

# **Dominating demography, altering destiny: India's settler-colonialism in Kashmir**

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The author discusses the demographic invasion of Indian Occupied Kashmir, which has been in process since 1947, with a focus on post-2019 legislative and policy measures taken by the Indian State. When understood in comparison with other cases of forced demographic changes worldwide, this article argues that there is an accelerated pace towards the erosion of the political, cultural, linguistic and social distinctiveness of the native population. The article reflects on how India's unchecked sovereignty over Kashmir, its unilateral abrogation of the special status of the region within the Indian polity and its post-abrogation settler-colonial strategies are arguably aimed at frustrating the outcome of a prospective self-determination exercise covered under UN Security Council resolutions on the Kashmir situation.

***Keywords:*** Settler-colonialism, Kashmir dispute, United Nations, Demographic changes, India, Pakistan, Occupied Territories, International law

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## **I. Introduction:**

French Philosopher August Comte wrote, "Demography is destiny." This statement means that the future of a nation-state is determined by its population, trends of its growth and decline, its distribution, choices and developmental patterns. Demography can be connected to various fields like politics, economics, sociology, geography, biology, law and others. The links to multiple subjects can be attributed to the interconnection of matters with the population, and how population changes impact almost everything. The relevance of this phrase to international law can be seen from times when tribes and clans existed - the clashes and subsequent control over territories altered the world's demography then. Moving a little ahead in time, conquests by kings while expanding their kingdoms affected the population and occasionally caused migrations. In the recent past, regimes altered demographic characteristics of lands either by eliminating whole or parts of populations, as in the case of the Holocaust and the Bosnian genocide.

This short old phrase still holds water in the current times, particularly in the international legal arena, be it refugee crises resulting from armed conflicts or situations of illegal occupation around the world. These events catalyze demographic shifts within state populations, reshaping the trajectory of future developments in that territory. As society transforms, the interplay of diverse perspectives brings about both innovation and tension, ultimately redefining the region's identity and its role on the global stage. Some contemporary examples include the armed conflict in Syria, which has produced millions of refugees from the Syrian population, their deaths, displacement and continuous migration, subsequently altering the demographic structure in Syria. Similarly, Myanmar's genocide of Rohingya Muslims in an attempt to convert Myanmar into an all-Buddhist State has wholly impacted the demography of Myanmar as millions of Rohingya Muslims either fled or

were butchered by the State. Israel's forceful evacuation of Palestinians and implantation of settlers within the Palestinian land, including areas of Jerusalem, Golan-Heights, the Gaza Strip and West Bank, is another example of altering the demography of a territory.

One such case discussed in this article is India's occupation of Indian-administered Kashmir and its relevance to demographic changes within the region. The article is focused on how occupation, demographic alteration and international law are interconnected when the question of the Kashmir dispute arises. Concurring with the general rule of occupation, in the present case, occupation serves as a powerful tool for implementing settler colonialism by restructuring the landscape and society of Kashmir to favour settlers over indigenous populations. Through a systematic process of land appropriation and policies that encourage settlement, the occupiers impose their governance designs, culture, and economic practices, effectively erasing the existing systems. This creative manipulation of space is being carried out under the garb of development through construction of new infrastructure, such as roads and settlements, but in turn these are instruments facilitating the influx of settlers and assuring their presence and dominance. As these new systems take root, a narrative that legitimises this brutal occupation and marginalises the voices, history and culture of natives is being popularised portraying it as a natural extension of progress. These demographic changes by altering the region's population composition and erasure the identity of the indigenous community are raising significant concerns regarding violations of international law, particularly principles related to self-determination and the protection of human rights.

The Indian-Administered Kashmir is an international territorial dispute between India and Pakistan. Both these regimes or states control parts of the region. The United Nations Security Council has resolved to have a free and fair referendum in Kashmir so the native population can

have a choice to decide their political status. Over the past seventy years, various political regimes in India have implemented policies to control Kashmir, carry out the occupation and prevent referendums. The two dominant parties, Congress and the Bharatiya Janata Party (BJP), have adopted contrasting approaches to the Kashmir issue, despite sharing the same overarching goal. Historically, Congress has pursued a conciliatory strategy, characterized by a "soft" approach aimed at secular integration. In contrast, the BJP has adopted a hardline stance, particularly evident after the abrogation of Article 370 in August 2019, seeking to alter Kashmir's religious demographics and solidify its integration into India. Recent developments on the Indian-administered side suggest that the Indian State's actions may change the future course of events, including the prospect of a free and fair referendum, by altering the demography of the territory under their control.

## **II. Settler-Colonialism and Self-Determination:**

Theodor Herzl, founder of the modern political Zionism, wrote in his novel titled 'The Jewish State', "If I wish to substitute a new building for an old one, I must demolish before I construct."<sup>1</sup> The idea of settler colonialism is based on the same principle. Settler colonialism is a persistent system which demands either the annihilation or displacement of indigenous inhabitants, the expropriation of their resources including land, and the settlement of outsiders in the natives' territory, claiming it as their own. This structured process causes the obliteration of the identity, traditions, and culture of the natives and, most importantly, their claim to the territory. Wolfe<sup>2</sup> and other scholars<sup>3</sup> explain this

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<sup>1</sup> Theodor Herzl, "The Jewish State", available at <https://www.jewishvirtuallibrary.org/quot-the-jewish-state-quot-theodor-herzl> (all internet resources were accessed on or before 10 June 2024).

<sup>2</sup> Patrick Wolfe, "Settler colonialism and the elimination of the native", *Journal of Genocide Research*, Vol. 8, No. 4, pp. 387–409, available at <https://doi.org/10.1080/14623520601056240>.

<sup>3</sup> Linda Tuhiwai Smith, K. Wayne Yang, Eve Tuck, *Indigenous and decolonizing studies in education: Mapping the long view*, 1<sup>st</sup> ed, Routledge, 2019.

phenomenon as a perpetual form of colonisation, a structure rather than a historical event because it continues to exist as long as the encroachers live on the appropriated land.

However, Veracini distinguishes settler colonialism from colonialism on the premise that the founding philosophy and desired objectives on which the former and latter rest are competing rather than concurrent. In the case of colonialism, the coloniser maintains what Veracini calls “exogenous domination”.<sup>4</sup> The colonisers require the native population to stay within the territory to exploit them for various purposes like slavery and labour of different kinds (physical, sexual, religious or others) intending to subordinate them permanently. In contrast, in the case of settler colonialism, the colonisers or the occupiers want the native population to be replaced. This replacement can either be done via displacement, forced migration, physical termination, genocide or the destruction of the natives’ culture and identity by assimilation in the settlers (occupier’s) population. The list is not exhaustive and there can be other methods and ways of replacement. Veracini<sup>5</sup> also distinguishes settler-colonialism from decolonisation. He explains that during decolonisation, the occupier departs, ending the relation of domination between the coloniser and the occupied. In contrast, in settler colonialism, he settles in the occupied territory and continues to exercise control over the occupied. Englert<sup>6</sup> and Prof. Hayes<sup>7</sup> also distinguish settler-colonialism from franchise colonialism. In franchise colonialism, the colonisers do not settle or intend to reside in the colonised territory permanently. They are interested in the exploitation of native labour and resources, not in creating settlements on the territory. The control and domination are exercised by agents of the

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<sup>4</sup> Veracini, L. (2011). Lorenzo Veracini, “Introducing”, *Settler Colonial Studies*, Vol. 1, No. 1, pp. 1–12, available at <https://doi.org/10.1080/2201473x.2011.10648799>.

<sup>5</sup> *Ibid.*

<sup>6</sup> Sai Englert, “Settlers, workers, and the logic of accumulation by dispossession” *Antipode*, Vol. 52, No. 6, pp. 1647–1666, available at <https://doi.org/10.1111/anti.12659>.

<sup>7</sup> Alan L. Hayes, “Indigenous and Settler Christianities in Canada”. available at [https://individual.utoronto.ca/hayes/indigenous/indigenous6\\_settler\\_colonialism.html](https://individual.utoronto.ca/hayes/indigenous/indigenous6_settler_colonialism.html).

colonising state who serve a period of duty in the colonised territory and then return to the home country (coloniser's territory), being replaced by successive colonial agents. This administration helps to serve the interests of colonisers and maintains the subordinate status of the colonised territory.

One aspect of the present case is settler-colonialism; the other is the self-determination. The right to self-determination, which has now achieved the status of *jus-cogens i.e.* peremptory norm, is a collective right where people exercise their free will to determine their political status and choose their sovereign.<sup>8</sup> This also includes their right to wilfully pursue their cultural, economic and social development. This right is embodied within Article 1 of the UN Charter (1945) and features as the first right in two fundamental Human Rights Covenants: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

The concepts of self-determination and settler colonialism are two sides of the same coin. At its core, self-determination is about the collective rights of native or indigenous people to determine their political status according to their own will and freely pursue their cultural, economic and social development.<sup>9</sup> In contrast, settler colonialism is a process of foreign occupation and encroachment of that very collective right. While objectives of self-determination include protection of native cultures, languages, and identities, settler colonialism aims to eradicate or eliminate the same. The settler-colonial setup is built to forcibly displace, relocate or commit genocide of the native communities for elimination whereas self-determination is designed to protect the indigenous against these violations. The settlers are inclined to exploit resources, land and labour in a non-consented manner in

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<sup>8</sup> International Law Commission, *Peremptory norms of general international law (jus cogens)*, 2022, United Nations, pp 87-88, available at <https://legal.un.org/ilc/reports/2022/english/chp4.pdf>,

<sup>9</sup> Hurst Hannum, "Legal aspects of self-determination. In The Princeton Encyclopedia of Self-Determination", *Princeton University*, available at <https://pesd.princeton.edu/node/511>.

contrast to self-determination which guarantees security of economic development at the native community's will. The settlers impose their own political institutions and decision-making authority over indigenous populations rather than respect their right to self-govern, the very essence of self-determination. Therefore, it is important to note that settler-colonialism inherently infringes upon the right to self-determination. This process not only displaces indigenous populations but also undermines their autonomy and ability to govern themselves, resulting in significant cultural and political ramifications.

Throughout history, structural inequities and power imbalances between the colonisers and the colonised have resulted in the former outrightly denying or gradually undermining the right to self-determination of the indigenous population. The garb of 'need for civilising' or 'development' has been a convenient tool to exploit native lands, eliminate indigenous cultures or populations and subsequently justify marginalisation, coerced displacements or the amalgamation of the indigenous into the population of the colonisers. Exercising self-determination rights would mean that some power (political, economic and cultural) whether in entirety or partially will cede from the hands of colonisers and be restored to the indigenous, an affair which generally settlers have historically denied to do. This transfer of authority or power may be a reason why despite being featured in all international instruments, self-determination remains one of the most challenging rights to be executed by the international community even today. Globally indigenous communities continue to fight for their rights over their native lands, preservation of their cultures, languages and restoration of their political and economic autonomies. Most of the cases pertaining to exercise of self-determination remain either buried under the debris of international resolutions and severe oppression or are slowed down by unending processes extending over generations like resistance, negotiations or reparations. The Kashmir case for self-determination is one of such struggles that has been slowed down and is being hollowed out by the Indian State so that it can collapse on its own

through the model of settler colonialism.

### **III. Brief Historical Background:**

History reflects that Kashmir witnessed several invasions and consequentially several ruling dynasties. Kalhana, a noted historian of Kashmir, traces back the colonial history of Kashmir to King Gonada I, whereas other historians mark it from Ashoka, who ruled during the third century BC. For the two thousand succeeding years after Ashoka, many powers ruled over Kashmir.<sup>10</sup> Until 1846, Jammu and Kashmir were separate territories and ruled by distinct powers.

Kashmir was ruled by Rianchin Shah (who later renamed himself Sadrudin) in 1339 A.D.<sup>11</sup> The Shahmirs took control in 1342 AD for the next 212 years. They were followed by Chaks who ascended the throne in 1554 and continued to rule for 35 years. The Chaks were defeated by Mughal King Akbar in 1586 and the Mughals ruled over Kashmir for the next century and a half i.e. 150 years. The Mughals in Kashmir were overthrown by Afghan conqueror Ahmad Shah Abdali. The Afghans and Pathans continued to rule through various governors appointed by the King of Kabul for approximately 70 years. The Afghan-Pathan rulers lost Kashmir to Sikh ruler Maharaja Ranjit Singh and the Sikh rule in the valley lasted for over 25 years.

In the eighteenth century, Jammu was ruled by Dogra chief (Rajput descent), Ranjit Deo who died in 1780 AD. Following his death, a battle for succession broke out leading to Jammu being converted to a dependency by Sikh rulers. In 1808, it was annexed to Sikh territory and given to Gulab Singh.

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<sup>10</sup> Michael Brecher, (1953). *The struggle for Kashmir*. Oxford University Press, New York, 1953, available at <https://archive.org/details/dli.csl.5975/page/n9/mode/2up>.

<sup>11</sup> Nagma Mangrio, "A Historical and Political Perspective of Kashmir Issue". available at [https://www.qurtuba.edu.pk/thedialogue/The%20Dialogue/7\\_3/Dialogue\\_July\\_September2012\\_255-264.pdf](https://www.qurtuba.edu.pk/thedialogue/The%20Dialogue/7_3/Dialogue_July_September2012_255-264.pdf).

Ladakh was under the control of the Mongols and tributary of Tibet for centuries until the Mughals took over and ruled it for over a century. In 1834, Gulab Singh, the ruler of Jammu conquered Ladakh, Lhasa, Skardu and Baltistan.<sup>12</sup>

In 1845, a battle broke out between Sikh rulers and the British, which had then colonised India. Gulab Singh aided the British against his allegiance to Sikh Darbar or Sikh rulers.<sup>13</sup> In exchange for this aid, Gulab Singh and his heirs were granted the territory of Jammu and Kashmir, including the territory of Ladakh under the Treaty of Amritsar as an independent possession forever.<sup>14</sup> This is how the states of Jammu and Kashmir became one consolidated territory. Gulab Singh and his descendants continued to rule the territory independently until the British decolonised India in 1947.

From pre-historic times and under most of the above-mentioned regimes, the native population continued to suffer as their voices and concerns remained unaddressed and their exploitation continued at the hands of different governing authorities. However, that is a different discussion. The author has not delved into that because none of the regimes before the partition practised settler-colonialism or tried to eliminate or replace the native population. Most of them were colonisers who wanted to rule, subjugate the population and exploit the resources of the territory. The phenomenon of settler-colonialism in Kashmir began only after the partition of British India in 1947.

#### **IV. The backdrop of the conflict:**

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<sup>12</sup> *Imperial Gazetteer of India*, Volume XV, 1908, p. 95.

<sup>13</sup> Bazaz, *History of Struggle for Freedom in Kashmir—cultural and political*, available at <https://archive.org/details/dli.pahar.3009/page/103/mode/2up>.

<sup>14</sup> The Treaty of Amritsar, available at [https://uploads-ssl.webflow.com/6031a13f23a42e1120a8c37c/60b418625ece85bb13d7c3cd\\_Treaty%20of%20Amritsar%20with%20context%20and%20receipt.pdf](https://uploads-ssl.webflow.com/6031a13f23a42e1120a8c37c/60b418625ece85bb13d7c3cd_Treaty%20of%20Amritsar%20with%20context%20and%20receipt.pdf).

The present conflict over the Kashmir region began in 1947 when the sub-continent was divided into the two separate dominions of India and Pakistan at the end of the British colonisation era. At that time, Jammu and Kashmir (J&K) existed as an independent princely state under the reign of the Dogra rulers. Importantly, it shared borders with India and Pakistan with both dominions wanting Kashmir to merge within their territories. After India and Pakistan achieved independence from British rule, the princely states could either assert their independence or accede to one of the dominions.<sup>15</sup> The then Dogra ruler of Kashmir, Maharaja Hari Singh, was harbouring hopes of declaring independence, which is why he did not accede to any of the dominions.<sup>16</sup> That being the case, he decided to initiate a 'standstill agreement with India and Pakistan' and with this intention, he sent invitations to India and Pakistan on August 12, 1947.

To this offer, the dominion of Pakistan responded in an affirmative and a standstill agreement was signed between the two.<sup>17</sup> However, the Indian side sent a cross-invitation to the Maharaja to send any of his representatives to negotiate over the standstill agreement. Therefore, no definitive agreement was signed between India and Jammu and Kashmir.<sup>18</sup> While this was still in progress, however, cadres of radical Rashtriya Swayamsevak Sangh (RSS) and Dogra forces carried out a massacre, assisted by both Hindus and Sikh migrants from Pakistan

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<sup>15</sup> Sarath Pillai, "Kashmir and The Forgotten History of India's Princely States", *The Diplomat*, 4 August 2020, available at <https://thediplomat.com/2020/08/kashmir-and-the-forgotten-history-of-indias-princely-states/>.

<sup>16</sup> Ganguly, Sumit, *The Crisis in Kashmir*, Cambridge University Press, 1997, available at [https://books.google.com.hk/books?id=Fi66mjIqR1IC&pg=PA9&lpg=PA9&dq=maharaja%20Bhari%20singh%20harboring%20hopes%20of%20independence&source=bl&ots=ofUOlcx\\_t\\_&sig=ACfU3U3litmo\\_t3sSRdpDRQM5BqKOZzn2g&hl=en&sa=X&ved=2ahUKEwiu44GEldv7AhXFAN4KHbTwBtoQ6AF6BAGcEAM#v=onepage&q=maharaja%20hari%20singh%20harboring%20hopes%20of%20independence&f=false](https://books.google.com.hk/books?id=Fi66mjIqR1IC&pg=PA9&lpg=PA9&dq=maharaja%20Bhari%20singh%20harboring%20hopes%20of%20independence&source=bl&ots=ofUOlcx_t_&sig=ACfU3U3litmo_t3sSRdpDRQM5BqKOZzn2g&hl=en&sa=X&ved=2ahUKEwiu44GEldv7AhXFAN4KHbTwBtoQ6AF6BAGcEAM#v=onepage&q=maharaja%20hari%20singh%20harboring%20hopes%20of%20independence&f=false).

<sup>17</sup> Victoria Schofield, *Kashmir in conflict: India, Pakistan and the unending war*, IB Tauris, Bloomsbury, 2021, pp. 40.

<sup>18</sup> *Ibid.*

from the Jammu region..<sup>19</sup> Up to two hundred thousand Muslims were butchered to death, and more than half a million were forcibly made refugees and displaced across the border into the freshly carved state of Pakistan.<sup>20</sup> According to Christopher Snedden, the Jammu massacre played the role of a precursor to the historical precedents underlying the protracted regional tensions between the two South Asian neighbours.<sup>21</sup> In response to the massacre, from October 20 to October 27, 1947, tribal militias from Pakistan invaded Kashmir.<sup>22</sup> As a measure to save his state, Maharaja, after a letter communication with Lord Mountbatten, asked for assistance and entered into a conditional accession<sup>23</sup> with the dominion of India, which was eventually meant to be put to rest on the restoration of law and order. In the same communication, it was expressly realised that the collective will of the state's people would be the final way to determine the future political status of Jammu and Kashmir.<sup>24</sup> Maharaja validated this Instrument of Accession (IOA) on October 27, 1947. Pakistan did not accept this arrangement, and several historians have also challenged its validity due to the circumstances under which it was signed.<sup>25</sup> That is an entirely different debate, but the general presumption is that it was signed between the then-independent state of Jammu and Kashmir and the Dominion of India. The Instrument of Accession contained the

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<sup>19</sup> Saeed Naqvi, *Being the Other*, Aleph, 2016, pp. 176, available at [https://books.google.co.in/books/about/Being\\_the\\_Other.html?id=b2BSAQAAAJ&redir\\_esc=y](https://books.google.co.in/books/about/Being_the_Other.html?id=b2BSAQAAAJ&redir_esc=y).

<sup>20</sup> Salma Malik, "Explaining Jammu & Kashmir Conflict Under Indian Illegal Occupation: Past & Present", *Margalla Papers*, Vol. 25, No. 1, 2021, available at [https://www.academia.edu/59428515/Explaining\\_Jammu\\_and\\_Kashmir\\_Conflict\\_Under\\_Indian\\_Illegal\\_Occupation\\_Past\\_and\\_Present?rhid=28671214991&swp=rr-rw-wc-38089677](https://www.academia.edu/59428515/Explaining_Jammu_and_Kashmir_Conflict_Under_Indian_Illegal_Occupation_Past_and_Present?rhid=28671214991&swp=rr-rw-wc-38089677).

<sup>21</sup> Christopher Snedden, (2001) "What happened to Muslims in Jammu? Local identity, "the massacre" of 1947 and the roots of the Kashmir problem.", *Journal of South Asian Studies*, Vol. 24, No.2, pp. 111.

<sup>22</sup> V. Schofield, above note 17, pp. 47.

<sup>23</sup> Text of Lord Mountbatten's letter dated 27 October 1947 to signify his acceptance of the Instrument of Accession, available at <https://www.mtholyoke.edu/acad/intrel/kasmount.htm>.

<sup>24</sup> *Ibid.*

<sup>25</sup> V. Schofield, above note 17, pp. 53.

submission of authority limited to matters about defence, communication and foreign issues to India.<sup>26</sup> It, however, clearly stated that the Government of India was not authorised to buy or acquire land in Jammu and Kashmir and could not enact any law in this regard.<sup>27</sup> Additionally, it expressed that: ultimate sovereignty vested in the hands of the king of Jammu and Kashmir, and that the IOA could not be amended or changed by any variation in the Indian Independence Act unless approved by (the) Maharaja himself.<sup>28</sup> It also clearly stated that “nothing contained in the Instrument could be deemed allegiance to adopting the Indian Constitution in the future”, thereby highlighting its conditional nature.<sup>29</sup> The Indian State argues that accession has granted them absolute sovereignty as the territory in question has merged into the Indian dominion and that Jammu and Kashmir territory is integral to India.<sup>30</sup> It becomes crucial to analyse the distinction between accession and merger at this stage. The terms "accession" and "merger" are often in debate when the status of Jammu and Kashmir is in question. The term "accession" means a treaty or agreement to a demand or request.<sup>31</sup> In contrast, “merger” means “blend or cause to blend gradually into something else to become indistinguishable from it, combine or cause to

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<sup>26</sup> The Instrument of Accession between the Maharaja of Jammu and Kashmir and Indian Dominion, available at [https://www.satp.org/satporgtp/countries/india/states/jandk/documents/actsandordinances/instrument\\_accession.htm](https://www.satp.org/satporgtp/countries/india/states/jandk/documents/actsandordinances/instrument_accession.htm).

<sup>27</sup> Venkatesh Nayak, “The Backstory of Article 370: A True Copy of J&K's Instrument of Accession”, *The Wire*, 5 August 2019, available at <https://thewire.in/history/public-first-time-jammu-kashmirs-instrument-accession-india>.

<sup>28</sup> *Ibid.*

<sup>29</sup> “Legal Documents: Instrument of Accession” (*Kashmir*) <[https://jammukashmir.com/documents/instrument\\_of\\_accession.html](https://jammukashmir.com/documents/instrument_of_accession.html)> Last Accessed December 2, 2023 [unable to leave a comment, but this link no longer works]

<sup>30</sup> Sajid Ali, “How, on This Day 72 Years Ago, Jammu & Kashmir Agreed to Become a Part of India”, *The Print*, 26 October 2019, available at <https://theprint.in/past-forward/how-on-this-day-72-years-ago-jammu-kashmir-agreed-to-become-a-part-of-india/311724/>.

Also see “Jammu and Kashmir Was, Is and Shall Forever Remain an Integral Part of India”, *The New Indian Express*, 26 February 26, 2020, available at <https://www.newindianexpress.com/world/2020/feb/26/jammu-and-kashmir-was-is-and-shall-forever-remain-an-integral-part-of-india-2108856.html>.

<sup>31</sup> Bryan A. Garner, *Black's Law Dictionary*, 11<sup>th</sup> ed, Thomson Reuters.

combine to form a single entity”.<sup>32</sup> Had the merger been signed between the two, it could have been concluded that Jammu and Kashmir was a part of India. However, unlike other princely states that agreed to a merger,<sup>33</sup> the Instrument of Merger was never signed between these two states (Jammu and Kashmir and India). Therefore, to begin with, this accession between the two is a treaty signed between two sovereigns heading two independent states. Furthermore, there is no mention of sharing or giving up sovereignty by Maharaja under the Instrument of Accession. On the contrary, there is a clear assertion of sovereignty by the Dogra ruler. Therefore, the Instrument of Accession cannot be implicitly presumed or treated as a merger. Reiterating that it is a treaty, it must also be recalled that under the Vienna Convention<sup>34</sup> (Articles 18 and 26), both parties to this treaty (IOA) have obligations to abstain from any action or omission which defeats or tends to defeat “object and purpose of the treaty.”<sup>35</sup> The parties are duty-bound to perform the obligations laid out in the treaty in good faith.<sup>36</sup>

This accession’s effect on the ground paved the way for Indian Armed forces to step on Kashmir soil. The Indian armed forces and the tribal group supported by Pakistan clashed in Kashmir.

Around the same time, India and Pakistan brought the matter before the UN Security Council to settle the dispute of Jammu and Kashmir.<sup>37</sup> Both states claimed total control, but neither could establish

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<sup>32</sup>Merriam-Webster, “Merge”, *Merriam-Webster*, available at <https://www.merriam-webster.com/dictionary/merge>. Also see Oxford languages for Merger (law).

<sup>33</sup> (For example, Orrisa, Baroda, Uttar Pradesh, Coachin).

For a detailed explanation of merger, see Holden Furber, “The Unification of India, 1947-1951”, *Pacific Affairs*, Vol. 24, No. 4, December 1951, pp. 4-7, 11, 12, 16-18, available at, <https://www.jstor.org/stable/pdf/2753451.pdf>.

<sup>34</sup> Vienna Convention on the Law of Treaties, 1969, available at [https://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

<sup>35</sup> Vienna Convention, above note 34, Art. 18.

<sup>36</sup> Vienna Convention, above note 34, Art. 26.

<sup>37</sup> United Nations India-Pakistan Observation Mission (UNIPOM) – Background, available at <https://peacekeeping.un.org/en/mission/past/unipombackgr.html>.

it.<sup>38</sup> Eventually, both agreed before the United Nations that it is an internationally disputed territory and that its people must decide its future through a free and fair referendum. Evident in the opening statement of Warren Austin, the then US representative at the Security Council, in his initial comments following opening remarks of Indian and Pakistan's cases, where he announced, on January 24, 1948, that "another point that I want to have in the record is a recognition of the significant fact that when India accepted accession of Kashmir, it did its act... that it was conditional on a fair plebiscite being held to determine the will of the people of Kashmir concerning accession. Now comes Pakistan, which agrees to stand for the exactly same doctrine..."<sup>39</sup> The Security Council passed 18 resolutions that discussed several plans for a referendum in Kashmir.<sup>40</sup> However, three things have been consistent in these resolutions and are relevant to this article. These are:

- I. Both countries have acknowledged Kashmir as a disputed territory.<sup>41</sup>
- II. The Indian Armed Forces will have to withdraw from Kashmir<sup>42</sup>
- III. The natives or the "permanent residents/state subjects" (under earlier law) of Jammu and Kashmir will exercise their right to referendum granted under the resolutions to decide the political future of this territory.<sup>43</sup>

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<sup>38</sup> Alistair Lamb, *Incomplete Partition: The Genesis of the Kashmir Dispute 1947-1948*, Oxford University Press, 2003.

<sup>39</sup> *Ibid.*

<sup>40</sup> UNSC Res. 38 (1948), 39 (1948), 47 (1948), 51 (1948), 80 (1950), 91 (1951), 96 (1951), 98 (1952), 122 (1957), 123 (1957), 126 (1957), 209 (1965), 210 (1965), 211 (1965), 214 (1965), 215 (1965), 303 (1971), 307 (1971), available at [https://www.securitycouncilreport.org/un\\_documents\\_type/security-council-resolutions/page/1?ctype=Jammu+and+Kashmir&cbtype=jammu-and-kashmir#038;cbtype=jammu-and-kashmir](https://www.securitycouncilreport.org/un_documents_type/security-council-resolutions/page/1?ctype=Jammu+and+Kashmir&cbtype=jammu-and-kashmir#038;cbtype=jammu-and-kashmir).

<sup>41</sup> *Ibid.*

Also see A. Lamb, above note 38.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

The armed forces, however, did not withdraw in line with these resolutions and neither reduced their strength to a minimum; instead, they exercised control over the territory by occupation with full force making Kashmir “the most militarised zone in the world”.<sup>44</sup> At the United Nations, Kashmir remains a long-standing international dispute between Pakistan and India.<sup>45</sup> India and Pakistan have fought three full-fledged wars over the Kashmir issue in 1947, 1965 and 1971 while the debate is still pending in the Security Council.

## V. Does India’s control over Kashmir fit for the case of occupation

The term occupation finds its mention in the 1907 Hague Regulations which lays down that a territory is considered to be occupied when it is "actually placed under the authority of the hostile army."<sup>46</sup> Moreover, where the occupying force's authority has been established and can be exercised, the occupation extends only to that territory.<sup>47</sup> The Geneva Conventions of 1949 under Article 2, i.e. the common article, widen the ambit of application of the law of occupation to any such territory which is occupied during the course of international armed conflicts. Crucially, this includes scenarios where the occupation transpires without encountering overt armed resistance. The legal framework pertaining to occupation is embodied in the UN Charter and the precepts of *jus ad bellum*. However, the determining factor for the applicability of international humanitarian law in this regard is that the empirical conditions or factual circumstances must satisfy the conditions of occupation. The law of occupation is undergirded by humanitarian

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<sup>44</sup> Rani Singh, “Kashmir: The World’s Most Militarized Zone, Violence after Years of Comparative Calm”, *Forbes*, 13 July 2016, available at <https://www.forbes.com/sites/ranisingh/2016/07/12/kashmir-in-the-worlds-most-militarized-zone-violence-after-years-of-comparative-calm/?sh=52e592253124>.

<sup>45</sup> UNIPOM, above note 37.

<sup>46</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907, Art. 42, available at <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907?activeTab=undefined>.

<sup>47</sup> *Ibid.*

considerations and factual circumstances on ground. Consequently, it becomes immaterial whether the occupation is lawful or whether the semantic appellation ascribed to the occupation is "invasion," "liberation," "administration," or "occupation".<sup>48</sup> The occupation ends when either the occupying forces withdraw from the occupied territory or when they transfer absolute sovereignty to be exercised by the local government.<sup>49</sup>

In the present case, it must be noted that neither India nor Pakistan are signatories to Fourth Hague Convention 1907 from which the Hague Regulations originate. However, since these regulations have achieved the status of customary international law, they are applicable to both states, irrespective of whether states ratify it or not<sup>50</sup> This status has been reinforced by the International Court of Justice in the Advisory Opinion delivered by the International Court of Justice (ICJ) in the case concerning the Legality of the Threat or Use of Nuclear Weapons and the Palestinian Wall case.<sup>51</sup> In its opinion, the ICJ affirmed that even in extreme circumstances, such as armed conflict, states remain obligated to respect the rules of international humanitarian law, which include the principles outlined in the Hague Regulations.<sup>52</sup>

In para 157 of the judgement of the Palestinian Wall Case, the ICJ recalled this Advisory Opinion on the Legality of the Threat or Use

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<sup>48</sup> Tristan Ferraro, "Determining the beginning and end of an occupation under international humanitarian law", *International Review of the Red Cross*, Vol. 94, No. 885, 2012, available at [https://www.rulac.org/assets/downloads/Ferraro\\_-\\_Beginning\\_and\\_end\\_of\\_occupation.pdf](https://www.rulac.org/assets/downloads/Ferraro_-_Beginning_and_end_of_occupation.pdf).

Also see "Occupation and international humanitarian law: questions and answers – ICRC", *International Committee of the Red Cross*, 2004, available at <https://www.icrc.org/en/doc/resources/documents/misc/634kfc.htm>.

<sup>49</sup> *Ibid.*

<sup>50</sup> "International standards", *OHCHR: Protecting human rights during conflict situation*, 2024, available at <https://www.ohchr.org/en/protecting-human-rights-conflict-situations/international-standards>.

<sup>51</sup> International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, available at <https://www.icj-cij.org/sites/default/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>.

<sup>52</sup> International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, available at <https://www.icj-cij.org/case/95>.

of Nuclear Weapons stating " many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and elementary considerations of humanity' . . .", that they are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" (I. C. J. Reports 1996 (I), p. 257, para. 79). In the Court's view, these rules incorporate obligations which are essentially of an *erga-omnes* character."<sup>53</sup>

In line with the criteria laid under Hague Regulations<sup>54</sup> and Geneva Conventions to ascertain if the present case is a fit case for occupation, the following constitutive elements of occupation need to be analysed:

- A. Is the Indian State exercising effective control over Jammu and Kashmir?
- B. Was Jammu and Kashmir "*Terra nullius*" at the time when India occupied it?
- C. Is India entitled under international law to exercise power over Jammu and Kashmir?
- D. Whether there is a presence and exercise of control or power by a hostile army?

EFFECTIVE CONTROL: The answer to the first question is in the affirmative. Although the exercise of effective control under IHL does not essentially require that the occupier in practice holds absolute control over the territory but mere capacity to exercise such type of force, authority or power is a sufficient ground to prove effective control.<sup>55</sup>

In the present case, the Indian State exercises effective control over the territory. Subjects including defence, foreign affairs, security,

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<sup>53</sup> International Court of Justice, above note 51.

<sup>54</sup> Convention, above note 46.

<sup>55</sup> Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, Art. 2, available at <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-2/commentary/2016#159>.

matters concerning administration, human rights, and land and citizenship, among others, are being directed and controlled by the Indian State.<sup>56</sup>

TERRA NULLIUS: Coming to the question of “*terra nullius*”, the term “*terra nullius*” was a “legal term of art employed in connection with “occupation” as one of the accepted legal methods of acquiring sovereignty over territory.”<sup>57</sup> The term means a “territory belonging to no one” or a “territory without a master.” Under international public law, when a territory is declared as *terra nullius*, another state can claim sovereignty and legitimise its occupation of the same.<sup>58</sup> This method of acquiring a territory is legal under international law under the doctrine of discovery.<sup>59</sup> The International Court of Justice has also approved this method as legal.<sup>60</sup> In the case of Western Sahara, The International Court of Justice (ICJ) held that, in order to have a legitimate acquisition of a territory, it must be a *terra nullius*.<sup>61</sup> It further stated that if the territory is not *terranullius*, the control is illegitimate.<sup>62</sup>

Applying the rule laid down to the present case, when India occupied Kashmir, Kashmir was not *terra nullius*. It is argued that it was a sovereign territory governed by a king and had a full-fledged established system of governance. Back then the territory of Kashmir qualified as a state under The Montevideo Convention on the Rights and

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<sup>56</sup> Rais Akhtar, William Kirk, Government and society, *Encyclopædia Britannica*, available at <https://www.britannica.com/place/Jammu-and-Kashmir/Government-and-society>.

<sup>57</sup> International Court of Justice, *WESTERN SAHARA (ADVISORY OPINION)*, 16 October 1975, available at <https://www.icj-cij.org/sites/default/files/case-related/61/061-19751016-ADV-01-00-EN.pdf>, pp. 39.

<sup>58</sup> Sookyeon Huh, “Title to Territory in the Post-Colonial Era”, *The European Journal of International Law*, Vol. 26, No. 3, available at <https://www.ejil.org/pdfs/26/3/2602.pdf>, pp. 715.

<sup>59</sup> Legal Information Institute, “*terra nullius*”, *Cornell Law School*, available at [https://www.law.cornell.edu/wex/terra\\_nullius](https://www.law.cornell.edu/wex/terra_nullius).

<sup>60</sup> *Ibid.*

<sup>61</sup> International Court of Justice, above note 57.

<sup>62</sup> *Ibid.*

Duties of States.<sup>63</sup> Article 1 of this convention lays down four criteria which if met, enable to qualify a territory as state.<sup>64</sup> These are “a permanent population, a defined territory, a government and a capacity to enter relations with other states.”<sup>65</sup> In case of Kashmir, prior to India’s occupation all these essential elements were satisfied.

- i. Permanent Population: Kashmir has a diverse and stable population that has lived in the region for centuries. This population is not only permanent but also possesses a unique cultural identity, primarily marked by its distinct languages, traditions, and religious practices.<sup>66</sup>
- ii. Defined Territory: Geographically, Kashmir is delineated by natural boundaries, including the Himalayas to the north and the Chenab River to the south. Its territorial boundaries have been historically recognized, and prior to the conflict, it was governed as a princely state with clear administrative borders.<sup>67</sup>
- iii. Government: Before the 1947 conflict, Kashmir had its own government led by sovereign Dogra ruler Maharaja Hari Singh. This government managed local affairs, implemented laws, and maintained order, demonstrating the capacity for self-governance and administrative control.<sup>68</sup>
- iv. Capacity to Enter Relations with Other States: Kashmir engaged in diplomatic interactions, particularly with Pakistan, after the partition of British India in 1947. The Instrument of Accession signed by Maharaja Hari Singh allowed Kashmir to establish formal ties with

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<sup>63</sup> Montevideo Convention on Rights and Duties of States, 2021, available at <https://www.colombohurdlaw.com/montevideo-convention-on-the-rights-and-duties-of-states/>.

<sup>64</sup> Montevideo Convention, above note 63, Art. 1.

<sup>65</sup> *Ibid.*

<sup>66</sup> Marc Aurel Stein, Kalhana’s Rajatarangini, Vol. 1 Translated available at <https://archive.org/details/dli.pahar.1527/page/n17/mode/2up>.

<sup>67</sup> V. Schofield, above note 17.

<sup>68</sup> Syed Damsaz Ali Andrabi, Dogra Rule: State of Jammu and Kashmir (1846-1952), available at [https://archive.org/details/15DograRuleStateOfJammuAndKashmir18461952\\_201809](https://archive.org/details/15DograRuleStateOfJammuAndKashmir18461952_201809).

India, showcasing its ability to enter into relations with other states.<sup>69</sup> Since all essentials required under Montivideo Convention were met, it qualified for a state and hence, was not *terra nullius*.

ENTITLEMENT: As discussed previously, the United Nations Security Council resolutions clarify that neither of the countries are legitimate title holders to the territory of Kashmir and future of Kashmir has to be decided through a fair and free plebiscite.<sup>70</sup> The lack of legal title in favour of Indian State can also be determined by the Instrument of Accession in clause 7 which reads, “*Nothing in this Instrument shall be deemed to be a commitment in any way as to acceptance of any future Constitution of India or to fetter my discretion to enter into arrangement with the Governments of India under any such future Constitution.*”<sup>71</sup> Clause 7 of the Instrument of Accession reflects that the accession was not an outright transfer of sovereignty and effectively challenges the legitimacy of any unilateral assertions of sovereignty by India over Kashmir. It highlights the contingent nature of the initial agreement and suggests that any future relationship was intended to be negotiated rather than imposed. As already discussed in foregoing chapters that Instrument of Accession can be looked on as a treaty, therefore India was incapacitated by a treaty to have a title over Kashmir.

HOSTILE ARMY: Regarding the hostility of army, there are number of factors to determine if an army is hostile. One of them is the “unconsented-to presence of foreign forces”, and “other is ability of the foreign forces to exercise authority over the territory concerned in lieu of the local sovereign.”<sup>72</sup> The potential conflict between occupant and occupied is yet another determinant.<sup>73</sup> In the present case, the presence of the Indian Army in Kashmir is not consented by The United Nations

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<sup>69</sup> V. Schofield, above note 17. Also see Legal Documents: Instrument of Accession, above note 29.

<sup>70</sup> UNSC, above note 40.

<sup>71</sup> V. Schofield, above note 29.

<sup>72</sup> Geneva Convention, above note 55.

<sup>73</sup> Eyal Benvenisti, *International Law of Occupation*, 2<sup>nd</sup> Edition, Oxford University Press, 2011.

Security Council Resolutions which demand Indian Armed forces to withdraw from the land of Kashmir.<sup>74</sup> Moreover this presence and severe exercise of control hinders exercise of right to self-determination and violates the Instrument of Accession. The overwhelming presence<sup>75</sup> of Indian Armed Forces along with legal impunity<sup>76</sup> and unaccountability<sup>77</sup> for blatant violation of human rights<sup>78</sup> has been a subject of concern for international community and disastrous for the native population for over seven decades. Since the army has not withdrawn nor the power exercise has been transferred to the local authorities, the territory of Jammu and Kashmir can be safely termed as an occupied territory.

## **VI. Kashmir pre-2019 and state-subject laws:**

Although, the Maharaja government was overturned and replaced with a new form of government, including the President (Sadr-e-Riyasat) and Prime Minister taking over the governance, decades back, the treaty provisions of Instrument of Accession remained effective. It is essential to note that prior to 2019, the treaty provisions of Instrument of Accession continued to apply and the change in government didn't have any impact on the flag, constitution or state subject laws framed under the Dogra rule. According to the existing state subject laws,<sup>79</sup> state

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<sup>74</sup> UNSC, above note 40.

<sup>75</sup> Rani Singh, "Kashmir: The World's Most Militarized Zone, Violence After Years Of Comparative Calm", *Forbes*, available at <https://www.forbes.com/sites/ranisingh/2016/07/12/kashmir-in-the-worlds-most-militarized-zone-violence-after-years-of-comparative-calm>.

<sup>76</sup> Caesar Roy, "THE DRACONIAN ARMED FORCES (SPECIAL POWERS) ACT, 1958 – URGENCY OF REVIEW" available at <https://www.files.ethz.ch/isn/180712/b5167a3995c057f77ff0ae3a230c2744.pdf>.

<sup>77</sup> "'DENIED' Failures in accountability for human rights violations by security force personnel in Jammu and Kashmir", *Amnesty International*, 2015, available at <https://www.amnesty.org/en/wp-content/uploads/2021/05/ASA2018742015ENGLISH.pdf>.

<sup>78</sup> "INDIA: Summary of human rights concerns in Jammu and Kashmir", *Amnesty International*, 1995, available at <https://www.amnesty.org/en/wp-content/uploads/2021/06/asa200021995en.pdf>.

<sup>79</sup> Government of the State of Jammu and Kashmir Notification No I-L/84, 20 April 1927, available at <https://www.satp.org/satporgtp/countries/india/states/jandk/documents/actsandordinan>

subjects could be categorised under the following classes: Class I included persons and their descendants born and permanently inhabiting within the territorial limits of Jammu and Kashmir before 1942.<sup>80</sup> Class II included persons, in addition to those belonging to Class I, who were permanently living/settled within the State and had successfully acquired an immovable property before the end of the samvat year of 1968.<sup>81</sup> Under Class III, permanent residents who had secured an immovable property under Riayat Nama or WIZO and could acquire the said property after ten years of residence therein under an ijazatnama were also covered.<sup>82</sup> Under Class IV, companies previously registered within Jammu and Kashmir could be declared state subjects.<sup>83</sup> Additionally, the state subjects' laws included descendants of any of the above-mentioned categories and any immigrant who was the wife or widow of the state subject if she continued to reside in the state permanently or did not remarry.<sup>84</sup> It even included any emigrants from Jammu and Kashmir and their descendants born aboard up to two generations as state subjects upon fulfilment of certain conditions.<sup>85</sup> Only state subjects under the law were entitled to purchase property, enjoy employment opportunities in the government sector and exercise voting rights.<sup>86</sup>

Pre-2019, India's relationship with Kashmir was governed by two articles of the Indian Constitution, Article 35A<sup>87</sup> and Article 370.<sup>88</sup> These articles reiterated the unique status of Jammu and Kashmir and its relation to the Indian State in line with terms agreed upon in the instrument of accession and state-subject legislation. After decades of

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ces/State\_Subject\_Rules.htm.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> Constitution of India 1949, *Indian Kanoon*, Art. 35(a), available at <https://indiankanoon.org/doc/487/>.

<sup>88</sup> Constiution of India, above note 87, Art. 370.

peaceful and uncontested application of these laws in Kashmir and India's maintenance of relations with Kashmir on the agreed-upon grounds, India unilaterally removed the application of both these articles to Kashmir on 5<sup>th</sup> August 2019. The series of actions which followed, reflect upon Indian State's intent to colonise Kashmir and establish a settler colonial project in the territory.<sup>89</sup> India argued that the provision (Article 370) contained in its constitution were listed under the sub-heading of temporary provisions. Therefore, changing its constitution did not require external intervention or validation. The argument here is partially valid. Article 370 was a part of the Indian Constitution, the bridge for India, through which it governed its relation with Jammu and Kashmir. Through the international law lens, it is immaterial if India removed a provision from its domestic law because it is still bound by the treaty (IOA), which was signed in 1948 between the Indian State and sovereign of Jammu and Kashmir and which clearly excluded India from having any sovereign title over Jammu and Kashmir. Relying on the principle that non-performance of treaty obligations cannot be defended by citing domestic law, India is still obligated to abide by the Instrument of Accession.<sup>90</sup> As there is no concrete evidence that the article/provision was temporary because of internal arrangements or was subject to change according to government policy, it can be validly argued that the transient nature of the said provision pointed out to temporary structures between sovereigns which were subject to the outcome of a referendum in UNSC resolutions.

## **VII. Post-2019 developments in Kashmir**

After August 5, 2019, the Indian occupying governance clamped down on the entire region of Jammu and Kashmir, blocked the internet and

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<sup>89</sup> "India's Modi visits kashmir: How has the region changed since 2019?", *Al Jazeera*, 7 March 2024, available at <https://www.aljazeera.com/news/2024/3/7/indias-modi-visits-kashmir-how-has-the-region-changed-since-2019>.

<sup>90</sup> Article 23, Excuses for Failure to Perform, *The American Journal of International Law Supplement: Research in International Law*, Vol. 29, No. 1, 1935, available at <https://www.jstor.org/stable/pdf/2213690.pdf>, pp. 1029-1031.

communication pathways, including mobile networks and landlines, halted local media services, arrested all mainstream political and separatist leadership, set the whole territory under a lock-down and unilaterally altered articles in their constitution governing relations with Jammu and Kashmir.<sup>91</sup> As mentioned in the earlier chapters, a typical characteristic of a settler is that it forcefully imposes its laws upon the indigenous population. The Indian state, post abrogation, directly imposed its laws upon Jammu and Kashmir. It announced the non-application of earlier laws without any legal authority, soundness or backing and divided the Indian Administered territory of Kashmir into two parts, the “Union Territory of Jammu and Kashmir” and the “Union Territory of Ladakh”.<sup>92</sup> The abrogation of Articles 370 and 35A, accompanied by the reorganisation of the former state, has drawn criticism for its perceived lack of adherence to the constitutional requirement of state legislature participation. The process has been characterised as being executed through covert means and deception.<sup>93</sup> Consequently, the hearings pertaining to a set of petitions challenging the decision in the Supreme Court of India encountered multiple delays, solidifying the perception of a *fait accompli*.<sup>94</sup> A great part of this decision affected the access to the land, economy and citizenship of the native population.

This move strategically replaced the state-subject laws with a new domicile policy. Going against the previously existing state-subject rules, the domicile policy of 2019 introduced a new process through which any

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<sup>91</sup> “How 2019 Changed the Kashmir Dispute Forever”, *Al Jazeera*, 1 January 2020, available at <https://www.aljazeera.com/news/2020/1/1/how-2019-changed-the-kashmir-dispute-forever>.

<sup>92</sup> Hannah Ellis-Petersen, “India Strips Kashmir of Special Status and Divides It in Two”, *The Guardian*, 31 October 2019, available at <https://www.theguardian.com/world/2019/oct/31/india-strips-kashmir-of-special-status-and-divides-it-in-two>.

<sup>93</sup> Ather Zia, “Erasing Kashmir’s autonomous status” *Al Jazeera*, 14 August 2017, available at <https://www.aljazeera.com/opinions/2017/8/14/erasing-kashmirs-autonomous-status>.

<sup>94</sup> “‘Clear threat’: Kashmiris on India top court upholding removal of autonomy”. *Al Jazeera*, 12 December 2023, available at <https://www.aljazeera.com/news/2023/12/12/clear-threat-kashmiris-on-india-top-court-upholding-removal-of-autonomy>.

Indian Citizen could become a permanent resident in Jammu and Kashmir.<sup>95</sup> In line with the basic characteristics of settler colonialism, this law provided an open opportunity to the settlers from India to build settlements, occupy the territory and exploit its resources. The new law stated that any person who acquires a domicile certificate would have the right to purchase land and other immovable property,<sup>96</sup> would be entitled to vote or contest elections<sup>97</sup> and secure jobs in government services in Jammu and Kashmir.<sup>98</sup>

Reiterating that the elimination of natives is another trait of settler colonialism, the new laws excluded the migrant Kashmiri people and their children (the indigenous) who do not have permanent residence in Kashmir; in other words, members of indigenous community who live outside the state. The Kashmiri emigrants' status for participation in self-determination is recognised under Security Council resolutions and the previously existing state-subject laws.<sup>99</sup> The Indian government has made numerous attempts to coerce the earlier state subjects into showing compliance with the said provisions. For example, the Domicile Certificate is a pre-requisite for admission to educational institutions and application to any professional service/employment opportunity.<sup>100</sup> The state-subject certificate, which was earlier a valid document for

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<sup>95</sup> Iyer KSand P, "Decoding the New Domicile Law of Jammu and Kashmir", *Observer Research Foundation*, 30 June 2020, available at <https://www.orfonline.org/expert-speak/decoding-new-domicile-law-jammu-kashmir-68777/&gt;>.

<sup>96</sup> Peerzada Ashiq, "J&K Throws Open Local Real Estate to All Citizens of Country", *The Hindu*, 28 December 2021, available at <https://www.thehindu.com/news/national/other-states/jk-throws-open-local-real-estate-to-all-citizens-of-country/article38050455.ece>.

<sup>97</sup> "Uproar in Kashmir as India Allows Voting Rights to Non-Locals", *Al Jazeera*, 19 August 2022, available at <https://www.aljazeera.com/news/2023/8/19/uproar-in-kashmir-as-india-allows-voting-rights-to-non-locals>.

<sup>98</sup> "Jammu and Kashmir Domicile Law: Meaning and Ramifications", *The Kashmir Walla*, May 31 May 2020, available at <https://thekashmirwalla.com/jammu-and-kashmir-domicile-law-meaning-and-ramifications/>.

<sup>99</sup> Government of the State of Janmu and Kashmire, above note 79.

<sup>100</sup> Peerzada Ashiq, "J&K Makes Domicile Certificate Mandatory for Admissions to Educational Institutions, Professional Exams", *The Hindu*, 20 May 2020, available at, <https://www.thehindu.com/news/national/other-states/jk-makes-domicile-certificate-mandatory-for-admissions-to-educational-institutions-professional-exams/article31636972.ece>.

applications, admissions or purchase of property and the validity of which was upheld by the High Court of Jammu and Kashmir on various occasions, is now reduced to a mere proof of residence and is no longer recognised for any other purpose.<sup>101</sup>

For example: In February of 2020, the Indian regime decided to terminate the recruitment process of Jammu and Kashmir Bank (one of the key public sector institutions in Jammu and Kashmir) for over 1,450 positions, which had been in progress since 2018.<sup>102</sup> This process involved recruitment only for permanent residents of Jammu and Kashmir (the state subjects). Subsequently, in June 2020, the bank initiated a new advertisement for 1,850 positions, inviting applications from individuals who meet the domicile requirements.<sup>103</sup> The replacement of state-subject with domicile paved the way for non-native population to participate in the process of recruitment and gradual naturalisation.<sup>104</sup>

For quick imposition of this domicile rule, the authority of the issuance of these certificates to any Indian Citizen is assigned to junior-most administrative officers (tehsildars) with little by way of checks and balances. Such a document has to be issued within fifteen days of application; the failure to comply with it results in a penalty to the concerned officer in the amount of 50,000 Indian Rupees.<sup>105</sup> The statistics show an increase in the purchase of land by outsiders using this method. According to official statistics, 185 non-Kashmiri people bought properties in the territory between 2020 and 2022.<sup>106</sup> The data also

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<sup>101</sup> Mirza Saaib Beg, “J&K’s New Domicile Order: Disenfranchising Kashmiris, One Step at a Time”, *The Wire*, 30 May 2020, available at <https://thewire.in/rights/kashmir-domicile-law>.

<sup>102</sup> Anuradha Bhasin, 20 June 2020, “Bringing the Israeli model to Kashmir” *Al Jazeera*, available at <https://www.aljazeera.com/opinions/2020/6/20/bringing-the-israeli-model-to-kashmir>.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> The Kashmir Walla, above note 98.

<sup>106</sup> “185 outsiders bought land in Jammu and Kashmir in last 3 years: Govt”, *State Times*, 6 April 2023, available at <https://statetimes.in/185-outsiders-bought-land-in-jk-in-last-3-years->

revealed that even less than a year after abrogation, more than 25,000 non-local people were granted domicile certificates.<sup>107</sup> According to the Indian Government, 3,231,353 non-native applicants were issued Domicile Certificates by the end of 2020.<sup>108</sup> It is important to note that numerous bureaucrats and members of the Indian Armed Forces have been stationed in the region for more than a couple of decades during their postings, making it easy for them to be eligible to be a domicile and enjoy privileges under the new regulations.<sup>109</sup> Political analysts and human rights experts argue that in the following years, the number of domiciles issued will continue to grow, every year higher than the previous. Given the non-accountable corrupt nature of the system, it is quite presumable how these laws will be twisted to benefit the non-native population and create settlements within the territory of Jammu and Kashmir.

On one hand, India's domicile law sets up the flow of Indian citizens for their settlement in the disputed territory, paving the way for a constant cycle of citizenship through naturalisation. On the other hand, it is forcefully evicting the indigenous Kashmiri Gujjar-Bakerwal community. This is another method of elimination followed by the Indian State. This indigenous community has lived in the forests of Jammu and Kashmir for generations.<sup>110</sup> The forceful eviction of natives from those lands is the first step to clearing the land for private investors.<sup>111</sup> The Gujjar-Bakerwal community is comprised of an

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<sup>107</sup> "Kashmir Muslims fear demographic shift as thousands get residency", *Al Jazeera*, 28 June 2020, available at <https://www.aljazeera.com/news/2020/6/28/kashmir-muslims-fear-demographic-shift-as-thousands-get-residency>.

<sup>108</sup> GOVERNMENT OF INDIA MINISTRY OF HOME AFFAIRS LOK SABHA STARRED QUESTION NO. \*287, Sansad, 16 March 2021, available at <https://sansad.in/getFile/loksabhaquestions/annex/173/AS287.pdf?source=pqals>.

<sup>109</sup> A. Bhasin, above note 102.

<sup>110</sup> Aakash Hassan, "'We Would Prefer Death': Kashmiri Muslim Nomads Fear Eviction", *Al Jazeera*, 20 November 2020, available at <https://www.aljazeera.com/news/2020/11/20/tribal-community-face- eviction-from-forests-in-kashmir>.

<sup>111</sup> Joe Wallen, Aakash Hassan Kanidajan, "'I Will Burn Myself to Death': Kashmir's

estimated three and a half million members from Jammu and Kashmir, whose homes are demolished, forcing them to become migrants and internally displaced persons.<sup>112</sup> India's strategic move to occupy Kashmir involves the government's proposal to provide land to various companies<sup>113</sup> and corporations to set up units and branches in Kashmir. Between 2019-2022, as per the official records provided by the Government of Jammu and Kashmir, it has been reported that a total of 1,559 Indian companies, which also include multinational corporations, have made substantial investments in the territory of Jammu and Kashmir.<sup>114</sup> Moreover, the law governing "land lease" prior to 2019 was also done away with by the Indian State. As a consequence, the state refused to extend the leases of native hoteliers. Instead, it decided to auction those permits, which would result in numerous Kashmiri hoteliers losing ownership of their properties.<sup>115</sup> These lands would then be leased to outsiders through e-bidding, preferably by former members of the Indian Armed Forces, war widows and migrant workers, according to the government's notification.<sup>116</sup> Similarly, in January 2023, Indian state authorities dispatched bulldozers to various locations in Jammu and Kashmir. The purpose of this operation was to demolish

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Nomads Evicted from Homes amid Anti-Muslim Crackdown", *The Telegraph*, 31 December 2020, available at <https://www.telegraph.co.uk/news/2020/12/31/will-burn-death-kashmir-muslim-nomads-evicted-homes-amid-anti/>.

<sup>112</sup> "In Photos: Kashmir's Bakarwal Tribe Faces Existential Crisis", *BBC News*, 23 September 2023, available at <https://www.bbc.com/news/world-asia-india-62886711>.

<sup>113</sup> Peerzda Ashiq, "Jammu and Kashmir Transfers 289-Acre Land for Housing, Dubai Realtors Likely to Invest", *The Hindu*, 2 February 2023, available at <https://www.thehindu.com/news/national/other-states/jammu-and-kashmir-transfers-289-acre-land-for-housing-dubai-realtors-likely-to-invest/article38365187.ece>.

Also see, "Jammu and Kashmir Govt Inks 39 MoUs Worth Rs 18,300 CR with Country's Real Estate Investors", *The Economic Times*, available at <https://economictimes.indiatimes.com/industry/services/property/-/construction/jammu-and-kashmir-govt-inks-39-mous-worth-rs-18300-cr-with-countrys-real-estate-investors/articleshow/88522715.cms?from=mdr>.

<sup>114</sup> "185 outsiders bought land in Jammu and Kashmir in last 3 years: Centre", NDTV, 5 April 2023, available at <https://www.ndtv.com/india-news/185-outsiders-bought-land-in-jammu-and-kashmir-in-last-3-years-centre-3922369>.

<sup>115</sup> "In 2022, India came for Kashmir's land, votes and journalists", *Al Jazeera*, 30 December 2022, available at <https://www.aljazeera.com/news/2022/12/30/2022-india-continues-series-of-controversial-policies-in-kashmir>.

<sup>116</sup> *Ibid.*

properties that were alleged to have been constructed on state land deemed to be encroached upon.<sup>117</sup> A petitioner brought forth a case regarding the matter before the Jammu, Kashmir and Ladakh High Court. From a technical perspective, the petitioner's argument held merit, as the laws in force in Jammu and Kashmir before 2019 permitted his contentions and assertions. However, the judges set aside the petitioner's plea due to the absence of Section 133(2) of the Jammu and Kashmir Land Revenue Act, 1996, whose absence in its previous form rendered the petitioner, as well as numerous other landholders susceptible to eviction and the potential demolition of their properties.<sup>118</sup>

Additionally, the government of India has been making constant efforts to make Hindu<sup>119</sup> and military settlements<sup>120</sup> to alter the religious demography of the Muslim-majority territory. In this regard, in July 2020, the Indian administration granted permission to the “Indian Army, Border Security Forces, paramilitary forces and similar organisations” to freely acquire land and undertake construction beyond military cantonment areas without requiring them to obtain a special certificate and a “no objection certificate” (NOC) clearance from the region’s home department, which was mandated by previous laws including the 1971 circular.<sup>121</sup> The occupying regime, starting from 2023, is also bringing in and providing accommodations to migrant workers who hail from outside Jammu and Kashmir in the form of flats; another way of bringing in settlers to the region.<sup>122</sup>

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<sup>117</sup> Shakir Mir, “2023: A year of ironies and paradoxes in J&K”, *The Wire*, 31 December 2023, available at <https://thewire.in/rights/2023-a-year-of-ironies-and-paradoxes-in-jk>.

<sup>118</sup> *Ibid.*

<sup>119</sup> “India's BJP to Revive Hindu Settlement Plan in Kashmir: Report”, *Al Jazeera*, 12 July 2019 <https://www.aljazeera.com/news/2019/7/12/indias-bjp-to-revive-hindu-settlement-plan-in-kashmir-report>. Also see [https://www.mha.gov.in/sites/default/files/2023-07/Annexure20\\_28072023.pdf](https://www.mha.gov.in/sites/default/files/2023-07/Annexure20_28072023.pdf).

<sup>120</sup> *Ibid.*

<sup>121</sup> “India eases rules for Security Forces to acquire land in Kashmir”, *Al Jazeera*, 28 July 2020, <https://www.aljazeera.com/news/2020/7/28/india-eases-rules-for-security-forces-to-acquire-land-in-kashmir>.

<sup>122</sup> “J&K govt. hands over 192 flats to migrant workers in Jammu”, 3 August 2023, available at <https://www.thehindu.com/news/national/jk-govt-hands-over-192-flats-to-migrant->

However, the plan doesn't end here. The delimitation or redrafting of boundaries of election balloters/peripheries on religious grounds is another significant example of settlement propaganda that marginalises and suppresses Muslim communities.<sup>123</sup> This decision made by the Delhi government to commence the delimitation process, entailing the redrawing of electoral constituency boundaries, is anticipated to have a profound impact on the local political landscape, particularly within the predominantly Hindu region of Jammu. Several leaders from the Bharatiya Janata Party (BJP) have put forth two proposals aimed at achieving this objective. Firstly, there is a suggestion to base the enumeration process on geographical area, departing from the prevailing norm of population-based enumeration throughout India.<sup>124</sup> Secondly, there is a proposition to allocate the 24 vacant seats from Pakistan-administered Kashmir (PAK) and Chinese-controlled Aksai Chin, which have remained unrepresented for the past 70 years, to the Jammu region by providing representation to Hindu and Sikh refugees from Pakistan-administered Kashmir.<sup>125</sup> Implementation of these ideas would engender a reconfiguration of electoral constituencies and potentially reshape the prevailing political dynamics in the area.

The Indian government's crackdown on bonafide buyers of Hindu-minority properties purchased in the 1990s, without ascertaining the merits and facts of each case unveils another aspect of its propaganda to evict Kashmiri natives.<sup>126</sup> Claiming to resettle minorities back in Kashmir, but not vacating Hindu-owned properties occupied by the government and instead encroaching upon Muslim buyers who are genuine owners of such estates, reflects the depth of bias that the

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workers-in-jammu/article67151092.ece.

<sup>123</sup> Al Jazeera, above note 119.

<sup>124</sup> A. Bhasin, above note 102.

<sup>125</sup> *Ibid.*

<sup>126</sup> Ashutosh Sharma, "India's Push to Resettle Kashmiri Hindus Exposes Old Fault Lines", *Al Jazeera*, 1 April 2023, available at <https://www.aljazeera.com/news/2022/4/1/india-push-to-resettle-kashmir-hindus-exposes-old-fault-lines>.

government holds against Muslims.<sup>127</sup> Moreover, in an attempt to further alienate the Muslim population and allow demographic intrusions, the Indian government is recruiting more and more people from outside Jammu and Kashmir, leaving thousands of natives jobless and victims of the state's settler policy.<sup>128</sup> Post-abrogation of Article 370 of the Indian Constitution, almost all the top bureaucratic roles in the Jammu and Kashmir administration are in the hands of outsiders.<sup>129</sup> According to an initial evaluation conducted by the Kashmir Chamber of Commerce (KCCI) in the year 2020, it was estimated that the economy of Kashmir suffered losses amounting to approximately \$5.32 billion.<sup>130</sup> The same study revealed a significant rise in unemployment with over 100,000 individuals losing their jobs in the territory, attributing it to the revocation of Kashmir's special status by the Indian government.<sup>131</sup> Consequently, a considerable portion of the native Kashmiri population has been compelled to seek economic opportunities elsewhere, both within India and abroad, conveniently pushing them to become economic migrants.

### **VIII. Demographic Changes: New step or Continuum**

Indian politics facilitates a multi-party system, but walking down the lanes of history and analysing the current situation, there are two major ideologies and both ideologically run contrary to each other. On one side is the Indian National Congress, which is built on the ideology based on inclusivity, secularism, social welfare and a democratic set-up where people from different religions or castes can live together with equal respect and harmony. In contrast is the Bharatiya Janata Party which promotes a right-wing Hindutva agenda, where it is on a mission to

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<sup>127</sup> *Ibid.*

<sup>128</sup> A. Bhasin, above note 102.

<sup>129</sup> *Ibid.*

<sup>130</sup> Womic Baba & Anam Zakaria, "The false promise of Normalcy and development in Kashmir", *Al Jazeera*, 5 August 2020, available at <https://www.aljazeera.com/opinions/2020/8/5/the-false-promise-of-normalcy-and-development-in-kashmir>.

<sup>131</sup> *Ibid.*

convert Indian democratic State into a Hindu-state. Under this Hindutva ideology, people belonging to religions outside Hinduism must be treated as subjugates or second-class citizens or be eliminated altogether. These fundamental ideological differences between the two major political parties in India have significantly shaped their respective policy platforms and agendas. Though it may appear that the positions of the BJP and the Congress are diametrically opposed, both can be situated within a broader ideological continuum when the issue pertains to Kashmir.

Though the state-subject and demographic laws were finally torn down under the BJP regime when it illegitimately abrogated Article 370, Congress had been hollowing out the basis of this Article since last 50 years of its rule. Congress has traditionally advocated for the autonomy of Jammu and Kashmir, but in practice it has maintained a complex and at times ambiguous relationship with Article 370, gradually diluting its own provisions and the clauses of the Instrument of Accession over the decades, eroding the state's autonomous status.

For example: under the 1952 Delhi Agreement the government led by the Congress Party extended Part III of Indian Constitution (fundamental rights), citizenship law, trade and commerce rules to Jammu and Kashmir, diluting the treaty clauses of Instrument of Accession and special status under Article 370.<sup>132</sup> Over a period of time, Congress signed accords in 1975 and 1986 with a regional political party, “National Conference” and gradually extended its control over the territory under the garb of protection of special status.<sup>133</sup> Congress’ gradual undermining of Jammu and Kashmir's autonomy, coupled with its own shifting ideological positions, laid the groundwork for the BJP's

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<sup>132</sup> The Delhi Agreement, 1952. available at [https://www.satp.org/satporgrp/countries/india/states/jandk/documents/papers/delhi\\_agreement\\_1952.htm](https://www.satp.org/satporgrp/countries/india/states/jandk/documents/papers/delhi_agreement_1952.htm).

<sup>133</sup> Bashir Assad, “Dumb charades: How Congress went so wrong on Article 370”, *The Sunday Guardian Live*, 24 December 2023, available at <https://sundayguardianlive.com/opinion/dumb-charades-how-congress-went-so-wrong-on-article-370>.

plans to execute.<sup>134</sup> The only major difference that can be identified between the two is that BJP wants to convert Kashmir, the only Muslim-majority territory, to a Hindu state<sup>135</sup> within the Indian nation whereas Congress wants to assimilate the population with the Indian mainlanders irrespective of considering the religions the people predominantly follow. The policies and strategies have remained different but the goal of settler-colonialism remains constant. While Congress' strategies can be better explained through the phrase, "an iron hand in a velvet glove", the Bhartiya Janata Party is a true reflection of the phrase "might is right."

Several international law experts, including Dr Sheikh Showkat Hussain<sup>136</sup>, a former professor of international law, have also argued that India has tried to alter demography since the late 1940s, when India took control over Jammu and Kashmir, but now it is more expressive and faster. In his book, "*Kashmir-Palestine in the Making*"<sup>137</sup>, Dr Sheikh Showkat Hussain tracks the population changes in Indian-administered Kashmir and attributes this change fundamentally to the religious identity of the state subjects. He points out the deliberate attempts by the Indian government since the early years of their control to alter the Muslim population in the territory. According to his work,<sup>138</sup> the Indian administration used various tactics in varied phases, including the genocide in the early years of governance, where a hundred thousand Muslims in Jammu province of Indian Administered Kashmir were massacred and around a hundred thousand people were coerced to migrate. Another scholar, Ian Stephens, presents the same argument in his work<sup>139</sup> where he writes that by the end of 1947, around half a million

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<sup>134</sup> *Ibid.*

<sup>135</sup> Kaisar Andrabi & Zubair Amin, "Modi Is Trying to Engineer a Hindu Majority in Kashmir. (2021). In Foreign Policy", 11 August 2021, available at <https://foreignpolicy.com/2021/08/11/modi-is-trying-to-engineer-a-hindu-majority-in-kashmir>.

<sup>136</sup> Dr. Sheikh Showkat Hussain is a Kashmiri political analyst and a prominent scholar of human rights and international law, he has authored several books on the Kashmir conflict.

<sup>137</sup> *Kashmir-Palestine in the Making*, pp. 7

<sup>138</sup> *Ibid.*

<sup>139</sup> Ian Stephens, *Horned Moon*, Chatto & Windus, 1953, pp. 138.

population had disintegrated around two lakh (two hundred thousand) could not be traced, which indicates that they were either killed or died while they tried to flee. In contrast, some managed to cross the border and escape to the Punjab province of Pakistan. This led to a 9% decline (78% to 69%) in the state's Muslim population between 1941 and 1961.<sup>140</sup> Some works indicate that faulty census procedures<sup>141</sup> and relatively minor invisible settlements have also contributed to earlier attempts to change the demography. A suitable example would be a comparison of the 1961-1971 and 1971-1981 census records. In 1971, 42,470 native Hindi speakers existed in the valley.<sup>142</sup> In contrast, under the 1981 census record, the number dramatically increased to 1,012,808 native Hindi speakers compared to native Kashmiri and Dogri speakers (two primary languages used in the territory), which showed an increase of 30% and 27% respectively in the same period.<sup>143</sup> Ironically, there is no reciprocal decline in any language to balance a mere 29% population growth in the same decade. This indicates the settlement of non-state subjects in Jammu and Kashmir or faulty census procedures that included migrants in the records.<sup>144</sup> It is also possible that massacres, mass killings and other human rights violations in the following decades in the region may have also impacted adversely on the demography. As mentioned in the foregoing chapter, the current regime in India is building multiple settlements, giving livelihood opportunities and granting domicile certificates to non-natives to alter the demography of Jammu and Kashmir.

## **IX. International Law and demographic changes in occupied territories:**

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<sup>140</sup> Kashmir-Palestine in the Making, above note 137.

Also see, Jawahar Lal Nehru speeches, VI Publications division government of India, pp. 165

<sup>141</sup> Kashmir-Palestine in the Making, above note 137, pp. 10.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid* pp.11.

It is interesting to note that various scholars, including Ather Zia,<sup>145</sup> Azad Essa,<sup>146</sup> and others, have recently compared the model used by India in Kashmir to that used by Israel in Palestine. Ironically, India's state representatives have sometimes acknowledged that they are using and further intend to use Israel's model on Palestine in Kashmir.<sup>147</sup> With time, a systematic pattern can be identified which makes these remarks a reality of India's actions in Kashmir.

When analysed using the lens of international law, the series of actions that have unfolded in and after 2019 reflect numerous violations of international law. For example: contraventions of Instrument of Accession (treaty violations), breach of international humanitarian law provisions that prohibit the forceful transfer of occupied populations out of the occupied territory or inducing of occupier's people in it (both custom and treaty principles), efforts to destroy the possibilities of the fair and free plebiscite and violation of self-determination rights (defeat the purpose and object of UN Security Council resolutions).

To begin with, India allotting land violates Article 6 of the Instrument of Accession, which explicitly prohibits India from purchasing or acquiring land or immovable properties in the territory of Kashmir for any purpose.<sup>148</sup> It is important to remember that the general

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<sup>145</sup> "Ather Zia is assistant professor of anthropology and gender studies at the University of Northern Colorado. She is the founder-editor of Kashmir Lit, an online journal of Kashmiri and diaspora writing, and the cofounder of Critical Kashmir Studies, an interdisciplinary network of scholars working on the Kashmir region. She has authored several books and articles on Kashmir conflict." This information has been derived from google books, author information section.

<sup>146</sup> "Azad Essa is a senior reporter for Middle East Eye based in New York City. He worked for Al Jazeera English between 2010-2018 covering southern and central Africa for the network. He is the author to numerous articles about Kashmir and a book titled, 'Hostile Homelands: The New Alliance Between India and Israel' (Pluto Press, Feb 2023)"- this information has been derived from the website for Middle East Eye, New York.

<sup>147</sup> "Anger over India's Diplomat Calling for 'Israel Model' in Kashmir", *Al Jazeera*, 28 November 2019, available at <https://www.aljazeera.com/news/2019/11/28/anger-over-indias-diplomat-calling-for-israel-model-in-kashmir>.

<sup>148</sup> "Instrument of Accession of Jammu and Kashmir", available at [https://cjp.org.in/wp-content/uploads/2019/08/instrument\\_of\\_accession\\_of\\_jammu\\_and\\_kashmir\\_state.pdf](https://cjp.org.in/wp-content/uploads/2019/08/instrument_of_accession_of_jammu_and_kashmir_state.pdf).

rule is that treaties neither terminate on their own nor do changes in internal government or successor regimes terminate treaty obligations.<sup>149</sup> Mere alteration in the form of government and subsequent recognition<sup>150</sup> by parties to the treaty leaves no scope in this case for non-application of treaty obligations. Secondly, international humanitarian law expressly prohibits, under Article 49 of the Fourth Geneva Convention,<sup>151</sup> forcible transfer of population from occupied territory, whether in the occupier's part or otherwise in any other region, or inducing of the occupier's population in occupied territory. Under the same article, temporary and partial evacuations within the environment are allowed only in case of military necessity (where no other alternative is available), followed by mandatory rehabilitation of the victims and resettlement immediately after the end of hostilities.<sup>152</sup> These evacuation circumstances do not apply to the present case under consideration. Therefore, India's forcible transfers were using immediate eviction or indirectly forcing victims to be displaced, which violates Article 49, Section III of the Fourth Geneva Convention. Article 49 also expressly prohibits deportations and movements of civilians in the occupied territory.<sup>153</sup> In the current case, India's policies and series of activities involving the settlement of its civilian entities in Jammu and Kashmir violate the convention. Adam Roberts<sup>154</sup> claims in his work<sup>155</sup> that one of the factors for the occupier to provide occupation is imposing any disruptive change and not engaging

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<sup>149</sup> § 10:13. Treaties and changed regimes, 2 Litigation of International Disputes in U.S. Courts § 10:13 [Unable to access link]

<sup>150</sup> Both India and the Government of Jammu and Kashmir upheld the principles of Instrument of Accession on many occasions. India included its reference in their constitution, and Jammu and Kashmir government upheld the same laws that previous regime had including the treaty obligation under Instrument of Accession.

<sup>151</sup> Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, available at [https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.33\\_GC-IV-EN.pdf](https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.33_GC-IV-EN.pdf).

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.*

<sup>154</sup> "Montague Burton Professor of International Relations, Oxford University; and Fellow of Balliol College"

<sup>155</sup> Adam Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967", *American Journal of International Law*, Vol. 84, No. 1, January 1990, par. 46.

in the annexation of occupied territory. He continues to add that the rights of the sovereign there have to be preserved and where the outcome is pending because of a peace settlement negotiation, the occupier is bound to facilitate “the prospects for an eventual peace agreement and the rules against transfers of populations into and from occupied territories, partly reflect this purpose.”<sup>156</sup> As far as the above-stated law is concerned, India, being a party to the Fourth Geneva Convention, is in absolute violation of Article 49, and its act of moving its population to Kashmir is an express violation of the stated law. India has also violated Articles 18 and 26 of the Vienna Convention on the Law of Treaties’1969 and its obligations therein which impose a duty on the states to not act contrary to the “object and purpose of the treaty” and to “perform the treaty in good faith” respectively.

Under customary international humanitarian law, Rule 130 prohibits states from deporting or transferring their civilian population, even if such movement is limited or partially carried out into a territory under their occupation.<sup>157</sup> The Rome Statute enlists it in the list of war crimes.<sup>158</sup> Many states, including Australia, Canada, Netherlands, the United Kingdom, South Africa and the United States of America, incorporate this principle in their domestic laws and military manuals.<sup>159</sup> Other states, including India, have made official statements upholding the stand against the practice of settler colonisation and moving an occupier’s population into the land it forcefully occupies. The Permanent Representative made an official statement reiterating India’s perspective in an open debate session at UNSC.<sup>160</sup> The Representative stated that it was fundamentally important that settlement activities be immediately

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<sup>156</sup> *Ibid.*

<sup>157</sup> “Rule 130. Transfer of Own Civilian Population into Occupied Territory”, *Customary IHL - Rule 130. Transfer of Own Civilian Population into Occupied Territory*, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule130](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule130).

<sup>158</sup> The Rome Statute, Article 8(2)(b)(viii).

<sup>159</sup> Customary IHL - Rule 130, above note 157.

<sup>160</sup> “Displacement and Displaced Persons”, *Customary IHL - Practice Relating to Rule 130. Transfer of Own Civilian Population into Occupied Territory*, [https://ihl-databases.icrc.org/customaryihl/eng/docs/v2\\_chapter38\\_rule130\\_13D5BE](https://ihl-databases.icrc.org/customaryihl/eng/docs/v2_chapter38_rule130_13D5BE).

and wholly stopped in the Middle East as it obstructs the peace process. What is ironic here is that India referred to Israel's settlement policies and activities in Palestine as illegal and a root cause of violence and humanitarian issues in the region. India went on in 2012 to "reiterate its call for Israel to stop all settlement activities."<sup>161</sup> In 2020, eight years later, India bluntly admitted that the model India follows in Kashmir is Israel's model that it followed in Palestinian-occupied territories.<sup>162</sup>

The United Nations Security Council has adopted numerous resolutions in different situations involving the question of former Yugoslavia, Israel-Palestine, and Iraq-Kuwait, among others, wherein it has clarified that setting up settlements by the occupier in occupied land, coerced relocation or forceful transfer of the native people of such territory which remains under occupation, subversion of demographic records of occupied territory, or other activities by occupier which alter the "physical character, demographic composition, institutional structure or status" are a severe violation of the Fourth Geneva Convention and are not legally valid under international law.<sup>163</sup>

The United Nations General Assembly has also condemned occupational settlements and demographic changes induced by the occupier in different situations before it. It has continuously reiterated its stand reaffirming illegality and opposition to settlement and related activities in the occupied territories.<sup>164</sup> The General Assembly, however, widened the ambit of settler-colonialism and included exercises associated with "confiscation of land, disruption of the livelihood of

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<sup>161</sup> *Ibid.*

<sup>162</sup> "Anger over India's Diplomat Calling for 'Israel Model' in Kashmir", *Al Jazeera*, 28 November 2019, <https://www.aljazeera.com/news/2019/11/28/anger-over-indias-diplomat-calling-for-israel-model-in-kashmir>.

Also see Nayanima Basu, "Indian Consul General in US Suggests Israel Model for Kashmiri Pandits' Return, Kicks up Row", *The Print*, 27 November 2019, available at <https://theprint.in/diplomacy/indian-consul-general-in-us-suggests-israel-model-for-kashmiri-pandits-return-kicks-up-row/327302/>.

<sup>163</sup> International Court of Justice, above note 157.

<sup>164</sup> "Ukraine: UN General Assembly Demands Russia Reverse Course on 'Attempted Illegal Annexation'", *United Nations*, available at <https://news.un.org/en/story/2022/10/1129492>.

protected persons and the de-facto annexation of land”.<sup>165</sup> The International Court of Justice<sup>166</sup> and United Nations High Commissioner of Human Rights,<sup>167</sup> discussing Israel’s settlement in occupied territories of Palestine as in breach of international law, reaffirmed the Security Council’s position that settler-colonialism and related activities are violations of international law.

According to a report on “*the human rights dimensions of population transfer, including the implantation of settlers*”,<sup>168</sup> population transfer, whether in the form of sending the occupier state’s population into occupied territory or forcefully moving the natives from their land (occupied zone) to the occupier’s environment or another state, is against international legal principles. It violates both international humanitarian law and human rights law. This opinion is well-received and highly validated by the Commission on Human Rights.<sup>169</sup> The report clarifies that state policies and activities that involve “implanting settlers” to establish hegemony over the native inhabitants of the occupied region are prima facie illegal.<sup>170</sup> Occupation is similar to acquisition by war. The defense that the settlers in occupation do not forcefully push out the native inhabitants is no good defence under Article 49 of the Geneva Convention IV (1949). Similarly, the argument that the occupier has a “better title to the territory under occupation than the ousted sovereign” is equally vague and non-acceptable, and the international community denies any such title.<sup>171</sup> The main reasons for this are that it would lead to the absolute failure of the application of international law of conflict (IHL) and would purposely assist the occupier in exceeding its power

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<sup>165</sup> UNGA Res. 10/13, October 2003, available at <https://www.jewishvirtuallibrary.org/un-general-assembly-resolution-es-10-13-october-2003>.

<sup>166</sup> International Court of Justice, above note 51.

<sup>167</sup> Customary IHL – Rule 130, above note 157.

<sup>168</sup> “Human Rights Dimension of Population Transfer, Implantation of Settlers - CHR Sub-Comm. - Special Rapporteur Report (Excerpts) - Question of Palestine”, *United Nations*, 8 December 2023, available at <https://www.un.org/unispal/document/auto-insert-179611/#:~:text=A1%2DKhasawneh%2C%20as%20Special%20Rapporteur,4>.

<sup>169</sup> *Ibid*, par. 2.

<sup>170</sup> *Ibid*, par. 35.

<sup>171</sup> CHR Sub-Comm, above note 168, par. 82.

and limits. Under international law, occupying forces have a limited area to use their control, including orderly governance, use of resources and military necessity, and this cannot be stretched “beyond the quantum and duration.” If it is, then it becomes legally invalid.<sup>172</sup> The occupier under no circumstances can declare the occupied territory as part of its territory or cannot treat the population in occupied zones as its subjects. Similarly, the occupier cannot confer rights on properties, whether the state/private, in occupied territory apart from the purposes stated earlier (for a limited duration only).<sup>173</sup>

The legal regime of international law, including international humanitarian law, provides a detailed analysis of what occupation is, how conflicts must be dealt with and what rules should operate. However, it doesn't provide any clue on how these laws will be enforced, who should enforce them and within what time frame must the law be executed. This point of execution of law is where the whole process gets frustrated. The enforcement challenges of international law are not unique to the case being discussed here but have been a universal problem with the application of international law.

Many scholars have highlighted that international law can only be incorporated to the extent to which a state cooperates and complies with it.<sup>174</sup> Some scholars further mention that any issue which involves the competing interests of two sovereigns and their national interests becomes even more difficult to resolve because the conflicting states prioritise their interests over compliance with international law.<sup>175</sup> This hinders the achievement of lasting or permanent solutions. Another

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<sup>172</sup> Julius Stone, “Legal Controls of International Conflict”, *The Yale Law Journal*, Vol. 64, No. 6, 1955.

<sup>173</sup> *Ibid.*

<sup>174</sup> Jack L. Goldsmith & Eric A. Posner, “The Limits Of International Law”, *Oxford University Press*, 2011, available at <https://iuristebi.wordpress.com/wp-content/uploads/2011/07/the-limits-of-international-law.pdf>.

<sup>175</sup> Anne-Marie Slaughter, “International law in a World of Liberal States”, *European Journal of International Law*, available at <https://www.ejil.org/pdfs/6/1/1310.pdf>.

factor that remains essential is the power imbalance.<sup>176</sup> Many states like the United States keep violating international law at great lengths without being held accountable for their actions, whereas the African nations are now and then held on trials for lapses in adhering to international law. These biased applications also hinder the strength and uniformity of international law. Moreover, the foreign policies of conflicting states, their international lobbies and their relations with superpowers complicates the issue further. For example, Russia being an ally to India has vetoed restraining the UNSC to give effect to its resolutions on Kashmir Issues.<sup>177</sup> Similarly the recent UN resolution regarding Palestine was vetoed by United States since US is an ally to Israel.<sup>178</sup>

The laws and arguments cited make it clear that international law does not support or endorse occupational regimes. It doesn't underpin the demographic changes such regimes bring about on occupied territories; therefore, India, in this case, is no exception. The UN Resolutions have laid down a solution to the problem being discussed in the article but even after more than seven decades have passed, the resolutions have neither been enforced nor has international law been able to address violations in this regard. Victoria Schofield<sup>179</sup> and Alistair Lamb<sup>180</sup> blame the lack of a universally accepted framework and inconsistent application of international law to Kashmir in matters of

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<sup>176</sup> Stephen D. Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables", *International Organization*, Vol. 36, No. 2, 1982, pp. 185-205. <https://www.jstor.org/stable/2706520>

<sup>177</sup> "Veto to blame for non-resolution of Kashmir issue: Pakistan", *The Economic Times*, 11 March 2016, available at <https://economictimes.indiatimes.com/news/politics-and-nation/veto-to-blame-for-non-resolution-of-kashmir-issue-pakistan/articleshow/51357318.cms?from=mdr>.

<sup>178</sup> "Meeting Two Weeks after United States Vetoes Security Council Resolution Recommending Full UN Membership for Palestine, General Assembly Debates Ramifications"; *United Nations Meetings Coverage and Press Releases*, 1 May 2024, available at <https://press.un.org/en/2024/ga12595.doc.htm>.

<sup>179</sup> Victoria Schofield, "The Kashmir Conflict: A Study of What Led to the Impasse", Bloomsbury Publishing, 2010.

<sup>180</sup> Alistair Lamb, "The Kashmir Dispute: A Study in India-Pakistan Relations", 1991, Routledge.

self-determination and territorial integrity for this failure whereas Hasnat<sup>181</sup> attributes this failure to lack of effective mediation and the inability of United Nations Security Council to execute its own resolutions.

## **X. Conclusion:**

India's attempt to alter demography may not appear like a direct violation of any of the conditions set in the UNSC resolutions or the international legal provisions. Nevertheless, if we draw a nexus between India's activities in Kashmir and the international legal position, it is arguable that it is violative of UNSC resolutions. On the surface, it may seem normalised because of the use of state-sponsored media to cover up the state's occupational hazards on one hand and the new media policy capping any journalism to unmask India's ruthless occupational developments on the other. India's attempt to settle its population in Kashmir by replacing the state-subject law with the domicile policy and building settlements at an alarming pace will have irreversible consequences. It will be nearly impossible to identify who would have a right to vote in the referendum if citizenship criteria for original residents and the newly induced population are the same as against the older state-subject laws which enabled segregation. It will be challenging to prevent the amalgamation of natives and outsiders because of social factors like intermarriage between Indians and Kashmiris when they are in proximity, further diminishing the possibility of a fair and free plebiscite. The native cultural elimination, the coercively induced migration of original residents and the application of brutal policies and laws of the occupier will further terminate the possibility of exercising self-determination. To sum up, if this is not reversed, there are chances that a

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<sup>181</sup> S. F. Hasnat, "The United Nations and the Kashmir Dispute", 2005, JSTOR.

decade later, it would not be possible to achieve the resolutions because the question of mass migrations of these new settlers would be looked at through the lens of refugee-producing situations. The whole of these activities will lead to escalation and new challenges in realising the Security Council Resolutions and invite new problems to address.