government. This gives the armed forces complete impunity to exercise their duty without the fear of being held accountable.¹⁷

This kind of impunity given to the armed forces has resulted in the killings of innocent youths, individuals who are detained under the carb of such an authority, are never presented before the Judge or handed over to the police officer in majority of the cases. In many cases, the Courts also found out that all those who have been detained by the armed forces have suddenly disappeared,¹⁸ making them the victims of the enforced disappearances.¹⁹

Arguments In Favour Of AFSPA

- i. Under Section 45 and 197-A of CrPC, the army is given some special powers in the form of impunity to carry out its activities without being held accountable. Such powers were not applicable to the army in the state of J&K because of Ranbir penal Code being in force.²⁰
- ii. The lifting of AFSPA would not be possible as Kashmir all of a sudden would become a safe heaven for terrorists and would also lead to secession of J&K from India.²¹
- iii. Also restricting AFSPA to only some districts in Kashmir cannot be possible as the major military establishments are in the capital city of J&K and partial implementation of AFSPA cannot be achieved due to the alignment of roads and establishments.²²

¹⁶ THE ARMED FORCES (JAMMU AND KASHMIR) SPECIAL POWERS ACT, 21 of 1990, § 4(d), (India).

¹⁷ THE ARMED FORCES (JAMMU AND KASHMIR) SPECIAL POWERS ACT, 21 of 1990, § 7, (India).

¹⁸ Nungshitombi Devi v. Rishang Keishang, CM Manipur, (1982) 1 GLR 756, and Luithukla v. Rishang Keishing, (1988) 2 GLR 159.

¹⁹ International Convention for the Protection of All Persons from Enforced Disappearance, Article 2.

²⁰ The Code Of Criminal Procedure, § 45 & 197-A, 1973 (India).

²¹ Pravin Swami. "Army Raises 'Secession' Spectre to Counter Clan to Lift AFSPA." Hindu, 11 November 2011.

²² Time Has Not Come For Any Rethink On AFSPA: Army Chief, 28TH Jan, 2018, Press Trust Of India, NDTV.

- iv. The Army is used as a last resort in fighting the terrorists and establishing peace. It would be impossible for them to function in disturbed areas without special powers or mandate.²³ They need operational flexibility and freedom to achieve its mandate.²⁴

Arguments against AFSPA

- i. The AFSPA is a relic of the colonial past, with its roots embedded in the 1942 law, which was drafted to suppress the Quit India Movement. This gives it an unsavory flavor and strengthens the argument against it.²⁵
- ii. Without the system of checks and balances, accountability and remedies available, AFSPA encroaches upon the rights of an individual making it a questionable legislation both in theory.²⁶

IV. AFSPA INCONSISTENT WITH ARTICLE 6 OF THE ICCPR

Article 6 of the International Covenant on Civil & Political rights, in comment no. 36, views right to life as a supreme virtue from which no derogation is permitted even in times of armed conflicts or emergency.²⁷ With India being a state party to ICCPR since 1979, it outlines a series of rights and corresponding obligations that are relevant when interpreting the application of the act. It further talks about the entitlement of individuals to be free from the acts or omissions of states that might lead to untimely and premature death or deprivation from right to life and life with dignity.²⁸ Right to life forms the corner stone of all the rights and no authority or individual in positions of power should come in between the individuals and their right to life in its truest sense.²⁹ The rights to life as a right is not absolute as some reasonable restrictions can be applied, e.g. use of force to disperse a crowd etc., but these restrictions should not be arbitrary in any manner.

Part II of ICCPR in article 6 talks about the arbitrary deprivation of life and if life is deprived in any manner irrespective of the fact that whether the same was done within the ambit of the domestic laws or the international laws, it will come under the ambit of arbitrary deprivation of

²³ Harinder Singh. "AFSPA: A Soldier's Perspective." IDSA Comment, 6 July 2010.

²⁴ Sreenivasan Jain. "Kashmir: The Riddle of AFSPA." NDTV.com, 21 November 2011.

²⁵ A. G. Noorani. "Armed Forces (Special Powers) Act: Urgency of Review." Economic and Political Weekly XLIV, no. 34, 22 August 2009. p. 8.

²⁶ Sajad, Kralyari. "Kashmir Economic Alliance, KEA Demands AFSPA Revocation from Entire J&K." Rising Kashmir, 15 November 2011.

²⁷ International Covenant on Civil and Political Rights, art. 6; Human Rights Committee, general comment No. 6 (1982) on the right to life, para. 1; general comment No. 14 (1984) on the right to life, para. 1; Camargo v. Colombia, communication No. 45/1979.

²⁸ Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 8. See also European Court of Human Rights, Osman v. United Kingdom (case No. 87/1997/871/1083), judgment of 28 October 1998, para. 116.

²⁹ Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, paras. 9 and 55.

life.³⁰ Arbitrary deprivation does not only mean something that's against the law, it also includes the element of bias, inappropriateness, immorality, injustice and marginalization.³¹ Therefore it's important to put in place appropriate legislations, ensuring that less-lethal means are adopted and adequate protective equipment is used in order to obviate the need to resort to lethal force.^{32,33}

Part III of ICCPR in article 6, stresses upon an added responsibility on the state actors to protect the life of its citizens as per the guidelines laid down in the provisions. If instances of violation are backed by the state actors in the form of impunity given to the law enforcement agencies, it is considered to be an act of utmost gravity, rupturing the very essence of the society and laws.³⁴ In a similar vein, the law enforcement officials should comply with relevant international standards, including the Code of Conduct for Law Enforcement Officials and the Basic Principles on Use the of Force and Firearms by Law Enforcement Officials,³⁵ and therefore should undergo appropriate training designed to inculcate these standards for the recognition of the right to dignified life. AFSPA has been inconsistent with other articles of the convention as well. It violates (Article 6), which includes prohibition against torture, inhuman treatment and degrading treatment³⁶ (Article 7), right to liberty and security of an individual³⁷ (Article 9), right to privacy and right not to be subjected to arbitrariness in any manner³⁸ & (Article 21), which talks about the right of an effective and legitimate remedy³⁹.

V. INSTANCES OF AFSPA VIOLATING RIGHT TO LIFE AND BEING IN CONFLICT WITH THE PROVISIONS OF ICCPR

Marginalization of people leads to their radicalization. With assault and armed conflicts, people tend to revolt and in retaliation the law enforcement agencies resort to illegal and inhuman means of crowd control. Psychological perspective of the problem is more propound than its

³⁰ African Commission on Human and Peoples' Rights, General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4) (2015), para. 12.

³¹ Gorji-Dinka v. Cameroon (CCPR/C/83/D/1134/2002), para. 5.1; Van Alphen v. Netherlands, communication No. 305/1988, para. 5.8.

³² A/HRC/31/66, para. 54.

³³ European Court of Human Rights, McCann and others v. United Kingdom (application No. 18984/91), judgment of 27 September 1995,

³⁴ Human Rights Committee, general comment No. 6, para. 3; Camargo v. Colombia, para. 13.1.

³⁵ Paul M. Taylor, Article 6: The Right to Life, 11th June, 2020, Cambridge University Press.

³⁶ UN Human Rights Committee (HRC), General Comment no. 36, art. 6, CCPR/C/GC/36.

³⁷ UN General Assembly, International Covenant on Civil and Political Rights, art. 7, 16 December 1966, 999 UNTS 171.

³⁸ UN General Assembly, International Covenant on Civil and Political Rights, art. 9, 16 December 1966, 999 UNTS 171.

³⁹ UN General Assembly, International Covenant on Civil and Political Rights, art. 21, 16 December 1966, 999 UNTS 171.

military, political, and diplomatic dimensions. To find the root cause of the problem is more important than trying to silence the problem temporarily. The use of inhuman weapons and a draconian legislation will further create rifts between the population and the political machinery in the valley. Therefore, we as a society grow together by peaceful deliberation and dialogue, not ammunition and political prologue.

(A) Sexual Violence - Kunan Poshpora

For years the Indian Army has been found guilty of mass rape in conflicted regions, be it the rape of Thanjam Manorama in the North east or the dreadful mass rape of two villages of Kashmir, i.e. Kunan & Poshpora. The tragic night of 23rd Feb, 1991, the 4RR regiment of the Indian Army carried out a cordon and search operation in two villages of kunan and Poshpora. Incensed at the villager's refusal to share information, the Indian Army took men out of their homes, tortured them and brutally mass raped as many as 31 women. 30 years after the shameful incident, the two villages could not find justice and are called as the villages of the raped women, courtesy "The Indian Army". An incident like this cannot be dismissed on the grounds of it being a fiction, as it must be denied even as fiction. The medical reports also suggested that the victims have been raped by the armed forces. What was our mistake?, is one common question that comes to the mind of every victim but it doesn't have an answer to it. Is it just because the women raped belonged to Kashmir, the very fact that justice cannot find its place to Kunan & Poshpora lies in the seemingly absurd paradox, that the Army manages to manipulate the judicial and non – judicial systems in J&K in favour of its own interests.⁴⁰

This incident clearly violates the article 6, article 7 and 2(3) of the ICCPR, as it degrades the dignity of the individuals and is none less than a torture of the highest order. Lack of transparency, accountability and an effective remedy given to the victims of the mass rape, makes AFSPA nonetheless a tool-legitimizing bloodbath, tyranny and disorder in the valley.⁴¹ It further violates the article 1 of CEDAW, which talks about prohibition of discrimination against women in all its forms.⁴² Similarly equal rights are given to the detained persons as well with respect to human treatment.⁴³ Normally in conflicted regions, mass rapes committed by men in uniform go unchecked under the garb of the legal impunity and special powers enjoyed

⁴⁰ Natsha Rather "et al", Do you remember Kunan – Poshpora?, see at: <https://www.inversejournal.com/2020/02/23/book-review-do-you-remember-kunan-poshpora-by-shah-munnes-muneer/>

⁴¹ UN General Assembly, International Covenant on Civil and Political Rights, art. 6, 7 & 2(3), 16 December 1966, 999 UNTS 171.

⁴² Convention on the Elimination of all forms of Discrimination against Women (CEDAW), art 1, 18th December 1979, UNTS 13.

⁴³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), art 10, 10th December 1984, UNTS 85.

by the armed forces which is one of the major concerns to be looked after for better and effective implementation of Justice and rights of the individuals.⁴⁴

The narrative of the Armed forces is that the claims put forth by the victims are baseless, frivolous and concocted with the main aim of demoralizing the Indian Army and portraying a bad picture. The survey conducted by the Press Trust of India clearly showed that the evidence lacked merit and the statements given by the victims did not match, thereby terming it as an attempt to malign the integrity of the forces.⁴⁵ Whenever we talk about AFSPA, we cannot not remind ourselves of Kunan – Poshpora where victims are still fighting for Justice. What we forget is that the victims are also a part of this nation as much as the perpetrators. The pain and the mental trauma that the victims would've been through is beyond imagination. Kunan – Poshpora is one of the main reasons as to why the AFSPA is a draconian law, merciless and ruthless.

(B) Massacre's - Bijbehara Massacre

On the looming afternoon of 22nd October 1993, in Bijbehara, Jawans from the Border Security Force opened fire as an attempt to silence the hundreds of protestors, who were carrying out a peaceful demonstration against the illegal occupation. The world's largest democracy resorted to indiscriminate firing at the demonstrators for carrying out their peaceful and lawful right; the irony. As many as 51 people were ruthlessly murdered and was marked as one of the black days in the history of Kashmir.⁴⁶ In addition to this, there are many massacres committed by the armed forces that go unchecked like the Gowakaddal massacre, Sopore massacre, zakoora massacre, handwara massacre etc.

The Human rights laws and Article 21 of the ICCPR specifically talks about the right of each and every individual to carry out a peaceful assembly. Law enforcement agencies should not use unnecessary and disproportionate force as a reasonable restriction on the rights of the others.⁴⁷ Brute force, which is not necessary, should not be used against the protestors as it violates the article 21 of ICCPR and is in conflict with the Right to life under ICCPR, UDHR AND ECHR. Even in situation of armed conflict, the use of force during peaceful assemblies remains regulated by the rules governing law enforcement, and the Covenant continues to apply.⁴⁸ In armed conflicts, if the demonstrators of a peaceful assembly are subjected to brute

⁴⁴ Manjula Sen, 'Right to Rape?' The Telegraph (19 June 2013).

⁴⁵ B.G Verghese, Crisis and Credibility, The Lancer Paper, Press Council of India 114 (1991).

⁴⁶ Majid Maqbool, At Bijbehara, Site of 1993 Massacre, the Killing of 43 Kashmiris is Still a Raw Wound, 22nd Oct. 2017, THE WIRE.

⁴⁷ UN General Assembly, Code of Conduct for Law Enforcement Officials, art. 3, 5th Feb. 1980, A/RES/34/169.

⁴⁸ UN Human Rights Committee (HRC), General Comment no. 36, art. 6, CCPR/C/GC/36.

or unlawful force, it is a matter of utmost gravity and falls within the ambit of “crimes against humanity”, which forms a jus cogens norm of International law, from which no derogation is permitted at all.⁴⁹

The law enforcement agencies cannot operate with certain pre-conceived notions and imaginary threats that a peaceful assembly will all of a sudden turn violent. In order to rebut this assumption, the peaceful assembly should be allowed. The security forces should increase the security cover and man certain checkpoints, but to not allow a peaceful demonstration to happen is against the tenets of the ICCPR and domestic laws as well.

(C) Degrading and Inhuman Treatment - Pellet Guns

Some carry the scars of the conflict on their souls and in Kashmir people carry it on their face, courtesy “the lethal pellets”. In 2016, after the paramilitary forces had gunned down Burhan Wani, the commander of the terror outfit Hizbul Mujahidin, it lead to widespread protests in the entire valley and to curb the same, the authorities started using pellets as a crowd dispersing strategy. The ruthless mortar fires hundreds of pellets at one go without taking any safety measures. The lethal form of crowd dispersing strategy blinded hundreds of people, which included young school going children, lone breadwinners of the family, old age people etc.. Not only this the scary pellets made the future of all the victims very bleak wherein they cannot pursue their ambitions, desires and is the human cost of governments authoritative and unethical regime. Victims were forced to let go off simple pleasures, and prepare for difficult futures.⁵⁰ It’s like telling the people of Kashmir that they lost their eyesight and should assume they never had one.⁵¹

As per the study “Psychiatric Morbidity in Pellet Injury Victims of the Kashmir Valley”, conducted by the Department of Psychiatry, GMC. Srinagar & Geneva – based Sans Frontieres, close to 1.9 million (more than 45% of the adult population) in the valley are experiencing serious symptoms of mental distress with 49% exhibiting high forms of depression, 30% suffering from anxiety and panic attacks and close to 25% of the population find it difficult to cope up with the cascading effects of the post traumatic stress disorder (PTSD).⁵² Fear of unknown, trepidation, episodes of violence and painful memories of the past have shunned the victims to speechlessness and reduced them in a vicious circle of pain and misery from which

⁴⁹ UN General Assembly, Rome Statute of the International Criminal Court, art. 7, 17th July, 1998.

⁵⁰ LOSING SIGHT IN KASHMIR – THE IMPACT OF PELLET-FIRING SHOTGUNS, Amnesty International, INDIA.

⁵¹ Office of the United Nations High Commissioner for Human Rights, Report on the situation of Human Rights, see at: <https://www.ohchr.org/Documents/Countries/PK/DevelopmentsInKashmirJune2016ToApril2018.pdf>

⁵² Peerzada Ashiq, In Kashmir, hundreds of pellet gun victims face a hazy future, Jun 01, 2019, THE HINDU.

there seems to be no imminent escape.⁵³ The scars on the face of the people in Kashmir says a lot about inhumanness of the forces,

*A 2-year-old Hiba back in the day, unaware of the situation, cause and conflict, was fired pellets mercilessly in her right eye and eventually lost her eyesight partially. For a 2 year old, she has seen it all. The unending circle of pain and misery, the flickering of the surgical bulb in the operation theatre, the cloaking of the surgical instruments, the piercing of the syringe in the eyeball. Without an iota of doubt, it's the human cost of India's highhanded crackdown in the valley. Probably the first experience that HIBA would ever have in her life would be that of pain and mental trauma.*⁵⁴

The United Nations basic principle on the use of force and firearms prohibits the use of life threatening or inherently dangerous weapons and firearms that cause serious injury, unwarranted damage and pose an imminent threat to life and well being of the people.⁵⁵ Also the ICCPR in General comment No. 37 states, Firearms are not an appropriate tool for the policing of assemblies and must never be used unnecessarily to disperse an assembly.⁵⁶ In addition to this, it violates (Article 6 of the ICCPR), which provides for a dignified life, free from all forms of torture, disability and mental trauma, (Article 7), which talks about protection from torture, cruelty, inhuman and degrading treatment. The use of pellet guns is in no way less than a war crime as it blinds the entire population and reduces them in a shell of mental trauma and emotional pain. Therefore the weapons that are prima facie lethal and disproportionate should not be used as a means of crowd control as they are not even approved off by the UN General Assembly and OAS General Assembly.⁵⁷ Further in the Nuclear weapons case, the ICJ clearly stated that the use of lethal and life threatening weapons should be banned as its against the cardinal principles of International human rights law.⁵⁸

(D) Military courts and tribunals impeding access to justice

Indian legal jurisprudence provides for the safety knit to the members of the armed forces, accused of having committed crimes on civilian population because the remedy is not readily available, as it defends the armed forces and manipulates the administration of justice.

⁵³ Hassan, M., Disabled Population: Facts, findings & Challenges 07 May, 2015, Rising Kashmir.

⁵⁴ Aaqib Khan, The Mental Agony of Pellet-gun Victims in Kashmir, 01, Nov. 2019, THE POLIS PROJECT.

⁵⁵ United Nations, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, General Provisions, No. 9, OHCHR.

⁵⁶ UN Human Rights Committee (HRC), General Comment no. 36, art. 6, CCPR/C/GC/36.

⁵⁷ See UN General Assembly, Res. 1653 (XVI) (ibid., § 369), Res. 3032 (XXVII) (ibid., § 370), Res. 3076 (XXVIII) (ibid., §§ 371–373, Second Review Conference of States Parties to the Convention on Certain Conventional Weapons, Final Declaration (ibid., § 387).

⁵⁸ ICJ, Nuclear Weapons case, Advisory Opinion (ibid., § 389).

Moreover the Military personnel's are tried in a Military Court or Tribunal, the hearing of which is kept confidential and outside the public domain. To contour the realm of the possibilities, it cannot be even proved if these Courts and tribunals try the alleged perpetrators for offences, such is the threshold of biasness and the lack of accountability measures. The Armed Forces Special Powers Act and other provisions noted above require the prior approval of the central government for civilian prosecutions of military personnel.⁵⁹ Also under the Army Act, the Army may transfer a soldier from civilian to military custody for offenses that can be tried by a court martial. As per the statistics, there are a total of 50 cases wherein the army has been held guilty of human rights violations and only once the alleged members of the forces have been punished. This sheds light on various aspects of how the justice dispensing system is compromised for the vested interests of the political machinery.⁶⁰

However, according to the 'Special Rapporteur on Independence of Judges and Lawyers, military courts' do not meet the International fair trial standards and thus are not suitable to try offences committed against civilians.⁶¹ Therefore military courts act as a hindrance in the administration of justice and violate various provisions and protocols of ICCPR such as Article 2(3), which provides for a remedy but owing to the justice dispensing system through these courts, the remedy is not given to the victims as there is no transparency with respect to the issues being dealt with.

(E) Arbitrary arrests, Torture and killings in the name of AFSPA

As a State party to the International Covenant on Civil and Political Rights, India is obligated to ensure the principles of legality⁶² and the right to liberty and security.⁶³ The right to liberty and security includes the right not to be subjected to arbitrary arrest or detention,⁶⁴ the right to know the reasons for one's detention and charges,⁶⁵ if any, the right to be brought before a judge within a reasonable time frame following the arrest or detention, and the right to appeal to a

⁵⁹ THE ARMED FORCES (JAMMU AND KASHMIR) SPECIAL POWERS ACT, 21 of 1990, § 6, (India).

⁶⁰ Amnesty International, "Denied: Failures in accountability for human rights violations by security force personnel in Jammu and Kashmir", 2015, p. 46.

⁶¹ Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, to the General Assembly, in accordance with resolution 17/2 of the Human Rights Council (A/68/285), 7 August 2013, pp. 21-22.

⁶² UN General Assembly, International Covenant on Civil and Political Rights, art. 15(1), 16 December 1966, 999 UNTS 171.

⁶³ UN General Assembly, International Covenant on Civil and Political Rights, art. 9, 16 December 1966, 999 UNTS 171.

⁶⁴ UN General Assembly, International Covenant on Civil and Political Rights, art. 9(1), 16 December 1966, 999 UNTS 171.

⁶⁵ UN General Assembly, International Covenant on Civil and Political Rights, art. 9(2), 16 December 1966, 999 UNTS 171.

court of law to review such an arrest or detention.⁶⁶ In addition to this, there is an explicit duty on the part of the Indian state to ensure that torture in any form or regard shouldn't exist and that each and every individual should be in a position to enjoy life in a dignified manner.⁶⁷

But as per the June 2018 report of OHCHR, there have been persistent claims of torture by security forces in Indian-Administered Kashmir, especially during the 1990s and early 2000s.⁶⁸ These instances clearly show that AFSPA is in conflict with the provisions of ICCPR and the use of excessive force have made AFSPA a tool, rather a tactical genius to legitimize grave human rights violations in the territory of J&K. In the words of King Martin Luther: "Injustice done anywhere is a threat to Justice done everywhere", so its time we realize that AFSPA should be repealed in order to ensure that peace, prosperity and tranquility prevails and that the most basic of all human rights are respected and regarded.

VI. CONCLUSION

In conclusion, the systematic debate on AFSPA being given a nod by the government is based on the unfortunate fact that the armed forces are allowed to get away with grave human rights violations by citing it as a matter of national security. By doing so, India has not only failed to uphold the ideals of International law but has also failed its own constitution. If AFSPA is believed to be a national necessity, then it is fair to assume that the principles of accountability and transparency should not be neglected in order to ensure Justice finds its place in every act of inhuman treatment, disproportionate use of force and inconsistencies with the law of the land. Since India believes its armed forces to be this secular and apolitical force in its functioning, therefore human rights laws should be strictly adhered to, to not let this faith fether away.

As per the statistics, except for the Machhil encounter, not even a single member of the armed forces has been tried for human rights violations in a civilian court, highlights how the lack of accountability has turned into facilitated series of human rights violations. If the Army knows before hand that they would be held accountable for human rights abuse, they would think a hundred times before pulling their trigger on an innocent. Small wonder even after 30 years, AFSPA is believed to be the savior of national security at the expense of killing innocent Kashmiris, torturing women and children, committing heinous crimes like mass rape, extra

⁶⁶ UN General Assembly, International Covenant on Civil and Political Rights, art. 9(4), 16 December 1966, 999 UNTS 171.

⁶⁷ Ibid at 48.

⁶⁸ HRW, "Everyone Lives in Fear - Patterns of impunity in Jammu and Kashmir", 11 September 2006, pp. 94-102

judicial killings, forced disappearances etc. “This is the law of the land and rightly so”.
