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CRIME OF AGGRESSION & RELEVANCE IN THE 21ST CENTURY IN CONFLICT
OF KASHMIR

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ABSTRACT

This thesis will fundamentally focus on the global implications of international justice through Article 8 *bis* 1 and 2 ‘crime of aggression’. I argue the need for the U.N. Security Council referrals to be made to the ICC under Chapter VII of the U.N. Charter. As previously stated, this allows for the Court to exercise jurisdiction over crime of aggression involving State Parties, regardless of their individual ratification status or “opt-out” status, and non-states parties alike. This thesis examines international situations in countries that have chosen to “opt-out” of and not ratify Article 8 *bis*, such as the India-Pakistan conflict of Jammu & Kashmir (more commonly referred to as Kashmir). It will be used as a means to analyze the purpose of crime of aggression in bringing about justice to current human rights violations, as this is a unique jurisdictional regime which cannot be triggered in the same manner as with other core crimes (crimes against humanity, genocide, and war crimes) of the Rome Statute.

The purpose of this research is to answer the following questions: Are India’s actions in Kashmir actions that constitute crimes of aggression (as defined by Article 8 *bis* of the Rome Statute) by a non-signatory nation? What constitutes acts of aggression under international law? What causes have led to the ongoing conflict between India and Pakistan? My research suggests that by applying Article 8 *bis* 1 and 2 the ICC can play a role in impartially adjudicating these most serious international crimes, bring justice to victims, and serve in the advancement of the rule of law and create stable, peaceful societies. It is important to note that this international crime emphasizes its ability to hold the leaders (i.e., individuals) of nations responsible, rather than the State Parties themselves.

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Chapter 1

Introduction

On December 15th 2017 at the United Nations Headquarters in New York, States Parties to the Rome Statute agreed to activate the International Criminal Court (ICC)'s jurisdiction over *Crime of Aggression* - its fourth 'core' crime. The adoption of this resolution came after ten days of intense diplomatic negotiation by States Parties. The resolution that was finally adopted entered into force on July 17th 2018—the date of the 20th anniversary of the ICC's founding treaty—for ICC member states which have ratified the Rome Statute and the amendments on the crime of aggression (Coalition for the International Criminal Court, 2019).

According to the statute, it is defined as "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations". The act of aggression means "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations" (Wenaweser et al., 2019). These acts can include, among others, invasion, military occupation, and annexation by the use of force, blockade by the ports or coasts. As of September 25th, 2019, 39 states have ratified the amendments on the Crime of Aggression to the Rome Statute of the International Criminal Court (Coalition for the International Criminal Court, 2019).

It also stipulates that the ICC will not have jurisdiction over ICC member states, or their nationals, that have not ratified these amendments in the case of a state referral or *proprio motu* (initiated by the ICC prosecutor) investigation. However, in the case of U.N. Security Council referrals to the ICC under Chapter VII of the UN Charter, the Court is able to exercise jurisdiction which extends to the entire international community (Article 15 *ter*). In other words, the prosecutor has the authority to investigate crime of aggression involving States Parties, regardless of their individual ratification status or “opt-out” status, and non-states parties alike (Coalition for the International Criminal Court, 2019).

For the purpose of this thesis, I will be examining one such international situation in countries that have chosen to “opt-out” of and not ratify Article 8 *bis*, such as the India-Pakistan conflict over Kashmir. That is to say, as these states are non-signatory members to the Rome Statute, I propose the U.N. Security Council refer Prime Minister Narendra Modi to be tried and charged under crime of aggression by the ICC in dissolving Article 370 and 35(a) of the Indian Constitution. In the act of doing so, Prime Minister Modi has violated the sovereignty and political integrity of the Kashmir region. These acts will be further discussed in this thesis. It is important to note that Article 8 *bis* may be the only way in which justice could be brought to the current human rights violations, as this is a unique jurisdictional regime which cannot be triggered in the same manner as with other core crimes (crimes against humanity, genocide, and war crimes) of the Rome Statute.

Chapter 2

Methodology

It is important to note that at this point, Article 8 *bis* is still fairly new in international law - having only been implemented as of late 2018. The ICC has only recently started to begin the search for potential cases to be tried under crime of aggression. Thus, to this date, there have been no cases put forth or claims been made for a person in a position effectively to exercise control with the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State.

This thesis is primarily concerned with how all actions that constitute crimes of aggressions, as defined by Article 8 *bis* of the Rome Statute, by non-signatory nations are actions that may be referred by the U.N. Security Council to the International Criminal Court for prosecution. Using qualitative research, I argue that India's Prime Minister Narendra Modi's actions in the region of Kashmir are ones that constitute crimes of aggression by a non-signatory nation.

For the purpose of thesis, I will be using qualitative research methods. This research method is necessary and most effective given that there are limited materials for which crime of aggression is discussed in international law. As mentioned previously, the ICC has not made a case under Article 8 *bis*; therein lies the difficulty of entailing what the trial may entail. However, my research is more concerned with what constitutes as a crime under Article 8 *bis*, especially a non-signatory nation's action, and how referral by the U.N. Security Council could aid in the resolution for this conflict. My analysis will be using a mixture of historical and

modern sources to aid in a comprehensive description of the conflict surrounding Kashmir. I will then move onto discussing the application of crime of aggression and assessing factors that assert India's involvement in Kashmir are for the maintenance of political power and economic prosperity. These factors include ulterior motives, media, militarism, and political gain. Finally, I will show how India's actions in Kashmir are that to be referred by the U.N. Security Council to the ICC for prosecution. My analysis will end with an evaluation of the current state and situation of India and region of Kashmir, express why Article 8 *bis* is imperative for conflict resolution, and provide recommendations for how foreign policy can (and should) proceed differently in the future.

Chapter 3

Historical Background and Context: India-Pakistan

Since the Partition of British India in 1947, India and Pakistan have engaged in territorial disputes, specifically over the region of Kashmir. India and Pakistan have fought four wars in the last 70 years, three of which, in 1947, 1965, and 1999 were over Kashmir (Steer, 2019).

The First Kashmir War, or Indo-Pakistani War of 1947–1948, was fought between the two newly independent dominions. In August of 1947, rulers of the princely states, Kashmir being one of them, were advised to join either dominions by executing an instrument of accession. Maharaja Hari Singh of Kashmir, along with his prime minister Ram Chandra Kak, decided not to accede to either dominion. The reasons cited were that the Muslim majority population of the state would not be comfortable with joining India and that the Hindu and Sikh minorities would become vulnerable if the state joined Pakistan (Ankit, 2014). It is important to note that at this time, Kashmir displayed a wide range of ethnic and religious communities. The Kashmir province consisted of the Kashmir Valley and the Muzaffarabad district had over 90% majority Muslim population. However, the Jammu province had a roughly equal division of Hindus and Muslims in the eastern districts (Udhampur, Jammu, and Reasi) and Muslim majority in the western districts (Mirpur and Poonch). The mountainous Ladakh district in the east had a significant Buddhist presence with a Muslim majority in Baltistan. The Gilgit Agency in the north region was overwhelmingly Muslim.

In October 1947, war had officially begun with Pakistan's launch of 22 tribal lashkar (militias) from Waziristan (Nawaz, 2008). These local tribal lashkar and Pakistan-backed

Pashtun forces moved to take the capital city of Srinagar, however upon reaching Baramulla, they had been stalled (Shapiro et al., 2010). Besieged both by a revolt in his state and by the invasion, the Maharaja requested armed assistance from the government of India. In return, the Maharaja executed the Instrument of Accession which legally recognized Kashmir as an Indian territory and handed over the state's powers of defense, communication and foreign affairs (BBC, 2002). It is important to note that at this time, Pakistan refused to recognize the accession of Kashmir to India - claiming it was "fraudulently and violently" obtained (Schofield, 2003). On this basis, fighting continued over the next two years between the two dominions. By January 1949, war had ended with a ceasefire adopted by the United Nations, which recommended Pakistan to withdraw its forces, both regular and irregular, while allowing India to maintain minimal forces within the state to preserve law and order (Resolution adopted by the United Nations Commission for India and Pakistan, 2016). Upon both countries' compliance, India gained control of about two-thirds of Kashmir, while Pakistan controlled the remaining one-third. This ceasefire line was established to be supervised under UN peacekeeping forces (Thomas, 1992). In addition, a referendum was to be held to determine the future of the territory. Though, this ultimately never took place and resulted in the status of territory continuing to be a point of dispute. While India accepted the Commission's resolution, Pakistan's main preoccupation was the guarantee of a free and impartial plebiscite after the fighting stopped. By December 1949, the Commission declared its failure due to disagreements over the process of demilitarization.

Following this failure, the Constituent Assembly of Jammu and Kashmir was recommended to either apply both Article 370 and 35(A) to the Indian constitution or to abrogate

them altogether. After consultation with the state's Constituent Assembly, the 1954 Presidential Order was issued, specifying the articles of the Indian constitution that applied to the state. Article 370 was drafted in the Indian constitution and granted Kashmir a special autonomous status, as per the Instrument of Accession of 1947. Article 35A, defined that the Jammu and Kashmir state's residents live under a separate set of laws, including those related to citizenship, ownership of property, and fundamental rights, as compared to residents of other Indian states (TNN, 2019). As a result of this provision, Indian citizens from other states could not purchase land or property in Jammu & Kashmir (ET Online, 2019). These articles were drafted in Part XXI of the Constitution titled "Temporary, Transitional and Special Provisions" (India Today, 2014). By 1957, these articles were considered to have become a permanent feature of the Indian constitution, as confirmed by various rulings of the Supreme Court of India and the High Court of Jammu and Kashmir (BBC, 2002).

The Second Indo-Pakistani War began following Pakistan's Operation Gibraltar - a military operation planned and executed by the Pakistan Army to instigate the Muslim-majority Kashmiri population into an uprising against Indian rule in August 1965 (Faruqui, 2018). The Pakistani military leadership strongly believed that inciting a local rebellion would serve as a justification for war against India (Hali, 2012). However, Indian forces were tipped off by the local populace that Pakistani soldiers, who were dressed as Kashmiri locals, had crossed the ceasefire line. As this was a clear violation of the two countries' previously agreed truce, India launched a full-scale military attack as an act of defense. This seventeen-day war caused thousands of casualties on both sides and witnessed the largest engagement of armored vehicles and tanks in battle since World War II (Higgins, 2016). By January 1966, the war ended when

officials from India and Pakistan signed, both UNSC Resolution 211 and the Tashkent Declaration, which affirmed their commitment to peace with no territorial changes (Lyon, 2008). This gives rise to yet another failure of the UN in the conflict over Kashmir, in its issuing of a 'return to the status quo ante bellum', i.e., the situation as it existed before the war. This meant that no side gains or loses territory or economic and political rights - which ultimately led to further deterioration in both nations' relationship. A clear indication from the international community that this conflict is not important enough to commit to.

The third Indo-Pakistani War of 1971 was unique in the sense that, while it did not involve the region of Kashmir directly, it established a unilateral ceasefire through the Simla Agreement and laid down the principles that would govern both nations future relations. During the war, Indian and Pakistani militaries simultaneously clashed on the eastern and western front, which resulted in Indian victory and the Eastern Command of the Pakistan military signing the Instrument of Surrender in December 1971 in Dhaka. This marked the formation of East Pakistan as the new nation of Bangladesh (Azhar et al., 2018). With this, the Simla Agreement of 1972 was signed by Zulfikar Ali Bhutto, President of Pakistan, and Indira Gandhi, Prime Minister of India, at the time. The agreement highlighted that both countries would "settle their differences by peaceful means through bilateral negotiations". It is important to note that India has maintained that the Kashmir dispute is a bilateral issue and must be settled through bilateral negotiations, not through any third-party intervention, such as the United Nations (PTI, 2013). Moreover, this agreement identified a new ceasefire line, now known as the Line of Control (LoC), between India and Pakistan. It was maintained "neither side shall seek to alter it unilaterally, irrespective of mutual differences and legal interpretations" (Chari, 2013). By 1974,

an accord was reached between the Kashmir state government and Indian Government and affirmed Kashmir's status as "a constituent unit of the union of India". Pakistan has since rejected this accord (BBC, 2002).

Conflict erupted for the first time in nearly 30 years in May 1999, as India launched airstrikes against Pakistani-backed forces - disguised as Kashmiri militants - that had infiltrated across the Indian-administered LoC, north of Kargil. This led to the fourth war between these nations, known as the Kargil War. During the initial stages of the war, Pakistan denied any involvement and insisted that the forces were "freedom fighters" fighting for the liberation of Indian-administered Jammu and Kashmir (BBC, 2002). However, documents left behind by casualties and later statements by Pakistan's Prime Minister, Nawaz Sharif, and Chief of Army Staff showed the involvement of Pakistani paramilitary forces led by General Ashraf Rashid. At the height of the conflict, thousands of shells were fired daily, and India launched hundreds of airstrikes. The Red Cross reported that at least 30,000 people had been forced to flee their homes on the Pakistani side of the LoC. In the end, the Indian Army, later supported by the Indian Air Force, recaptured a majority of the positions on the Indian side of the LoC. Facing international diplomatic opposition by the G8 nations, European Union, and China among others, Pakistani forces withdrew from the remaining Indian positions along the LoC.

Since then, there has not been an end to this state of conflict. The result of Kargil War was simply - Indian repossession of Kargil and return to the status quo ante bellum. There is a clear need for international intervention and resolution. However, it must be different in that there must a clear commitment from the international community in identifying this regional conflict as a major issue.

Chapter 4

Modern Day Conflict of Kashmir

Between 1999 and 2019, there was not as much volatile action in the Kashmir region. However, on August 5, India's government, under the direction of Prime Minister Narendra Modi, proposed revoking the special constitutional status of its portion of Jammu and Kashmir (J&K) – namely Article 370 and 35(a). This unilateral decision annulled the limited autonomy of Indian-administered Kashmir, which was signed into agreement under the Instrument of Accession in 1947. Since Modi's election in 2014, he and the Hindu nationalist BJP had long opposed Article 370. The ruling party argued that Kashmir's special constitutional status hindered its integration with India (Srivastava, 2019). Thus, in order for India to strengthen its influence over its only Muslim-majority region, revocation became the party's 2019 election manifesto. After returning to power with a massive mandate in the April-May general election cycle, the Indian government lost no time in acting on its promise (BBC, 2019).

To start, Article 370 gave special status to Kashmir conferring it with the power to have a separate constitution, a state flag, and autonomy over the internal administration of the state (BBC, 2019). It was drafted in Part XXI of the Indian Constitution titled "Temporary, Transitional and Special Provisions" (Unnithan, 2017). It stated that the Constituent Assembly of Jammu and Kashmir would be empowered to recommend the extent to which the Indian constitution would apply to the state. After the state constituent assembly was convened, it recommended the provisions of the Indian constitution that should apply to the state, based on which 1954 Presidential Order was issued. Since the state Constituent Assembly dissolved itself

without recommending the abrogation of Article 370, the article was deemed to have become a permanent feature of the Indian Constitution in 1956 (Mahapatra, 2018). Article 35(a) was added to the Constitution through the Presidential Order of 1954 under Article 370 and empowered J&K state's legislature to define "permanent residents" of the state and provide special rights and privileges to them (Bhadoriya, 2016). The state defined these privileges to include the ability to purchase land and immovable property, ability to vote and contest elections, seeking government employment and availing other state benefits such as higher education and health care. Non-permanent residents of the state, even if Indian citizens, were not entitled to these 'privileges'. Moreover, it protected the exclusive laws – such as the bar on outsiders buying property and women marrying non-Kashmiris losing their property rights - of the State (Venkataramanan, 2019). It is important to note that these articles could only be altered on the recommendation of the Constituent Assembly of the State – at the time at which all of the events took place, there was no such position in J&K.

The process of repealing J&K's special status began with President Ram Nath Kovind issuing a Presidential Order under Article 370 (1) of the Constitution. This new Order superseded the Presidential Order of 1954 – which effectively made all the provisions that formed the basis of a separate “Constitution” for J&K stand null (Venkataramanan, 2019). Thereby, no longer recognizing J&K's legal claim for sovereignty. As discussed, this clause enables the President to specify the matters which are applicable to the State and can only be issued with “the concurrence of the Government of the State of Jammu and Kashmir” (Venkataramanan, 2019). In order to scrap Article 370 altogether, Home Minister Amit Shah announced that additional clauses were added to Article 367 of the Indian Constitution – these

were ‘interpretations’ for the new provisions made. Specifically, all references to the ‘Sadar-i-Riyasat’, acting on the aid and advice of the Council of Ministers, will be construed as references to the Governor of Jammu and Kashmir. All references to the State government shall mean “the Governor”. The reference to the “Constituent Assembly” in a proviso to Article 370 (3) was amended to read “Legislative Assembly of the State” (Venkataramanan, 2019). This had stated that the President can only declare that Article 370 is no longer operative on the recommendation by the Constituent Assembly. As previously stated, since there is no current Constituent Assembly. When there is no state assembly, the power is automatically transferred to the Parliament. This coupled with the Governor provision, allowed Modi’s government to make changes accordingly by circumventing the “necessary” clause – this meant revocation could be made to Article 370 (Times of India, 2019).

Furthermore, the Order declared that all the provisions of the Constitution of India should be applied to J&K as well. These decisions were followed by a harsh crackdown, with the Indian government sending tens of thousands of troops in addition to the 500,000 troops already present in the area, canceling a major Hindu pilgrimage, and shutting down schools and colleges (BBC, 2019). This was all pre-calculated actions taken by the government; all in knowing what needed to be done to silence the many voices of Kashmir (Gupta, 2020). In fact, the days leading up to August 5th saw the government ordering tourists to leave and regional political leaders were placed under house arrest. This resulted in a curfew with suspension of virtually all forms of communication, as telephone and internet services were cut and shut down (BBC, 2019). Immediately following the revocation of J&K’s special status was the arrest of thousands of civilians and 500 political leaders by paramilitary forces (TRT World, 2019).

As a result of the revocation, the State has since been divided into two union territories – Jammu & Kashmir, which will have its own legislature, and Ladakh, which will be ruled directly by the central government and will have no legislature of its own. A union territory is a type of administrative division unlike other states in India, in that federal territories governed directly by the main government (Srivastava, 2019). More simply put, with these new changes all Indian laws will be automatically applicable to Kashmiris, and people from outside the state will be able to buy property there. While the Modi government justified that this move would bring development to the region (which ceased to exist due to the previously held special laws), the region remains hostile nearly two years later. Communications are still slow, as black-outs and high-speed internet blockades continue to occur (Ellis-Petersen, 2020). Additionally, arrests have become routine for those residing in the area (Salam, 2020). According to an AFP report, under the Public Safety Act, which allows the government to detain any person above the age of 16 without a trial for two years, at least 4000 people were arrested and booked (Sharma, 2019). In fact, Modi had given permission for the paramilitary forces and troops sent in to arrest anyone to suppress ‘violence’ (Salam, 2020). This lawless law paved the way for Kashmiri youths to join military organizations, according to an internal analysis by the Indian Army (Bashir, 2019). 635 “over ground workers,” a term used by police to describe these alleged supporters of militants, was the highest in any year since the eruption of militancy in 1990 (Mir, 2021). It is increasingly evident that Modi’s government has fostered a situation of fear among civilians and hindered any chance of regional stability in J&K. Bilateral or previously held “non-cooperative militarized strategies” (which were established as a result of the bilateral cease-fire agreement) are no longer an option for resolving this ongoing conflict.

Chapter 5

Literature Review

“Nuclear War? How Kashmir Could Still Cause an Indo-Pakistan War in 2020.”

This secondary source is published by an independent, geopolitical intelligence and advisory firm, The National Interest, that examines global events in a way for readers to obtain more accurate information. It provides a very brief overview on the recent escalation in tensions between India and Pakistan starting early last year. Tensions spiked in February 2019, when, for the first time in nearly five decades, both India and Pakistan hit each other with airstrikes. Moreover, India blamed a Pakistan-based group for a suicide bombing in Indian-controlled Kashmir that month. In August of the same year, Indian Prime Minister Narendra Modi's government revoked Jammu and Kashmir state's autonomy – Article 370 and 35(a).

It then determines how these developments will make for bilateral relations centered on the dispute over Kashmir and ongoing militant activity could trigger another military confrontation. The article focused on how the Pulwama attack occurred during Modi's reelection campaign, giving the prime minister a powerful issue — national security — to help the Bharatiya Janata Party (BJP) win in a landslide against its rival, the Indian National Congress (INC). This insurgency occurred in the Indian-administered Kashmir on February 14, 2019, when a suicide attacker drove a vehicle-borne improvised explosive device into a paramilitary

convoy in the district of Pulwama. This resulted in the killing of 40 personnel from the Central Reserve Police Force. In retaliation, Pakistan launched its own counterstrike the next day across the Line of Control, the de facto border dividing Kashmir between both countries.

This led to the BJP becoming the first party other than Congress to clinch back-to-back majorities in the parliament's lower house since independence in 1947. Alluding to a great deal of power, Pakistan's Prime Minister Imran Khan, strongly condemned the decision, halted bilateral trade and expelled the Indian high commissioner. Khan even alluded to the possibility of military confrontation between "two nuclear-armed states" if the international community failed to intervene. The article also suggests that the 54 security incidents in Indian-controlled Kashmir the month after the attacks resulted in 72 deaths, largely unchanged from the 68 deaths in March 2018. No dramatic uptick in militant attacks has occurred since then, but rather a drop-off.

While this could be as a result of heightened security presence in the centrally administered territory, it also stands to suggest the possibility that Indian strikes on its territory might not have deterred Pakistan. In particular, a significant proportion of insurgents are not coming from Pakistan, but are indeed locals. The Indian government has claimed that infiltration from Pakistan across the LoC had increased by 50 percent, creating a pretext for more retaliation against Pakistan. Additionally, the BJP took a major step towards advancing the country's territorial unity at the cost of undermining talks aimed at normalizing relations with Pakistan. For

reference, these two nations have fought three out of four wars since gaining independence in 1947 over the territory of Kashmir, which both claim in full, but administer separate portions of.

Ayres, Alyssa, and Robert D. Blackwill. "Conflict Between India and Pakistan."

Furthermore, researchers Ayres and Blackwill (2020) argue that these recent acts of aggression only worsen the ongoing conflict between these two nuclear-armed neighbors. This leaves much room for Article 8 *bis* 1 and 2 to be explored. It should be noted that the United Nations Secretary General, Antonio Guterres, has expressed "deep concern" at heightened tensions in the past. While India has swiftly rejected Guterres' offer to mediate the dispute stating it "would be discussed bilaterally", Pakistan has invited the international community to involve itself. This creates the necessity for the U.N. Security General to intervene and take this call for action to the ICC under Article 15 *ter* citing increasing conflict and lack of de-escalation efforts by both parties – a procedural move highlighted by Article 8 *bis* 1 and 2. More importantly, the ICC is intended to complement existing national judicial systems. Therefore, in this case, the Court may exercise its jurisdiction or even as an aid by extension of the Pakistani government as per Pakistan's request. In either case, the argument presents itself for ICC's involvement in potentially resolving this conflict.

Chapter 6

Application of Article 8 *bis* to Kashmir

Article 8 *bis* 1 and 2 marks its importance as this makes the ICC the first international court, since the Nuremberg Trials, to have the crime of aggression in its statute (Whiting, 2017). International law experts find that it would be unlikely to expect to see crime of aggression prosecutions anytime soon. In today's world, there is a changing nature of armed conflict—from the traditional war between two States to the modern humanitarian intervention or action against non-State armed groups (Petty, 2009). In fact, the evolution of modern combat has seen non-state actors and corporations becoming increasingly involved in armed conflict (Graziano et al., 2017). However, there is scope in applying this form of international crime to the conflict of Kashmir. This is due in part for the many ways in which the crime and Court's jurisdiction are narrowly defined.

In other words, crime of aggression, as defined by the Rome Statute is a crime committed against the sovereignty of a state. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations (Coalition for the International Criminal Court, 2019). More importantly, the crime targets only persons in senior leadership and defined as those “in a position effectively to

exercise control over or to direct the political or military action of a State” (Whiting, 2017). This reiterates the weight of the crime in terms of accountability held to those in positions of power.

As a Prime Minister in India, Modi occupies a position as the senior-most member of cabinet in the executive of government in a parliamentary system. Further, as the chairperson of Appointments Committee of the Cabinet (ACC), he decides the assignments of top military personnel such as the Chief of the Army Staff, Chief of the Air Staff, Chief of the Naval Staff, commanders of operational and training commands, and postings of the Indian Police Service officers (which staffs most of the higher-level law enforcement at the federal and state position) (Laxmikanth, 2014). Taking this into consideration, Modi stands to represent this very position. It could be seen from his swift planning, preparation and execution in revoking Article 370 and 35(a), which legally recognized J&K’s sovereignty and political integrity as a State. Therefore, by garnering additional military forces in the region of J&K and arresting civilians and regional political leaders through use of force, Modi has committed an act of aggression as defined by Article 8 *bis* under the Rome Statute.

Petty (2009) argues for a two-step analytical approach to determine whether the threshold of unlawful aggression has been crossed. The first step is determining whether the use of force violates the U.N. Charter. Once that has been determined, the analysis shifts to whether the unlawful use of force is a manifest violation of the Charter. Only after resolving these questions can individuals be held responsible before the ICC for the crime of aggression. With respect to the first step, i.e. the use of force, the definition of aggression does not appear to limit

the lawful uses of force. Specifically, in paragraph 2 of Article 8 *bis*, the phrase, “in any other manner inconsistent with the Charter of the United Nations,” both maintains the consistency of Article 2(4) of the U.N. Charter and does not restrict uses of force that are consistent with the U.N. Charter, such as actions authorized under the Security Council and right of self-defense enumerated in Article 51. In this way, the Charter lists a number of acts that qualify as an act of aggression. With specific regards to Modi’s actions in 2019, the act of “(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State” would appropriately qualify as an act of aggression under Article 8 *bis* as per the Rome Statute. Moreover, the “manifest violation” element in the definition of aggression requires an inquiry into the magnitude of the unlawful use of force. That the act must be more than an illegal application of force is clear by the use of the term “manifest,” meaning clear, apparent, evident. Article 17(d) requires the Pre-trial Chamber to weigh the gravity of any alleged offense in order to determine whether a case is admissible before the ICC. Crime of aggression will not apply to uses of force on a smaller scale. For example, “border skirmishes, cross-border artillery, armed incursions, and similar situations should not fall under the definition of aggression” (Petty, 2009). In other words, “the crime must be of significant magnitude... its commission is widespread or systematic or occurs as part of a large-scale commission... must involve a relatively large number of victims . . . or impose other very severe injury upon noncombatant populations . . .”, in other words with regards to the

conflict over Kashmir it raises relevancy to the ICC as there is a significant threat of increasing conflict and affecting noncombatant populations (i.e., the Kashmiris).

In addition, Article 8 *bis* allows for the U.N. Security Council to refer non-States Parties for prosecution to the ICC with no possibility of an opt-out. In fact, this may be the most likely scenario for an aggression prosecution to arise at the Court: the major powers on the U.N. Security Council targeting a state committing an act of aggression.

Chapter 7

Relevance of U.N. Security Council Referral

As discussed in previous sections, crime of aggression will be able to prosecute leaders responsible for waging aggressive war in regards to certain conditions. It is important to understand that ICC judges maintain their independence in ruling on jurisdictional matters and referrals from the U.N. Security Council have no jurisdictional limitations (Coalition for the International Criminal Court, 2019). The unique capability with Article 8 *bis* is that it cannot be triggered in the same manner as with other crimes of the Rome Statute (i.e., genocide, crimes against humanity and war crimes).

That being said, there are three methods for which the ICC can exercise jurisdiction regime. Firstly, an ICC member state can refer a situation to the Court. In regards to this case of state referral, as addressed under Article 15 *bis*, the Court will only be allowed to exercise jurisdiction if the amendments have entered into force for at least one of the ICC member states, victim or aggressor, involved. The Prosecutor must then determine there to be a reasonable basis to proceed with an investigation. If this occurs, the Prosecutor must notify the UN Secretary-General of the situation presented. The Security Council itself has the authority to determine whether an act of aggression has been committed. It becomes the Prosecutor's responsibility to allow the Security Council six months to decide. Should no determination be made, the Prosecutor may continue to proceed with investigation only with authorization by the Pre-Trial Division judges (Coalition for the International Criminal Court, 2019).

The second method is through the prosecutor initiating an investigation *proprio motu*. Here, the same conditions apply as the first method. Likewise, Court requires the acceptance of the amendments by the thirty State Parties. Should the State party in question declare that it does not accept such jurisdiction or is not party to the Rome Statute, the Court cannot exercise its jurisdiction over the crime of aggression. This is important as there are only thirty-nine states that have ratified to the Rome Statute, of which neither include India nor Pakistan (Coalition for the International Criminal Court, 2019).

Thirdly, the U.N. Security Council can refer a situation to the Court. With specific regards to Article 15 *ter* under the Rome Statute, the Prosecutor has the authority to investigate any of the four core crimes and the Court is able to exercise jurisdiction over crimes of aggression involving ICC member states, regardless of their individual ratification status or “opt-out” status, and non-ICC member states alike (Coalition for the International Criminal Court, 2019). Therefore, this would allow India’s Prime Minister Narendra Modi to be tried by the Court under crime of aggression. India has not ratified the Rome Statute, making it a non-member and non-signatory state of the ICC.

Traditionally, the Court would not be able to exert jurisdiction, as only member States are privy to its platform for justice. However, with the U.N. Security Council referral, Modi would be held accountable for his actions in disregarding sovereignty and worsening the conflict in Kashmir through use of force. The seeming advantage of Article 8 *bis* is that it would allow a chance for India to be tried in a Court that would otherwise not be able to. While the ICC has the capability to be used in complement with regional justice systems, this would not be possible as Modi’s government is backed by the majority. BJP’s influence runs deep within the political

system and integrity of the country. Even more, the Prime Minister has the authority to influence the selection of senior-most judges in concerned state high court (Kirpal, 2013). Thus, no court would be able to entertain the process of seeking justice under these claims. In regards to the U.N., there is presently no legislation like that of the Article 8 *bis* under the Rome Statute that could hold India accountable, let alone Modi himself. While India was among the original members that signed the Declaration by the UN in 1942, it has also been a non-permanent member of the U.N. Security Council for eight terms (16 years) including the 2021-22 term (United Nations General Assembly, 2020). This presents itself as a potential barrier should there be a U.N. Security Council referral to be tried under crime of aggression. Considering India's position within the U.N. organ, couple with the country being a G4 member (which allows for a permanent seat on the Security Council), it could ultimately impact the Prosecutor's decision.

Chapter 8

Conclusion

My conclusion does not unilaterally suggest that India's current Prime Minister Narendra Modi is guilty of crime of aggression. However, I believe that my research found significant legal claims for a case to be made and be brought forth to the ICC. By carefully laying out the language of the law and what constitutes as a crime under Article 8 *bis*, Modi's actions can no longer be ignored. There were clear violations of long withstanding agreements and use of political influence within regional courts to justify violence and heighten instability within the region of Kashmir. As I had argued, there is jurisdiction for the ICC through the referral by the U.N. Security Council. While there have been no formal cases put forth by the ICC as of yet, this reiterates a significance in this thesis - the need for and/or relevancy of ICC in the 21st century.

As it stands, the principal significance of the ICC's adoption of the crime of aggression lies in the articulation and establishment of the crime. Such crimes are not just an inevitable result of conflict, but are caused by individuals who should be held responsible for them. Conversely, the ICC is often criticized that it can only reach weaker states and not the major powers of the world. Especially since the Court can prosecute only a small percentage of crimes that occur in the world, even where it has jurisdiction. However, with the potential for increased jurisdiction over strong State Parties that could not be tried by international courts, this novel crime of aggression points to how justice no longer has boundaries and the weight of responsibility held by individuals for wars.

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The Pennsylvania State University | The Schreyer Honors College *Class of 2021*
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Global and International Studies (B.S.) with Honors; Concentration in Human Rights

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SOCIAL JUSTICE EXPERIENCE

United Nations Campus Advocates **University Park, PA**
Vice President of Strategic Planning *May 2020 – Present*

- Served as the head coordinator between all internal committees of the organization and responsible for establishing the yearly strategic plan for UNCA

The Anne Frank House: Human Rights and Crimes Against Humanity **The Netherlands**
Summer Global Program *June 2019 – July 2019*

- Immersed in an intensive program in partnership with the Anne Frank House, focusing on crimes against humanity, human rights, and international law in various locations throughout the Netherlands
- Composed a short educational film for Anne Frank House's 'Memory Walk' YouTube Channel

Explore Law **University Park, PA**
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- Participated in a highly selective residential program for undergraduate students pursuing careers in law
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UNESCO Youth as Researchers Program **University Park, PA**
Researcher *Aug 2017 – April 2018*

- Spearheaded focus groups, conducted research through surveys, investigated, compiled data about on-campus environmental sustainability practices, presented findings to a global audience at the annual UN Youth Summit and UNESCO Youth Forum

LEADERSHIP

World in Conversation, Center for Public Diplomacy **University Park, PA**
Practitioner Team *December 2020 – Present*

- Managing cross-functional teamwork in working alongside other student leaders, global partners, and alum facilitators to determine and implement new developments in facilitation as well as other operations in the Center using Zoom and Slack

- Facilitated over 650 hours of dialogues with over 3000 students per semester [domestic and global, virtually and in-person]
- Earned ‘Small Group Conflict and Collaboration’ professional facilitation certificate through Penn State

Advanced Dialogue Assistant (ADA)

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- Worked over 200 hours with advanced facilitators to guide and navigate 90-minute conversations in ways that constructively challenge perspectives and supports their own examination of the art of facilitation and co-facilitation

Family Relations THON Chair & Dancer for THON’21

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Bee House (Special Interest Penn State Dance Marathon Organization) April 2019 – Present

- Primary liaison between students and families affected by pediatric cancer through the ‘Adopt-a-Family’ Program
- Responsible for maintaining constant weekly communication with paired families, generating bi-weekly reports through Teams, providing logistical support to the families for events conducted throughout the year

Recovery Volunteer

Houston, TX

All Hands and Hearts

July 2018

- Involved in reconstruction of 2 charter schools and 5 residences destroyed by Hurricane Harvey, while immersed in a multi-cultural and multi-generational community

Penn State Idea Makers Challenge

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- Collaborated and developed with a multidisciplinary team to create a working prototype mobile app to help students with specific tasks related academics and campus life

RESEARCH & TEACHING

Honors Thesis – Crime of Aggression & Relevance in the 21st Century in the Conflict of Kashmir

Independent Studies – research project pertaining to ‘forgotten voices and children’ of the Holocaust

Teaching Assistant – SOC 119, Race & Ethnic Relations (4 credits) Jan 2019 – May 2019