

FALLING THROUGH THE CRACKS: KASHMIR'S RESISTANCE AGAINST SETTLER COLONIALISM AND THE LIMITS OF INTERNATIONAL LAW

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Abstract: *This Note centers Kashmir as a case study to illuminate the ways in which the law can and cannot offer respite for those in settler colonial regimes. In particular, it highlights how the international community has failed to accept Kashmir as under occupation and thus refused to extend the protections of jus in bello to its civilians. While Kashmiris have been pushed out of the protections from international law in the past, this Note presents settler colonialism as an analytical lens that can potentially offer respite. It acknowledges that international law does not explicitly prohibit settler colonial conduct but highlights how advocates can couple their “legal work” with the rights that are established in international law to build their own opportunities for relief outside of the law. This piece provides two contributions to existing literature: it advances the very limited discussion of the international law of settler colonialism and strengthens the current understanding of the modes of oppression that exist in Kashmir.*

INTRODUCTION

On December 14, 1960, the U.N. General Assembly issued a solemn proclamation in Resolution 1514: that the “speedy and unconditional end [to] colonialism in all its forms and manifestations” was a “necessity.”¹ For the “subjection of peoples to alien subjugation, domination and exploitation

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¹ G.A. Res. 1514 (XV) (Dec. 14, 1960).

constitutes a denial of fundamental human rights, [was and is] contrary to the Charter of the United Nations and [was and is] an impediment to the promotion of world peace and co-operation.”² It was this proclamation that the global community fondly remembers as the start of the decolonization era. Despite the moment’s grandeur, the modern global political climate suggests that this declaration from 1960 was far too ambitious and perhaps altogether deceptive. Traditional colonial empires superficially collapsed. But their undercurrents—the need to dominate the “other”—lingered. The result was that colonialism of the past did not crumble but instead persisted, evolved, and re-clothed itself in nations both new and old.

Settler colonialism is the General Assembly Resolution 1514’s modern enemy. Settler colonialism is premised on the state’s recruitment of a class of settlers whose goal is to not only occupy the land of the Indigenous but also to eliminate the Indigenous who stand in their way.³ Settler colonialism and colonialism are distinct, yet intertwined, modes of oppression. While colonizers say, “you, work for me,” settler colonizers say, “you, go away.”⁴ Still, at the core of both projects are migration and a relationship of ascendancy.⁵

Since 1960, settler colonialism has wreaked havoc on a number of global communities: from Indigenous people across the Americas, New Zealand, and Australia,⁶ to the Palestinians.⁷ And unfortunately, the global expanse of

² *Id.*

³ See Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387, 388 (2006).

⁴ Lorenzo Veracini, *Introducing: Settler Colonial Studies*, 1 SETTLER COLONIAL STUD. 1, 1 (2011).

⁵ *Id.*

⁶ See generally A. GRENFELL PRICE, *WHITE SETTLERS AND NATIVE PEOPLES* (1950) (comparing the effects of white settler colonialism on Indigenous populations of North America, New Zealand, and Australia).

⁷ See generally, e.g., MAXIME RODINSON, *ISRAEL: A COLONIAL-SETTLER STATE?* (1973); Nadim N. Rouhana & Areej Sabbagh-Khoury, *Settler-Colonial Citizenship: Conceptualizing the Relationship Between Israel and Its Palestinian Citizens*, 5 SETTLER COLONIAL STUD. 205 (2015).

settler colonial forces has not slowed down. With the 2019 abrogation of Jammu and Kashmir's semi-autonomous status in India, some scholars now fear that India's relationship with the region has transitioned into a fully settler colonial one. Some, as I have previously argued,⁸ contend that settler colonialism narratives in Kashmir have persisted since well before the abrogation. Regardless of the starting point of India's settler colonial project in Kashmir, the fears for the future are the same: that India will recruit a class of non-Kashmiri settlers to change the predominantly Muslim demographic of the region.

This Note centers Kashmir as a case study to illuminate the ways in which the law can and cannot offer respite for those in settler colonial regimes. Given a settler state's interest in preserving itself, domestic law's use as a shield appears unlikely.⁹ This piece thus asks: What, if anything, can we make of international law?

After presenting context on the situation in Jammu and Kashmir in Part I, Part II discusses the ways international law has failed the region in the past. In particular, it highlights how the international community has failed to accept Kashmir as under occupation and has thus failed to extend the protections of *jus in bello* to its civilians. This Note then proceeds in Part III to present the settler colonialism framework as one that can potentially offer respite for Kashmiris outside of the traditional *jus in bello* framework. Although literature on the subject remains limited, the approach offered by Professor Natsu Taylor Saito is a helpful starting point for understanding what tools currently exist in international law. In the final Part, this Note examines the strengths and weaknesses of the existing international legal

⁸ See Note, *From Domicile to Dominion: India's Settler Colonial Agenda in Kashmir*, 134 HARV. L. REV. 2530 (2021).

⁹ See NATSU TAYLOR SAITO, *SETTLER COLONIALISM, RACE, AND THE LAW* 167 (Ediberto Roman ed., 2020) ("States, as political constructs, have little if any incentive to recognize the rights of minority groups or peoples who are colonized, internally or externally.").

framework on settler colonialism. While it acknowledges that international law does not explicitly prohibit settler colonial conduct, it recognizes that advocates can couple their “legal work” with the rights established in international law to build their own opportunities for relief outside of the law.

I. THE LEGACY OF PARTITION

In August 1947, the Indian subcontinent comprised not only the familiar nations of India and Pakistan but also more than 500 “princely states” foreign to modern maps.¹⁰ The princely system relied on nested sovereignty, where princes exercised near-autonomy while still heeding the title of the British monarchy.¹¹ Each chiefdom confronted a challenging question with the onset of 1947: How would, and should, their future manifest in a free Indian subcontinent?

For the majority of the princely states, the answer to this question was bifurcated: join Pakistan or India.¹² Although the Viceroy of India Lord Mountbatten successfully persuaded nearly all of the princely states to align based on geography or religious demography, three states remained unfettered. Of these three, the snow-capped, Himalayan-crested state of Kashmir stood tall.

At the time, the state of Jammu and Kashmir neared the physical size of the United Kingdom and had a population of just over four million people.¹³ The region was culturally and topographically heterogenous, including what is now the predominantly Hindu low-hilled region of Jammu, the majority Muslim Valley of Kashmir, and the Buddhist dominated high-peaked Ladakh.¹⁴ What could have been

¹⁰ RAMACHANDRA GUHA, *INDIA AFTER GANDHI: THE HISTORY OF THE WORLD'S LARGEST DEMOCRACY* 36–37 (2008).

¹¹ *Id.*

¹² See NEERA CHANDHOKE, *CONTESTED SECESSIONS: RIGHTS, SELF-DETERMINATION, DEMOCRACY, AND KASHMIR* 19 (2012).

¹³ See GUHA, *supra* note 10, at 59.

¹⁴ See *id.* at 37.

three distinct states in and of themselves were unified under the regime of Dogra Rajput, a clan who stretched the state's borders from Afghanistan to Tibet.¹⁵ Together, the heterogenous region was a notable powerhouse in the subcontinent. Prized for its naturally rich land and strategic geographic location,¹⁶ Kashmir captured the interest of both the infantile India and Pakistan.

However, Kashmir did not fit neatly into the framework for alignment.¹⁷ The state was not only predominantly Muslim yet ruled by a Hindu king, Maharaja Hari Singh, but also uniquely abutted both Indian and Pakistani frontiers.¹⁸ The King's own preference for an independent Kashmir only further muddled the region's future.¹⁹ Thus, when confronted with the question of accession, the Maharaja opted instead for a "standstill agreement," leaving Kashmir with free movement and transport across both India and Pakistan without ceding any sovereignty.²⁰

What comes next remains as disputed as Kashmir's present-day story. What is clear however is that the so-called standstill did not last very long. The agreed upon facts are the following: in October 1947, a mass of armed men invaded the region from the north, made their way to the capital, and launched an invasion of an ill-defended Kashmir.²¹ Unsettled still, and hotly debated, is why and how these raiders came to Kashmir.²² Some accounts characterize the invasion as Pakistani-orchestrated to secure Kashmir;

¹⁵ *Id.*

¹⁶ See CHANDHOKE, *supra* note 12.

¹⁷ See Matthew J. Webb, *Escaping History or Merely Rewriting It? The Significance of Kashmir's Accession to Its Political Future*, 20 CONTEMP. S. ASIA 471, 477 (2012).

¹⁸ GUHA, *supra* note 10, at 60.

¹⁹ *Id.* at 64.

²⁰ See Webb, *supra* note 17.

²¹ The Maharaja's Letter to the Governor-General of India, Lord Mountbatten (Oct. 26, 1947), *reprinted in* A.G. NOORANI, ARTICLE 370: A CONSTITUTIONAL HISTORY OF JAMMU AND KASHMIR 41–42 (2011).

²² GUHA, *supra* note 10, at 64–65.

others present an independent group rushing to save subjugated Muslims suffering under an oppressive Hindu rule in Kashmir.²³ Regardless, the invasion forced Maharaja Singh's hand—fearing for his ill-equipped state army, he turned to India for defensive support. India conditioned its support on Kashmir signing the Instrument of Accession, and the Maharaja agreed.²⁴ Critical to that signing, however, was an agreement between Lord Mountbatten and Maharaja Singh that although India would provide Kashmir with military aid given the invasion, “as soon as law and order have been restored in Kashmir and her soil cleared of the invader, the question of the State’s accession should be settled by a reference to the people.”²⁵

Despite assurances for a plebiscite from the Viceroy and later, the United Nations,²⁶ such an inquiry never took place. Instead, select Kashmiri political leaders continued their negotiations with the Indian national government, eventually crafting Article 370 of the Indian Constitution in 1950.

Article 370 crystallized Kashmir’s uniquely semi-autonomous status. Notably, Article 370 curtailed the application of the Indian Constitution and the national government’s powers to the domains specified in the Instrument of Accession: defense, external affairs, and communication.²⁷ While it allowed for other constitutional provisions to discretionarily apply to Kashmir, it required

²³ *Id.*

²⁴ Note that the Maharaja’s signing of the Instrument of Accession is also contested, with scholars arguing that the accession was induced through false promises. *See, e.g.,* CHANDHOKE, *supra* note 12, at 101.

²⁵ Letters between Lord Mountbatten and Maharaja Singh suggest that although India would aid in Kashmir’s military aid given the invasion, “as soon as law and order have been restored in Kashmir and her soil cleared of the invader, the question of the State’s accession should be settled by a reference to the people.” Letter from Governor-General, India, Delhi, to Maharaja Sahib (Oct. 27, 1947), *reprinted in* NOORANI, *supra* note 21, at 43 [hereinafter Letter from Governor-General].

²⁶ *Infra* Part II.

²⁷ CONSTITUTION OF INDIA art. 370, cl. 1(a)–(b).

not just the President's notification but critically the approval from the "Constituent Assembly of the State."²⁸ Similarly, Article 370 could only be deemed inoperative with the state assembly's recommendation.²⁹ It was with the powers vested in Article 370 that Kashmir adopted Article 35A to the Indian Constitution,³⁰ which empowered the state legislature to both define the "permanent residents" of the state and attach specific privileges, like the ownership of land, to such residency.³¹

The region's autonomy grew beyond Article 370, manifesting in the terms of its own state Constitution as well.³² These terms included the creation of Kashmir's own Prime Minister-ship and a unique state flag.³³ Ultimately, Kashmir's legal regime empowered it to block the application of federal legislation in its own boundaries, limit the ownership of land to Kashmiri natives, and safeguard its Muslim majority demographic.³⁴

However, Kashmir's promised autonomy was whittled to a legal fiction. From the reduction of Kashmir's Prime Minister to a Chief Minister to the extension of a majority of the articles of the Indian Constitution to the state,³⁵ Article 370 was more a symbol of Kashmir's desired sovereignty

²⁸ *Id.* cl. 3.

²⁹ *Id.*

³⁰ Ministry of Law, Constitution (Application to Jammu and Kashmir) Order, 1954, C.O. 48 (Issued on May 14, 1954).

³¹ *Id.* pt. 4, cl. (j). Other states in India have similar restrictions on land ownership as described in Vakasha Sachdev, *Despite J&K Changes, You Still Can't Buy Land in These States*, THE QUINT (Oct. 29, 2020), <https://www.thequint.com/news/india/jammu-kashmir-land-laws-amended-other-states-where-outsiders-cant-purchase-property-himachal-sikkim-arunachal-tribal-areas> [https://perma.cc/N3ES-U6N9].

³² CONSTITUTION OF JAMMU AND KASHMIR Nov. 17, 1956, arts. 3–5.

³³ *Id.* arts. 36, 144.

³⁴ Haseeb A. Drabu, *Modi's Majoritarian March to Kashmir*, N.Y. TIMES (Aug. 8, 2019), <https://www.nytimes.com/2019/08/08/opinion/modis-majoritarian-march-to-kashmir.html> [https://perma.cc/U9W5-W3ZM].

³⁵ See Angana P. Chatterji, *Kashmir: A Place Without Rights*, JUST SEC. (Aug. 5, 2020), <https://www.justsecurity.org/71840/kashmir-a-place-without-rights> [https://perma.cc/G4EB-8695].

than the sword championing it. This whittled autonomy, apexed by the Indian-rigged state elections in 1989,³⁶ amplified a Kashmiri freedom struggle that had existed even before Partition.³⁷ However, it also launched an intense counter-insurgency strategy from the Indian state, one which was facilitated by the deployment of hundreds of thousands of troops that secured Kashmir's title as one of the most densely militarized zones in the world.³⁸

Almost two years ago, the Indian government delivered its final blow to Kashmir's autonomy. On August 5th, 2019, the Indian government—under the leadership of the Bharatiya Janata Party (BJP)—abrogated Articles 370 and 35A of the Indian Constitution.³⁹ This legal strike was not without an Indian-orchestrated brutal crackdown in Kashmir, including but not limited to: enforcing a curfew, blockading communications arbitrarily detaining civilians, limiting civilian access to basic necessities like medical care, disappearing civilians, and conducting torture and extrajudicial killings.⁴⁰ The move both eliminated the region's status as a state and overturned provisions that shielded Kashmir from land purchases made by non-Kashmiris. Post August 5th, Jammu and Kashmir was officially “for

³⁶ See generally Sten Widmalm, *The Rise and Fall of Democracy in Jammu and Kashmir*, 37 ASIAN SURV. 1005 (1997) (detailing notable and perceived-as-rigged elections in Kashmir).

³⁷ See generally MRIDU RAI, HINDU RULERS, MUSLIM SUBJECTS 224–87 (2019) (discussing Kashmiri political mobilization against the “Hindu State” under the ruling dynasty).

³⁸ See JAMMU KASHMIR COAL. OF CIV. SOC'Y, STRUCTURES OF VIOLENCE: THE INDIAN STATE IN JAMMU AND KASHMIR 36–37, 75 (2015).

³⁹ *India Revokes Kashmir's Special Status*, AL JAZEERA (Sept. 4, 2019), <https://www.aljazeera.com/news/2019/09/india-revokes-kashmir-special-status-190904143838166.html> [https://perma.cc/DN2H-FELR].

⁴⁰ See *Kashmir: Curfew-Like Restrictions Imposed on Movement of People*, INDIA TODAY (Aug. 5, 2019), <https://www.indiatoday.in/india/story/jammu-and-kashmir-curfew-section-144-imposed-1577218-2019-08-05> [https://perma.cc/8LMP-2KAB].

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II. KASHMIR'S HISTORY WITH INTERNATIONAL LAW

The Third World Approaches to International Law (TWAIL) have highlighted international law's impotence writ large. In particular, the school has critiqued the regime for its dubious origins: colonialism.⁴² Core to states' imperial project and thus the creation of international law was a "civilizing mission," where states justified their casting aside of "the other."⁴³ This dynamic has only been reproduced in a "supposedly non-imperial world" and its international order.⁴⁴ The result—as seen by TWAIL scholars—is that international law is strapped by the sovereignty doctrine, where "states are the principal actors . . . bound only by that to which they have consented."⁴⁵

The primacy of state sovereignty has been at the root of Kashmir's tortured history with international law. Following the 1947 invasion, Kashmir was the first inter-state conflict discussed at the United Nations Security Council (UNSC).⁴⁶ Brought through Article 35 of the UN Charter, India sought the aid of the UNSC in enforcing the withdrawal of Pakistani troops from "a State which acceded to the Dominion of India."⁴⁷ Pakistan responded with its own counter-claims, accusing India of waging a genocide against Muslims in parts of India and forcing Kashmir's accession by fraud and

⁴¹ Omar Abdullah (@OmarAbdullah), TWITTER (Oct. 27, 2020, 4:06 AM), <https://twitter.com/OmarAbdullah/status/1321015482544054273> [<https://perma.cc/TSN7-994N>].

⁴² See ANTONY ANGHIE, CORE IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 3 (2005).

⁴³ *Id.* at 311–12.

⁴⁴ *Id.* at 310–11.

⁴⁵ *Id.* at 33.

⁴⁶ Rakesh Ankit, *Britain and Kashmir, 1948: "The Arena of the UN"*, 24 DIPL. & STATECRAFT 273, 273 (2013).

⁴⁷ Stephen P. Westcott, *The Case of UN Involvement in Jammu and Kashmir*, E-INT'L RELS. 1, 4 (2020), <https://www.e-ir.info/pdf/81046> [<https://perma.cc/F2SC-DS2S>].

violence.⁴⁸ Pakistan made a number of requests of the UNSC, but of note, it asked that the UNSC coordinate a cessation of fighting, ordering the withdrawal of outsiders in Kashmir, and hold a plebiscite in Kashmir “as to whether the State shall accede to Pakistan or to India.”⁴⁹ Thus, in the aftermath of decolonization, Kashmir was not its own sovereign but rather the home to a “dispute”⁵⁰ between warring India and Pakistan.

From 1948 to 1971, the UNSC issued a series of increasingly watered-down resolutions on Kashmir.⁵¹ What began as a firm call for a “free and impartial plebiscite”⁵² ended with a jockey game between India and Pakistan over who erred first.⁵³ Although the “India-Pakistan Question” remains on the UNSC agenda as a matter of which the “Security Council [is] currently seized,”⁵⁴ it functions as nothing more than a placeholder. The “Kashmir dispute” is at best a bilateral issue and at worst, an internal one.⁵⁵ To this day, no plebiscite has taken place.

Kashmir’s frayed relationship with international law does not stop with hollowed UNSC resolutions. Despite scholars robustly arguing for the application of the law of occupation

48 Brian R. Farrell, *The Security Council and Kashmir*, 22 *TRANSNAT’L L. & CONTEMP. PROBS.* 343, 346 (2014).

49 Minister of Foreign Affs. of Pakistan, Letter dated Jan. 15, 1948 from the Minister of Foreign Affairs of Pakistan to the Secretary-General, U.N. Doc. S/646 (Jan. 15, 1948).

50 S.C. Res. 39 (Jan. 20, 1948).

51 See generally Farrell, *supra* note 48 (for a detailed history of Security Council action on Kashmir).

52 S.C. Res. 47 (Apr. 21, 1948).

53 See Farrell, *supra* note 48, at 354–55.

54 Ghulam Nabi Fai, *Kashmir and the UN Security Council*, ANADOLU AGENCY (Sept. 12, 2020), <https://www.aa.com.tr/en/analysis/kashmir-and-the-un-security-council/1971039> [https://perma.cc/N4BJ-3L29].

55 Geeta Mohan, *Kashmir a bilateral issue, India tells US after Trump offers help*, INDIA TODAY (Jan. 22, 2020), <https://www.indiatoday.in/india/story/kashmir-a-bilateral-issue-india-tells-us-after-trump-offers-help-1639126-2020-01-22> [https://perma.cc/YC3P-6SXU].

to Kashmir,⁵⁶ the international community has resisted such a classification. As Critical Kashmir Studies scholar Haley Duschinski explains, the stopping block is typically Kashmir's partition history.⁵⁷ Those unwilling to apply the occupation law reason that Kashmir, by way of signing the Instrument of Accession, is integral to the territory of the Indian state.⁵⁸

The denial of the application of international humanitarian law to Kashmir has been a large blow to its freedom struggle generally. The benefits of this regime are clear: unlike other areas of international law, the rules are bright lined and concretized.⁵⁹ Without the recognition of the unlawful occupation of Kashmiri soil, India has been able to portray a different narrative on the ground. The intense military presence in Kashmir does not represent occupying powers but rather components of a necessary counter-insurgency strategy. Likewise, the use of force to suppress unrest is, once again, an internal matter rather than one of international import. India, like other states, has resisted any classification as an occupying force and instead, has promoted what some scholars call a *de facto occupational constitutionalism*, where foreign dominance and control are legalized through domestic mechanisms.⁶⁰ As a result, international law has largely left Kashmiris to fend for themselves within the bounds of the Indian state.

56 See generally Nosheen Ali et al., *Geographies of Occupation in South Asia*, 45 FEMINIST STUD. 574 (2019); Mona Bhan et al., "Rebels of the Streets": Violence, Protest, and Freedom in Kashmir, in RESISTING OCCUPATION IN KASHMIR 1, 5 (Haley Duschinski et al. eds., 2019); Haley Duschinski & Shrimoyee Nandini Ghosh, *Constituting the Occupation: Preventive Detention and Permanent Emergency in Kashmir*, 49 J. LEGAL PLURALISM & UNOFFICIAL L. 314 (2017).

57 Duschinski & Ghosh, *supra* note 56, at 315–16.

58 *Id.*

59 See Breven C. Parsons, *Moving the Law of Occupation into the Twenty-First Century*, 57 NAVAL L. REV. 1, 5–8 (2009) (discussing the law of occupation's robust treaty framework but noting how it's been practically undermined).

60 Duschinski & Ghosh, *supra* note 56, at 318.

III. INTERNATIONAL LAW'S EXISTING TOOLS AGAINST SETTLER COLONIALISM

The lens of settler colonialism can shift the focus from Kashmir's debated accession history to the less disputed threat to their land and people. Thus, where occupation law falters, the lens of settler colonialism can supplant. The question then arises—where are such protections in international law?

Unfortunately, articles discussing the protective value of international law in settler colonial regimes are limited. However, Professor Natsu Taylor Saito has discussed the application of international law as it relates to the settler colonial projects waged against Indigenous persons and people of color in the United States.⁶¹ This part builds on her analysis in the context of the Kashmiri struggle in India. Ultimately, international law, as it currently exists, does not prohibit “settler colonialism” by name. Yet, it does supply key legal principles that offer protections more expansive than those that typically exist within a nation. This part turns to a number of different areas of international law—first, key framing principles; then, the rights of the Indigenous; and finally, the right to self-determination—to present the existing tools available to those colonized in settler regimes today.

A. Framing principles

Human rights law operates with two key principles in the background: the preservation of human dignity and the prohibition on discrimination. Human dignity is often recognized as a precursor to the realization of other rights.⁶²

⁶¹ See generally SAITO, *supra* note 9.

⁶² See International Covenant on Civil and Political Rights, preamble, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social, and Cultural Rights, preamble, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (“[R]ecognition of the inherent dignity and of the equal and

This principle strikes at the core of the settler regime: “the coercive rule of one or the few over the many is incompatible with a due respect for the dignity of the person.”⁶³

International law explicitly creates a prohibition on discrimination and reaffirms that prohibition across conventions.⁶⁴ In particular, the two core human rights treaties, the International Covenant on Civil and Political Rights (ICCPR)⁶⁵ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁶⁶ bind India on this front by way of ratification.⁶⁷ The anti-discrimination right extends to a broad category of persons.⁶⁸ The ICCPR even goes so far as to enshrine rights protecting against the forced assimilation of minorities,⁶⁹ reflecting concerns over erasure. More simply, the principle of anti-discrimination fights the creation of the Indigenous other.⁷⁰

B. Rights of Indigenous Peoples

Following several decades of robust advocacy, the UN passed the Declaration on the Rights of Indigenous Peoples

inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”).

63 Oscar Schachter, *Human Dignity as A Normative Concept*, 77 AM. J. INT'L L. 848, 850 (1983).

64 See U.N. Charter art. 1(3); ICCPR, arts. 2, 7; ICESCR, art. 2(2).

65 ICCPR, arts. 2(1), 26.

66 ICESCR, art. 2(2).

67 RATIFICATION STATUS FOR INDIA, https://tbineternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=79&Lang=EN [<https://perma.cc/9BZZ-M8VW>] (last visited May 2, 2021).

68 ICCPR, art. 26 (protecting “discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”)

69 ICCPR, art. 27 (“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”)

70 See Veracini, *supra* note 4, at 2.

(UNDRIP),⁷¹ which received India's vote.⁷² While there is no authoritative definition of Indigenous populations in international law, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities proposed the following indicators for indigeneity: historical continuity; distinctiveness; non-dominance; and a determination to pass their ancestral territories and culture to future generations.⁷³ But above all, "self-identification as Indigenous or tribal" is the fundamental criterion.⁷⁴ Kashmiris have not only consistently self-identified as a distinct political entity,⁷⁵ but they have also organized around *Kashmiriyat*, a culture which is comprised of a "love of the homeland (*kashir*) and common speech (*koshur*)."⁷⁶

UNDRIP,⁷⁷ although a non-binding declaration,⁷⁸ rhetorically combats the logic of elimination driving settler colonial projects. It reinforces the right of Indigenous communities to maintain their cultures and prohibits forced assimilation and displacement,⁷⁹ both of which, as Saito

71 G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sep. 13, 2007) [hereinafter UNDRIP].

72 RATIFICATION STATUS FOR INDIA, *supra* note 67.

73 José R. Martínez Cobo (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Prot. of Minorities), *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7 and Adds. 1–4 (1987).

74 ILO Convention (No. 169) concerning Indigenous and Tribal Peoples Convention in Independent Countries, art. 1(2), June 27, 1989, 1650 U.N.T.S. 383.

75 Rattan Lal Hangloo, *Kashmiriyat: The voice of the past misconstrued*, in THE PARCHMENT OF KASHMIR 28 (N. Khan ed., 2012) (citing the use of revolutionary phrases — "choun desh meun desh, Koshur Desh! Koshur Desh! (Your country, my country, Kashmir! Our country, Kashmir!)" — well before 1975).

76 *Id.* at 38.

77 UNDRIP, arts. 5, 8–15.

78 While some persuasive arguments have been made to UNDRIP's customary, and thus binding status, they are not yet widely accepted. See OFFICE OF THE HIGH COMMISSIONER, INDIGENOUS PEOPLES AND THE UNITED NATIONS HUMAN RIGHTS SYSTEM 8 (2013), <https://www.ohchr.org/documents/publications/fs9rev.2.pdf> [https://perma.cc/JLK8-3WGF].

79 UNDRIP, arts. 5, 8–15.

notes, are powerful for ensuring the protection of Indigenous resources and lands.⁸⁰ However, the Declaration is most dilute as it relates to recognizing Indigenous sovereignty—recognizing the explicit right of self-determination for Indigenous people but failing to require the realization of such a right by states.⁸¹

Although the Indigenous rights framework may not be as comprehensive as the laws of war governing occupation, they are “arguably more comprehensive than international legal instruments associated with minorities”⁸² and can therefore be an important resource for Kashmiri advocates. However, UNDRIP, notably, is a declaration and not a treaty, thus giving it no binding power under international law. While some persuasive arguments have been made to UNDRIP’s customary, and thus binding status, they are not widely accepted.⁸³

C. *Right to Self-Determination*

The right to self-determination—that is the peoples’ right to its own sovereignty—is arguably the most crucial element for release from a settler colonial regime. In some ways, international law has glorified this right the most, with its cardinal articulation as one of the “purposes” of the UN Charter itself.⁸⁴ This purpose was given muster with the passage of the Declaration on the Granting of Independence to Colonial Countries and Peoples, which called for the “the speedy end [of] colonialism in *all* its forms and manifestations

⁸⁰ See SAITO, *supra* note **Error! Bookmark not defined.**, at 173. The Inter-American Court of Human Rights has also stressed the importance of protecting Indigenous land in particular, noting that: “relations to the land are not merely a matter of possession and production but a material and spiritual element.” *Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001).*

⁸¹ UNDRIP, arts. 3–4.

⁸² See OFFICE OF THE HIGH COMMISSIONER, *supra* note 78, at 3.

⁸³ *Id.* at 8.

⁸⁴ U.N. Charter art. 1(2).

[to be a] necessity.”⁸⁵

This unabashed right to self-determination has narrowed in its scope since the “Decolonization Era.” Today, the right to self-determination is divided into internal and external forms. The more widely applicable form is the internal one, which entails guaranteeing socio-political rights to ensure autonomy for peoples within a state.⁸⁶ External self-determination, where the result is the drawing of new international boundaries,⁸⁷ has been limited to the extreme cases of “alien subjugation” and traditional colonial regimes as they existed in the past.⁸⁸ Although some jurists suggest that the right may exist where self-determination is blocked internally,⁸⁹ there has been no authoritative interpretation on this matter.

As a threshold matter, both internal and external rights to self-determination are limited to “peoples.” Similar to the definition of Indigenous peoples, “peoples” in the context of self-determination is not defined by an international treaty. It is generally accepted that the “peoples” determination is both subjective and objective, often including a shared belief in being a unit as well as actually sharing things like race, culture, and ethnicity.⁹⁰ In defending themselves from claims to self-determination, settler states typically argue that the population is not a “people,” that only geographically distinct territories warrant decolonization, and that, regardless, these matters are internal affairs.⁹¹ However, Saito, by

⁸⁵ The UN Charter includes guaranteeing respect for the “self-determination of peoples” as one of the UN’s core “purposes.” G.A. Res. 1514 (XV), *supra* note 1, preamble (emphasis added).

⁸⁶ Reference re Secession of Quebec, [1998] 2 S.C.R. 217, ¶¶ 130–135 (Can.).

⁸⁷ G.A. Res. 2625 (XXV) (Oct. 24, 1970).

⁸⁸ Reference re Secession of Quebec, [1998] 2 S.C.R. 217, ¶ 136.

⁸⁹ *Id.* at ¶ 134; Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, 618, ¶ 16 (July 22) (separate opinion of Yusuf, J.).

⁹⁰ Michael P. Scharf, *Earned Sovereignty: Judicial Underpinnings*, 31 DENV. J. INT’L L. & POL’Y 373, 373–79 (2003).

⁹¹ See SAITO, *supra* note **Error! Bookmark not defined.**, at 192–93.

looking at self-determination from the bottom-up, debunks these defenses.⁹²

Self-determination is arguably the most crucial element for release from a settler colonial regime. However, its dilution in the law is the product of the tension it straddles. The right to self-determination toes the line between respecting the rights of subjugated people and upsetting *uti possidetis juris*, the preference for the territorial status quo in the name of stability.⁹³ Notably, and despite this friction, international law still emphasizes that it is only “by virtue of that right [to self-determination]” that other widely accepted human rights can have meaning.⁹⁴

IV. WORKING FOR REMEDIES

Given international law's colonial origins,⁹⁵ how can we expect the principles laid out above to protect against settler colonial projects? The answer is not an easy one, and it might in fact be we cannot.

Kashmiris, like many in settler colonial states, are trapped in oppressive domestic regimes. Their oppressor states spin narratives of “internal affairs,” escaping the protections and limitations of the law of occupation and *jus in bello* more generally. International legal principles, like the ones above, may dismiss settler conduct as normatively wrong but fail to provide any remedial bite. The result? Kashmiris and those similarly colonized by settler states have fallen through the cracks of international legal regime.

⁹² See *id.* at 193 (highlighting five principles: “Territorial integrity is a legal fiction;” “Peoplehood is constructed and defined by the people, not the state;” “Self-determination cannot be constrained by a paradigm of “universal” rights;” “States are not the only viable forms of political organization;” “Self-determination is a process and a continuing right.”).

⁹³ Frontier Dispute (Burk. Faso/Mali), 1986 I.C.J. 554, ¶ 20 (Dec. 22); see also *id.* ¶¶ 25–26 (“At first sight [*uti possidetis juris*] conflicts outright with another one, the right of peoples to self-determination.”).

⁹⁴ ICCPR, art. 1; ICESCR, art. 1.

⁹⁵ See ANGHIE, *supra* note 42, at 5–6.

However, dismissing international law entirely may not be the answer either. While it may be limited due to its origins, the current international legal regime at least evinces this: native peoples combatting settler colonial states are empowered with rights recognized by the international framework. It is a framework that calls for decolonization and recognizes the right to self-determination of peoples. It is one that lifts up the shared culture, identity, and collectively-owned land and calls for their preservation. It is the vesting of these rights that shifts our original question to a more appropriate one—how can Kashmiris *use* these rights to not just resist but launch their decolonization? And perhaps, how can they *reimagine* a new regime altogether?

Decolonization of settler colonial states requires, then, what Professor Duncan Kennedy initially coined⁹⁶ and Professor Noura Erakat later deploys in the context of Palestine,⁹⁷ engaging in “legal work.” “Legal work,” at its core, entails an effort on the part of the worker to mold a legal regime to their benefit.⁹⁸ At this stage, the existing international principles described above are embedded in a weak enforcement regime with little binding power.⁹⁹ But with “legal work,” as Kennedy explains, the worker can “transform an initial apprehension of what the system of norms requires . . . so that a new apprehension of the system . . . will correspond to the extra-juristic preferences of the interpretive worker.”¹⁰⁰

While there is no “blueprint” for the decolonization of a settler regime, one thing is clear: it must be crafted from the hands of the oppressed.¹⁰¹ Kashmiris, by engaging in “legal

⁹⁶ Duncan Kennedy, *A Left Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation*, in LEGAL REASONING, COLLECTED ESSAYS 158 (2008).

⁹⁷ See NOURA ERAKAT, JUSTICE FOR SOME 7 (2019).

⁹⁸ See Kennedy, *supra* note 96.

⁹⁹ See Daryl J. Levinson & Jack L. Goldsmith, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1822–23 (2009).

¹⁰⁰ Kennedy, *supra* note 96.

¹⁰¹ See SAITO, *supra* note **Error! Bookmark not defined.**, at 202.

work” with the principles laid out above, can reinvigorate their struggle at the international stage. For example, by organizing around these rights—of indigeneity and more generally peoplehood—advocates can better illuminate the parallels between the Kashmiri pro-freedom movement and that of the Palestinians or the Indigenous communities in Australia and New Zealand.¹⁰² Both of the movements have received more concretized legal support in the international order, like large recognition for their independent statehood¹⁰³ and the benefits of the passage of UNDRIP respectively. Working within the settler colonialism framework can also shift conversations away from the law of occupation, which the international community has resisted.¹⁰⁴ Principles of indigeneity can instead focus the discussion on the less disputed threat to Kashmiri land and people.

Activist can utilize these principles to imbue their work with a newfound sense of urgency. Taken to its end, the settler logic warns of a full, physical and violent elimination of the native. It is this elimination that UNDRIP itself explicitly warns and protects against.¹⁰⁵ As a result, the question of genocide—prohibited by international law¹⁰⁶—

102 Stand with Kashmir, a prominent group of Kashmiri activists, protested with the First Nations peoples of Australia to “stand against the devastation and lasting impact of settler colonialism on Indigenous communities.” Stand with Kashmir, FACEBOOK (Jan. 28, 2021, 11:27 AM), <https://www.facebook.com/StandWithKashmir/posts/2183498138449673> [https://perma.cc/GJE9-EKSF]. While they mention settler colonialism, concretizing that framework through the law, as this Note attempts, can embolden their case and highlight the parallels for the international community.

103 139 UN members recognize Palestine as an independent state. See PERMANENT OBSERVER MISSION OF THE STATE OF PALESTINE TO THE UNITED NATIONS NEW YORK, <https://palestineun.org/about-palestine/diplomatic-relations/> [https://perma.cc/R84M-MU9D] (last visited Jan. 15, 2021).

104 Those unwilling to apply the occupation law reason that Kashmir, by way of signing the Instrument of Accession, is integral to the territory of the Indian state. See Bhan et al., *supra* note 56 at 315–16.

105 UNDRIP, art. 7.

106 Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1948, 78 U.N.T.S. 277.

lurks behind any discussion of settler colonialism.¹⁰⁷ Kashmir itself is no stranger to these concerns, particularly in the aftermath of the abrogation.¹⁰⁸

By repositioning itself in the settler colonial narrative, the Kashmiri freedom movement can use the concerns articulated in UNDRIP to illuminate India's seemingly normal actions as insidious. These principles provide the language for why emerging "neighborhoods" or changes in title may be problematic.¹⁰⁹ Having this language can also illuminate new acts of resistance that may be necessary, like discouraging Indians from buying land in the region¹¹⁰ or larger Boycott, Divestment and Sanctions movements like in Palestine. Moreover, exposing this urgency—stopping the settler colonial project before it is too late—can itself "create[] the imperatives of decolonization."¹¹¹

CONCLUSION

The fight against settler colonialism has been no stranger to the benefits of the "legal work" of the colonized. Indigenous movements have made great strides in decolonizing domestic legal spaces like those in Canada,¹¹² and pushed international

¹⁰⁷ See Wolfe, *supra* note 3, at 387.

¹⁰⁸ See Gregory Stanton, *Genocide Alert for Kashmir, India*, GENOCIDE WATCH (Aug. 15, 2019), <https://www.genocidewatch.com/single-post/2019/08/15/genocide-alert-for-kashmir-india> [https://perma.cc/9M89-JUGK].

¹⁰⁹ See Veracini, *supra* note 4, at 31 ("This is why merely calling settlements 'neighborhoods' or 'communities' and ensuring that settlements look like neighborhoods can never be enough. The necessary normalization cannot proceed unless these 'neighborhoods' become fully integrated in their surroundings and the relationship of opposition between settler and Indigenous collectives is erased or superseded, which for the reasons noted above is not possible.")

¹¹⁰ *Kashmir for Kashmiris*, STAND WITH KASHMIR, <https://www.standwithkashmir.org/kashmir-for-kashmiris> [https://perma.cc/45AR-UHZR] (last visited Apr. 30, 2021).

¹¹¹ See SAITO, *supra* note **Error! Bookmark not defined.**, at 175.

¹¹² Kristy Gover, *The Potential Impact of Indigenous Rights on the International Law of Nationality*, 115 AJIL UNBOUND 135, 135 (2021) ("*Love-Thomas* and *Desautel* extend this idea by establishing that the relevant connection can endure across state boundaries irrespective of state law and international law on nationality, as a constitutional right vested in Indigenous non-citizens.>").

courts, like the Inter-American Court of Human Rights, to recognizing the principality of land to Indigenous communities as a “material and spiritual element.”¹¹³ In fact, it was only from several decades of intense advocacy that UNDRIP was even born.

Thus, the fact that international law does not itself carry explicit legal remedies may be secondary to the fact that it *does* vest Kashmiris with rights relevant to settler colonial realities. Indigenous communities do in fact have rights recognized by the law. “[T]aking up the struggle for freedom,” particularly around the framework of settler colonialism, is a fundamental way for Kashmiris to “assert [their] international personality,” and more fundamentally, their identity as people protected by international law.¹¹⁴ Whether India or other settler colonial states heed activism, their sovereignty, “inherent in every people,” will continue to exist regardless of whether India or the international order is willing to recognize them at this moment.¹¹⁵ Thus, although creating an international legal order that penalizes settler colonial states may require radical reimagination, creating an international legal order that acknowledges the wrongs of a settler regime and vests rights within the wronged requires much less.

However, as the settler colonized engage in “legal work” to reimagine their own relief, we should ask whether this is how we want our international legal system to operate. Without explicit remedies for settler colonial conduct in

¹¹³ *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001).

¹¹⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, ¶ 2 (June 21) (separate opinion of Ammoun, J.).

¹¹⁵ *See id.* (“Sovereignty, which is inherent in every people, just as liberty is inherent in every human being, therefore did not cease to belong to the people subject to mandate. It had simply, for a time, been rendered inarticulate and deprived of freedom of expression.”)

existing international law, those suffering under oppressive regimes now have the additional labor of crafting their own relief. They must engage in the legal work while also protecting their culture, their land, and their people. Are these cracks in the international legal system by design? Or the mere reality of true decolonization?