

Policy Report

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The Plight of Kashmiri Half-Widows

Deya Bhattacharya



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ABSTRACT

This report examines transitional justice in Kashmir from the perspective of a unique category of women. The insurgency in Kashmir that began in 1989 brought forth the category of ‘half-widows’. Half-widows are the wives of the disappeared men in Kashmir, who are uncertain about the status and whereabouts of their husbands. However, since this category does not have the legitimacy of the law, and is born out of the identity of the disappeared man, it is not justiciable in a court of law. This makes it almost impossible to include women’s rights into the transitional justice paradigm within Kashmir. This Report, therefore, documents the experiences of these women *vis-à-vis* the reparations structure that was developed following the conflict.

The Report uses the experiences of these women to indicate how during the course of transitional justice mechanisms, the experiences and needs of women are noticeably missing or silenced by the general discourse of accounting for the past. This study is an attempt to bridge two disciplines — women’s rights and transitional justice — though it seems immensely problematic in Kashmir because of how incomplete or even

exclusionary the disciplines seem to become when attempted to stitch together during conflict.

The Report traces the trajectory that enforced disappearance, as an unchecked, undocumented, fragmented crime, has taken in Kashmir and how this affects the lives of women who survived their husbands. For this research paper, the author interviewed 55 women whose lived realities, along with her understanding of the extant reparations paradigm shaped this research project. This Report endeavours to make a case for policy changes towards the welfare of these women — whether social, psychological, economic or financial. The author hopes that this research will aid in changing the current environment in which international law in India, and by extension in Kashmir, is enforced. Such an exercise will also help in preparing for a gendered reparations structure, while entrenching the narratives of the half-widows.

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Coalition for Civil Society (JKCCS), and all the journalists and translators who helped me during my research in Srinagar. Most importantly, I am immensely grateful to all the women whose stories I documented — it is because of them that I was able to understand the reparations paradigm in Kashmir, and it is for them that I wrote this Report.

I. INTRODUCTION

When I met Fatima Begum,¹ a little later than I promised, somewhere between Hyderpora and Alnoor Colony, she is chanting the words ‘Gawakadal’ and ‘half-widow’ to herself. She adjusts her headscarf, puts her hands deep into the pockets of her *pheran*, in a bid to resist the crisp November air, and begins the conversation. She calls herself a ‘half-widow’, but adds a disclaimer, even before I can ask her any questions. Fatima dislikes the term but she confesses, in Kashmiri, that she knows what it represents. Ever since Gawakadal in 1990 (where police firing on protesters claimed at least 50 lives), she says, being a half-widow has become a part of her identity.

Fatima’s husband Hussain Ali was 26 years old at the time he disappeared. He was among many to protest at the Gawakadal Bridge in January 1990. He escaped the shooting by the Central Reserve Police Force (CRPF), but was arrested on the charge of being a militant later that same week, and taken away. Fatima

¹ Name of interviewee changed on request.

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has not seen him since. Several years later in 2000, her son (15 years old, at that time), whose name she does not want to divulge, was picked up from school and she, suddenly, found herself without a family. “Half-widow, no full family”, Fatima smiles, attempting to slice through the tension in the air.

There have been several studies² that explore the various ways in which women speak about their traumatic experiences³ under violent regimes or in the midst of conflict (Ross, 2002; Das, 2000; Motsemme, 2003; Zur, 1998). These studies have primarily looked into instances of sexual violence, bringing the experience of the individual under the ambit of the law, as a direct victim.⁴ In a place like Kashmir, where history is wrought with conflict and where a culture of impunity is rampant, women’s narratives are placed far away from the official

² The International Center for Transitional Justice (ICTJ) has conducted a number of studies in Latin America (Peru, Guatemala), South Africa, Rwanda, Sierra Leone and Timor-Leste on the nexus between gender and reparations. See, ICTJ website, [Gender and Reparations](#). Last accessed December 4, 2014.

³ Motsemme, N. 2004. [The Mute Always Speak: On Women’s Silences at the Truth and Reconciliation Commission](#), *Current Sociology*, 52 (5) September: p. 909-932.

⁴ Marcus, S. 1992. [Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention](#), in *Feminists Theorize the Political*. p 385- 403 (Butler, J and Scott, J. eds., Routledge New York).

transitional justice concerns. The rights of the half-widow, who is but an indirect victim⁵ of another injustice (enforced disappearance), are then further removed from the agenda of most political parties and do-gooders.

Over the past three decades, a lot has been written on the various ways in which gender is pivotal in shaping post-conflict justice programmes in understanding and addressing the effects of political violence and repression perpetrated by totalitarian governments or during violent conflict, echoing the UN Security Council's Resolution 1325 on Women, Peace and Security.⁶ The literature defines the contours of normative

⁵ Indirect victims, according to the Declaration of the UN Commission on Human Rights, are the family members of a direct victim. Relatives often experience extreme hardship and pain because of the suffering of a family member or by being punished because of their connection to that person - through serious socio-economic deprivation, bereavement, the loss of a breadwinner, missed educational opportunities, family breakdown, police intimidation or humiliation. The Declaration also speaks of the people who suffer as a result of intervening to assist a victim or to prevent further violations. According to the Declaration on the Right to Restitution for Victims of Gross Human Rights Violations (1999), “[a] ‘victim’ may also be a dependent or a member of the immediate family or household of the direct victim as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, has suffered physical, mental or economic harm”.

⁶[S.C.Res.1325, U.N.Doc.S/RES/1325](#) (Oct. 31, 2000).

harms (Ní Aoláin, 2013)⁷ suffered by women as a result of this violence, and the various forms of reparations that can be awarded for the defined harms. A gendered analysis of violence, however, has not begotten many successful gender-sensitive perspectives on reparations for mass and systemic abuses of human rights.⁸ The aim of this Report, thus, is to cull out potential large-scale gender-sensitive reparation programmes in areas such as Kashmir, where the end of violence has led to an unstable form of peace that is characterised by the mere absence of violence, without the constructive resolution of the conflict (Galtung, 1996).⁹

⁷ A normative harm is a harm that is captured by the regulatory framework of reparations and can be legally identified. . Often, the notion of reparations presupposes the repair of a harm that is legally identified. But when evaluating the circumstances of a region like Kashmir, one often might begin with the presumption that the—harm is either not recognized, not qualified, or only a limited perception of that harm exists in law, and remedying that presupposed harm is often only a fragment of what (Kashmiri) women have experienced.

⁸ United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) and United Nations Development Program (UNDP), *Reparations, Development and Gender* (October, 2012), Last accessed December 4, 2014.

⁹ Johan Galtung's theory 'negative peace versus positive peace' refers to a dichotomy within the notion of peace. Negative peace refers to an absence of conflict, where the enactment of a ceasefire only ends the war formally, while positive peace is the component that prefers reconciliation and restoration within conflicted societies. *See*, Galtung, J. 1996. *Peace by Peaceful Means* p. 30-39, International Peace Research Institute, Sage Publications.

Through this Report, there is a possibility to comprehend the transformative potential of reparation programmes, especially in the ways that reparation mechanisms can help disrupt pre-existing structural gender inequalities, thereby, contributing to a more inclusive democracy.

Broadly speaking, my aim is not to alter the present reparation system in Kashmir, but to use a methodology to infuse it with a gender element¹⁰ (Rubio-Marín, 2009). This would entail three strategies: first, to be able to point out any existing formalised gender discrimination in the structure and implementation of these programmes. Second, guaranteeing that no patriarchal norms and standards of the ancient regime are reinforced, and that previous value systems do not seep into the reparation programmes. This is a significantly difficult problem because the concept of reparations revolves on the argument that addressing the violation of a right would mean undertaking to revert the right-holder to the *status quo ante*

¹⁰ Rubio-Marín, R. 2009. *The Gender of Reparations in Transitional Societies* in THE GENDER OF REPARATIONS p. 66 (Rubio-Marín ed.). Rubio-Marín refers to this infusion as “engendering reparations”.

(situations that existed before the violation).¹¹ However, in many societies, even before the outbreak of violent conflict or political oppression, women are seldom treated as equals (Gray and Levin, 2013) and are oftentimes discriminated against.¹² Third, we need to investigate the ways in which the reparation programmes can be both cathartic for the community concerned and transformative for the transitional society in order to rid the new regime of gross gender subversion.¹³

This Report is the result of interviews with half-widows of Kashmir whom I met in the districts of Srinagar, Bandipore, Budgam and the edges of Kupwara district in November 2014, and a detailed analysis of the existing administrative reparation system in Kashmir.

¹¹ The *locus classicus* that talks about this principle can be found in *Chorzów Factory* case – “[R]eparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear (...)”. *Chorzów Factory* (Claim for Indemnity) (Merits), [Germany v. Poland, 1928 P.C.I.J. Ser.A., No. 17, Judgment No. 13 231](#) (13 September, 1928).

¹² Gray, D. C., and Levin, B.A. 2013. Feminist Perspectives on Extraordinary Justice in *Feminist Perspectives on Transitional Justice* 76 – 80 (Fineman and Zinsstag eds., May).

¹³ *Supra.*, 6.

During my fieldwork in Kashmir, I got an opportunity to interview 55 women — not all of whom were half-widows. Some had lost their sons, their fathers and uncles — all of whom indicated that a deeper sense of patriarchy and dependency prevails among these women, making it understandably difficult to investigate their predicament without exploring the phenomenon of enforced disappearances. In the Report, I attempt to deconstruct the reparation programme in a bid to analyse its design, implementation and philosophies. With the help of international and regional instruments on enforced disappearances and reparations alike, I identify discrepancies within the Kashmiri reparations paradigm. Finally, I strive to carve out a series of best practices that can be applied in Kashmir to address the dilemma of the half-widows.

II. CONTEXT AND HISTORY

While the Kashmiri people's cry for *azadi* (independence; self-determination), and subsequent insurgency in 1989, is beyond the purview of this report, it is imperative to understand that the predicament of the Kashmiri half-widows cannot be isolated from the territorial nature of the problem,¹⁴. The conflict has been cautiously referred to as an “externally sponsored internal conflict”.¹⁵ The Kashmiri insurgency began in 1989¹⁶, initiated by nationalist youth from Jammu Kashmir Liberation Front (JKLF) — who reportedly crossed over to Pakistan, through the porous borders from India-administered Kashmir to

¹⁴Ather Zia, [*Disappeared Men and Searching Women: Human Rights and Mourning in Kashmir*](#), Samar Magazine, Issue 36, August 30, 2011. Last accessed December 31, 2015.

¹⁵ Syed Ata Hasnain 2014, [*Resolving the Kashmir Conflict*](#), *The Deccan Chronicle* December 29. Last accessed December 31, 2015.

¹⁶ The exact year when the insurgency began is disputed. Some reports indicate that it was 1988 and others have chronicled that it began in 1989. See, Happymon. J 2009, [*Kashmir Insurgency. 20 Years After*](#), *The Hindu*, December 25. Last accessed December 1, 2015.

Sumit Ganguly, [*Explaining the Kashmir Insurgency: Political Mobilization and Institutional Decay*](#), *International Security* Vol. 21, No. 2 (Fall, 1996), pp. 76-107; See also, Wajahat. A 2011, [*Repression and resistance in Kashmir*](#), *Al-Jazeera*, August 2. Last accessed December 1, 2015.

Pakistan-occupied Kashmir, to get armed and trained to protest against India and demand independence.¹⁷ This move by the JKLF was supported by Kashmiris, who took to the streets to call for a plebiscite after years of being forced to abide by the commands of the Indian government. With a State Assembly resolution, Jammu and Kashmir remained under the rule of the Indian government. Besides this, the State was put under two Draconian laws¹⁸ — the Armed Forces Special Powers Act (AFSPA), 1990, and the Jammu and Kashmir Disturbed Areas Act, 1992. These laws gave wide extraordinary special powers to “arrest without warrant”,¹⁹ “enter and search without warrant any premises”,²⁰ “use force”,²¹ etc., if it is “necessary to do so for the maintenance of public order”.²²

¹⁷ [Kashmir: Conflict Profile – South Asia’s Longest War](#), *Insight on Conflict*. Last accessed December 5, 2014.

¹⁸ [Behind the Kashmir Conflict – Abuses by Indian Security Forces and Militant Groups Continue](#) (1999), *Human Right Watch*. Last accessed December 12, 2014.

¹⁹ Section 4(c) of the Armed Forces Special Powers Act [hereinafter, ‘AFSPA’], 1990.

²⁰ Section 4(d) of the AFSPA, 1990.

²¹ Section 4(a) of the AFSPA, 1990.

²² *Ibid.*

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Having labelled the insurrection as a proxy war²³ by Pakistan to claim Kashmir, India responded with brute force. The Gawakadal massacre, the first of many atrocities against Kashmiris, was a response to the insurgency, allegedly on the orders of administrator and the Governor of the State, Jagmohan, and the then-Home Minister, Mufti Mohammed Sayeed, whose daughter, Rubaiya Sayeed, had been kidnapped by the JKLF to be released later.²⁴ Under Jagmohan's iron-fisted regime, India's response to the political upsurge was to indiscriminately fire at unarmed protestors.²⁵ According to a Human Rights Watch report, aptly titled, *Everyone Lives in Fear*:

In the weeks that followed [the Gawakadal massacre], as security forces fired on crowds of marchers and as militants intensified their attacks against the police and

²³ The term, 'proxy war' has been used over the decades to characterize the conflict between India and Pakistan over the territory of Kashmir. This term has been in use even in recent times. In August, 2014, Narendra Modi used it, condemning Pakistan's actions. Agence France-Presse in Kargil, [Narendra Modi accuses Pakistan of waging war in Kashmir](#), *The Guardian* August 12, 2014).

²⁴ [Mufti, Jagmohan architects of Gawkadal, other massacres: Kamaal](#), *Greater Kashmir* 2015. Last accessed on January 27, 2015.

²⁵ Arif Shafi Wani, 2014. '[Gaw Kadal massacre: Lone survivor recounts CRPF terror](#)', *Greater Kashmir*, January 20. Last accessed January 4, 2016.

those suspected of aiding them, Kashmir's civil war began in earnest.²⁶

Along with a steadfast resolve to end militancy and protests through immeasurable force and the unfair advantage of full ammunition and paramilitary troops, Jagmohan allegedly orchestrated firings on defenceless crowds of protestors, imposed round-the-clock curfews and large-scale searches known as 'crackdowns'. This began the infamous conflict and, among other things, an irreparable schism appeared between the Kashmiris and the Indian troops.²⁷ As M.J. Akbar, editor of the *Asian Age*, rightly remarks:

January 19 became the catalyst which propelled into a mass upsurge. Young men from hundreds of homes crossed over into Pakistan-Occupied Kashmir to receive arms and training in insurrection... Pakistan came out in open support of secession, and for the first time, did not need to involve its regular troops in the confrontation. In Srinagar, each mosque became a citadel of fervour.²⁸

²⁶ [Everyone Lives in Fear](#) *Human Rights Watch*, Volume 18, No.11 (c) September 2006. Last accessed December 13, 2014.

²⁷ [India's Secret Army in Kashmir](#) *Human Rights Watch*, Vol.8, No.4(C), May 1996. Last accessed December 13, 2014).

²⁸ Inder Malhotra 1991, *Tragic Bunglings* – Book Review of M.J. Akbar's [Kashmir: Behind The Vale](#), *India Today* June 30. Last accessed December 13, 2014).

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Since 1990, human rights violations in the Valley have been rampant — while armed groups have reportedly taken thousands of civilians hostages, and tortured, sexually violated and killed them, the security forces and State police, too, have used their ‘special powers’ to arbitrarily arrest civilians on suspicion, torturing them and causing hundreds of custodial deaths and extrajudicial executions during investigations. According to a report titled *Buried Evidence*, between 1989 and 2009, the figures are staggering — actions of Indian military and paramilitary forces in Kashmir resulted in over 8,000 enforced and involuntary disappearances and more than 70,000 deaths, including through extrajudicial or “fake encounter” executions, and custodial brutality.²⁹

Moreover, reportedly, lawyers have filed over 15,000 petitions since 1990 inquiring into the charges against these detainees and their health and location, but these petitions have been largely unsuccessful.³⁰ A report titled *Peace and Process of Violence* provides for comprehensive data collected by the Jammu &

²⁹Angana, P. 2009. [Buried Evidence](#) *Jammu & Kashmir Coalition of Civil Society (JKCCS) and International People's Tribunal on Human Rights and Justice*. Last accessed December 1, 2015.

³⁰ *Ibid.*

Kashmir Coalition of Civil Society (JKCCS) on killings, disappearances, suicides and custodial violence between 2002 and 2009. More than 14,000 people lost their lives during this period — this includes 3,404 civilians, 7,504 militants (claimed by government), 2,451 troopers and 674 others.³¹

What began in Gawakadal, took shape in the Bijbehara massacre, in 1993, where the 74th Battalion Border Security Force (BSF) opened fire on a crowd of around 10,000 to 15,000 protestors gathered in the courtyard of the Jamia Masjid of Bijbehara after finishing Friday prayers. The protestors marched through the streets shouting slogans, demanding an end to the Hazratbal siege and supporting Kashmiri independence. Over 50 people were killed and more than 200 were injured.³² In March 2000, the Chattisinghpura massacre in Anantnag district happened where the Sikh community in Jammu and Kashmir came under attack³³, and the Pathribal encounter killings took place subsequently, killing “five foreign

³¹ [Peace and Process of Violence Jammu & Kashmir Coalition of Civil Society \(JKCCS\)](#). Last accessed December 1, 2015

³² [Bijbehara Massacre: The Court Verdict](#), *Kashmir Life*. Last accessed December 2, 2015.

³³ *Supra* note 29, at 70.

terrorists (Harkat-ul-Mujahideen and Lashkar-e-Taiba group)” through joint operations by the police led by Farooq Khan and the army’s 7th Rashtriya Rifles led by Col. Ajay Saxena.³⁴ Local residents claimed that the ‘militants’ were, in fact, abducted men from the village who had been arrested and then murdered in a staged encounter; their bodies were then charred to prevent effective identification. The army, stating that Kashmiri people were trying to twist facts to suit themselves, denied these reports. Years later, in January 2014, the matter was declared “closed” by the Army’s Court of Inquiry (CoI) and it acquitted Brigadier Ajay Saxena, Lt Col Brajendra Pratap Singh, Major Sourabh Sharma, Major Amit Saxena and Subedar Idrees Khan, stating that the evidence recorded could not establish a *prima facie* case against the accused.³⁵

Even 25 years after such horrendous killings, Kashmir still remains a heavily militarised zone with the impunity of the armed forces causing, amongst other injustices, the international war crime of enforced disappearances. Several

³⁴ Fayyaz, A.A. 2014. [Kashmir shuts down over Pathribal](#), *The Hindu*, February 1. Last accessed December 2, 2015.

³⁵ Fayyaz, A.A. 2014. [Army gives itself clean chit in Pathribal case](#), *The Hindu* January 25. Last accessed December 13, 2014.

thousands in Kashmir have disappeared since 1989³⁶. In 2008, the Association of Parents of Disappeared Persons (APDP), a Srinagar-based non-governmental organisation, released a report, *Faces Under Ground*³⁷, documenting the existence of unmarked graves³⁸, often referred to as mass graves,³⁹ in areas that are not accessible without the authorisation of the security forces because of their proximity to the Line of Control (LoC) with Pakistan. The Army in these areas has claimed that those buried were foreign militants and armed rebels, killed lawfully in a bid to protect the nation-state and maintain public order.⁴⁰ However, exhaustive testimonies charted out in the *Faces Under*

³⁶ Pankaj Mishra 2000, [Kashmir: The Unending War](#), *The New York Review of Books* October 19, 2000. Last accessed December 3, 2015.

³⁷ [Facts Under Ground](#) Association of Parents of Disappeared Persons (APDP). Last accessed October 24, 2014.

³⁸ *Ibid.*, 4.

³⁹ The difference between a mass grave and an unmarked grave is subtle but important. United Nation Commission of Experts defines a mass grave as any site intended as a place of permanent internment from which the bodies are prevented from being moved by natural elements and which contains two or more bodies. A mass grave contains the remains of a group of individuals who share “*common trait that justifies their assassination in the eyes of the perpetrator*” (From Facts Under Ground). On the other hand, an unmarked grave has metaphorical and religious connotations. An unmarked grave means consigning the dead to oblivion or ignominy. Jason Burke 2011, [Kashmir Unmarked Graves Hold Thousands of Bodies](#), *The Guardian* August 21. Last accessed December 3, 2015.

⁴⁰ Sharma, M. 2008. [Addressing the issue of enforced disappearances](#), *The Hindu* June 24. Last accessed October 24, 2014.

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Ground state otherwise — local residents say that those buried were residents of these areas, who were arrested and then killed in staged encounters.⁴¹

The report also suggests that more than 8,000 men have gone missing in Jammu and Kashmir since 1989, when India began to curb the insurgencies. The Union and State authorities, however, have repeatedly said that the number is exaggerated, and that the actual number is under 4,000. They also stated that those who cannot be found are terrorists who went to Pakistan to join the armed opposition groups. The report *Buried Evidence*,⁴² released in November 2009, by the International People's Tribunal on Human Rights and Justice in Indian-administered Kashmir (IPTK), in associated with APDP, has recorded the existence of 2,700 unknown, unmarked mass graves containing more than 2,943 bodies across more than 62 sites in 55 villages in the districts of Bandipora, Baramullah and Kupwara.⁴³

⁴¹*Ibid*

⁴² *Supra* note 29.

⁴³ShyamVij. 2011, A Response to [SHRC's Report on Unknown and Unmarked Graves of Kashmir: IPTK](#), *Kafila* August 30. Last accessed September 7, 2014.

The report, in its recommendations on State reparations, talks about how the spirit of Kashmir is greatly impaired due to the special laws that provide immunity to the security and paramilitary forces, authorising them with extraordinary powers.⁴⁴ It also brings to life the debate on India's fragile relationship with the International Convention for the Protection of All Persons from Enforced Disappearances (CED), 2006. India has been a signatory to the Convention since February 2007. However, there has been no ratification of this Convention by India⁴⁵, without which India remains free from establishing its consent to be bound by it, and the international legal obligation to apply its principles to its internal laws.⁴⁶

Along with this, it also brings forth an acute understanding of AFSPA's unbridled powers, a legacy of 'routinised use of

⁴⁴ *Supra* note, 29 at 88, 92-93.

⁴⁵ A number of steps are necessary before a treaty enters into force. Signature and Ratification are two of these steps. Signature means that a state declares that it has agreed upon the content of the treaty, and intends to work towards its implementation. – this is not binding, however. Ratification, however, leads to a legally binding obligation under international law; it refers to the domestic procedure that translates treaties under international law into domestic law.

⁴⁶ [Enforced disappearances: South Asian states asked to ratify UN convention](#), *The Tribune* February 5, 2015. Last accessed on February 5, 2015.

constitutional, emergency-like executive authority⁴⁷ that the government claims to justify under Article 4 of the International Covenant on Civil and Political Rights (ICCPR), that prevents certain basic rights – such as the right to life, freedom from torture and slavery, freedom of retrospective law, right of recognition of personhood and the freedom of thought, conscience and religion – from derogation even during times of “a public emergency which threatens the life of the nation”.⁴⁸

Moreover, a report in 1997 by the Human Rights Committee (HRC) stated that India, under the AFSPA, has been using emergency powers for extended amounts of time without complying with the exact procedure spelt out in the ICCPR,⁴⁹ and has been violating rule of law. India, in its third periodic report to the United Nations HRC in November 1995,

⁴⁷ Sanjib Baruah, [AFSPA: A Legacy of Colonial Constitutionalism](#), *India Seminar*. Last accessed December 13, 2014.

⁴⁸ General Comment 29, [States of Emergency](#), Article 4 of ICCPR, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), *UN Human Rights Committee*. Last accessed December 31, 2015.

⁴⁹ UN Human Rights Committee (HRC), [Concluding observations of the Human Rights Committee: India](#), CCPR/C/79/Add.81 (August 4, 1997). Last accessed December 20, 2014.

expounded on its rationale for its extended application of AFSPA over Kashmir:

[s]uch statutes were enacted by a democratically elected Parliament, their duration was subject to periodic review, and not only could their validity be tested by judicial review, but also any action taken thereunder could be challenged before the High Courts and Supreme Court.... if individual and isolated aberrations have occurred, there are judicial remedies available, including procedures for apprehension and punishment for such perpetrators of human rights violations.⁵⁰

Buried Evidence also initiates a necessary and excruciatingly difficult subject — it states that the issues of enforced disappearances and unknown, unmarked graves affects and involves the living as much as the disappeared and the dead.⁵¹ In international law, the disappeared are not the only persons who are regarded as direct victims of the crime of enforced disappearance; their children, spouses, parents and extended families may also be considered victims directly affected by the crime.⁵² Article 24 (1) of the CED defines the victim as “the

⁵⁰ GOI 1996, UN Human Rights Committee: Addendum to the [Third Periodic Reports of States Parties Due in 1992](#), UN CCPR/C/76/Add.6 *Human Rights Committee (HRC)*, June 17, 1996. Last accessed December 20, 2014.

⁵¹ *Supra* note 29.

⁵² *Supra* note 29.

disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.”⁵³ In other words, the enforced disappearance of a single person can create multiple victims.⁵⁴

Because Kashmir’s cultural schema is subsumed within traditional gender roles and structural inequalities, the wives of the disappeared confront a plethora of overlapping harms — psychological, social, economic, and even political. Wives of the disappeared are often pushed out into public spaces, where they must become the sole breadwinner as well as the head of the household to feed her family. For many, this may mean entering the workforce for the first time in their lives. Most of these women are illiterate, inexperienced and lack skills, and have to take on low-paying jobs. Several are even forced to remarry within their husband’s family — her husband’s brother or cousin — for the sake of her children receiving her husband’s share of the family property. Amidst socio-

⁵³Article 24(1) of International Convention for the Protection of All Persons from Enforced Disappearances (CED), 2006.

⁵⁴Dewhirst, P and Kapur, K. 2015. [The Disappeared and Invisible: Revealing the Enduring Impact of Enforced Disappearance on Women](#) *UN Women and International Center for Transitional Justice*, March. Last accessed March 12, 2015.

economic insecurity, some women struggle as single mothers – refusing to remarry, believing that their disappeared husbands will come back one day, and whose children show manifestations of emotional trauma.

The women I interviewed during the course of this study – some denouncing the term ‘half-widow’, refusing to identify themselves as a bridge between the living and the dead, and others proudly wearing this peculiar identity on their sleeves, as they take to public spaces to protest against the government – told me that a familiar pattern exists in how their husbands disappeared.⁵⁵ Another report, *Half Widow, Half Wife?*⁵⁶, by the APDP, also sheds light on how the disappearances seem like an endemic, orchestrated attempt by the security forces as a weapon of social control in the region. In these cases, the security forces enter a house forcefully, often on the pretext of searching the house, and take the eldest male member of the family, stating that he needs to be questioned.⁵⁷ In other cases,

⁵⁵ Interviews conducted in November, 2014.

⁵⁶ Association of Parents of Disappeared Persons (APDP), [Half Widow, Half Wife?: Responding to Gendered Violence in Kashmir](#) July 2011. Last accessed September 4, 2014.

⁵⁷ *Ibid.*

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male members are often picked up from their places of work or schools by the forces, again on the pretext of questioning. These men are, more often than not, never seen again. The female relatives of these men, often their wives or mothers, go looking for them, and are sent from one jail to another, from one military base to another, by the forces. Security forces claim to share classified information about the whereabouts of their husbands/sons with the female relatives. A class of ‘messengers’ have also sprung up and made a business out of this desperation, often charging exorbitant amounts of money to convey “information” about the detainees.⁵⁸ Often, the officials give these female relatives a fixed date and time when they promise to allow a meeting of the ‘missing’ and his family. Later, they deny having the person in custody, and with this, the predicament of the half-widow begins.

⁵⁸ [Enforced Disappearances in Jammu and Kashmir](#), *Association of Parents of Disappeared Persons (APDP)*. Last accessed December 11, 2015.

III. INTERVIEW METHODOLOGY

The research was driven by the notion that the current relief system is not conducive to the needs of the half-widows in Kashmir, and that they have been kept largely out of the governmental reparations framework. While developing the research design, there was a deliberate effort to avoid a descriptive research design, which is the observation, scrutiny and description of the subject(s). Instead, it aimed to be an ethnographic study with a precise goal of understanding the extant relief system through the eyes of the victims, without subjecting such understanding to my personal opinions. I endeavoured to develop participatory action research (PAR) designed to not only bring the adversity of the half-widow to light, but to also use this research to create ripples in public policy implementation.⁵⁹

In September 2014, I travelled to Kashmir a day before the deluge took over most of the low-lying districts, bringing my

⁵⁹ I adapted my methodology from an ICRC report on Nepal's survivors of disappeared/missing persons. See, International Committee of the Red Cross (ICRC). 2009. *Families of Missing Persons in Nepal: A Study of Their Needs?* (April). Last accessed December 10, 2014.

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field research to a grinding halt. After being rescued by benevolent strangers and stranded in their house in Budgam district, I began to see the conflict through the eyes of the women, who were rescued with me. Without an explicit motive to interview these flood-affected women, rescued from various parts of Srinagar and brought to Budgam, I spoke to them — some of them half-widows, some who had lost their brothers, fathers, and sons to enforced disappearance. This series of interviews does not form a part of this Policy Report, because these conversations were not structured, there was no luxury of keeping a strict record of these interviews and, lastly, a lot of their responses were built upon the advent of the devastating floods.

Two months later, in November 2014, I left for Kashmir again; this time, a lot more prepared for any impending disaster, and extremely determined to interview at least 30 women — an unambitious number, in the aftermath of the floods. I travelled to the districts of Srinagar, Budgam, Bandipora (Bandipore), and the edges of Kupwara district (for the lack of official permission to enter the district). As luck would have it, I was able to interview about 55 women, both from upper and lower income backgrounds, which, in my opinion, was surprisingly

insightful of how it is not only the impoverished, destitute women who are affected by the disappearances of their male relatives, and how the repercussions of the conflict cut families in half across all social and economic classes. In this way, I also endeavoured to make my sample as representative as possible. The interviews were a result of a peculiar non-probability snowball sampling. Because the scale envisioned for this study was small, my research design did not intend to cover all ten districts in the Kashmir Valley. Moreover, because of the aftermath of the floods, it would be impossible, I realised, to travel to all the districts. The acquaintances I had made during my visit in September 2014 helped me find subjects later in November, and these subjects led me to other prospective subjects. In essence, I was attempting to access the 'hard-to-reach' population of half-widows, who had faced grave violations ensuing from the enforced disappearances of their husbands, such as harassment by officials during the search for their husbands, sexual violence, rape, and stigma and had, despite all of this, approached the reparations system and witnessed further harassment. My aim, at the onset, was to achieve a loose form of respondent-driven sampling.

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My research methods were qualitative. The research methods employed in the survey were chosen to optimise the utility of the sensitive data in policy change. Given the political climate in the Kashmir Valley and the vast challenges that it may pose to reliability and validity, I attempted to use a mix of research techniques to augment the probability of constructive triangulation. Thus, the research methods employed were as follows:

- **Semi-structured, open-ended interviews:** Areas of discussion were predetermined; questionnaires were deliberately kept open-ended so that the subject could approach the questions comfortably and without stress or fear.
- **Focus group discussions:** Often the interviewees were met in groups, as they did not want to speak to a stranger by themselves. Each participant was given a chance to represent and express herself, with the added dynamic of a group discussion on the same issues.
- **Participant/group observation:** While interviews could not be recorded as several subjects refused to being filmed or recorded on tape, a supplementary method for triangulation was participant observation. This enabled that

verbal data gathered during individual/group interviews could be charted, and later, confirmed or debunked along the hypothesis.

- Observation notes during the interviews made it feasible to confirm data from secondary literature about socio-economic conditions, impact of political agendas on the subjects and the subject-community and various subtle cues of social interaction. During both interviews and group discussions, field notes were maintained of the observations of the participants and their environments.

The interviews were conducted over a period of 15 days. A majority of the subjects were visited in their homes, some at their workplaces or in the offices of a third party (Kashmiri NGOs) in the districts. Traditional family hierarchies would mean that frequently the male relatives (typically the father-in-law, brother, brother-in-law, son or husband, if the subject had remarried) would appear and answer questions on the subject's behalf, presenting himself as the principal respondent. Sometimes, this could be avoided by simply requesting the presence of only the women in the house, and stating that the questionnaire had gender-specific and gender-sensitive

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elements. However, at times, despite my requests, the male relatives insisted on being present with the interviewee, which may have compromised her responses. Wherever possible, the half-widows were spoken to in private, or with other wives of the disappeared in focus groups, to comprehend as much as possible the familial pressures and social stigma to which they may have been subject.

I led all the interviews and group discussions. However, a research assistant accompanied me to almost all the interviews, barring a few, where there were helpful social workers to translate. Throughout the gathering of interviews, two research assistants were used, and their primary role was to translate and culturally interpret the responses. The interviews were conducted mostly in Kashmiri and, at times, in Hindi or English. To facilitate an affable atmosphere during the interviews, the research assistants were drawn from within the communities and were both women — one, the daughter of a former disappeared/missing person, who came back to tell the tale, her mother (a former half-widow) was not included in the participant pool to avoid bias; and another, a social worker, who works with various NGOs to help families deal with loss.

IV. ETHNOGRAPHIC FINDINGS

1) Process as Punishment

In November 2014, low-lying Bemina bypass was no longer bookended by ramshackle slums, as it was in September. The floods left several hundreds from Bemina homeless. Nusrat Jahan⁶⁰ is amongst them, but she does not consider herself unfortunate — her relatives from Budgam have taken her in. Nusrat's husband, Mohmin, was picked up during a protest in 2010. Mohmin was beaten in custody, subjected to electric shocks and, a day later, returned home on bail. However, two weeks later, two unidentified men — Nusrat refuses to say whether they were state actors or militants — tore him away from bed and she has had sleepless nights ever since. Nusrat's only son lives with her in-laws, with whom she had stopped talking since 2011, when they began forcing her to remarry Mohmin's distant cousin.

⁶⁰ Nusrat Jahan (Participant no. 5), Bemina Bypass (Srinagar), Focus Group Discussion 1, November 5, 2014. **[Names of respondents have been changed to protect identity.]**

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Nusrat's journey from wife to half-widow has been nothing short of a pattern. "Almost every half-widow goes through the same stages so it is easy to predict. It begins with unidentified men coming to your house very late at night. You can never know who they are because the devil is intelligent — he does not come in uniform, does he? They demand to speak to the man of the house. By 2010, every woman knew what was going to happen so they never let their fathers, uncles, brothers or husbands open the door. The men would hide, they were scared; they would hide and stop breathing — they would be completely silent. Yet sometimes, the devil would catch a hushed whisper or snore, and ask to see your man. On this pretext, they would take him and there were chances that you would never see him again. I know women whose husbands were abused and they came back, with horrifying stories. But I never saw my husband again.

"Lodging an FIR [First Information Report] was difficult. I went to the police at least seven times. The first time they said that a Missing Person Complaint would suffice. On telling them that my husband had not left the house on his own

volition, they asked me to keep quiet. Of course, now that my husband was gone, I was silenced.”

I asked Nusrat whether she received any monetary benefits from the *ex-gratia* relief programme. ‘How can I? I am not eligible. They have dubbed me a militant’s wife and militants’ wives are not eligible to have a normal life. For years together now, I have taken up menial jobs to send my son to school. And now the *sailaab* has taken away everything from me...’

Nusrat’s friends, Rabia and Naz, also half-widows, join in the discussion late. Rabia and her husband, Sheikhhassan, were married for seven months when one evening in 2007 he did not come back from work.

“He was unemployed at the time so the forces were suspicious of him. After he disappeared, I went from jail to jail, camp to camp in the hope of finding him. Several times the army came to my house to conduct searches. There was no warning — they just used to arrive. My house was known as *lapata-gbar*. I

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was forced to leave Kupwara and come down to Srinagar. The government did not think I deserved relief or employment.”⁶¹ Naz is older and wiser. She is disillusioned, Nusrat says. Naz’s husband, Shaukat, who was an activist, was picked up from their house in 2002, and since then, Naz has seen it all – from the police’s refusal to lodge an FIR to filing a writ petition to challenge police inaction to appearing in front of the District Screening Committee for relief. It has been over 12 years since her husband disappeared and there has been no justice for her. “My husband and I are joined in our victimisation. He was a victim and so am I, but I am a victim of the system. Is that why the state does not recognise me?”⁶²

Jana Begum from Budgam has become well-versed in understanding the system. Her husband disappeared in 2003, and then her son-in-law disappeared in 2007. She and her daughter, both half-widows, have invoked the relief systems – the *ex-gratia* relief, and the compassionate appointment programme. Though her daughter received Rs. one lakh in

⁶¹ Rabia Begum (Participant no. 6), Bemina Bypass (Srinagar), Focus Group Discussion 1, November 5, 2014.

⁶² Naz (Participant no. 7), Bemina Bypass (Srinagar), Focus Group Discussion 1, November 5, 2014.

2014, albeit in the form of a fixed deposit for her and her children, Jana herself has been deprived of any possible relief. The provision of relief is contingent on the proof of a certain death (availability of death certificate) and on the deceased's involvement in militant-related activity, and Jana's husband's name could not be cleared of these charges.⁶³

2) Societal Pressure to Remarry

Anum, whom I meet in the office of an NGO that works on enforced disappearances, sat across me on the office balcony. I ask her how her life has changed since the disappearance. She does not comment on the process; she confesses that she does not comprehend the rigmarole of procedure — fortunately, lawyers at the NGO have handled that for her.

What she could not escape, she says, is the societal pressure to remarry. Anum's husband, Ashraf, was a tailor. He and his shop assistant were beaten up on the street near Rawalpura and then taken to one of the camps. Anum resents not having seen him before he disappeared; she says their marriage felt

⁶³ Jana Begum (Participant no. 16), Chaadora (Budgam), Personal Interview, November 8, 2014.

incomplete — she was pregnant at the time, and the baby grew up without a father. Her in-laws pressurised her to get married to Ashraf's brother — she did not give in. She left her conjugal home for the fear of remarriage.⁶⁴

Another woman, Shafiqā, succumbed to the pressure and remarried her disappeared husband's brother. "I had to do this. My mother-in-law was insecure and there was property matters, but I am happy now. Or at least I try to be — my husband is a good man, provides for my children though they are not his biological children." She adds, in a hushed whisper, "Please madam, don't use the word 'half-widow' here. My husband does not like it at all. I am no longer a half-widow. I am his wife — he has given me comfort and a status in society."⁶⁵

Asima from Kralpora (Kupwara) ran away from her in-laws' home when they forced her to remarry her husband's brother. Unfortunately, she had to abandon her children but there was

⁶⁴ Anum (Participant no. 9), Hyderpora (Srinagar), Personal Interview, November 5, 2014.

⁶⁵ Shafiqā Begum (Participant no. 8), Hyderpora (Srinagar), Personal Interview, November 5, 2014.

very little she could do. “[...] the *nikah* was fixed about 11 months after my husband was picked up from home. My heart was still wounded. However, that was not why I ran away. I ran away because my new *shonbaar* (husband) was only 14 years old.” She smiles, when I gasp, “I am happy now, madam. My life is filled with protests and demonstrations. Somebody has to do it. Somebody has to be the face of our movement. I see my children when I can, but my father-in-law does not like it. He calls me a devil-woman.”⁶⁶

Islam encourages remarriage, and it would probably make sense for half-widows to get remarried so that their vulnerability is not exploited. Under Islamic jurisprudence, a widow with children gets one-eighth of her husband’s property. A widow without children gets one-fourth. A half-widow, till her husband is declared dead, gets nothing. However, not many widows prefer to remarry. Within Islamic law, there is no provision for the phenomenon of enforced disappearance. The four schools of thought — Hanafi, Maliki, Shafi and Hambali — do not have any consensus on the

⁶⁶ Asima (Participant no. 39), Kralpora (Kupwara), Personal Interview, November 12, 2014.

number of years that the woman has to wait before remarrying.⁶⁷ While the Hanafi school insists on a period of 90 years, the Maliki school asks to wait for seven years. In January 2014, a landmark consensus was reached by Islamic Ulemas regarding the waiting period for half-widows to remarry in four years after her husband's disappearance.⁶⁸ The joint agreement means that the wives of Kashmiri men who have disappeared during the Kashmir conflict are allowed to remarry four years after the disappearance. However, only two of the 55 half-widows I interviewed had remarried and this might have been because of family coercion.

3) Victims of sexual violence

Zahira Bibi had led a very sheltered life before her husband disappeared, so her life changed drastically when she had to visit camps, jails and police stations to find him in the autumn of 2008. "I became a drifter. People begin to disrespect you when you are not following societal norms and here I was a

⁶⁷ [‘The other half: For many Kashmir ‘half-widows’, remarriage ruling means little’](#), *The Indian Express*, March 2, 2014. Last accessed December 6, 2015.

⁶⁸ [Breakthrough ruling on Kashmir ‘Half-Widows’](#), Conciliation Resources, January, 2014. Last accessed December 6, 2015.

Kashmiri woman, travelling long distances to find my husband. Bad things would happen, I knew it!” During one such journey, near the CRPF in Camp Zangam in Pattan, two army officials sexually assaulted Zahira. It is after this that she has stopped going to demonstrations and protests; her sister tells me that she has given up completely on all relief procedures, including the State Human Rights Commission (SHRC) hearings.⁶⁹

For years together, Yasmin and her three sons, living in Tregram, Kupwara, were subject to surprise searches from army officials. She tells me that she had made the “mistake” of raising her voice at the camp (she refuses to name the camp) officials several times as she was sure her husband had been kept prisoner inside. After this incident, she often found paramilitary officials in her house “using their power to search our house for weapons. Sometimes during winters, they would have us stand out in the snow for hours on end, while they stayed inside my house. My house, do you understand? Once when I was frustrated by this and had shouted, they sexually assaulted me as punishment. Their sudden visits did not stop

⁶⁹ Zahira Bibi (Participant no. 34), Kupwara, Personal Interview, November 12, 2014.

before 2010. My sons saw their mother being violated — can you imagine?”⁷⁰

While our understanding of sexual violence in Kashmir is limited to the discourse that developed after the incident in Kunan-Poshpora in February 1991⁷¹, several incidents of sexual harassment have occurred but they do not figure in the mainstream stories of violation in Kashmir.⁷² Most women who have gone through sexual harassment, during their search for their husbands, remain silent about the ways in which the state or non-state actors have violated their private spaces.⁷³ In their opinion, the stories of sexual abuse should not eclipse the larger picture of the enforced disappearances of their husbands.⁷⁴ For instance, Rubina, a widow from Kaloosa, Bandipora, was allegedly raped at her residence during a search

⁷⁰ Yasmin (Participant no. 36), Tregam (Kupwara), Personal Interview, November 12, 2014.

⁷¹ Prashant Jha, 2013. [‘Unravelling a ‘mass rape’](#), *The Hindu*, July 8. Last accessed December 14, 2015.

⁷² Asia Watch & Physicians for Human Rights, [‘Rape in Kashmir’](#) (Vol. 5, Issue 9). Last accessed December 13, 2015.

⁷³ See, Amnesty International, ‘India: New Allegations of Rape by Army Personnel in Jammu and Kashmir’; and Flavia Agnes, “Fighting Rape -- Has Amending the Law Helped?” *The Lawyers*, February 1990, pp. 4-11.

⁷⁴ Rita Manchanda, [Kashmiri Women and the Conflict: From Icon to Agency](#), in Aparna Rao (Ed). *THE VALLEY OF KASHMIR* (Manohar, 2008).

that was conducted by paramilitary forces. She, however, chose to not report this — she believes that the struggle is mainly to get her husband justice; everything else, including herself, is immaterial. “My body is not the site of violation. I am violated to the extent of my husband’s custodial torture and disappearance.”⁷⁵

4) Mental Health Issues

A large number of women I interviewed were plagued by mental health problems. From chronic depression to psychological trauma, these women were battling several mental illnesses as they struggled with daily life. Often, their physical illnesses were a manifestation of the mental stress that they were going through. Sabina from Ompora, Budgam is a victim of many aches and pains — she visits the local dispensary often and her living room smells of an aliquot of medicines. She lost her voice five years back suddenly, and her only son, Akhram, translates her gestures to words for me. “I don't think she has slept properly since my father went missing in 1993. Sometimes, I find her waiting at the door even late at

⁷⁵ Rubina (Participant no. 29), Kaloosa (Bandipora), Personal Interview, November 10, 2014.

night, staring into the darkness. Every time her heart has palpitations, she begins to cry — she says it is a sign that my father is upset. She is very disturbed but if we take her to psychologist, people will call her mad,” says Akhram.⁷⁶

Zara from Barzulla, Srinagar, known in her locality as the ‘sleepwalker-sleep-talker’, is a deeply disturbed woman. Her father and her husband both disappeared during a protest in Srinagar. Zara lives with her mother in their infinitesimal house with visible signs of vandalism. Zara is chronically depressed and has signs of obsessive compulsive disorder; almost every night, in her sleep, she and unlocks the door, she speaks to her lost and disappeared husband in her sleep, tells him to be careful and then walks around the house several times before returning to her bed.⁷⁷

In 2015, on another trip to Kashmir, I spoke to staff from Médecins Sans Frontières (MSF) in Srinagar and she reported that several women who come to their medical camps are

⁷⁶ Sabina (Participant 19) and Akhram, Ompora (Budgam), Personal Interview, November 8, 2014.

⁷⁷ Zara Saiyyed (Participant 44), Barzulla (Srinagar), Personal Interview, November 16, 2014.

women whose family members have disappeared. The MSF camps, at a variety of locations, cater to psychological counselling only — several women first come in with complaints of aches and pains, but as they vent, cry and speak, the physical manifestations disappear.

5) Complete Invisibility and No Social Welfare

Aatifa, Rasheeda and Urooj are three women from Dardpora, who were forced to come down to the Valley in Srinagar and find work.⁷⁸ Aatifa's husband's family is originally from Pakistan, so the India's porous borders gave them hope to go back 'home' someday, she tells me. However, Aatifa tells me, teary-eyed, that her husband "got mixed up" with the wrong crowd — "*kbujīya dost thbe unke*", she tries to speak in broken Hindi, a language she has had to learn and unlearn over the years, in a bid to find menial jobs to feed herself and her mentally-challenged sister. Her husband was reluctant to have children before *azāadi* (independence from the territory of India and complete sovereignty for Kashmir) was achieved. So she is alone which is both a bane and a boon, she says. The

⁷⁸ Aatifa, Rasheeda and Urooj, (Participants 45,46,47), Focus Group Discussion 2, November 16, 2014.

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boon is if she had had a child, he/she would have had to grow up without a father, and the bane is that she will have to grow old without any support from anyone. She says this is immensely daunting but Kashmir has taught her to live for herself. She does not tell me how exactly her husband disappeared, but it was about 15 years ago, she says she is ashamed that he was probably a militant. Aatifa, who never went to school, says something profound to me, that I will never forget — “*Koi kisi ke jung ka kaaran nahi poochtaa...*” (No one cares for the cause of someone’s war).⁷⁹

Urooj and Rashida, are a little more cheerful. They tell me that this cause (their husbands’ disappearance) made them friends, and they thank *Allah* for that vehemently. They have been told during several searches of their house by the paramilitary forces that their husbands were “informers” — double agents — for both the Indian army as well as a well-known terrorist organisation (name not mentioned). However, Urooj’s husband was a school teacher, while Rashida’s husband was a

⁷⁹ This FGD was also used to write an article for Strategic Advocacy for Human Rights (SAHR). See, Deya Bhattacharya, [*Discovering Dardpora. Through Their Eyes*](#), SAHR Blog (July, 2015. Last accessed August 3, 2015.

seasonal farmer. Their husbands were taken away from their homes in 2000, and they never came back. Rashida says she is not a “half-widow” because it is quite possible that she might find her husband’s remains in one of the many mass graves in Kupwara. Urooj shushes her affectionately, she says to me to call both her and Rashida “begum” because they are still wives, still married, still waiting.⁸⁰

When I brought up the lack of social welfare incentives from the government, the atmosphere thickens. Aatifa refuses to speak about it; she says her husband was right about wanting to move away from India, because Indian government officials overlooked their needs throughout the decades. Rashida and Urooj say that the *ex-gratia* payment that they had received was not enough at all. Rashida spent it on her son’s education, and for repair work towards her house, where her son and his wife now live. Urooj was shunned by her in-laws after she accepted the money, and so she came away to Srinagar to find work. She works as a cleaner at a school in Srinagar, and watching the kids reminds her of her own (her son, too, was taken by the army). For her in-laws, the money from the government was

⁸⁰ *Supra* note 78.

nothing more than a “bribe” to keep quiet about her husband’s disappearance and by accepting it, she had been unfaithful to him and his family.

Do they miss Dardpora, I ask them. Aatifa looks at me wistfully, while Rashida says there are hardly any men seen there, and in Srinagar, there are more men on the streets than there are women. She chuckles at the paradox. Urooj tells me that she feels powerful being away from Dardpora. Srinagar, so far, has been good to her and *Allah* saved her during the floods.⁸¹ Since leaving Dardpora, Aatifa has shown signs of being a hypochondriac — she gets unbearable headaches almost every evening, she smiles often but looks depressed, she is often at a loss for words and she says that along with the state, the doctors of Kashmir have failed her too. No one has been able to diagnose her miasma of aches and pains. She says she is 37 years old, but the war has added several invisible years to her frail body — a hundred years for every year that she has lived without Shahadab (her husband).⁸²

⁸¹ *Supra* note 78.

⁸² *Supra* note 79.

In the end, I ask them what it feels like to lobby for their husbands' rights, when their own rights are violated by the State. "This is the fate that *Allah* has probably reserved for us, we are wives of militants..." Aatifa is rueful. I stop writing, and look up and see that Rashida is giving her a look of sisterly disapproval. As I start writing in my notebook again, Urooj breaks into a smile, and states, "Stay in Kashmir a long time and you will realise ... *Hum ek dusre se juda nahi hain!* (our lives and our husbands' are intertwined...) their stories are our stories; our stories are theirs."

I look up, and I see Urooj retying her headscarf, and adjusting her *pheran*, getting ready to leave. In her, I do not see a half-widow. I see hope.

V. SUMMARY OF FINDINGS

When I proposed this study, it was aimed at the mechanisms of the transitional justice process for half-widows in Kashmir after the conflict.

However, throughout the research and interview phases, I grasped the complexity of this endeavour. Firstly, a transitional justice process begins with the state's acknowledgment of atrocities in the region concerned. Secondly, this acknowledgment gives rise to a plethora of judicial and non-judicial measures, such as fact-finding and investigation of the crimes, truth-telling processes, public apologies, memorialisation and the like, along with the formal procedures of finding and punishing the guilty. Thirdly, the post-conflict procedures begin, like most definitive political processes, to change the historical narrative of the place and the conflict — in short, to rewrite history.

In Kashmir, however, it cannot be said with explicit conviction and equanimity that this, in fact, has been the case. Three of the six senior lawyers I spoke with told me that the transition in Kashmir, in their opinion, has not even commenced, so

comprehending its processes is far from simple. The state has not acknowledged the crimes by its agents, and has repeatedly maintained that the whole Kashmir affair has been something of a “proxy war” with Pakistan, and consistently contradicted the fact that between 1989 and the early 2000s, what Kashmir went through was a non-international armed conflict. It still maintains that there is heavy terrorist activity in the area, and that laws like the AFSPA are necessary in the interests of national security. The fact that AFSPA has not been repealed in the territory of Kashmir is evidence enough that there exists a culture of impunity, and that the state is reluctant to acknowledge the succession of war crimes that occurred in the region. Moreover, India has not yet ratified the CED and accepted its jurisdiction, which indicates its willingness (or lack, thereof) to prosecute the crime of enforced disappearances in Kashmir, and formally begin a post-conflict process.

The aforementioned reasons make it evident that there is little possibility of a formal governmental transitional process. Although it is not a rigid rule in international law that only governments must begin the transitional justice process, in Kashmir, because of its toxic history with violence, this

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development can be effective only if the government leads it. A reluctance to acknowledge the atrocities and a consistent refusal to define an international crime in its penal law is symptomatic of a denial to alter the historical narrative of history. Unfortunately, the distressed half-widows have been wiped clean from most Kashmiri political agendas.

My research, and consequentially, my interview questions, pertained to only the administrative/non-legal remedies for the half-widows, partly because they bore semblance to successful transitional justice processes in Latin America, where the enforced disappearances of political dissidents, along with torture, was rampant during the rule of the military government. I steered clear of questions primarily relating to judicial/criminal procedure as this would pivot the discussions towards the disappeared male relatives, instead of their wives, and would mar the purpose of the intended research. My intention was to document the experiences of the half-widows, involving the relief system and allied processes, only. When they meandered from the questions asked — talking about the minuscule elements of the relief system — it just reflected their involvement with the system to the point where they

themselves indicated to me the alterations that could be made to the present structure.

1) Effects of gender-blind approaches in reparations

“A woman can do very little in Kashmir, but we are trying...”

- Ayesha, Srinagar⁸³

A significant number of interviewees showed an internalised helplessness that clearly emanated from how harms are defined in the present reparations arrangement. Although I turn to international law specifically to allay the plight of the half-widows in Kashmir, this approach may well be problematic. This is because even in international law, the status of the half-widows depends exclusively on their disappeared husbands. The current relief system and even the ones proposed and practiced in various parts of the world are contingent upon the death and/or return of the disappeared male relatives. The category of ‘half widows/half wives’ itself relies on the existence of the husband’s return. And, because the legal status of the disappeared, in turn, determines the fate of the relief system, this dependency may even reflect in the reparations.

⁸³ Ayesha (Participant 52), Batmaloo (Srinagar), Personal/Phone Interview, November 16, 2015.

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International law, whether conventional or customary international law, makes it difficult to define the half-widow as an isolated victim, independent of the continuous crime of enforced disappearance that her husband was a direct victim of, thereby establishing the primary victim/secondary victim dichotomy. This arbitrarily creates a hierarchy of victimology. It could be argued that the violations against the half-widow could be subsumed under various other legal instruments, both national and international, like the Constitution of India, the Indian Penal Code, CPT, ICCPR, ICESR, and the CEDAW.

However, except for the CEDAW, all the instruments adhere to a strict gender-neutral manner of defining harms. All harms are contained under one broad umbrella, and both the definition of the crimes as well as their remedies are universal and contain no scope for the experiences of women.⁸⁴

In the conceptual universe of regulatory post-conflict framework for reparations, especially in a region like Kashmir,

⁸⁴ [Procedural History of the Convention on the Elimination of All Forms of Discrimination against Women](#) December 18, 1979, *Audio Visual Library of International Law*. Last accessed December 21, 2015.

one must often begin in a place where gendered harms may themselves be inadequately defined, or sometimes, not appropriately recognised (Ní Aoláin).

Unfortunately, the notion of reparations assumes the restoration of a harm only if it is legally identified. In the case of Kashmiri half-widows, where a hierarchy of victimology has begun to appear, it is important to understand since the gender quotient is noticeably absent, the violations against the half-widows are either not recognised or unqualified and, more often than not, only a narrow perception of it exists in positive law.⁸⁵

As explained in previous sections, the prevailing relief system in Kashmir is intricate, and the fate of which relies largely on the status of the disappeared male member, which in turn, depends on the discretion of the central Government. The personal experiences of the half-widow – harassment, sexual abuse, violation of her rights during the reparations procedures

⁸⁵ Fionnuala Ní Aoláin 2013, [Rethinking Reparations for Conflict-Related Sexual Violence](#), *Western New England University*, School of Law Clason Speaker Series January 29. Last accessed June 18, 2015.

– do not figure anywhere in the arrangement, thereby making the present system gender-deficient and gender-negligent.

2) The Problems with Presumption

“Because a piece of paper does not determine your existence — you do!”
- Mumtaz, Srinagar.⁸⁶

For most of the half-widows I interviewed in Kashmir, an element of powerlessness is projected because the reparations paradigm imposes a mandatory declaration of death in order to invoke the process of relief. This is problematic in more ways than one.

Firstly, a vast number of widows do not readily believe that their husbands are dead. Their lives are often divided as ‘half-widows’ — to the outside world where they are lobbying for their rights — and ‘half-wives’ — because they believe that their husbands are still alive and will, one day, return. This leaves them with depression, ambiguous loss, PTSD and a plethora of psychological illnesses, along with the pressure to appear normal to the outside world.⁸⁷ Secondly, and perhaps

⁸⁶ Mumtaz Bibi, Hyderpora (Srinagar), Personal Interview, November 15, 2014.

⁸⁷ Supra note 14.

more importantly, a conditional reparations scheme, where the entire procedure only begins when a particular condition is fulfilled, goes against the ideals of rule of law and democracy.⁸⁸ Conditional amnesties are common in several transitional arrangements, but a conditional reparations system can hardly be thought of as efficient.⁸⁹ A discriminatory, authoritarian reparations programme can barely be identified as one that works. The legal status of a disappeared person is exceptional, and must be treated as such, especially for the sake of his/her relatives. However, as Kashmir's reparations programme is primarily built upon the inheritance paradigm, the presumption of death prevails, and this is where the problems for the half-widows become more and more complicated.

One may argue that the Evidence Act provides for a period of seven years before the disappeared person is definitively described as deceased.⁹⁰ Nonetheless, in my interviews, several

⁸⁸ Fionnuala Ní Aoláin, & Michael Hamilton 2009, Gender and the Rule of Law in Transitional Societies, 18 Minn. J. Int'l L. 380 (2009). *Scholarship Repository, University of Minnesota Law School*. Last accessed December 31, 2015.

⁸⁹ Lenta. P 2009, What Conditional Amnesty Is Not, *Theoria: A Journal of Social and Political Theory*, Vol. 56, No. 120.

⁹⁰ §108 of the Indian Evidence Act, 1872.

half-widows refused to accommodate the ‘legal death’ of their husbands. Without actually seeing the dead bodies of their loved ones, several of them stated that they refuse to believe that their husbands are dead; some are averse to beginning the process of relief because it might well begin with declaring them dead.

3) A Complex ‘Transitional’ Lexical Gap

Deriving from the previous point, there exists a legal lacuna – in both law and literature – about what persons who have disappeared, and whose death has not been proven (or dead bodies found) in a conflict area are known as. This, as I will explain later in the Report, makes for not only psychological and emotional trauma but also for procedural problems. Having no new category of such persons also makes the relief system immensely weak, widening the discretionary power among authorities, and leaving the regulation of interpretation in the hands of the perpetrators themselves.

At this point, it would be important to know that the Latin American countries of Guatemala and Argentina, and to an

extent, Bosnia and Herzegovina, under the pressure of the relatives of the disappeared, created a new, specially tailored category called the ‘absence due to disappearance’ and codified it. The legal category of ‘absence due to disappearance’ borrows heavily from the presumption of death but judiciously avoids jargon that demands that the relatives of the disappeared accept his/her death, when they do not know their whereabouts and have not found their bodies. In Latin America, procedurally, it was easy to procure a certificate of ‘absence due to disappearance’ – all the relatives had to demonstrate that the disappearance had been reported to the relevant authority. For compensation and other social welfare packages, this certificate was adequate, and no additional documents were required. The category does not put an end to the obligation of the government to carry out investigations. A majority of interviews indicate that the presence of this lexical gap has been both procedurally and emotionally disruptive to the victims.

4) *Ex-gratia* Relief Payment as “Blood Money”

Ex-gratia payment by the government in cases where such payment is applied for by the half-widow is treated as “blood

money”, in exchange for the lives of the disappeared. The implication for accepting this money is that the half-widow has abandoned the struggle for finding her husband, and securing punishment for his wrongdoers. This tacit interpretation has resulted many half-widows feeling guilt at accepting the *ex-gratia* payment, and several refusing it despite their economic hardships.

This interpretation as ‘the prostitution of the struggle’ is further supported by the *shuras* of the Hadith⁹¹ and the Qur’an⁹² that contain explicit mention of monetary payment by the perpetrator of murder or other grave crime to the heir of the victims, until the heirs remit this as charity. It is seen as an

⁹¹ For instance, “Yahya related to me from Malik that he heard that Umar ibnAbd al-Aziz gave a decision that when a Jew or Christian was killed, his blood-money was half the compensation of a free Muslim. (Al-Muwatta, 43 15.8b)

⁹² For instance, “It is not for a believer [Muslim] to kill a believer unless (it be) by mistake. He who hath killed a believer by mistake must set free a believing slave, and pay the compensation to the family of the slain, unless they remit it as a charity. If he (the victim) be of a people hostile unto you, and he is a believer, then (the penance is) to set free a believing slave. And, if he cometh of a folk between whom and you there is a covenant, then the blood-money must be paid unto his folk and (also) a believing slave must be set free. And whoso hath not the wherewithal must fast two consecutive months. A penance from Allah. Allah is Knower, Wise.” [Qur’an, 4:92]

“alternative punishment”. Therefore, the community of the half-widows and their families see the *ex gratia* payment as a “punishment” that the agents of the government have chosen, instead of prosecuting those who are responsible.

Viewing the proceeds of the relief system as tainted is indication that the reparations programme is far away from success. The difference between a compensation that emanates from a legitimate reparations system and an *ex-gratia* relief payment from an administrative procedure like that of Kashmir’s is that compensation means that there is an obligation or liability attached to the relief amount. *Ex gratia* literally means ‘out of goodwill’ and, therefore, this money has neither any negative nor any positive obligations attached to it, and the party paying it does not appear to be liable to pay this amount to the receiving party.

The money given to the half-widows after the administrative process is free from all obligations of the state, which leaves most of the women from this community with a difficult dilemma — choose the *ex-gratia* payment and lose the battle for

justice, and in many cases, the confidence of the rest of the community; or choose the battle and live in squalor.

5) The Frightening Abyss of ‘*nullum crimen sine lege*⁹³’ and ‘*nulla poena sine lege*⁹⁴’

Enforced disappearance is not a codified crime under any law either in Jammu and Kashmir or in India. Despite a number of international conventions and a customary international law that prohibit the crime of enforced disappearance, it will be practically impossible to make these applicable in India unless it ratifies the treaties and/or makes a legislation on the same. This, of course, brings us to the point about criminal legal principles that suggest that an activity cannot be a crime unless the law says so, and that one cannot be punished for the commission of an act unless the act has been declared a crime under a law by the command of the sovereign. Both generally mean the same thing — one cannot be punished for the crime of enforced disappearance unless it becomes law.

⁹³No crime without law.

⁹⁴No penalty without law.

The problematic nature of this is evident. As long as acts of enforced disappearance are swept under the carpet and circumvented under legal fictions of missing cases or as 'death', the violations against the relatives of the disappeared will keep multiplying.

VI. THE PRESENT FRAMEWORK OF REPARATIONS

In a seminal work, *Does Feminism Need a Theory of Transitional Justice?*, Christine Bell and Catherine O'Rourke question the existing transitional justice paradigm: 'where are women, where is gender, where is feminism in transitional justice?' (Bell and O'Rourke, 2007)⁹⁵ — something that I have endeavoured to do in this Report by using Kashmiri half-widows as an example. Bell and O'Rourke criticise the embryonic phase of transitional justice mechanisms, where women are generally kept away from most platforms and institutions that propose and implement reparations and other forms of post-conflict justice. They state that the justification provided for this is that mechanisms are often begun as gender-blind devices to change the *ancien régime*⁹⁶, and institute rule of law and basic rights in the new

⁹⁵ Bell, B., and O'Rourke, C. 2007. [Does Feminism Need a Theory of Transitional Justice? An Introductory Essay](#), *International Journal of Transitional Justice*, 1 (1): 23-44.

⁹⁶ Ní Aoláin, F., Haynes, D.F., and Naomi Cahn, N. 2011. [On the Frontlines: Gender, War and the Post-Conflict Process](#). Oxford University Press.

order.⁹⁷ In fact, a long line of institutional gaps for women can be traced from omissions during peace-building (Ni Aoláin and Hamilton, 2009) and “deal-making” during negotiations, which give way to normative and legal gaps that can further facilitate several exclusions during reparations.⁹⁸

The present framework of laws and remedies for half-widows in Kashmir reflect Bell and O’Rourke’s theory of under-representation or no representation of women’s experiences in the framework of post-conflict reparations, and Ni Aoláin’s observation that the absence of women from politics may, in many ways, impede their access to the reparations framework. Moreover, it should be kept in mind that while international transitional justice post-1990, materialised as a notion of stretching out accountability and rule of law mechanisms onto the post-conflict terrain, where it had been missing (Koskeniemi, 2002), the current ‘normalisation’ of the rhetoric is viewed by critics as vaguely linked to exceptionalism,

⁹⁷ NiAoláin, F. 2009. [Women, Security, and the Patriarchy of Internationalized Transitional Justice](#), *Human Rights Quarterly* Vol. 31, No. 4 (November), p. 1055-1085.

⁹⁸ Ni Aoláin F., and Michael Hamilton, M. 2009. [Gender and Rule of Law in Transitional Societies](#), *Minn. J. Int’l L.* 397, 18.

justification of interventions, and the hegemony of a more powerful state. This can also translate into strengthening of already ingrained forms of patriarchy, both in the occupied territory in question as well as the occupying, intervening state.⁹⁹

The framework of remedies for the half-widows is elusive, at best. Half-widows and their children have been at the receiving end of harassment during administrative or legal processes, and the Indian government has generally failed them in providing for assistance, resulting in further hardship. The sources of remedies, theoretically available, are of two kinds: legal and non-legal/administrative. However, there are a number of obstacles while pursuing these remedies. The most sizeable of these impediments is the fact that the phenomenon of enforced disappearances in Kashmir is not officially recognised by the Indian government, which results in various other challenges for the half-widows. Moreover, the state has no incentive to recognise these disappearances – recognition

⁹⁹ Koskenniemi, M. 2002. [Between Impunity and Show Trials](#), *Max Planck Yearbook of United Nations Law* (Bogdandy and Wolfrum. (eds.) Vol. 6) p. 1-35.

would give rise to questions of accountability during the conflict in Kashmir that the State is not yet prepared to answer. Kauzlarich et al., in *Toward a Victimology of State Crime*, assert that perpetrators often do not acknowledge the degree to which their policies have caused harm while evaluating the efficacy of these policies to bring about “desired change, maintain hegemony, or promote other forms of dominance”.¹⁰⁰ Moreover, detrimental and unjust policies can also be played down by

“neutralising reasonable categorical imperatives by employing bankrupt consequentialism, perhaps guided by ethnocentric paternalism.”¹⁰¹ (Kauzlarich et al.)

Therefore, the state hides its illegal activities and crimes under the cloak of ‘national security’, thereby denying its subjects basic rights to due processes. The state also denies responsibility and dehumanises the powerless, which allows for unjust policies to flourish and, as a result (Crew, 2008), compounds atrocities over the victims.¹⁰²

¹⁰⁰David Kauzlarich, Rick A. Matthews and William J. Miller, [Toward A Victimology Of State Crime](#), *Critical Criminology* (Vol. 10, Issue 3) 173 – 194.

¹⁰¹*Ibid.*, at 185.

¹⁰² Crew uses Kauzlarich et al.’s theory to delineate the state’s culture of impunity in the cases of enforced disappearances in Kashmir. See

Legal remedies in a country like India are tedious. The procedure is lengthy, convoluted and often too technical and daunting for a half-widow, who has had no formal education. The hurdles in the legal processes begin even before the legal process formally begins. On approaching the police, they, more often than not, refuse to register a FIR,¹⁰³ a written document that the police are mandatorily required to prepare when they receive information about the commission of a cognisable offence.¹⁰⁴ In India, the document is seen to set in motion the criminal justice process for the particular crime committed.

generally, Teresa.C 2008 ["If They Are Dead, Tell Us!" A Criminological Study of the "Disappearances" in Kashmir](#), *Internet Journal of Criminology* (2008), last accessed on December 22, 2014.

¹⁰³ Section 154 of the Code of Criminal Procedure (CrPC) provides for rules governing the process of filing an FIR. It requires that:

- i) information that is given orally must be recorded in written form (this is known as a statement) by the presiding officer;
 - ii) this statement must then be read back to the informant after delivery;
 - iii) the statement in writing must be signed/authorised by the informant;
- When the police refuses to help the informant file an FIR, s/he may file a *mandamus* petition with the High Court, to instruct the police to file it.

¹⁰⁴ The difference between cognisable and non-cognisable offences is the *gravitas* of the offence. Cognisable offences are known to be more serious – the police has the authority in these cases to make an arrest without a warrant; they are also allowed to start the investigation without the leave of the Courts. Cognisable offences carry a sentence of three years or more.

Instead, the police file a ‘missing persons’ report¹⁰⁵, knowing fully well that the investigation into the crime of enforced disappearance cannot be impelled without an FIR. A 1992 circular¹⁰⁶ instructed Kashmiri police stations, contrary to the requirements of the Code of Criminal Procedure, to stop filing FIRs against security forces without the approval of higher authorities.¹⁰⁷

Legal jargon is the archenemy of the half-widow, as very few in the community understand the difference between the terms ‘missing person’ and ‘enforced disappearance’. The main difference between a person who has disappeared and one who has gone missing is *mens rea*, or the intention of the crime. In short, enforced disappearance is a weapon for the broader systematic policy of making people, mostly political opponents and dissidents, disappear. Often compared to the Great Purges

¹⁰⁵ A missing person’s report only documents that the person is missing, and does not amount to any legal action with regard to accountability or investigation.

¹⁰⁶ Letter No: SP (5Exg/267881 dated 14.4.1992). See, Jammu & Kashmir Coalition of Civil Society (JKCCS), [Alleged Perpetrators](#). P. 10. Last accessed December 18, 2014.

¹⁰⁷ Manav Bhatnagar, Krissa Lanham and BidishSarma, [The Myth of Normalcy: Impunity and the Judiciary in Kashmir](#) (Allard K. Lowenstein International Human Rights Clinic Yale Law School April 2009).

of the Soviet Union and the Nazi *Nacht und Nebel* *Erlass*, enforced disappearances are synonymous with large-scale political repression.¹⁰⁸

A unique debate between Emmanuel Decaux, President of the UN Committee on Enforced Disappearances, and Oliver de Frouville, Chair and Rapporteur of the Working Group on Enforced or Involuntary Disappearances (WGEID), in 2013 on the International Day of the Victims of Enforced Disappearances (August 30) provided an unparalleled perspective on the difference between the phenomena of ‘missing person’ and ‘enforced disappearance’.¹⁰⁹ Decaux stated that the legal definition of enforced disappearance places a burden on the state; he calls this an implication of “imputability” of the state, which can act directly through its agents (security forces, police), but also indirectly by giving explicit or tacit acquiescence, support or authorisation to non-state actors. Decaux, while extrapolating on the indirect

¹⁰⁸Daniel MacmillenVoskoboynik 2015, [To Take Without Echo: A Brief History of Disappearance](#), King’s Review, January 13. Last accessed January 13, 2015.

¹⁰⁹[How Can a Human Being Disappear?](#), *Oxford University Press Blog*, August 30, 2013). Last accessed December 29, 2014.

attributability of the state, talks about the duty of the state to prevent disappearances and protect its citizens.

Thus, he clearly laid down that in case of an enforced disappearance, the state has both positive and negative obligations.¹¹⁰ The classical negative obligations simply means that the state shall merely abstain from human rights violations, while positive obligations, in the case of enforced disappearances, are fourfold as laid down by the Inter American Court in *González et al. v. Mexico*¹¹¹ — the duty of the state to prevent violations, investigate, impose penalty and compensate the victim. The Court, in this case, held that the responsibility of the state is not unlimited, but arises under the following circumstances: (a) if there was awareness of a situation of real or imminent danger; (b) in relation to a specific individual or group; and (c) if there was reasonable possibility of preventing the harm.¹¹²

¹¹⁰*Ibid.*

¹¹¹[Case of Gonz'alez et al. \("Cotton Field"\) v. Mexico](#), Preliminary Objection, Merits, Reparations and Costs, Judgment, *Inter-American Court of Human Rights*. (ser. C) No. 205. November 16, 2009. Last accessed December 31, 2015.

¹¹²*Ibid.*

De Frouville, on the other hand, charts the crime of enforced disappearance from the perspective of the victim, stating that victims of the crime do not disappear of their own volition. They are victims of a “technique of terror” that consists of, among other atrocities, the deprivation of liberty and the subsequent denial of that deprivation, or complete refusal of governmental authorities to share information of the whereabouts of this disappeared person, thus, expunging his identity and placing him outside the ambit of the law.¹¹³

According to him, therefore, enforced disappearances are “part of counter-subversive strategies used by some intelligence services and security personnel, together with torture and summary executions”¹¹⁴, while the term ‘missing person’ is devoid of political connotations.

Owing to such vast complications in legal language and procedure, the legal remedy route is usually the final recourse of the half-widow, and she can only pursue the case if a lawyer

¹¹³[The International Day of the Victims of Enforced Disappearance](#), video, *UV Web TV*, August 29, 2013, last accessed on December 29, 2014.

¹¹⁴ *Supra* note 56.

accepts the matter *pro bono*, that is, without charging a fee. At the onset of the legal remedy, the half-widow files a *habeas corpus* petition in the High Court of Jammu and Kashmir, which requires the legal system to respond to the claims of deprivation of liberty and illegal detention.¹¹⁵ As discussed before, the State almost always denies its knowledge of the disappearance. Government lawyers reportedly often respond to court orders by eschewing knowledge of the detention; for instance, they file motions claiming that the alleged detainee is not in custody, or submit evidence that security personnel were not in the area on the date of the alleged disappearance, or claim that the arresting officer is dead. A court, in this case, goes in one of two directions. It may order an inquiry by a District Judge or Chief Judicial Magistrate, wait to receive the findings and then, choose to direct the police officials to file an FIR (if it has not been filed before) and conduct investigation, and, in many rare cases, order the State to pay *ex-gratia* relief to the petitioner. The other option is that the court orders further investigation into the disappearance where the FIR was filed, but alleged perpetrators did not cooperate during the first investigation.

¹¹⁵ *Supra* note 42 at 7.

Often, the half-widow is denied remedies that would effectively punish the non-cooperating authorities, despite receiving a favourable response from the court. In both the *Tanveer Ahmad Salay* and the *Abdul Majid Sofi* cases,¹¹⁶ the courts were petitioned to issue contempt orders against the government authorities. In both cases, however, although the court quashed the detention order, it refused to rule on the contempt claim or to take judicial notice of the relevant government agencies' lack of cooperation.¹¹⁷

Moreover, judicial pronouncements seem like paper tigers when confronted by the legal procedure in the AFSPA. Under the Act, armed forces are given immunity, and a suit in a civilian court cannot be instituted against them unless there is a formal

¹¹⁶Tanveer Ahmed Salay Judgment, J&K High Court, HCP No. 421/2005 (18.7.2006). Abdul Majid Sofi Judgment, J&K High Court, HCP No. 422/05 (18.7.2006). In the Tanveer Ahmad Salay case, Justice Hussain similarly found that “[p]erusal of the record would show that the grounds of detention is a verbatim copy of the dossier of SSP of Police.” Judgment, J&K High Court, HCP No. 421/2005 (18.7.2006). Justice Hussain reached the same conclusion in the Abdul Majid Sofi case—“[P]erusal of the record would show that the grounds of detention . . . is a verbatim copy of dossier of Sr. Superintendent [*sic*] of Police Baramulla submitted to the District Magistrate.” Judgment, J&K High Court, HCP No. 422/05 (18.7.2006).

¹¹⁷ *Supra.*, 55 at 30.

‘sanction’ from the central government to authorise prosecutions. Section 7 of the Act (AFSPA) provides that “[n]o prosecution, suit or other legal proceeding shall be instituted” against a member of the security forces “except with the previous sanction of the Central Government.” Therefore, if the findings of the police investigation provide evidence of guilt against an official, the process of sanctioning the arrest and prosecution must begin. Applying for the sanction requires submission of a case file by the Kashmiri police to the State Home Secretary (Home Department in Jammu and Kashmir), who then forwards the request to the Union Home Ministry, which in turn, further forwards such request to either the Defence Secretary (when the indicted perpetrator is from the army), or to the Home Secretary (when indicted perpetrator is from the paramilitary forces).¹¹⁸ There is very little information available on how many such sanctions have been granted by the Union Government, and whether these sanctions have given way to prosecutions.¹¹⁹ An Amnesty International report

¹¹⁸ [India: Briefing on The Armed Forces \(Special Powers\) Act, 1958](#), ASA 20/025/2005, *Amnesty International*. Last accessed December 29, 2014.

¹¹⁹ Advocate Pervez Imroz, Srinagar, Personal Interview, November 14, 2015.

states that in 2005, there were approximately 300 sanction requests for prosecution sent to Union Government by the Jammu and Kashmir government, but none of these were successful.

Criminal procedure is also lenient on the armed forces providing for similar immunities. Section 197 of the CrPC states that when officers of the Central Government are

accused of any offence alleged to have been committed by [them] while acting or purporting to act in the discharge of [their] official duty, no court shall take cognizance of such offence except with the previous sanction (...) of the Central Government,¹²⁰

and Section 45 of the CrPC places a more particular prohibition on the arrest of armed forces members; it requires that,

no member of the Armed Forces of the Union shall be arrested for anything done or purported to be done by him in the discharge of his official duties except after obtaining the consent of the Central Government.¹²¹

There is no known specific legal mechanism for victims to challenge the central government's inaction, with regard to sanctions or decision to deny its consent to the arrest and prosecution of a member of the security forces. Moreover, the information is classified on how many sanctions have become prosecutions.

¹²⁰ §197 of the Code of Criminal Procedure, 1973.

¹²¹ §45 of the Code of Criminal Procedure, 1973.

At every stage of the legal process, the half-widow is met with delays, non-compliance and procedural hindrances that lead her to a state of learned helplessness.¹²² The non-legal/administrative remedy routes are equally elusive.

However, in this Report, I try to chase the conundrum of the administrative relief system for the half-widow, primarily because I intend to look at the Kashmir situation through the lens of a transitional justice system, that puts equal, sometimes increased, emphasis on the non-legal, non-judicial measures used to address the large-scale past violations and achieve reconciliation. The government has established relief systems that are available to the half-widow; these include *ex-gratia* relief and compassionate appointment. To expound on these further:

- i. *Ex-gratia* relief: An *ex-gratia* relief is an amount of money provided to the next of kin of the killed/disappeared person without any legal obligation of liability or

¹²² In 1965, psychologist Martin Seligman developed the theory of learned helplessness, which is a cognitive bias of an organism that has endured repeated painful or otherwise aversive stimuli which it was unable to escape or avoid. After such experience, the organism often fails to learn escape or avoidance in new situations where such behaviour would be effective.

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government acknowledgement of any kind. Often, the half-widow, despite being impoverished, refuses to accept this money as it is only a charitable amount not accompanied by a public apology (an accepted part of the international reparations framework) and stripped off all political overtones. There is also a certain amount of stigma attached as the rest of her community might blame her for selling her disappeared husband's soul to the government

- ii. Compassionate appointment: The government employs a member of the family of a person killed/disappeared in militancy-related incidents

The mechanism of *ex-gratia* payment does not take form in legislation, but is founded upon a government order that allows for application for such relief on the condition that it has been more than seven years since the disappearance of the husband. The half-widow must apply to the District Magistrate, who places this application before a committee known as the 'District Screening-cum-Coordinator Committee'. This Committee is placed with the responsibility of ascertaining whether the disappeared person can be presumed dead and whether he can be cleared of all military-related activity and associations. Only when these facts are established does the

Committee decide to award the *ex-gratia* relief. However, the Committee is in no way an impartial one — it is constituted of officials and representatives from the police, the security forces as well as governmental agencies. Many a times, the Committee might comprise the same people who perpetrated the crimes.¹²³ For the *ex-gratia* payment and the compassionate appointment, proving the death of person is imperative and can be proven with the help of a death certificate. A second imperative is to establish that the deceased person has not been involved in militancy-related activities. A half-widow, therefore, has literally no remedy available in the administrative sense, because in a case of disappearance, death cannot be unambiguously ascertained, and the government bodies begin with a presumption that the deceased does have a nexus with militant pursuits. During several interviews, I realised that half-widows felt compelled to get their husbands' death certificates issued in order to receive the benefits of governmental

¹²³ Personal interview with Nadima (Participant 32), Ompora (Budgam). Nadima recounts that that two army officials whom she had met regularly at Badami Bagh Cantonment while looking for her husband, were on the Committee. She states there was sniggering when she claimed that her husband was not a militant. Nadima was offered the *ex-gratia* amount but did not accept it.

reparations while not actually believing that their husbands are dead — that they will come back someday.

Psychologically and emotionally, these women are living two lives — one in which they strive to believe that their husbands shall come back home one day, and the other where they have to reconcile with the fact that their husbands may be dead during the course of the conflict.

Earlier, it was believed that these war widows show the symptoms of post-traumatic stress disorder (PTSD), but most recently, this diagnosis has been debunked, and replaced by the term ‘ambiguous loss’, which identifies the causes of stress as an external, outside and ongoing pressure, instead of previous, disjointed traumatic experience. Pauline Boss defines ambiguous loss as a “situation of unclear loss resulting from not knowing whether a loved one is dead or alive, absent or present.”¹²⁴

¹²⁴Ambiguous Loss: Learning to Live with Unresolved Grief (Harvard University Press, 1999), 3, 6.

It is also important to understand that in order to bring an end to the “depoliticisation” of half-widows, the various ways they are objectified and instrumentalised first by the system of political repression, and then, by the reparations programme, needs to be addressed. In many regimes, including in Kashmir, many female family members of political dissidents or “terrorists” have been targeted by the paramilitary and police forces in order to “punish” their male relatives. McClintock as well as Anthias and Yuval-Davis, while exploring ideologies of gender and nationalism, affirm that women are essentially seen as the “symbolic representations of the body politic”, to be attacked and protected during conflict, akin to a country. Buss expounds on this theory further by stating that “[w]omen, thus, become the embodied boundaries of the nation-state, and as such, are targets for violence directed against a national collectivity”. Moreover, the benefits of the reparations system are contingent upon the exoneration of the direct victim from all terrorist activities. Often when this exoneration does not occur because of evidence against the male relative, the half-widow is stigmatised and might be referred to as a “collaborator” or be harassed for information by the police.

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While disappeared persons are placed in a legal limbo, their unknown fates often making regulation of legal status and settlement of inheritance, property and family matters and social welfare difficult, the half-widows are moved to the back burner in governmental and political agendas. In the absence of an *ad hoc* legislation or policy that addresses these uncertain consequences, legal provisions on the presumption of death and the possession of a declaration of death (death certificate) has been the mode of relief. Not only does this completely ignore the instances of enforced disappearance, but it imposes a supplementary emotional burden on the widows, which may amount to ill-treatment and a derived form of grave human rights violation. In many cases, the presumption of death has added to the culture of impunity in Kashmir, revealing how the crime of enforced disappearance is continuous and is generally not subject to statutes of limitations, and how the violence against one individual can in turn serve as a breeding ground for further violations for his relatives.

As discussed before, the exercise of resorting to a declaration of death, which is the most common practice in Jammu and Kashmir, is widely problematic. It causes an enormous amount

of anguish to the half-widows, who are exposed to several forms of re-victimisation when they have to declare their husbands dead, often having to randomly pick a date for their demise (often this date is one that represents when their husbands were last seen), while believing internally that they are still alive and living in distress.

During my interview with Riffat Bibi, a widow in Budgam district, who had to resort to using the presumption of death to make use of the reparations system for compassionate appointment, asked me, wistfully, whether her job would be taken away from her in case the government got to know that she still believed that her husband would come back.

VII. THE PRESUMPTION OF DEATH IN THE REPARATIONS PARADIGM

Several treaties in international law establish the right to an adequate and effective remedy. Therefore, people have the right to equal and effective access to justice and reparations for harms they have suffered. Most of these rights are enshrined in international treaties or in customary international law, but are implemented primarily at the domestic level.¹²⁵ In cases where an individual has not been able to invoke an adequate and effective remedy from the state, s/he can approach an international court or committee provided the state has accepted the jurisdiction of such court or committee, through the ratification of concerned treaty; and such court has the right to calculate and award reparations.¹²⁶

¹²⁵ Pablo De Greiff, *Justice and Reparations* in THE HANDBOOK OF REPARATIONS (Pablo De Greiff, Ed.), International Center for Transitional Justice (Oxford University Press, 2006), 451.

¹²⁶ Richard Falk, *Reparations, International Law, and Global Justice: A New Frontier*, in THE HANDBOOK OF REPARATIONS (Pablo De Greiff, Ed.), International Center for Transitional Justice (Oxford University Press, 2006), 478 – 503.

A subset of the right to an effective remedy is the right to reparations¹²⁷. In international law, the right to reparations for the violation of human rights has been recognised.¹²⁸ Despite this, the contours of this right remain jagged. What was initially conceived as a concept of inter-state responsibility deeply interlinked to the “commission of an internationally wrongful act”, later stopped being the object of international disputes and came strictly under the jurisdiction of local courts and legislative bodies. Again, the content of this obligation remains unclear, partly because the obligation depends on the perceived harm, and different harms require variants of this obligation.

Various types of administrative reparation programmes exist around the world, and distribute a wide range of benefits. Economic compensation may be distributed in different forms, such as monthly, quarterly, bi-annually, and yearly pensions, lump-sum awards or a potential combination of the two. Reparations may also come in the form of social welfare

¹²⁷ María José Guembe, *Economic Reparations for Grave Human Right Violations: The Argentinian Experience*, in THE HANDBOOK OF REPARATIONS (Pablo De Greiff, Ed.), International Center for Transitional Justice (Oxford University Press, 2006), 24.

¹²⁸ *Supra* 126.

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services, including housing benefits, free or special healthcare packages, education and vocational-training benefits, and microcredit. Some reparation measures also include symbolic measures that may include unofficial or official memorialisation projects, truth-telling and fact-finding bodies, apologies, public recognition, and public ceremonies of commemoration. Recent successful reparations also include guarantees of non-repetition.

A number of relevant human rights international treaties and conventions provide an understanding of this obligation of providing reparations and help construe the scope and extent of the obligation and a definite affirmation of the right to reparation. Of these, *The Basic Principles and Guidelines on the Right to a Remedy and Reparation for the Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (hereinafter, *Basic Principles*) is one, and has been debated since 1989 and was finally approved in 2006. The *Basic Principles* chart out, succinctly, the scope of the obligation that explicitly states reparation, under a generic instruction to provide effective remedies to victims of human

rights violations.¹²⁹ The principles also suggest a harmony between the ‘victims’ right to remedies’ and the victims’ right to ‘access to justice’.¹³⁰ Moreover, it contains a non-exhaustive list of reparation mechanisms¹³¹ that, *inter alia*, contain compensation, restitution and rehabilitation as “adequate, effective and prompt reparation”.

These principles are well grounded in the internationally recognised right to remedy for victims of violations of international human rights law and humanitarian law, as incorporated in various human rights instruments. It is focused on identifying procedures, mechanisms, and modes for

¹²⁹ The scope of the obligation is contained in Principles II of the Basic Principles. They are as follows: (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations; (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law; (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and (d) Provide effective remedies to victims, including reparation.

¹³⁰ *See*, Principles VII and VIII of Basic Principles.

¹³¹ Principle IX of Basic Principles (Reparation of harm suffered).

reparations within extant legal obligations, instead of developing new-fangled obligations in the international, regional or domestic context. However, the principles fail to define “gross violations of international human rights” or “serious violations of international humanitarian law”, leaving us to refer to the vast instruments ourselves in order delineate the phrases.¹³² Moreover, the document — a General Assembly Resolution — is soft law, and possesses merely persuasive value.¹³³

The *Basic Principles* gives us a clear, unparalleled definition of ‘victim’ that includes not only the individuals, who have directly suffered harm, but also the immediate relatives and/or dependents of the direct victim:

Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of

¹³² *Supra* 126.

¹³³ A/RES/60/147; The *Basic Principles* were approved by the then UN Commission on Human Rights by 40 votes to 0, with 13 abstentions. At the General Assembly, they were adopted without a vote.

international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

Rubio-Marín, Sandoval and Díaz refer to this as the “harm-oriented concept of victim”¹³⁴, quoting Ni Aolain, stating that human rights violations

not only destabilize the person(s) toward whom the acts are directly intended but a wider circle whose own autonomous entitlements are precariously in balance with the well-being and safety of others . . . [producing] a domino effect (Rubio-Marín, et al., 2009).

The inventive concept recognises the obligation of states to consider the immediate family or dependents of the direct victims as potential victims of a gross violation of human rights. However, this obligation is subject to the domestic legal

¹³⁴ Ruth Rubio-Marín, Clara Sandoval, and Catalina Díaz, *Repairing Family Members: Gross Human Rights Violations and Communities of Harm*, in THE GENDER OF REPARATIONS (Ruth Rubio-Marín, Ed.), Cambridge University Press (2009).

system.¹³⁵ A few instruments to have incorporated the harm-oriented expansion of the concept of victim are the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the recent UN Convention for the Protection of All Persons from Enforced Disappearances.

The policy of reparations, including monetary compensation, began in Latin America following Argentina's transition to democracy from military dictatorship.¹³⁶ In its final report in 1984, the National Commission on the Disappearance of Persons (*Comisión Nacional sobre la Desaparición de Personas*) or CONADEP, recommended the enactment of laws and modes of providing "economic assistance to the children and/or family of the disappeared persons during the repression: scholarships, social assistance and job positions ..."

After this, a plethora of reparations law and policy came into being between 1984 and 1985, though they were not exclusively economic. In October 1988, a colloquium of

¹³⁵ Fionnuala Ni Aolain, *Sex-based Violence during the Holocaust – A Reevaluation of Harms and Rights in International Law*, *Yale Journal of Law and Feminism* 12 (2000): 43–84.

¹³⁶ *Supra* 127.

NGOs in Latin America and international law experts, along with the *Grupo de Iniciativa para una Convencio'n contra las Desapariciones Forzadas de Personas* (the Initiative Group for the Convention against the Forced Disappearance of Persons), discussed the violation of enforced disappearance at length, and drafted the Declaration on the Forced Disappearance of Persons, a document to be presented before the UN General Assembly. Besides this, the colloquium debated the obligation of the state to provide economic reparation to victims, something that had never been discussed before in the international or regional arena.¹³⁷

The debates around economic reparations proved to be contentious and several NGOs seemed repulsed by the idea of awarding monetary compensation to victims, and there was widespread resistance regarding the same, because they believed that the economic reparation was, to an extent, a barter for the lives of their disappeared family members and their access to justice. Organisations such as the *Asociaci'on Madres de Plaza de Mayo* (Mothers of Plaza de Mayo Association) were against the idea of reparations, whether monetary or acts

¹³⁷ Supra 127.

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of public acknowledgement, and believed that reparations meant accepting the death of the disappeared, that the state was offering reparations in exchange for their silence about the incidents and the impunity of those who were responsible.

Most remedial mechanisms, often guised as reparations, like in the case of Kashmir, replicate the “inheritance paradigm”, where death is accepted as a natural stage in life, and from that death, new events follow, such as the division of property, remarriage, passing on titles, debts, rights and obligations. However, remedies attempting to repair harms that emanate from enforced disappearances and deaths from political violence cannot be equated with inheritance. Death is not natural in these circumstances and the progression to new events is agonising. In many countries, to gain access to a remedy, the disappeared person must be declared dead.

Disappearances are pigeonholed into the “inheritance paradigm”. However, several harms derived from the violation of enforced disappearance are ignored, in this case. For instance, for the wives of disappeared men, the category of “standard widowhood” seems insufficient to seize the various

harms she is subjected to, and can be linked to her disappeared husband, thereby reducing her status from an ‘indirect victim’ to an invisibilised accessory.

There is no international instrument that obliges states to codify or define the legal status of persons, who are victims of the crime of enforced disappearance, without resorting to the declaration of death. Therefore, it has become a legal fiction to pronounce the victim dead in order for clarification on matters such as property, inheritance and reparations for indirect victims. In the process, however, the burden of proof for enforced disappearances stands renounced when death is formally declared, affecting investigations and adding to impunity.

In fact, the commitment to adopt appropriate measures to regulate specifically the status of disappeared persons is contained only in Article 24(6) of the International Convention on the Protection of All Persons from Enforced Disappearance. This Convention has not been ratified by India. The provision states that state parties must take ‘the appropriate steps with regard to the legal situation of

disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights'.¹³⁸ However, the Convention remains silent about death certificates or declarations of death being the sole technique for regulating the legal status of the disappeared. And, without a global precedent, it is increasingly difficult to say otherwise (Citroni, 2014).

In March 2014, the Committee on Enforced Disappearances (CED) summoned states to review and alter their local legislation, with a stance to incorporate a 'declaration of absence as a result of enforced disappearance', and remove the legal presumption of death to determine the legal status of disappeared persons.¹³⁹

According to the United Nations Working Group on Enforced or Involuntary Disappearances (WGEID), in a General

¹³⁸ Gabriella Citroni, 2014. The Pitfalls of Regulating the Legal Status of Disappeared Persons Through Declaration of Death, *J Int Criminal Justice*.

¹³⁹ Committee on Enforced Disappearances (CED), Concluding Observations on Germany, UN Doc. CED/C/DEU/CO/1, 27 March 2014, §§ 26-27; and Concluding Observations on the Netherlands, UN Doc. CED/C/NLD/CO/1, 27 March 2014, §§ 34-35.

Comment on the right to recognition as a person before the law in the context of enforced disappearances, it is imperative to “fully recognize the legal personality of disappeared persons and thus respect the rights of their next-of-kin and as well as others”.¹⁴⁰

The WGEID says that the most viable concept to deal with the problems of the legal status of a disappeared person should be addressed through a ‘declaration of absence by reason of enforced disappearance’, which can be issued only with the prior consent of the family, and by a state authority after a certain amount of time has elapsed since the disappearance, not exceeding one year.¹⁴¹

A declaration of absence, according to the WGEID, in no way interrupts or concludes the ongoing investigations to search for the victims. In fact, on the contrary, the declaration would make it the positive obligation of the state to continue all investigations to determine the whereabouts of the victims,

¹⁴⁰ Annual Report of the WGEID for 2011, UN Doc. A/HRC/19/58/Rev.1, 2 March 2012, § 42 (§6 of the general comment)

¹⁴¹ *Ibid*, §8

thus ensuring governmental accountability. However, the declaration of absence would be a measure to protect the relatives of the disappeared while, at the same time, allow them to exercise all rights relating to property, social welfare, and inheritance on behalf of the victim.

Most importantly, in my opinion, the WGEID elucidated that mechanisms of reparation and/or social welfare measures should not be made contingent on the requirement that the relatives of the disappeared person produce a death certificate, and “as a general principle, no victim of enforced disappearance shall be presumed dead over the objections of the family”.¹⁴²

Article 2 of the European Convention on Human Rights (ECHR) provides for a thorough examination of the

¹⁴² Annual Report of the WGEID for 2012, UN Doc. A/HRC/22/45, 28 January 2013, § 50. A similar stand was taken by the Advisory Committee of the Human Rights Council in its progress report on best practices on the issue of missing persons, highlighting that ‘missing persons should be presumed to be alive until their fate has been ascertained. The foremost right of a missing person is that of search and recovery. A person should not be declared dead without sufficient supporting evidence’. Progress Report of the Human Rights Council Advisory Committee on Best Practices on the Issue of Missing Persons, UN Doc. A/HRC/14/42, 22 March 2010, § 60

procedural obligation to investigate in cases of mysterious deaths or deaths resulting because of an unlawful act. The Article and the obligation emanating from the Article are generally set off upon the discovery of the body or the actual occurrence of death.

However, the European Court of Human Rights (ECtHR) has expounded on this and stated that when disappearances in circumstances that are severely life-threatening are concerned, the procedural obligation to investigate the crime does not come to an end with the discovery of the body or the presumption of death.¹⁴³ In fact, the ECtHR states that “an obligation to account for the disappearance and death, and to identify and prosecute any perpetrator of unlawful acts in that connection, will generally remain” and the discovery of the body “... merely casts light on one aspect of the fate of the missing person”.¹⁴⁴

¹⁴³ *Varnava and others v. Turkey*, Appl. No. 16064/90, 16065/90, 16066/90, ECtHR [GC], 18 September 2009, § 145

¹⁴⁴ *Ibid.*

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While in the Indian context, the burden of proving whether the disappeared person is alive or dead rests on the person who affirms it — this is generally the half-widow who often has to debate the alleged death of her husband to beget a response from the reparations system — the Inter-American Court of Human Rights (IACtHR) has an immensely progressive manner of delineating the presumption and the allied burden of proof.

According to the IACtHR, the nature of the presumption of death of a disappeared person is *juris tantum* (rebuttable presumption) and admits evidence, if available, to the contrary; and that burden of proof, as a rule, rests on the respondent, as it laid down in the *Radilla Pacheco* case:

[I]n the case of the presumption of death due to forced disappearance, the burden of proof falls upon the party that had the alleged control over the detained person and their fate — generally the State — who must prove the fact contrary to what is concluded from said presumption, that is, that the person has not died...it would be inadmissible that the party on which the burden to invalidate the presumption falls use it in order to exclude or limit, in an early manner through a preliminary objection, the Tribunal's jurisdiction over certain facts in a case of forced disappearance. On the contrary, the State would be using the presumption of

death to once again invert the burden of proof on who argued it for the first time, that is the Commission and the alleged victims. The use of a presumption in this manner makes its existence ineffective and invalidates the sense of its existence within the law.¹⁴⁵

Moreover, the IACtHR also has ruled that something as fragile as the presumption of death cannot lead to a conclusive determination of the date of on which the disappeared person may have died. Because of the rationale in *Radilla Pacheco*, the IACtHR was able to reject the respondent state's (Mexico) objection *ratione temporis*, built on the assertion that IACtHR had no jurisdiction over the state (and as a result, the state had no international obligation), assuming that the victim had died before the Convention had been ratified by the state.¹⁴⁶

In India, Section 108 of the Indian Evidence Act, 1872, allows for the presumption of death. The word 'presumption' is not explicitly mentioned and can be carved out of the burden of proof provision within Section 108.¹⁴⁷ It states that when the

¹⁴⁵ *Radilla Pacheco v. Mexico*, Judgment of 23 November 2009, Inter-American Court of Human Rights (IACtHR), §§47- 48

¹⁴⁶ *Ibid.*

¹⁴⁷ 108. Burden of proving that person is alive who has not been heard of for seven years.—1[Provided that when] the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven

whereabouts of a person are not known for more than seven years, the person who affirms that such missing/disappeared person is dead or alive has the burden of proving so.

There has been extensive debate on the ramifications of the application of the presumption of death to disappeared persons by a few international human rights tribunals and agencies that have tried to set limitations to the application and, as a result, also determined the realms of burden of proof in the matter.¹⁴⁸

Resorting to the declaration of death for the regulation of the legal status of the disappeared often leads to treating a case of enforced disappearance as a “presumptive death” and, through a legal fiction, evaluating and qualifying such case as another ‘associated’ offence or, as the case is in India, denigrate it to an act that does not figure in the Indian Penal Code (IPC) at all.

years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is 2[shifted to] the person who affirms it.—1[Provided that when] the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is 2[shifted to] the person who affirms it.

¹⁴⁸ Supra 138.

Moreover, what worsens this is a deficient and obsolete domestic criminal legislation that does not succeed in codifying enforced disappearance as a discrete criminal offence. A plethora of related criminal acts are outlawed by the IPC, such as kidnapping, torture, illegal detention and deprivation of liberty. While it may seem that these associated criminal acts form vital fragments of the crime of enforced disappearance, the crime in itself is so peculiar and consolidated that it seems inexcusable to diminish it to a disintegrated amalgam of criminal acts that, whether isolated or conjoined, fall short of addressing the intricacy of the crime.

Moreover, both Sections 107 and 108 of the Indian Evidence Act, 1872, which talk about the presumption of death, unfairly shifts the obligation of proving whether a person is dead or alive on those people who assert the fact. Generally, during an enforced disappearance case — often masked as a missing case by the police — it is the relatives of the victim who would make such an assertion. This is because the family is often pushed to the brink of poverty, and the reparations system requires a fixed classification of death for them to receive benefits. However, in my opinion, the law is unjustly skewed in favour

of the state as, due to an archaic law, the state is never required to make any assertions of the disappeared person's legal status — the status of the disappeared person, as is evident, does not in any way affect the state.

Under the ICCPED, the obligation rests on the state party to “take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law”, while Article 5 of the ICCPED declares that enforced disappearance “constitutes a crime against humanity”, a fact that is supported by the Statute of the International Criminal Court (Rome Statute). Both these Conventions explicitly put the burden of proof on the state and require that both negative and positive obligations emanate from the state when examining the nature of the criminal act.¹⁴⁹

A legal positivist's argument would be that the current framework of Indian laws does not put any onus on the state to recognise enforced disappearance as a crime in its jurisdiction, take adequate steps to define it as an offence under

¹⁴⁹ Supra 138.

its domestic laws for the sake of *nullum crimen sine lege*¹⁵⁰, and remove the declaration of death as a condition to approach it for relief.

The argument would be based on the fact that India has not ratified the ICCPED or the Rome Statute, making it impossible for India to be under the jurisdiction of these Conventions. For the implementation of international law at the municipal level, India follows the dualist theory¹⁵¹, which means that conventions, treaties of an international nature do not *ipso facto* become a part of national law in India. Therefore, the international treaty needs backing from a national legislation made by Parliament for its implementation.

However, despite the relatively modern separation between signature and ratification of treaties, as Bradley observes, when a nation signs a treaty or convention, it is bound to abstain

¹⁵⁰The criminal law principle that states that there is no crime without a law.

¹⁵¹ Under the dualist theory, there cannot exist any kind of conflicts between the internal and international provisions/legislations. Dualists emphasise the difference between national and international law and require the translation of the latter to the former, without which International Law is not law.

from acts that would “defeat the object and purpose” of the treaty or convention until such time the nation clarifies its intention not to become a party to the treaty or convention. Article 18 of a treaty that governs creation, interpretation, and termination of international treaties and one that India refers to while making reservations to treaties, the Vienna Convention on the Law of Treaties (Vienna Convention), also codifies this obligation.¹⁵² Article 253 of the Indian Constitution¹⁵³, read with Entries 13¹⁵⁴ and 14¹⁵⁵ of the Union List under the Seventh Schedule, is required to give effect to international treaty obligations after ratification by making any law for the whole or any part of India for implementing treaties, agreements or conventions. In *Visakha v. State of*

¹⁵²Curtis A. Bradley, [*Unratified Treaties, Domestic Politics, and the U.S. Constitution*](#), Harvard International Law Journal, Vol. 48, No. 2 (2007)

¹⁵³ Legislation for giving effect to international agreements Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

¹⁵⁴ Participation in international conferences, associations and other bodies and implementing of decisions made thereat.

¹⁵⁵ Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign Countries.

*Rajasthan*¹⁵⁶, the Supreme Court affirmed that whenever requisite, Indian courts could turn to international conventions as an external aid for creation of a new national legislation:

In the absence of domestic law occupying the field to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions to enlarge the meaning and content thereof, to promote the object of the Constitutional guarantee.

In *Jolly George Varghese and Another v. The Bank of Cochin*¹⁵⁷, the Supreme Court strived to deal with emerging correlations between national law and human rights laws by harmonising Article 11 of the International Covenant on Civil and Political Rights (ICCPR) with provisions of contractual obligations of the State to protect the human rights of a civil debtor whose liberty was under attack because of judicial process under

¹⁵⁶ (1997) 6 SCC 241.

¹⁵⁷ AIR 1980 SC 470.

proviso under Section 51 and Order 21, Rule 37, Civil Procedure Code.

The Supreme Court, in *ADM, Jabalpur v. Shivakant Shukla*¹⁵⁸, widened the scope of Article 21 of the Indian constitution by alluding to the Universal Declaration of Human Rights (UDHR). In the same judgment, Justice Khanna, in his dissenting opinion, held that in the event that there is a possibility of two constructions of a municipal law, the courts should support the adoption of the construction that would aid in the provisions of the municipal law to be read harmoniously with international law or treaty obligations as well as with the provisions of the Constitution, while not being in conflict with the Universal Declaration of Human Rights (UDHR). The UDHR, while not being legally binding, has attained the status of customary international law globally, including in India.

Moreover, Article 51(c)¹⁵⁹ of the Constitution of India states that the state shall endeavour to “foster respect for

¹⁵⁸ AIR 1976 SC 1207.

¹⁵⁹ Article 51 enshrines one of the fundamental principles of State policy (DPSP), embodied in Part IV of the Constitution. The directive principles,

international law and treaty obligations in the dealings of organised peoples with one another”. *Arguendo*, it could be said that the term ‘international law’ in this Article 51(c) may be construed as ‘customary international law’¹⁶⁰ (CHL), and not ‘treaty obligations’ because, as explained before, international treaty obligations would need ratification and a domestic legislation. Accepting this approach would mean that CHL is not integrated into the municipal laws of India *ipso facto*, thus, reducing the position of international law in India to a trivial principle or an *obiter dictum*,¹⁶¹ although the judgment in *Vellore Citizens Welfare Forum v. Union of India and Others*¹⁶² holds that:

Even otherwise, once these principles are accepted as part of the Customary International Law there would be no difficulty in accepting them as part of the domestic law. It is almost a proposition of law that the rules of Customary International Law which are not

according to article 37, are not enforceable through the court of law, nevertheless they are fundamental in the governance of the country and there is a nonobligatory duty on the part of the State to apply these principles in making of laws.

¹⁶⁰ Jean-Marie Henckaerts and Louise Doswald-Beck, *Rule 98: Enforced Disappearance*, in [CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES](#), International Committee of the Red Cross (Cambridge University Press, 2009).

¹⁶¹ Rules of international law are not mere ethical rules, although it was otherwise held by Justice Beg in *A.D.M., Jabalpur v. Shivakant Shukla*

¹⁶² AIR 1996 SC 2715.

contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of Law.

Thus, the application of Rule 98 of the study on Customary International Humanitarian law¹⁶³ (customary IHL study) published by the International Committee of the Red Cross (ICRC) in 2005 states that enforced disappearance is prohibited, both in international and non-international armed conflicts. Rule 117 of the ICRC study makes it necessary for all parties in a conflict, whether it be an international or a non-international armed conflict, to take “feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate”.¹⁶⁴

From the legal positivist’s point of view, the current framework of reparations that asks for a declaration of death to make relief possible for half-widows is legally sound. India’s application of the dualist theory during implementation of international laws

¹⁶³ [Practice Relating to Rule 98. Enforced Disappearance](#), Customary International Humanitarian Law. Last accessed January 4, 2016.

¹⁶⁴ [Supra, 160.](#)

block the automatic incorporation of international treaties into the national legal system.

Only an act of Parliament, after the ratification of the ICCPED, can, in this case, aid in recognising enforced disappearance as a crime in India and take adequate measures to investigate it in Kashmir and develop an approachable relief system for the half-widows. However, a close perusal of the constitutional jurisprudence in India would suggest that the gaps in human rights law in India are often filled by resorting to CIL as well as moral imperatives arising out of being a mere signatory in a treaty or convention.¹⁶⁵

¹⁶⁵ Agarwal, S.K. *Implementation of International Law in India: Role of Judiciary (working paper)*, Faculty of Law, McGill University.

VIII. RECOMMENDATIONS

1 Strengthen Enforcement of International Law

One of the prime reasons why India has been able to turn a blind eye to the issues in Kashmir, whether from a gendered perspective or not, is because India's allegiance to and its enforcement of International Law has been fragmentary. So far, India's history of denying applicability of international law to the Kashmir conflict has only done more harm than good. India's enforcement of international law must be strengthened. At this point, from the point of view of the Kashmir conflict, this can be done in the following ways:

a) *Defining the situation in Kashmir:*

India is a party to the Geneva Convention, 1949. Therefore, it is bound by the provision of the Common Article 3 of the Geneva Convention¹⁶⁶. Despite this, India has not defined the

¹⁶⁶ Common Article 3 establishes fundamental rules from which no derogation is permitted. It is like a mini-Convention within the Conventions as it contains the essential rules of the Geneva Conventions in a condensed format and makes them applicable to conflicts not of an international character: It requires humane treatment for all persons in enemy hands, without any adverse distinction. It specifically prohibits murder, mutilation, torture, cruel, humiliating and degrading treatment, the taking of hostages and unfair trial. It requires that the wounded, sick

conflict in Kashmir. On examination of the situation in Kashmir, it is sufficient to say that there is an internal armed conflict (or non-international armed conflict) going on. There are many definitions for internal armed conflict and civil war but none of them are universally acceptable.¹⁶⁷ According to H.P. Gasser, it is generally admitted that

non-international armed conflicts are armed confrontations that take place within the territory of a State between the government on the one hand and armed insurgent groups on the other hand. [...] Another case is the crumbling of all government authority in the country, as a result of which various groups fight each other in the struggle for power.¹⁶⁸

According to the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v. Dusko Tadic*,

and shipwrecked be collected and cared for. It grants the ICRC the right to offer its services to the parties to the conflict. It calls on the parties to the conflict to bring all or parts of the Geneva Conventions into force through so-called special agreements. It recognizes that the application of these rules does not affect the legal status of the parties to the conflict. Given that most armed conflicts today are non-international, applying Common Article 3 is of the utmost importance. Its full respect is required.

¹⁶⁷ Anita Yadav and Amit Yadav, *International Humanitarian Law in India: A Critical Case Study*, Online International Interdisciplinary Research Journal, ISSN2249-9598, Volume-IV, Issue-I, Jan-Feb 2014.

¹⁶⁸ Hans-Peter Gasser, *International humanitarian law and the protection of war victims*, in INTERNATIONAL HUMANITARIAN LAW: AN INTRODUCTION, Henry Dunant Institute/ Paul Haupt Publishers (Bern, 1993. Last accessed December 12, 2015.

an armed conflict exists whenever there is a resort to armed forces between states or protracted armed violence between governmental authorities and organised armed groups within a state. In given case, it was stipulated that International humanitarian law applies from the initiation of such conflict and extends beyond the cessation of hostilities until a general conclusion of peace is reached or, in the case of internal conflicts, a peaceful settlement is achieved.¹⁶⁹

As soon as the situation in Kashmir is defined, India's obligations as a 'High Contracting Party' in Article 3 shall be invoked and the conflict within Kashmir will be more regulated according to International Humanitarian Law (IHL). This would allow more stringent measures when it comes to women, protection of civilians, the wounded and the sick, violation of life, and the outrages upon personal dignity.

b) *Exploring the ways in which India's obligation to ICCPED as a signatory can be strengthened, instead of pushing for ratification*

According to Article 12 the Vienna Convention on the Law of Treaties (VCLT), signing a convention or treaty is an expression of the interest and consent of the party to be bound

¹⁶⁹*Prosecutor v. Tadić* (Trial Judgment) IT-94-1-T, ICTY (May 7, 1997). See also, Dino Kritsiotis, *The Tremors of Tadić*, Israel Law Review, Vol. 43:262 (2010).

by such convention or treaty.¹⁷⁰ Unless this consent and interest has been revoked by the said party, in another negotiating instrument, the signature would continue to mean consent as regards the content of the convention or treaty. Moreover, Article 18 of the VCLT states that the State has an obligation not to defeat the object and purpose of a Treaty Prior to its Entry Into Force.¹⁷¹

This means that the party shall not violate the terms of the treaty before it has entered into force in its jurisdiction. India is a signatory to the ICCPED which means that before it formally ratifies, accepts, approves and accedes to the treaty, or simply before it formally makes its intention clear about becoming a party to the treaty or not, it has an obligation to uphold the object and purpose of the treaty. However, by creating legal fictions and completely surpassing the necessity to declare disappearance as a defined and punishable crime, India has been continually defeating the purpose of the treaty.

¹⁷⁰ Article 12 of the Vienna Convention of the Law of Treaties (Consent to be bound by a treaty expressed by signature).

¹⁷¹ Article 18 of the Vienna Convention of the Law of Treaties (Obligation not to defeat the object and purpose of a treaty prior to its entry into force)

Therefore, it is necessary to lobby for international pressure in a way that India is compelled to clarify its position on enforced disappearances.

c) *India's obligations within the ICCPR*

India has signed, ratified and acceded to the International Covenant on Civil and Political Rights, 1966 (ICCPR). However, it has been violating the 'absolute and non-derogable rights' doctrine that states under Article 4 (2) that certain rights cannot be suspended even during times of public emergency.¹⁷²

¹⁷² Article 4(2) of ICCPR

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. *No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.*

3. *Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further*

These rights include, *inter alia*, the right to life, freedom from torture or cruel, inhuman and degrading treatment, freedom from slavery, prohibition against the retrospective operation of criminal laws and the right to recognition before the law. India has been violating its obligations under the ICCPR in Kashmir, and this needs to be brought to the cognisance of international authorities.

2. Employment of the Continuous Violation Doctrine

Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a state or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.¹⁷³

In November, 2010, the UN adopted the 'Continuous Violation' doctrine in cases of enforced disappearances. In a General Comment, the United Nations Working Group on

communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

¹⁷³ Article 7 ¶2 of the Rome Statute of the International Criminal Court.

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Enforced or Involuntary Disappearance (WGEID) affirmed its position that an act of enforced disappearance begins at the time of the arrest and detention or abduction of persons and extends for the whole period of detention or abduction until the perpetrator acknowledges such detention or abduction or releases accurate and credible information pertaining to the fate and or whereabouts of the detained or abducted persons.¹⁷⁴

As a perpetrator is identified as being responsible for having committed a crime of enforced disappearance that began before the entry into force of the relevant legal instrument and which continued after its entry into force, the perpetrator should be held responsible for all violations resulting from the enforced disappearance, and not only for violations occurring after the entry into force of the instrument. The WGEID stated the following:

Even if some aspects of the violation may have been completed before the entry into force of the relevant national or international instrument, if other parts of the violation are still continuing, until such time as the

¹⁷⁴ General Comment on Enforced Disappearance as a Continuous Crime, A/HRC/16/48 (para.39), January, 2011.

victim's fate or whereabouts are established, the matter should be heard, and the act should not be fragmented.¹⁷⁵

“[O]ne consequence of the continuing character of enforced disappearance is that it is possible to convict someone for enforced disappearance on the basis of a legal instrument that was enacted after the enforced disappearance began, notwithstanding the fundamental principle of non-retroactivity”.¹⁷⁶

By virtue of the aforementioned and by virtue that India is a signatory of the ICCPED, it has both positive as well as negative obligations to prevent violations, investigate, impose penalty and compensate the victim. Moreover, while under the various legal fictions, India separates every part of the crime of enforced disappearance in its jurisdiction and pigeonholes it within its Penal Code, it would be important to understand that its obligations to International Law require India to follow up all constituting acts leading up to and after the disappearance and provide for relief. Therefore, all acts constituting enforced disappearance shall be considered as a continuing offence as

¹⁷⁵ *Ibid.*

¹⁷⁶ [Compilation of General Comments on the Declaration on the Protection of All Persons from Enforced Disappearance](#). Last accessed December 20, 2015.

long as perpetrators continue to conceal the fate and whereabouts of persons who have disappeared.

3. Doing Away with the concept of Presumption of Death

Several half-widows I spoke with did not want to invoke the administrative remedies as the idea of presumption of death or the necessity of procuring death certificates creep in, making them uncomfortable. Moreover, despite disappearance — whether by state or non-state actors — these women may not be ready to accept the death of their husbands at all. Therefore, there is the need of a scheme that recognises women who have been identified as the target victims of the cycle of violence and conflict, and bypasses the need of a death certificate and provides to them opportunities for training and employment, along with financial schemes. These benefits would be provided without any prejudice on the status of the husbands with regards to their deaths.

As an important footnote to this, it is also imperative to do away with the label of ‘half-widows’. It was a term adopted in haste and shrouded in irony in order to invoke authorities. However, because of the language, my respondents believed

that this has reduced their identities as women not only attached to their husbands' identities but also to the conflict. This term makes it impossible for them to escape the conflict, and it makes it almost impossible to find a way to reach these women for restorative measures because their entire identity is based on the conflict. Alternatively, legislators should create a new legal category, like in Peru, Argentina and Bosnia and Herzegovina, that does not require the disappeared to be declared dead for their relatives to access benefits, such as inheriting the disappeared person's wealth and assets or allowing spouses to dissolve marriages.¹⁷⁷ In countries where this has worked, this category is known as "absence by enforced or involuntary disappearance."¹⁷⁸

4. Certificate of Disappearance

Another scheme could be providing for a 'Certificate of Absence' to the family members of the disappeared. As conceived, this would be an official document issued to family members of the disappeared persons affirming their status as

¹⁷⁷ Supra 54.

¹⁷⁸ David Tolbert, *Enforced Disappearances: Justice for the Disappeared has a Woman's Face*, International Center for Transitional Justice (ICTJ) (August 30, 2013). Last accessed December 21, 2014.

“missing” as opposed to “deceased”. This certificate could be issued to family members in cases of enforced disappearance where there is sufficient supporting evidence but leads to uncertainty (right to truth), which is a widely recognised right in international law. In a plethora of countries, including Peru, Chile and Argentina, there are legislations that provide for a declaration of disappearance — it provides for an accessible framework to receive social security and property benefits. Presently, Sri Lanka is weighing the possibilities of this scheme.¹⁷⁹

5. Efforts for Memorialisation

Many post-war countries have instituted war memorials for the people lost in conflict. Notwithstanding that many of these memorials have been wrought with politics, the memorialisation of a war is the first stage of acknowledging the grief of the survivors and the relatives of the survivors.¹⁸⁰ A

¹⁷⁹ The Center for Policy Alternatives, *Certificates of Absence: A Practical Step to Address Challenges Faced by the Families of the Disappeared in Sri Lanka* (September 2015). Last accessed December 20, 2015.

¹⁸⁰ Judy Barsalou and Victoria Baxter, 2007. *The Urge to Remember: The Role of Memorials in Social Reconstruction and Transitional Justice*, United States Institute of Peace, January. Last accessed December 20, 2015. See also, Sebastian Brett, Louis Bickford, Liz Ševčenko & Marcela Rios,

memorial in Kashmir on the disappeared men can be a small gesture, but it can go a long way. The grief of the women who are demanding to know what happened to their husbands and sons will be allayed to some extent. Moreover, without the bodies of the disappeared, there is no way that their families can visit them and pay homage.

In the same vein, I would recommend exhuming the bodies in the unmarked graves, starting DNA analysis and making sure the remains reach the families. This would provide much needed closure to the families of the disappeared. Moreover, if this is done by the state, the distance between the state and the Kashmiri families will also be reduced.

6. Healing Support and Psychosocial Development

State programmes with regard to psychological and social development of the half-widows is much needed. The half-widows go through a world of pathos, depression and are victims of extreme stigmatisation. If the state invests in a programme where it provides for psychological support, along

Memorialization and Democracy: State Policy and Civic Action, International Center for Transitional Justice, 2007. Last accessed December 20, 2015.

with voluntary trainings and employment while at the same time understanding the nature of their grief and removing stigma from society because of their identities, it will be an interesting way to integrate them back into society and giving them legitimacy.

7. Gendered Reparations

For areas like Dardpora where all the men have disappeared or have been killed¹⁸¹, there is a need for a more gendered reparations programme. It is understandable that a lot of damage during the conflict was on the lives of the women survivors of the disappeared and this must be acknowledged. While any reparations programme — from state or a private organisation — should certainly help in allaying the effects of the conflict, it should not dwell on the disappearances alone. Reparations programmes should try to develop a concept of moving away from the conflict, in a way that they build capacities of the survivors to handle the social, economic and cultural parts of everyday life. While investigating the criminal acts, trials and punishments have been a part of the fabric of Kashmir for a long time now, these have helped improve the

¹⁸¹ Ashoke Pandit, *Village of Widows* (2010).

lives of the victims. Therefore, it is imperative to develop the concept of agency within the lives of the half-widow so that they do not struggle to survive.

IX. CONCLUSION

I was able to speak with 55 half-widows in November, 2014 and another 35 women between May and August, 2015. Both of these periods required different strategies of engagement — in 2014, my strategy was more research and policy based. Because of the nature of the research, I was more of an investigative journalist — the nature of my research was the comprehension of the violation, the extent of healing and the efficacy of the remedies available. In 2015, my role changed drastically — the nature of research was very ethnographic and advocacy-based; my primary work was to document the stories of the half-widow while at the same time try to find effective solutions, along with the half-widows, to their plight. During both phases of my research, I began to find a pattern of behaviour among the women I interviewed: most of them believed that their husbands were still alive, and the idea of a death certificate was something they were greatly averse to them. Often, the compulsory procurement of the death certificate dissuades the half-widows from approaching and invoking the remedial system. One wonders then would it make sense to do away with the presumption of death in war situations? It cannot be denied that the penal code in India and Jammu and Kashmir does not have any specific clauses or provisions for conflict

situations. Most parts of the Penal Code exist verbatim from the time it came into force in 1860. No improvements have been made to the definitions of crime, and no new crime, with respect to or resembling disappearance, has been included within the Code either. This is problematic, especially because crimes such as enforced disappearance, intimate partner violence, genocide and other war crimes get left out from definitions.

The existing structure of reparations is not only obsolete, it also does not allow for fairness and efficacy when it comes to finding remedies for the half-widows. Moreover, without their identities and status being validated by the government, there is little that the half-widows will be able to do. There is no specific scheme or social welfare plan for them, and none is likely to exist unless there is pressure on the government to recognise them. It is understood within Kashmir, as well as outside, that the widows' plight is not important, that if something has to be done in Kashmir, it has to be post-conflict measures to address the conflict first and then make way for development, education and employment issues. In fact, gender is not even an important agenda while devising

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comprehensive strategies to identify enforced disappearance as crime. The legal status of the indirect victims of disappearances is unique in law and in fact this should be understood and their plight must be addressed through the adoption of measures that fully take into account the features of the phenomenon of enforced disappearance.

It is necessary to continue considering alive those who perhaps are not, but whom we have the obligation of claiming, one by one, until the answer finally unveils the truth that today is intended to be hidden.

- Julio Cortázar (*La negación del olvido*, 1981; translated by Gabriella Citroni)

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