LEGAL MEMORANDUM

The Status of Jammu & Kashmir under International Law

THE LAW OF OCCUPATION & ILLEGAL ANNEXATION
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THE STATUS OF JAMMU & KASHMIR UNDER INTERNATIONAL LAW

THE LAW OF OCCUPATION AND ILLEGAL ANNEXATION

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TABLE OF CONTENTS

1. INTRODUCTION ........................................................................................................................ 3

2. CONTEXT AND BACKGROUND ............................................................................................ 4

3. JAMMU & KASHMIR AS A TERRITORY UNDER OCCUPATION AND UNLAWFUL
   ANNEXATION BY INDIA ............................................................................................................ 9
   3.1. India’s Occupation of Kashmir.......................................................................................... 9
   3.1.1. Territory: Jammu & Kashmir is not Indian Territory under International Law .......... 9
   3.1.2. Hostile Army: The Indian Forces present in Jammu & Kashmir are a ‘Hostile Army’
          under International law ................................................................................................ 11
   3.1.3. Authority: India Exercises Complete Authority and Effective Control over J&K ...... 12
   3.2. Legal Rules Applicable to an Annexation: ....................................................................... 13
   3.2.1. India’s unlawful attempts at Annexation are Null and Void under International Law... 14
   3.2.2. Demographic Changes in Jammu & Kashmir are Strictly Prohibited under the Geneva
          Conventions .................................................................................................................. 15

4. IMPLICATIONS UNDER INTERNATIONAL LAW ........................................................... 17
   4.1. Legal Rules Applicable in an Occupation and their Implications ..................................... 17
   4.2. Violations of the Laws of War by Indian Forces ................................................................. 17
       4.2.1. Use of Indiscriminate Weapons .............................................................................. 18
       4.2.2. Use of Torture ....................................................................................................... 18
       4.2.3. Use of Rape as a Weapon of War .......................................................................... 19
       4.2.4. Impunity for Perpetrators .................................................................................... 19
   4.3. The Application of International Human Rights Law and its violations by Indian Forces .. 20
       4.3.1. India’s Violations of Human Rights Norms in Maintaining Public Order .............. 20
       4.3.2. Other Obligations related to Maintaining Public Order .......................................... 21
   4.4. The Legal Implications of an Annexation ......................................................................... 22

5. CONCLUSION ........................................................................................................................... 24
1. INTRODUCTION

The on-going crisis in Jammu & Kashmir has refocused international attention on the disputed territory. While the political and diplomatic dimensions are routinely discussed, the Kashmir issue primarily remains one of legal significance. From the application of numerous UN Security Council Resolutions to the constitutional changes made by the Indian state on 5 August 2019, all entail legal consequences and unfulfilled international obligations. Given the significance of Jammu & Kashmir to Pakistan and India, as well as to regional peace and security, it is unfortunate that scant scholarly analysis is available on the international law dimensions of the situation. It is for this reason that the Research Society of International Law, Pakistan (RSIL) has developed this legal memorandum to help inform debate on the issue of Jammu & Kashmir and provide clarity on the applicable international law. This memorandum discusses the international law relevant to the transfer of legal title, to territories under occupation, as well as the legal rules applicable to illegal annexations.

In our assessment, the State of India is an Occupying Power in Jammu & Kashmir and through its actions of 5 August 2019, has attempted to unlawfully annex this territory without any recourse to the will of the people of Jammu & Kashmir. Based on an analysis of the applicable law, this memorandum sets out in broad strokes, the main legal implications of India’s occupation and unlawful annexation.

This document is not intended to be an exhaustive analysis. RSIL welcomes feedback and academic engagement on the legal positions outlined below.
2. CONTEXT AND BACKGROUND

Prior to India’s independence, Jammu & Kashmir was a princely state under British rule. The Cabinet Mission Plan and the India Independence Act 1947 gave princely states the choice to remain independent or accede to the two new sovereign states of India or Pakistan. However, since the underlying basis for partition of India was premised on Muslim and non-Muslim majority areas, it was resolved by the Cabinet Mission that the accession of any Indian State would not be acceptable where the Ruler belonged to a different faith than his subjects until accession was put to referendum of the people.

Position of the State of Jammu & Kashmir on 15 August, 1947

Maharaja Hari Singh, the Hindu ruler of the Muslim-majority Jammu & Kashmir, initially chose to remain independent and the State did not accede to either dominions by 15 August 1947. Instead, the Maharaja signed a ‘Standstill Agreement’ with the dominion of Pakistan which transferred responsibility for administering certain services in Jammu & Kashmir such as the post, telegraph and railways from India to Pakistan. No such Agreement was concluded between the State of Kashmir and the dominion of India.

This position continued till the third week of October 1947, when disturbances inside the State led to Maharaja Hari Singh fleeing Srinagar. An ‘Instrument of Accession’ to the dominion of India is purported to have been signed by the fleeing Maharaja on 26 October 1947. In his response dated 27 October 1947, the Governor General of India accepted the accession on the condition that "as soon as law and order [was] restored in Kashmir and her soil cleared of the invader the question of State's accession should be settled by a reference to the people."

Intervention by the United Nations

An armed conflict between Indian and Pakistani forces soon followed. The Indian Cabinet referred the Kashmir crisis to the UN Security Council on 1 January 1948 with Pakistan also raising its concerns two weeks later. In response to the situation, the Security Council through Resolution 39 on 20 January 1948 established the United Nations Commission on India and Pakistan (UNCIP) to investigate the allegations made by Pakistan and India. The Security Council then adopted Resolution 47 on 21 April 1948 advising that Indian troops and the tribesmen should withdraw, an interim government should be established to represent the major Kashmiri political groups and a five-member UNCIP should go to Kashmir to help restore

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1 Memorandum on States’ Treaties and Paramountcy presented by the Cabinet Mission to His Highness the Chancellor of the Chamber of Princes on 12 May 1946; Section 7(1)(b) of the Indian Independence Act,1947
4 See John Braithwaite and Bina D’costa, Cascades of Violence, War, Crime and Peacebuilding Across South Asia, ANU Press (2018) https://www.jstor.org/stable/j.ctt22h6r7h.12 ; Memorandum on States’ Treaties and Paramountcy presented by the Cabinet Mission to His Highness the Chancellor of the Chamber of Princes on 12 May 1946
5 UN Security Council, Security Council resolution 39 (1948) [The India-Pakistan Question], 20 January 1948, S/RES/39 (1948)
peace and arrange a fair plebiscite. The plebiscite would be to decide whether Jammu & Kashmir was to accede to India or Pakistan.

This demilitarization never took place owing to disagreements between the two states. Pakistan believed that any withdrawal should be simultaneous owing to the fear of Indian aggression stemming from India’s annexation of the princely States of Junagadh and Hyderabad, the former having formally acceded to Pakistan during partition. India maintained that Pakistan should withdraw and only then would India withdraw its own forces. Since 1949, India has refused to agree to demilitarization of the region in any form to allow for a free and impartial plebiscite. It continues to persist in its original refusal of demilitarization in any form or sequence till this day, although in changing forms and for varying reasons.

Making of the Constitution of India

During this period, the Indian Constituent Assembly was being convened to draft the Indian Constitution. However, it had by now become apparent that the UN Security Council was not yielding a favourable outcome for India, especially with regard to the question of plebiscite. It therefore changed its political and legal strategy by attempting to incorporate Kashmir into its Constitution in defiance of the Security Council and the principles of the UN Charter on the premise that it would be ‘unfair to the Government and the People of the State of Jammu & Kashmir to deny them the opportunity of participating in the discussions’ on the new Constitution of India. However, given the sensitivity of the issue, India continued to openly declare its ‘determination’ to abide by the ‘freely declared will of the people of Jammu & Kashmir’.

It was in this context that Article 306-A was taken up for consideration by the Constituent Assembly for India which eventually became Article 370 of the Indian Constitution. The records of the Constituent Assembly debates unequivocally establish that Jammu & Kashmir required special treatment because of India’s ‘entanglement’ with the United Nations on this issue which could only be removed ‘when the Kashmir problem is satisfactorily settled’. Once again, the Government of India committed itself to the position that ‘an opportunity would be given to the people of the state to decide for themselves whether they will remain with the republic or wish to go out of it’ while also committing to ‘ascertaining this will of the people by means of a plebiscite provided that peaceful and normal conditions are restored and the impartiality of the plebiscite could be guaranteed’.

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9 Id.
10 "While the Constitution of India, which, inter alia provides for the relations of existing states to the Government of India was under consideration, it would have been unfair to the Government and the People of the State of Jammu & Kashmir to deny them the opportunity of participating in the discussions of that Constitution. Such participation was not intended and does not, in fact, alter the Government of India's determination to abide, in the matter of accession, by the freely declared will of the people of the Jammu & Kashmir. Should that will be against the" State continuing to be part of India, if and when it comes to express in a constitutional way under conditions to peace and impartiality, the representation of the State in the Indian Parliament would automatically cease and provisions of the Constitution of India that govern the relations of the State of Jammu & Kashmir with the Union of India will also cease to operate." Government of India communication dated 21.11.1949.
11 See Shri N. Gopalaswami Ayyangar’s representations before the Constituent Assembly when Art. 370 was moved for consideration in AG Noorani, The Kashmir Question, (1964) at p.46
12 Id.
13 Id.
Article 370 was thus portrayed by India as an ‘interim system’ and labelled a ‘temporary provision’ which gave constitutional cover to the Instrument of Accession by exempting Jammu & Kashmir from the provisions of the Indian Constitution and restricting Parliament’s legislative power over the State to three subjects namely defence, foreign affairs and communications. If other ‘constitutional provisions or other Union powers were to be extended to Kashmir, the prior concurrence of the State government was required. This concurrence was strictly provisional and had to be ratified by the State’s Constituent Assembly. Negotiated over six months, it represented a solemn compact between the State of Jammu & Kashmir and India.

The Constituent Assembly of Jammu & Kashmir

In October 1951, India convened a Constituent Assembly to formulate a Constitution for Jammu & Kashmir. According to the International Commission of Jurists, this Assembly was elected ‘in a manner which deprived it of all democratic legitimacy’. In response, the Security Council passed Resolution 91 of 1951 which affirmed that the convening of the Constituent Assembly and any action it might attempt to take to determine the future shape and affiliation of Kashmir would not constitute a disposition of the State in accordance with the principle of a free and impartial plebiscite conducted by the UN.

The Constituent Assembly was formally dissolved by resolution in January 1957 after framing a separate Constitution for Jammu & Kashmir and declaring that the whole of the former princely State to be an ‘integral part of the Union of India’ in defiance of the Security Council Resolutions. However, the Security Council in Resolution 122 of 1957 reaffirmed the action taken by the Constituent Assembly would not satisfy its earlier resolutions calling for a plebiscite.

The ‘Hollowing Out’ of Article 370

Having garnered the support of segments of the political leadership of Jammu & Kashmir for the inclusion of Art. 370 in the Indian Constitution, the Indian Government proceeded to go back on the solemn commitments it had made. As stated previously, the State Government’s authority to give ‘concurrence’ on matters beyond the Instrument of Accession could only last until the Constituent Assembly was convened, meaning the President could not extend the Indian Constitution to Jammu & Kashmir indefinitely. Once the State’s Constituent Assembly had finalized the scheme and dispersed, the President’s extending powers ended completely. However, through 47 Presidential Orders spanning a 50-year period, 260 of the 395 Articles of the Indian Constitution were extended to Jammu & Kashmir, including 94 out of 97 entries on the Union List. The effect of this illegal and ‘calculated, systematic hollowing out’ of Article 370 was to put the State of Kashmir in a dramatically inferior position to other States in the Indian Union, a far cry from the ‘special’ and ‘preferred’ status promised to it by India.
The Constitutional Changes affected by the State of India on 5 August, 2019

In early August 2019, a major security clampdown began in Jammu & Kashmir. Tourists were ordered to leave, a Hindu pilgrimage was cancelled, a communication blackout was imposed, restrictions were enforced on public gatherings, and local politicians were placed under house arrest. An additional 38,000 troops were also sent to the region. On 5 August 2019, the President of India issued the Presidential Order C.O. 272 which made the following changes to the Indian Constitution:

a. All references to the ‘Government of Jammu & Kashmir’ would henceforth be construed as references to the ‘Governor of Jammu & Kashmir’;

b. All references to the ‘Constituent Assembly of Jammu & Kashmir’ shall be construed as references to the ‘Legislative Assembly of Jammu & Kashmir’;

c. The Constitution (Application to Jammu & Kashmir) Order 1954 was superseded with immediate effect.

C.O. 272 was only the first of a series of carefully crafted legal maneuvers aimed at abolishing the autonomy and special status of Jammu & Kashmir and served a two-fold objective. Firstly, Article 35-A became null and void by supersession of the Constitution (Application to Jammu & Kashmir) Order 1954. Article 35-A of the Indian Constitution protected native Kashmiris from displacement and any attempts to change the demographics of the state by preventing people from the rest of India from buying properties or acquiring certification as a permanent resident of Jammu & Kashmir or availing local government jobs.

Secondly, C.O. 272 aimed to make the procedure for abrogating Article 370 less cumbersome. This procedure was set out in Article 370(3) and enabled the President to cease the operation of this article by public notification but only on the recommendation of the Constituent Assembly of Jammu & Kashmir. As the Constituent Assembly lay dissolved by formal resolution in 1957 and had not recommended abolition of Article 370, it was widely understood that it had attained permanence in the Indian Constitution. The Indian Supreme Court and Jammu & Kashmir High Court have consistently discouraged and effectively rejected requests for repeal of Article 370 on the ground that the said Article has attained permanence and cannot be revisited nor amended. However, this critical safeguard was brushed aside by the Indian Government simply by changing the ‘interpretation’ of the Constituent Assembly to mean the Legislative Assembly of Jammu & Kashmir.

However, even the recommendation of the Jammu & Kashmir Legislative Assembly was not obtained by India in abrogating Article 370 as the Assembly was dissolved in November 2018.

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22 Ashok Kumar And Others vs President Of India And Others (2015), Jammu & Kashmir High Court; Bhuipinder Singh Sodhi And Ors vs Union Of India And Ors (2015)
and the state has been under direct rule of the state’s governor who is appointed by the President of India. According to the Indian Government, this state of affairs permitted the Indian Parliament to act as a substitute for the Legislative Assembly of Jammu & Kashmir.

With this framework in place, the upper chamber of the Indian Parliament passed a resolution ‘recommending’ that the President use his powers under Article 370(3) to abrogate the entire substance of Article 370. This resolution passed the lower chamber of Parliament on 6 August 2019 which was followed by Presidential Order C.O. 273 which applied the entire Indian Constitution ‘without any modifications or exceptions’ to Jammu & Kashmir.

At the same time, the Indian Parliament passed the Jammu & Kashmir Reorganization Bill which abolished the erstwhile State of Jammu & Kashmir and divided the region into two ‘Union territories’ of Ladakh and Jammu & Kashmir. Once again, constitutional safeguards were sidestepped. Article 3 of the Indian Constitution requires bills changing the name or area of any State to be referred to the Legislature of that State for its view thereon. In the view of the Indian Government however, the Indian Parliament could act as a substitute for the dissolved Legislative Assembly of Jammu & Kashmir.

The legal maneuvers undertaken by India between 5-6 August 2019 are in open contempt of its own Constitution and jurisprudence of the Indian superior courts. The Indian Congress Party, the main opposition party, has labelled these moves *ultra vires* and against Constitutional procedure. They have also been met by widespread derision from the Indian Bar, including its most senior and reputable members and petitions have been filed before the Supreme Court of India challenging their constitutional validity.

By repealing the special protections provided by Article 35-A and 370, India has clearly signalled its intention to abandon its decades long commitment to the Kashmiri people and defy the law and procedure laid down by the Security Council in its resolutions on Kashmir.

The following sections examine the legal aspects of India’s occupation and unlawful annexation of Jammu & Kashmir and the implications stemming therefrom.

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3. JAMMU & KASHMIR AS A TERRITORY UNDER OCCUPATION AND UNLAWFUL ANNEXATION BY INDIA

3.1. India’s Occupation of Kashmir

In our view, the State of Jammu & Kashmir has historically been under a state of Indian occupation. With the events of 5 August 2019 the situation has become an occupation with an unlawful annexation.

Under International Law an occupation is a question of fact. Consequently, the existence of an occupation does not depend on a declaration by the Occupying Power that it is in occupation or any recognition of the occupation on its part. It merely requires that the situation meet the defined factual criteria in order for it to be so classified. Moreover, the intention of the Occupying Power also does not matter – whether they aim to exploit the country or liberate the population does not have any effect on the classification of the situation.25

The definition of an occupation is given in Article 42 of the Hague Regulations 1907 which states:

 Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised. 26

Whilst neither Pakistan nor India are party to the Fourth Hague Convention of 1907 to which the Hague Regulations are annexed, it is widely accepted as being customary international law applicable to all States.27

In brief, there are three conditions for an occupation that of a) territory which the Occupying Power is not entitled to under International Law, b) the Occupying Power is a hostile army, and c) that the Occupying Power has effective control and exercises its authority over the territory. For the reasons discussed below it is evident that all three conditions for an occupation are met by the Indian State actions in Jammu & Kashmir.

3.1.1. Territory: Jammu & Kashmir is not Indian Territory under International Law

Territory consists of land as well as any adjoining sea and air territory the size of which does not matter for the purposes of the definition. Significant to the situation in Kashmir, a territory can be considered occupied even when the status of the territory is contested. This was so held

26 International Conferences (The Hague), Hague 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
27 In the Judgment of the International Military Tribunal of Nuremberg, 30 September and 1 October 1946, p. 65 it was held that the ‘rules laid down in the Convention were recognised by all civilized nations and were regarded as being declaratory of the laws and customs of war’. Also see Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), 9 July 2004.
by the Eritrea-Ethiopia Claims Commission in 2004.\textsuperscript{28} The ICJ in the \textit{Wall} Advisory Opinion has stated the same.\textsuperscript{29} Therefore, ambiguities about competing sovereign claims to a territory do not preclude its classification as occupied territory.

According to Pakistan, no legal title under International law has passed to India regarding the territory of Jammu & Kashmir, therefore, any attempt to subsume it within its own territory amounts to an act of occupation and illegal annexation. Pakistan’s position of Jammu & Kashmir being disputed territory and India’s consequent lack of legal title to it has been recognized by numerous UN Security Council resolutions on the matter.\textsuperscript{30} Due to this lack of legal title, India lacks the competence to take any unilateral action altering the status of Jammu & Kashmir from a disputed territory to a part of the Union of India. This is evidenced by the Security Council’s unequivocal rejection of previous Indian attempts to unilaterally alter the status of Jammu & Kashmir in Resolutions 91 of 1951 and 122 of 1957.

The illegality of unilateral action, altering the status of Jammu & Kashmir by either State, was reaffirmed in the Simla Agreement of 1972 wherein it was pledged that:

\begin{quote}
"Pending the final settlement of any of the problems between the two countries, neither side shall unilaterally alter the situation and both shall prevent the organization, assistance or encouragement of any acts detrimental to the maintenance of peaceful and harmonious relations."\textsuperscript{31}
\end{quote}

The Simla Agreement further notes that:

\begin{quote}
"…the representatives of the two sides will meet to discuss further the modalities and arrangements for the establishment of durable peace and normalization of relations, including the questions of prisoners of war and civilian internees, a final settlement of Jammu & Kashmir and the resumption of diplomatic relations.\textsuperscript{32}\"
\end{quote}

Further, the Instrument of Accession, based on which India argues that it has valid legal title to Jammu & Kashmir, also denies India any authority to unilaterally take action on Kashmir. Clause 5 of which states:

\begin{quote}
"5. The terms of this my Instrument of Accession shall not be varied by any amendment of the Act or of the Indian Independence Act, 1947, unless such amendment is accepted by me by an Instrument supplementary to this Instrument.\textsuperscript{33}\"
\end{quote}

The Instrument of Accession further notes:

\begin{quote}
"7. 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.\"
\end{quote}

\begin{itemize}
\item \textsuperscript{28} Partial Award, Central Front, Ethiopia’s Claim no.2, April 28, 2004 para 29
\item \textsuperscript{29} \textit{Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory}, International Court of Justice (ICJ), 9 July 2004
\item \textsuperscript{30} UN SC Res. 47 of 1948; UN SC Res. 51 of 1948; UN SC Res. 80 of 1950; UN SC Res. 91 of 1951; UN SC Res. 96 of 1951; UN SC Res. 98 of 1952; UN SC Res.122 of 1957; UN SC Res.123 of 1957; UN SC Res.126 of 1957; and UN SC Res.307 of 1971.
\item \textsuperscript{31} Clause 1(ii) of the Simla Agreement of 1972.
\item \textsuperscript{32} Ibid. Clause 6.
\item \textsuperscript{33} Instrument of Accession of Jammu & Kashmir, 1947 by Maharaja Hari Singh
\end{itemize}
8. Nothing in this Instrument affects the continuance of my sovereignty in and over this State, or save as provided by or under this Instrument the exercise of any powers, authority and rights now enjoyed by me as Ruler of this State or the validity of any law at present in force in this State.”

As discussed above, Article 370 represented the unique terms on which Jammu & Kashmir is purported to have acceded to India as set out in the Instrument of Accession. By unilaterally abrogating Article 370 without any recourse to the Kashmiri people and their elected representatives, India has materially breached the Instrument of Accession, further undermining its claim to legal title to Jammu & Kashmir.

3.1.2. Hostile Army: The Indian Forces present in Jammu & Kashmir are a ‘Hostile Army’ under International law

The second condition for an occupation is the presence of a ‘hostile army’ over the territory in question. While traditionally this requirement has implied the presence of foreign troops, international precedent has evolved a more inclusive definition. In the context of Kashmir both the traditional and modern requirements are satisfied.

While Pakistan does not recognize the validity of the Instrument of Accession, India argues that its forces were invited into Kashmir by Maharaja Hari Singh in 1947. However, as discussed above, India’s actions of 5 August 2019 are a material breach of Maharaja Hari Singh’s Instrument of Accession and will render it a hostile army. This is due to the Indian Army’s role in affecting:

a. the violation of the Instrument of Accession;

b. the continued denial of the Kashmiri people’s right to self-determination (the only means through which legal title can be transferred in this context);

c. the ensuing occupation and unlawful annexation of Jammu & Kashmir.

Additionally, International Law provides precedent of a more inclusive definition of occupation as there are ‘are ample reasons to apply the law of occupation to situations not only on the basis of foreignness between administration and subjects’.35 This is on the basis that at the heart of all occupations exists a potential – if not inherent – conflict of interest between Occupant and Occupied.

The Eritrea-Ethiopia Claims Commission award mentioned above supports this approach as it held that the law of occupation could be applied to contested territory. The Commission stated, referring to the Fourth Geneva Convention and the Hague Regulations 1907 that “neither text suggests that only territory the title to which is clear and uncontested can be occupied territory”.36 This does not support the argument that the army be necessarily ‘foreign’. The Commission stated that the alternative to this conclusion ‘could deny vulnerable persons in disputed areas the important protections provided by international humanitarian law’.37

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34 Ibid.
36 Partial Award, Central Front, Ethiopia’s Claim no.2, April 28, 2004 para 29
37 Ibid.
India’s attempts to occupy and unlawfully annex the territory of Jammu & Kashmir closely align with Israeli state practice in the West Bank and the Gaza Strip. Israel gained effective control over the West Bank and the Gaza Strip in the 1967 war. Neither territory had a government which could claim to represent its interests as its sovereign at the time. Israel argued that Article 2(2) of the Fourth Geneva Convention required occupation of another High Contracting Party. However, the Security Council deemed Israel an occupant of those territories. The law of occupation therefore applied in this case to territories not recognised as belonging to a ‘foreign state’ prior to the occupation. It is evident that this reasoning is analogous to the prevailing situation in Jammu & Kashmir.

The Court further elaborated in *Wall* that ‘the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians in time of war, regardless of the status of the occupied territories, as is shown by Article 47 of the Convention’. The Court held that the Convention was applicable as the Palestinian territories, whose prior status was contested, became occupied by Israel during the 1967 armed conflict. Therefore, a functional approach to the terms of Article 42 has been upheld by the ICJ which has chosen to not deprive a population of IHL’s protection due to the absence of a strictly ‘foreign’ state.

This has been reiterated and endorsed by the ICRC in the 2016 commentary to the Geneva Convention which under Article 2 states that: “Any other interpretation would lead to a result that is unreasonable as the applicability of the law of occupation would depend on the invading State’s subjective considerations. It would suffice for that State to invoke the controversial international status of the territory in question in order to deny that the areas in question are occupied territory and thus evade its responsibilities under the law of occupation.”

The aforementioned reasoning aims at enhancing the applicability of IHL protections of vulnerable populations and is clearly applicable to the people of Jammu & Kashmir, where a popular indigenous insurgency fighting against a highly concentrated Indian army presence indicates that formal bonds would not be an appropriate way to classify the conflict, much like in the former Federal Republic of Yugoslavia. In *Tadić*, Bosnian Muslims who were ‘in the hands of’ Bosnian Serbs were deemed to be protected persons despite sharing bonds of nationality with their captors as the Tribunal ruled that they did not share the same allegiance and required effective protection.

### 3.1.3. Authority: India Exercises Complete Authority and Effective Control over J&K

The International Court of Justice in its *Wall* Advisory Opinion stated that "territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised." Primacy is given to the factual situation under which the Occupying Power has
the capacity to be in effective control of the territory. Even prior to the events of 5 August 2019, the unlawful inclusion of Jammu & Kashmir into the Indian Constitution, and the further extension of 260 Articles to its territory, as well as the enforcement of Indian laws in the territory through Indian troops and law enforcement personnel fulfils the authority requirements under International law. The events of 5 August 2019 further underscore India’s complete and effective control and authority over Jammu & Kashmir.

The International Criminal Tribunal of Yugoslavia provided clarity on the factual circumstances to determine the existence of ‘authority’ in *Naletilić & Martinovic*.45

a. The occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly;

b. The enemy’s forces have surrendered, been defeated or withdrawn. In this respect, battle areas may not be considered as occupied territory. However, sporadic local resistance, even successful, does not affect the reality of occupation;

c. The occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt;

d. A temporary administration has been established over the territory;

e. The occupying power has issued and enforced directions to the civilian population;

The actions of the Indian State and its forces prior to and following the Constitutional changes of 5 August 2019 meet all of the criteria noted above, with the second criteria not directly relevant to the situation in Jammu & Kashmir. India has unilaterally and in contravention of the will of the people of Kashmir abrogated the Constitution of Jammu & Kashmir, removed all autonomy they enjoyed, removed the special status of ‘permanent residents’ for Kashmiris, and bifurcated the territory of Jammu & Kashmir into two separate Union Territories of India. They have imposed an unlawful blanket communications blackout over the territory of Jammu & Kashmir and are brutally suppressing the local population who are protesting their actions. The Indian State is in complete administrative control of the area and as an Occupying Power is routinely issuing directions to the civilian population.

3.2. **Legal Rules Applicable to an Annexation:**

One of the most well-established principles of international law is that an Occupier cannot acquire the right to conquer, annex or gain any legal or sovereign title over the Occupying Territory.46 The law of occupation merely recognises that the Occupying Power is the administrator of the territory and holds a temporary or provisional status which does not constitute a transfer or displacement of territory. This is indicated by the words of Article 55 of the Hague Regulations (1907) which refer to the Occupying Power as an administrator or

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usufructuary of the territory. As a result, the Occupying Power cannot annex the Occupied Territory or change its political status, to do so would be unlawful under international law.

The difference between an occupation and an annexation is explained and the illegality of annexation is reinforced in Pictet’s Commentary to Article 47 of Geneva Convention IV in which he states that: “The law of occupation merely recognises that the Occupying Power is the administrator of the territory and thus establishes a series of positive obligations towards the Occupied Population. As a result, the Occupying Power cannot annex the Occupied Territory or change its political status, instead it must respect and maintain the political and other institutions which exist in that territory for the entirety of the occupation.”

In the occupation of Iraq by coalition forces in 2003, the Security Council reaffirmed the requirement to leave the Occupied Territory’s status unaltered in Resolution 1483 (2003) by noting the commitment of the Occupying Powers to return the governance of Iraq back to its people as soon as possible.

India, in changing Kashmir’s political status and eliminating its sovereignty and autonomy entirely and indefinitely, through the Constitution (Application to Jammu & Kashmir) Order (2019), has unlawfully annexed the state to its territory. The situation has become, after the passing of this Order, an occupation with an unlawful annexation.

### 3.2.1. India’s unlawful attempts at Annexation are Null and Void under International Law

India’s actions are similar to Israel’s in Jerusalem and the Golan Heights. Israel seized Palestinian territory, namely the West Bank, including East Jerusalem and Gaza, in the 1967 war. It later annexed East Jerusalem and parts of the West Bank in June 1967 by a Government decree. The General Assembly denounced the annexation and called upon Israel to “rescind all measures already taken and to desist forthwith from taking any action which would alter the status of Jerusalem”. However, Israel then extended its laws to Jerusalem with the Jerusalem Basic Law of 1980. The Security Council in Resolution 476 (1980) reaffirmed that “all legislative and administrative measures and actions taken by Israel, the occupying Power, which purport to alter the character and status of the Holy City of Jerusalem have no legal validity and constitute a flagrant violation of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East.” It also stated that all states, which had established diplomatic missions at Jerusalem, should withdraw them from the Holy City.

Similarly, the Golan Heights were seized and occupied by Israeli forces at the end of 1967 War. The Knesset (Israeli Parliament) passed the Golan Heights Law 5742-1981 which stated that from that point on, the law, jurisdiction and administration of Israel would also apply to the Golan Heights. This move was roundly condemned by the Security Council which in

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47 Jean S. Pictet, The Geneva Conventions of 12 August 1949 Commentary - IV Geneva Convention relative to the Protection of Civilian Persons in Time of War; Article 47
48 Security Council resolution 1483 (2003) [on the situation between Iraq and Kuwait], 22 May 2003
49 General Assembly Resolutions 2253 and 2254 (ES-V) Measures taken by Israel to change the status of the City of Jerusalem, 4 July 1964 and 14 July 1964. Also see General Assembly Resolution 33/113C which was also passed in 1978 regarding Israel's actions in Jerusalem saying it "Condemns the following Israeli policies and practices: (a) Annexation of parts of the occupied territories, (b) Establishment of new Israeli settlements and expansion of existing settlements on private and public Arab lands, and transfer of population thereto.'
Resolution 497 (1981) reaffirmed that the acquisition of territory by force was inadmissible under the UN Charter and decided that “the Israeli decision to impose its laws, jurisdiction and administration in the occupied Syrian Golan Heights is null and void and without international legal effect”.51

Moreover, in the Wall Advisory Opinion, the ICJ held that the construction of the wall and its associated régime created a "fait accompli" that could well become permanent, in which case it would be tantamount to a de facto annexation.52

In unlawfully annexing Jammu & Kashmir and incorporating it as Union Territory, India has breached international law. As per the Security Council Resolutions governing Israel’s illegal de jure annexations of the Golan Heights and Jerusalem, this law is to be seen as null and void and lacking legal effect.

3.2.2. Demographic Changes in Jammu & Kashmir are Strictly Prohibited under the Geneva Conventions

Under Article 49 of Geneva Convention IV, it is prohibited for the Occupier to transfer civilians from the Occupying Power into the Occupied Territory. This is to prevent the Occupier from demographically transforming the territory in order to advance a claim of sovereignty and undermining the Occupied People’s right to self-determination.53 Article 35A of the Indian Constitution complied with this requirement as it did not allow non-Kashmiris to settle permanently in Kashmir or buy land there. However, with the removal of this law and the splitting of the territory into two, India appears to be attempting to change the demographics of the state. This is especially concerning given Jammu & Kashmir was the only Muslim-majority state in the entire country. Currently, Jammu has a Hindu-majority and Ladakh has a Buddhist-majority, leaving only Kashmir with a Muslim majority. Any future referendums in the state will be severely impacted by its bifurcation and any demographic changes caused as a result of non-Kashmiri settlers. This would be contrary to Article 49 of the Fourth Geneva Convention.

By attempting to alter Jammu & Kashmir’s demographics, India is also aiming to end, once and for all, any chance of a plebiscite in accordance with the UN Security Council resolutions on the disputed territory. The unlawfulness of a referendum conducted following demographic changes is clear under International Law. In 1976, the General Assembly was presented with this question with regards to the issue of the Comorian island of Mayotte. The Comoros, as a whole, had in a referendum held on 22 December 1974 demonstrated a will to accede to independence. However, France then occupied the island of Mayotte and held its own referendums on the island on 8 February and 11 April 1976 in which the French-speaking population decided to accede to France. The General Assembly in Resolution 31/4 (1976) held that the referendums were null and void and appealed to all states to render effective assistance to the Comorian State to defend and safeguard its independence, and intervene to persuade France to abandon its plan to detach Mayotte from the Comoros Republic. By analogy, any such attempt to hold a referendum by splitting the state and allowing a Hindu/non-Kashmiri

52 Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), 9 July 2004, para. 121
majority to vote would fall foul of International Law and defeat the numerous UN Security Council resolutions on the disputed territory.
4. IMPLICATIONS UNDER INTERNATIONAL LAW

4.1. Legal Rules Applicable in an Occupation and their Implications

An Occupation is governed by International Humanitarian Law (IHL) as the lex specialis as well as International Human Rights Law (IHRL), both of which are binding on India due to its ratification of key IHL and IHRL treaties as well as the application of customary international law.\(^{54}\)

An occupation is an international armed conflict under Common Article 2 to the Geneva Conventions of 1949. In the context of Jammu & Kashmir therefore, the laws of war which apply to an international armed conflict are applicable to India as an Occupying Power, in particular the Fourth Geneva Convention. This includes, inter alia, the duty to protect the population\(^{55}\) of Indian-occupied Kashmir and to uphold public order and safety.\(^{56}\) In addition, India bears the obligation to allow and facilitate the rapid and unimpeded passage of humanitarian relief for civilians in need,\(^{57}\) it must treat the population humanely, without discrimination\(^{58}\) and respect all their fundamental rights.\(^{59}\) The protections afforded by IHL in an Occupation would continue to apply even where the territory is unlawfully annexed.\(^{60}\)

India asserts that the situation in Kashmir is one of an ‘internal disturbance’, presumably since such a classification would not attract IHL and all the protections it affords to the Occupied Territory and its population. However, as set out in detail above, under international law, an occupation is a question of fact which does not require the Occupying Power to recognize its existence.

4.2. Violations of the Laws of War by Indian Forces

Human rights groups have documented numerous instances in which the laws of war have been violated by Indian security forces. Human Rights Watch has reported that security forces in Jammu & Kashmir have deliberately targeted civilians who have been murdered in reprisal attacks, tortured and summarily executed while in custody, targeted during search operations, and raped.\(^{61}\) While a full analysis of all IHL violations by India are outside the scope of this

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\(^{55}\) Art. 55(1) of the Fourth Geneva Convention (GC IV) regarding food and medical supplies; see also Art. 56 GC IV regarding duty to ensure and maintain medical services; see also Art. 50 GC IV for duty to facilitate proper working of education institutions.

\(^{56}\) Regulations Art. 43, 46 of the Hague Convention of 18 October 1907 Respecting the Laws and Customs of War on Land and Annexed Regulations

\(^{57}\) Art. 59 GC IV; ICRC Customary Law Study, Rule 55. As consent of the occupying power remains necessary, it cannot be withheld on grounds other than those set out in Art.59 GC IV.

\(^{58}\) Art. 27 GC IV

\(^{59}\) Art. 27 GC IV

\(^{60}\) Article 47 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949

document, it is sufficient here to look at some key breaches of the laws of war for which India may be liable.

4.2.1. Use of Indiscriminate Weapons

The Indian army’s widespread use of pellet guns against protestors violates the laws of war, primarily the principle of distinction and humanity.

An estimated 3,000 people in the region have sustained eye injuries – known as the ‘dead eye epidemic’ as pellets in the retina cause partial or full blinding for life.\(^{62}\) Although there has been public outrage and criticism at the use of pellet guns, only one special investigation into death caused by pellet-gun injuries has been set up.\(^{63}\) A Special Investigation Team was established in 2017 to probe into the killing of a 21 year old boy who had been shot by a pellet cartridge which burst in his abdomen leaving over 300 metal pellets in his body.\(^ {64}\) There have been no such inquiries into the other deaths or serious injuries. The lack of inquiry itself violates India’s obligations under Article 146 of the Fourth Geneva Convention.

Even today, India continues to make use of such weapons in violation of IHL. Civilians, reportedly, have also been severely wounded in pellet gun attacks during the curfew that has been imposed. It was reported that Asrar Khan, a 16-year-old, was hit by pellet gun shrapnel by a returning group of Indian paramilitary forces even though there was no protest in the area prior to the incident. Currently, Khan is in critical condition and the medical officials have told Al Jazeera that he would likely lose his eyes if he survives.\(^ {65}\)

4.2.2. Use of Torture

Human rights reports have identified thousands of cases of torture, including techniques such as simulated drowning, striping flesh with razors, piping petrol into anuses, and government reports from 2012 even revealed that some security agents had amputated the limbs off suspects and fed prisoners their own flesh.\(^{66}\) Those subjected to torture, are held at detention centres without access to medical attention or legal counsel.\(^ {67}\) Those tortured can also be killed such as Jalil Andrabi, a human rights lawyer and pro-independence activists, who was found near River Jhelum having been shot in the head with his eyes gouged out in 1996.\(^ {68}\)

India is violating its obligations under the Geneva Conventions as well as the Convention against Torture in failing to prosecute and punish instances of torture conducted by its forces.

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\(^{64}\) Ibid


\(^{66}\) India’s crackdown in Kashmir: is this the world’s first mass blinding? Mirza Waheed 8 Nov 2016 https://www.theguardian.com/world/2016/nov/08/india-crackdown-in-kashmir-is-this-worlds-first-mass-blinding

\(^{67}\) Ibid

\(^{68}\) Ibid
4.2.3. Use of Rape as a Weapon of War

Indian large-scale military operations in the region have involved ‘cordon and search’ operations wherein security forces would isolate an area, remove the men who were paraded in front of an informer, and then search the houses.69 During the course of these crackdowns, women are raped as a form of collective punishment, to punish and humiliate the entire community.70 A human rights group documented 143 cases of alleged sexual violence between 1989 and 2017.71 The Special Rapporteur on violence against women also noted that information received had highlighted the use of mass rape, enforced disappearances, killings, torture and ill treatment without measures to ensure accountability and redress for victims.72

The classification of these rapes as war crimes and not mere domestic crimes is supported by the International Criminal Tribunal for Yugoslavia’s decision in Brđanin where it held that rapes committed during weapon searches by combatants and members of forces were ‘in the context’ of an armed conflict and so were war crimes.73

4.2.4. Impunity for Perpetrators

Under the Armed Forces (Jammu & Kashmir) Special Powers Act (1990),74 soldiers and paramilitaries enjoy complete immunity from prosecution unless the Ministry of Defence sanctions their trial.75

The Officer of the UN High Commissioner for Human Rights reports that there has not been a single prosecution of armed forces personnel granted by the central government.76 This is despite the fact that the Jammu & Kashmir government had sought its sanction in 50 cases, 47 of which were refused and 3 remain pending.77 Moreover, no inquiries into 87 incidents of killings, rape, and arson have resulted in criminal prosecutions.

An example of an incident where a grave breach of the Geneva Conventions and human rights law was met with impunity is that of a military officer accused of using a Kashmiri civilian as a human shield by tying him to the front of his jeep. The officer responsible was subsequently given a commendation award from the Indian Army Chief.78

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72 Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, Addendum: Mission to India (A/HRC/26/38/Add.1), 1 April 2014, para 23
73 ICTY, Prosecutor v. Brđanin, Case No. IT-99-36, Judgment (Trial Chamber), 1 September 2004
77 Ibid
78 BBC News, Indian award for Kashmir 'human shield' officer, 23 May 2017
4.3. The Application of International Human Rights Law and its violations by Indian Forces

The maintenance of public order in Occupied Territory is primarily a law enforcement function and therefore must comply with human rights norms. International human rights law also applies during an armed conflict and an occupation. In the 1971 Advisory Opinion on Namibia the Court noted the applicability of ‘certain general conventions such as those of a humanitarian character’ to occupied territories. Moreover, in the Wall Opinion, the ICJ held that Israel was bound by the International Covenant on Civil and Political Rights in respect of its occupied territories. As a result, India’s duties under the human rights treaties such as the ICCPR and ICESR continue to apply to its occupied population.

The key point of confluence between the two regimes of humanitarian law and human rights law occurs here as human rights-based law enforcement norms must be applied to meet the Occupying Power’s humanitarian law mandate to maintain public order.

4.3.1. India’s Violations of Human Rights Norms in Maintaining Public Order

The presence of Indian forces in Jammu & Kashmir regularly results in eruptions of violence against locals opposed to Indian rule. For example, in summer 2016, following the death of Burhan Wani, an influential local fighter, over 100 civilians lost their lives in clashes and 17,000 adults and children were injured. There were allegations that troops used ‘excessive force’ against protestors as they fired bullets, CS gas, and metal pellets into the crowd.

Section 4 of the AFSPA 1990 allows personnel operating under the Act to use lethal force not only in self-defence but also against those contravening laws or orders ‘prohibiting the assembly of five or more persons’. This has been criticised for violating the right to life and fails to safeguard against the use of excessive force.

The AFSPA allows the security forces to preventively detain individuals for up to two years without trial and without charges being laid against them. Following an outcry in 2011, this period was reduced to one year, however, in practical terms this has not led to much change as

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79 Kenneth Watkin, Use of force during occupation: law enforcement and conduct of hostilities, 94 Int'l Rev. Red Cross 267 (2012)
83 BBC News, Is India losing Kashmir?, Soutik Biswas, 26 April 2017
84 India’s crackdown in Kashmir: is this the world’s first mass blinding? Mirza Waheed 8 Nov 2016
those released after one year are immediately arrested and detained again upon leaving the police station. 87 Human rights groups also reported that minors were being arrested under the Act in 2016 despite the fact that the law had been amended in 2012 to prohibit the detention of individuals under the age of 18 years old. 88 According to Human Rights Watch, an estimated 20,000 are detained under this legislation. 89 Christof Heyns, the Special Rapporteur on Extrajudicial Executions, told India that these laws were draconian and had no place in a democracy. 90

The Act, moreover, exempts authorities from the need to inform the detainee of the grounds upon which they are being detained. 91 It also allows authorities to detain individuals from Kashmir in places outside the state impeding access to those so detained by their families and legal representatives and the struggle for habeas corpus. 92 This violates the laws of war which prohibit the displacement or transfer of civilians in an armed conflict and it also violates India’s human rights obligations under Article 9 of the ICCPR.

Presently, detentions and restrictions on peaceful assembly have been reported in the region. A total of 560 people were reported to have been detained in the cities of Srinagar, Baramulla and Gurez. 93 whilst New York Times reported that 500 people were detained in night-time raids across Kashmir 94 these are said to include business leaders, activists, professors 95 and politicians which include Omar Abdullah and Mehbooba Mufti – two former state Chief Ministers. 96

4.3.2. Other Obligations related to Maintaining Public Order

The Occupying Power must also ensure the availability of food and medical supplies for the population and bring foodstuffs and medical resources if the resources in the Occupied Territory are inadequate. 97 In the 2016 unrest in Kashmir it was reported that medical services were attacked or obstructed which severely impacted the injured and general population as

90 Ibid
92 Ibid
their access to medical care was impeded. Human rights groups claimed that injured patients would flee from hospitals out of fear of being arrested. Curfews and communication service outages also affected people’s access to medical care.

The recent curfew is no different. There has, reportedly, been a shortage of food and currency because of the continuing security lockdown. Schools, shops, colleges and officers are all shut and there is no public transport on the roads. Whilst the blanket ban on telecommunications is still intact the curfew has been eased a little for Eid al-Adha, and schools have been reopened in Hindu-majority areas. However, this serves as no guarantee for those exercising their right to peaceful protest and for students hoping to return to their normal life in Muslim-majority areas.

After the recent developments in Kashmir, the Spokesperson for the Office of the High Commissioner for Human Rights noted that ‘[India] takes what was already a bit of a pattern to a new level’. The Office further expressed its concern over the human rights situation in the region where there are, presently, blanket telecommunication restrictions. Under the ICCPR, India has an obligation to provide the people of Jammu & Kashmir, the right to freedom of expression as provided under Article 19 of the ICCPR. To this end, most English and Urdu language newspapers based in the main city have not been able to publish their daily editions.

4.4. The Legal Implications of an Annexation

As discussed above, an annexation is unlawful under international law. In accordance with international precedent there is a duty upon States not to recognize such unlawful annexations. The European Union’s Directorate-General for External Policies recommends that States adopt the following policies in cases of occupations and illegal annexations:

99 Ibid
105 Ibid
106 Although the provision leaves room to curtail this right in cases of public order (Article 19(3)) the same must be proportionate. A blanket ban on telecommunications would not be so.
108 The European Union Directorate-General for External Policies – Policies Department, 2015. ‘Occupation/annexation of a territory: Respect for international humanitarian law and human rights and consistent EU policy’. Available at:
an unequivocal statement that the annexation will not be recognized
prohibition of measures like investment that might support the annexation, including support for economic activity in the occupied territory under the aegis of the occupying power
sanctions against the occupying state, in case the occupation is in violation of international law
sanctions amounting to asset freeze and visa ban against those individuals who are responsible for the annexation, or who benefit from it.”109

109 Id. p.10.
5. CONCLUSION

The Kashmir dispute remains one of the oldest items on the UN Security Council Agenda. The recent actions by India have once again escalated tensions in the disputed region and have grave implications for international peace and security. At a time when the rule-based international system is under threat from populist regimes and non-state actors, the need to reaffirm cardinal principles of international law becomes imperative. The foregoing analysis has tried to demonstrate the evolving legal dimensions of the complicated Kashmir dispute. An examination of the applicable law underscores that the actions of the State of India with respect to Jammu & Kashmir are incompatible with international law, bilateral treaties and even its own domestic law. In our assessment, Kashmir is a test case for the efficacy of the international rules-based order requiring all States to uphold the sanctity of international law as a legal and moral obligation.