



## THE KASHMIR QUAGMIRE: AN INTERNATIONAL LAW PERSPECTIVE

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The territorial disputes in the 21<sup>st</sup> century have acquired dangerous proportions because of their capability to culminate into full scale wars or even nuclear wars. These disputes are generally difficult to resolve because of sensitive notions of nationalism and territorial integrity appended to them. India and Pakistan have been embroiled in such an enduring territorial dispute from the last 75 years. The dispute has been the cause of four wars and conflict in various arenas. The present study first analyses the legally relevant facts of dispute and then assess the legal merits of contentions put forth by either side in accordance with the international law. The study finds that the legal case made out by both the nations has been gradually undermined by their unilateral actions actuated by domestic politics.

### Keywords:

Territorial Dispute, International Law, Kashmir, India-Pakistan, Legal Perspective.

## INTRODUCTION

The Kashmir conflict has endured since the withdrawal of British and the partition of the Indian Sub-continent in 1947.<sup>1</sup> The hostile neighbours share 3323 km of land boundary which includes 776 km of Line of Control (LoC) in disputed Jammu and Kashmir sector. There is an additional 110 km of actual ground position line which divides current military positions of India and Pakistan in the Siachen glacier area.<sup>2</sup> Pakistan controls around one-third of territory of Kashmir while India controls the rest.<sup>3</sup>

Despite UN Intervention in the dispute, this dispute continues to threaten international peace and stability. The Kashmir dispute is essentially a legal dispute and thus the total political approach of the dispute is unwarranted.<sup>4</sup> The present study first analyses the legally relevant facts of dispute and then assess the legal merits of contentions put forth by either side in accordance with the international law.

## GENESIS OF THE DISPUTE

The Kashmir region comprises of the whole of erstwhile Dogra princely state of Jammu and Kashmir of British India.<sup>5</sup> Kashmir region was annexed by the forces of Sikh Empire ruled by Maharaja Ranjit Singh from

<sup>1</sup> United States Institute of Peace, "Special Report 410 on Kashmir Line of Control and Grassroots Peacebuilding" (July 2017)

<sup>2</sup> Col. T.N. Marwah, *Border and Boundaries Reflection on India Partition* 228 (Gaurav Book Centre, 2020).

<sup>3</sup> *Ibid.*

<sup>4</sup> Emilia Toivola, *Kashmir Conflict: Analysis of Legal Issues and Arbitration As a Proposal For Settlement 2020* (Unpublished Thesis, Tallinn University of Technology, School of Business and Governance, Department of Law)

<sup>5</sup> Stephen P. Westcott, "The Case of UN Involvement in Jammu and Kashmir" *E-International Relations* 3 (2020)



Afghan rulers in 1819.<sup>6</sup> Thereafter, when the British defeated the Sikh Empire in First Anglo-Sikh War in 1846, the Kashmir region was surrendered by the Sikh Empire as a consequence of failure to pay war indemnity imposed by the British.<sup>7</sup> Subsequently, the British East Indian Company sold the Kashmir Valley to Raja Gulab Singh of Jammu in return for payment of seventy five lakh rupees and in lieu of acknowledgment of British Paramountcy.<sup>8</sup>

When the British left India in 1947, they partitioned India into two new dominions of India and Pakistan vide the Indian Independence Act, 1947. The princely states were given option either to join India or Pakistan or to remain independent.<sup>9</sup> However, the option of remaining independent was not practical for princely states as mostly the states were small with insignificant defence forces.<sup>10</sup> The princely states were encouraged by the British to make decisions of accession based on their geographic location and demography.<sup>11</sup> Before the partition of British India took place, over 500 princely states joined either dominion by signing an Instrument of Accession without any plebiscite or ratification.<sup>12</sup>

In Kashmir state, a Hindu ruler ruled over a Muslim majority state (around 80 percent in 1947) with different religions constituting majority in five different regions. There is evidence which suggests that the ruler of Kashmir, Raja Hari Singh, preferred to stay independent rather than joining either of the dominions.<sup>13</sup> The Maharaja signed Standstill Agreement with Pakistan on 12 August 1947 thereby agreeing to maintain status quo till a final decision on accession is reached.<sup>14</sup>

By the end of October 1947, both the states of India and Pakistan were getting impatient with the ambivalence of the ruler of the Kashmir. In an effort to pre-empt any Indian manoeuvres, Pakistan military and government carried out an invasion of Kashmir territory on 22 October, 1947 with the help of Pashstun tribesmen from the western frontier of Pakistan. The Maharaja forces, which were already pre-occupied with management of unrest in the Poonch region, failed to resist the invasion and were taken down easily.<sup>15</sup> This led Maharaja to turn to Indian government for help in repulsing foreign invasion. However, Indian establishment made such help contingent upon signing of Instrument of Accession. The Maharaja agreed to the demand of Indian government and signed the IoA on 26

<sup>6</sup> Anna Orton, *India's Borderland Disputes* (Epitome Publishers, 1 December 2010).

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> Ali Khan, *The Kashmir Dispute: A Plan for Regional Cooperation*, 31 *Columbia Journal Of Transnational Law* 505 (1994).

<sup>10</sup> Damodar R. Sardesai, *The Origins of Kashmir's International and Legal in Perspectives On Kashmir: The Roots of Conflict In South Asia* 81 (Raju G.C. Thomas, 1992 edition).

<sup>11</sup> Brian Farrel, "The Role of International Law in the Kashmir Conflict" 21(2) *Penn State International Law Review* 296 (2003)

<sup>12</sup> *Supra* Note 10.

<sup>13</sup> Sumathi Subbiah, "Security Council Mediation and the Kashmir Dispute: Reflections on its Failure and Possibilities for Renewal" 27(1) *Boston College International and Comparative Law Review* 174 (2004).

<sup>14</sup> Surendra Chopra, *Kashmir in the United Nations*, 25 *The Indian Journal of Political Science* 126 (1964).

<sup>15</sup> James Howley, *Alive and Kicking: The Kashmir Dispute Forty Years Later*, 9 *Dick. Journal of International Law* 89-90 (1991).



October, 1947.<sup>16</sup> The next day, the Governor General of India formally accepted the IoA.<sup>17</sup> The Governor-General on the same day in separate personal letter addressed to the Maharaja observed therein that after the territory is cleared of invader, “the question of accession will be settled by reference to the people”.<sup>18</sup> The IoA provided that the Maharaja is not bound by any future constitution of the Dominion of India and Maharaja while retaining his sovereignty will exercise his discretion while entering into any arrangement with the Dominion of India.<sup>19</sup>

## THE 1947 WAR AND THE U.N INTERVENTION

### (a) The signing of the instrument and initiation of war

After the signing of the Instrument of Accession, Indian troops were rushed in Kashmir which led to the initiation of first Indo-Pakistan war in 1947. The Indian troops halted invaders advance and in some pockets forced retreat of Pakistani troops also. With the winter weather setting in and making any further military campaigns impossible, the Indian Premier decided to seek UN intervention on 1 January 1948. The Indian Prime Minister requested the UN Security Council under Article 35 of the Charter of the United Nations to call upon Pakistan to put an end to the act of aggression immediately.

Indian alleged in the complaint that Pakistan is helping the Pashtun invaders by providing military equipment, training and supplies.<sup>20</sup> The Pakistan counterpart gave their reply on 15 January 1948 wherein while rejecting India’s charges, Pakistan accused India of its involvement in genocide of Muslims in Kashmir and impugned the validity of Instrument of Accession signed by Maharaja Hari Singh. Moreover, Pakistan requested UNSC to secure a ceasefire, ensure ouster of foreign forces from Kashmir and execution of a plebiscite.<sup>21</sup> Much to India’s disappointment, the UNSC did not order Pakistan to withdraw its forces but rather appointed a three member commission namely United Nations Commission on India and Pakistan (UNCIP) to investigate, mediate and resolve the dispute vide its resolution No. 39 dated 20 January 1948. The Commission was given the mandate to ascertain the facts of the dispute under article 34 of the Charter and to mediate for resolution.<sup>22</sup>

### (b) UNSC Resolution No. 47

After a few months of deliberation, UNSC passed a detailed resolution No. 47 on 21 April 1948 whereby it expanded the three member commission to five member commission and prescribed the guidelines for resolving the dispute through plebiscite. This resolution called upon both the Pakistan to withdraw its forces which was to be followed by Indian troop withdrawal. After achieving

<sup>16</sup> *Supra* note 10 at 84.

<sup>17</sup> James Howley, *Alive and Kicking: The Kashmir Dispute Forty Years Later*, 9 *Dick. Journal of International Law* 94 (1991).

<sup>18</sup> *Supra* note 10 at 298.

<sup>19</sup> Venkatesh Nayak, “The Backstory of Article 370: A True Copy of J&K’s Instrument of Accession”, *The Wire* 5 August 2019, available at [https://thewire.in/history/public-first-time-jammu-](https://thewire.in/history/public-first-time-jammu-kashmirs-instrument-accession-india)

[kashmirs-instrument-accession-india](https://thewire.in/history/public-first-time-jammu-kashmirs-instrument-accession-india). (last accessed on 17 June 2022)

<sup>20</sup> Letter from the Representative of India to the President of the Security Council (Jan 1, 1948), U.N. Doc. S/628 (1948).

<sup>21</sup> Letter from the Minister of Foreign Affairs of Pakistan to the Secretary General (Jan 15, 1948), U.N. Doc. S/646/Corr. 1 (1948).

<sup>22</sup> Security Council Resolution 39, U.N. Doc. S/654 (1948).



demilitarisation of the area, the UN would oversee the execution of free and fair plebiscite through a temporary administration in Kashmir. However, this resolution was passed despite protests from the state parties.<sup>23</sup> The resolution could not be put into practice as fighting was still raging in the area. In fact, after passing of the resolution, Pakistan started replacing its tribesmen with regular army. The United Nations Commission on India and Pakistan (UNCIP) arrived in Kashmir in July 1949 and strived to broker a truce between India and Pakistan before proceeding to any plebiscite exercise.<sup>24</sup>

On 13 August 1948, the UNCIP adopted a resolution containing a three-pronged agreement. The first part called upon the parties to affect a ceasefire. The second part called upon Pakistan to withdraw its tribesmen and troops from the occupied territory. Following the Pakistan withdrawal, India was expected to withdraw major chunk of its forces. The third part laid down that after the first two steps, the future of Kashmir will be decided by a plebiscite.<sup>25</sup> These proposals were eventually accepted by Pakistan and India. However, Pakistan accepted the proposal based upon such conditions that UNCIP considered it as equivalent to rejection.

### (c) Agreement of ceasefire and ceasefire line

Notwithstanding all the differences in relation to final resolution of dispute, India and Pakistan agreed to a ceasefire which came into effect on 1 January 1949. This ceasefire line crystallised Indian and Pakistani troop position whereby Pakistan wrested control of roughly one-third of the Kashmir i.e Gilgit-Baltistan and Azad Kashmir with India retaining control of rest of Kashmir.<sup>26</sup>

After the ceasefire agreement, no withdrawal of Pakistani forces took place in pursuance of the UN resolutions and UNCIP proposals. However, a ceasefire line was agreed upon by the disputant nations on 27 July 1949.<sup>27</sup> To ensure compliance of ceasefire line, a UN Military Observer Group was sent to the area.<sup>28</sup>

### (d) Disbandment of UNCIP

Despite the ceasefire agreement and ceasefire line, the UNCIP was unable to put forth a proposal to make the states amicably agree to a demilitarisation plan or conduct of a plebiscite.<sup>29</sup> Pakistan remained reluctant to make the first move in withdrawal of forces being wary of India's intentions. India insisted on legitimacy of the IoA signed by the Maharaja of Kashmir. India impugned the Pakistani occupation of part of Kashmir on

<sup>23</sup> Security Council Resolution 47, U.N. SCOR, 3<sup>rd</sup> Session, 286<sup>th</sup> Meeting, U.N. Doc. S/276 (1948).

<sup>24</sup> *Supra* note 5 at 4.

<sup>25</sup> Resolution for a Cease-Fire Order and Truce Agreement Adopted by the United Nations Commission on India and Pakistan, U.N. SCOR, 3<sup>rd</sup> Session, at 3, U.N. Doc. S/995 (1948).

<sup>26</sup> *Supra* note 5.

<sup>27</sup> Agreement Between Military Representatives of India and Pakistan Regarding the Establishment of a

Ceasefire-line in the State of Jammu and Kashmir, 27 July 1949, India-Pakistan, 81 U.N.T.S. 273.

<sup>28</sup> S.C. Resolution 91, U.N. SCOR, 6<sup>th</sup> Session, 539<sup>th</sup> Meeting, U.N. Doc S/2017/Rev.1 (1951).

<sup>29</sup> Christopher Snedden, "Would a plebiscite have resolved the Kashmir Dispute?" 28(1) *South Asia: Journal of South Asian Studies* 72-74 (2005).



the basis of illegality of Pakistan's invasion and occupation of its territory by force. Consequently India called upon UNCIP to force withdrawal of Pakistani troops and due to inaction of UNCIP on the same, India remained reluctant for any plebiscite exercise.<sup>30</sup>

In December 1949, the UNCIP submitted its final report to the Security Council wherein UNCIP admitted its failure in resolution of the dispute. The UNCIP in its final report recommended disbanding of the commission and appointing any individual for mediation for more flexibility. The UNCIP also stated that although plebiscite was the most effective method for resolution of the dispute yet it termed the procedure prescribed under UNSC Resolution 47 as obsolete. The UNCIP further suggested that its successors should consider alternative methods of resolution including arbitration.<sup>31</sup> The UNCIP was accordingly disbanded by the UNSC in 1951.<sup>32</sup>

#### (e) Proposal of Sir Owen Dixon

After the dissolution of UNCIP several individual representatives were appointed by the UNSC to mediate and resolve the dispute. The most notable among them was Australian Judge Owen Dixon who was appointed as U.N mediator on April 12, 1950.<sup>33</sup> During his term as mediator, Dixon travelled extensively throughout the territory of Kashmir and held talk talks with local

stakeholders also. He realized that the procedure prescribed under the Resolution No. 47 was impractical and unworkable. He noted in his report that the State of Jammu and Kashmir is not a homogeneous unit but rather an amalgamation of different demographic units brought under the rule of one Maharaja.<sup>34</sup> Therefore, Dixon suggested that the procedure of plebiscite given under Resolution 47 be modified to two potential methods. In first method, Dixon proposed dividing Kashmir into respective ethno-nationalist units and then conducting a plebiscite asking for the choice of nation they would prefer to accede. In the second method, Dixon suggested that the units be allocated to the country that would certainly be preferred and conducting plebiscite in the valley of Kashmir.<sup>35</sup> The Indian government was amenable to the idea of dividing Kashmir but Pakistan refused to divert from the procedure prescribed under Resolution 47. Otherwise, Pakistan was prepared to accept the partition of state of Jammu of Kashmir if the valley of Kashmir went to Pakistan. This was not acceptable to India. This resulted in ultimate rejection of Dixon's proposals from both sides.<sup>36</sup>

#### (f) Article 370 of the Constitution of India and Constituent Assembly of Kashmir

In the meanwhile, the Constitution of India was promulgated on 26 January 1950. Before the Constitution came into being, the Maharaja of Jammu and Kashmir issued a

<sup>30</sup> Nisid Hajari, *Midnight Furies: The Deadly Legacy of India's Partition* 246 (Houghton Mifflin, 1<sup>st</sup> Edition, 2015).

<sup>31</sup> S/1430/Rev.1, O.R., 4<sup>th</sup> year, Special Supplement No.7, Page 78-79.

<sup>32</sup> Security Council Resolution 80, U.N. SCOR, 5<sup>th</sup> Session, 470<sup>th</sup> Meeting, U.N. Doc. S/1469 (1950).

<sup>33</sup> *Supra* note 5 at 6.

<sup>34</sup> United Nations Security Council, Report of Sir Owen Dixon, United Nations Representative for India and Pakistan to the Security Council, S/1791 (15 September 1950).

<sup>35</sup> United Nations Security Council, Report of Sir Owen Dixon, United Nations Representative for India and Pakistan to the Security Council, S/1791 (15 September 1950).

<sup>36</sup> *Supra* note 5 at 6.



proclamation on 25 November 1950 issued a proclamation which inter-alia, provided that the Constitution of India to be adopted by India shall govern the constitutional relationship between this State and the Union of India and shall be enforced in his State by him and his successors.<sup>37</sup> The bare reading of the aforesaid proclamation shows that sovereignty reserved by the Maharaja with himself Instrument of Accession stood modified. With this proclamation, the Constitution of India substituted the Instrument of Accession as the primary document governing the relationship between India and Jammu and Kashmir, in so far as it became applicable to Jammu and Kashmir.<sup>38</sup>

Article 370 of the Constitution of India restricted the power of the Indian Parliament to pass law for the State of Jammu and Kashmir thereby granting some degree of autonomy to state.<sup>39</sup> No modification of the legislative relation of Centre and Jammu and Kashmir was possible without concurrent of the state government and Constituent Assembly of the state.<sup>40</sup> Accordingly, a Constituent Assembly for the state came into being in 1951 through elections which were discredited by Pakistan.<sup>41</sup>

The UNSC passed a resolution stating that any action taken by Constituent Assembly would not satisfy the requirement for free and fair plebiscite.<sup>42</sup> Notwithstanding the

objections, the Constituent Assembly passed a resolution in 1954 ratifying the accession of State of Jammu and Kashmir to India. The Constituent Assembly also performed the main task assigned to it and constitution for the state was adopted by it on 17<sup>th</sup> November 1956. On the other hand, the autonomy provided by Article 370 gradually faded away making way for stringent control of the Central Government over the state apparently for administrative reasons. Many constitutional provisions were made applicable by amendment of Article 370 with the prior consent of the state Constituent Assembly.<sup>43</sup>

#### (g) Promulgation of the Constitution of Jammu and Kashmir

In 1957, the UNSC again took up the matter of Kashmir on the request of Pakistan based upon the promulgation of the new constitution of Jammu and Kashmir on 26 January 1957 by the Constituent Assembly of the state. The UNSC passed a resolution calling for final resolution of Kashmir dispute through a free and impartial plebiscite.<sup>44</sup> The Constitution of the state of Jammu and Kashmir was adopted by the State Constituent Assembly 17 November 1956 which was convened in pursuance to Article 370 of the Indian Constitution. As per Section 3 of the state constitution, Jammu and Kashmir is an integral part of India with the state having all the territory as under the

<sup>37</sup> Ravindra K Raizada, "Article 370", *First Post*, 29 August 2019, available at <https://www.firstpost.com/india/article-370-writ-petitions-challenge-abrogation-in-sc-but-maharaja-hari-singhs-proclamation-made-indian-constitution-supreme-in-1950-in-kashmir-7246531.html> (last accessed on 10 May 2022)

<sup>38</sup> *Ibid.*

<sup>39</sup> *Supra* note 11 at 301.

<sup>40</sup> Article 370 of the Constitution of India.

<sup>41</sup> Ali Khan, "The Kashmir Dispute: A Plan for Regional Cooperation", 31 *Columbia Journal of Transnational Law*, 517 (1994).

<sup>42</sup> Security Council Resolution 91, U.N. SCOR, 6<sup>th</sup> Session, 539<sup>th</sup> Meeting, U.N. Doc. S/2017/Rev. 1 (1951).

<sup>43</sup> *Supra* note 11 at 302.

<sup>44</sup> "UN's Failure in Kashmir, A Factual Survey", *The Economic Weekly* 1508 (1965).



sovereignty of Maharaja on the date of partition.<sup>45</sup> Although the convening of the constituent assembly by India has been labelled by many commentators as an effort to avoid plebiscite, yet it has been said that India was willing for a plebiscite till 1954 when Pakistan deliberately entered into a military alliance with the western nations.<sup>46</sup>

#### (h) UN shelve the Kashmir issue

The last resolution on Kashmir dispute was passed by the UNSC on 16 November, 1957. The resolution called upon Graham to suggest methods of resolution to India and Pakistan and for implementing earlier resolutions of the Council. The proposals of Graham were also not accepted by both the states.<sup>47</sup> In 1958, after Graham, the UNSC did not appoint any other representative as successor of Graham and thus ended the series of UN appointed mediators for Kashmir dispute.<sup>48</sup>

After the resolution of 16 November 1957, no other resolution could be successfully passed by the Council although Council took up the issue multiple during meetings of the Council from February 1964 to May 1964. In the last of these meetings held on 12-13 May 1964, the Council urged both the states to hold direct negotiations and thus apparently shelved the issue.<sup>49</sup>

## WARS AND THEIR LEGAL REPERCUSSIONS

### (a) 1965 War

India and Pakistan got embroiled in three more wars after the 1947 war. In 1965, a war erupted in the state of Jammu and Kashmir as a result of infiltration of Pakistani-supported armed insurgents under the covert operation codenamed Gibraltar. The Pakistani insurgents entered the state in the first week of August 1965 with the objective of inciting popular uprising against the government. However, the planned uprising failed. India, after realizing that uprising was orchestrated by Pakistan, declared war on Pakistan.<sup>50</sup>

The 1965 War lasted for around 49 days. The war was fought mainly in the Kashmir and Punjab areas. The war eventually reached stalemate with India having the upper hand at the time of ceasefire.<sup>51</sup> At the end of war, India had occupied 1840 sq. km. of Pakistani Territory comprising of Sialkot, Lahore and Kashmir sectors while Pakistani occupied 545 sq. km. of Indian Territory comprising of areas in Sindh and Chumb sector.<sup>52</sup> The UNSC passed a unanimous resolution on 22 September 1965 demanding an unconditional ceasefire between both the countries. The war ended the next day when ceasefire was accepted by both the nations. With the Soviet intervention, the Indian Prime Minister and Pakistan's President signed the peace agreement in Tashkent on 10 January 1966. The Tashkent Declaration required withdrawal of troops to their pre-war positions before 25 February 1966 and

<sup>45</sup> The Constitution of Jammu and Kashmir, 1956.

<sup>46</sup> *Supra* note 11 at 302.

<sup>47</sup> *Supra* note 44.

<sup>48</sup> *Supra* note 5 at 7.

<sup>49</sup> *Supra* note 44 at 1509.

<sup>50</sup> *Supra* note 11 at 303.

<sup>51</sup> Gita Howard, India's Removal of Special Protection Status: an Internationally Wrongful Act?, Volume 8 Issue 2, University of Miami International and Comparative Law Review 2021 494-517. 502.

<sup>52</sup> *Supra* note 6 at 109.



reaffirmed commitment of both the nations towards the ceasefire line.<sup>53</sup> The Declaration thus restored the status quo ante and the ceasefire line assumed greater legal significance.<sup>54</sup>

### (b) 1971 War

India and Pakistan again got engaged in a war in 1971. This time war did not start directly between the two hostile neighbours. In the elections held in joint Pakistan for National Assembly in December 1970, Awami League led by Sheikh Mujibur Rahman, won 160 of the 162 seats in East Pakistan. On the other hand Zulfikar Ali Bhutto's party won 81 of the 138 seats in West Pakistan. Therefore, Mujib obtained a clear overall majority in the House to become leader of the House and Premier. A quest for power ensued between East and West Pakistan's mainstream parties. However, Bhutto had the backing of Pakistan Army. After political negotiations failed, the Army decided to quell the protest which had broken out in East Pakistan with a heavy hand.<sup>55</sup> The war between India and Pakistan started when India decided to intervene in the conflict as Pakistan's atrocities on East Pakistanis were resulting in refugee influx into India.<sup>56</sup> The formal and direct hostilities between India and Pakistan started on 3 December 1971 when the Pakistan Air Force launched air strikes on airforce stations located in western India. India responded by declaring war on Pakistan in the early hours

of December 4 and launched retaliatory airstrikes inside Pakistani Territory. The war lasted for two weeks in which Indian decisively defeated the Pakistan armed forces by capturing Dacca (Dhaka), the capital of East Pakistan. The war also resulted into creation of an independent nation of Bangladesh. On the eastern front, the Pakistani forces surrendered before the Indian forces on 16 December 1971 which ended the war in East Pakistan. On the western front, India declared a unilateral ceasefire on 17 December after Pakistani forces surrendered in the east. This unilateral ceasefire by India ended the 1971 war completely.<sup>57</sup>

### The Simla Agreement

As a consequence of end of this war and defeat of Pakistan, India signed Simla Agreement with Pakistan on 2 July 1972. The Simla Agreement changed the legal contours of the Kashmir dispute. The agreement replaced the ceasefire line agreed earlier with the Line of Control (LoC) which took into account the territorial gains made in Jammu and Kashmir by India in the war. The ceasefire line as existing on 17 June 1971 was to be treated as the Line of Control without any prejudice to respective positions on territorial limits. The said line was agreed to be changed only with mutual consent of both the nations. The agreement also prohibited either country from the changing the status

<sup>53</sup> Ministry of External Affairs, Government of India, *Tashkent Declaration*, January 10, 1966, <https://mea.gov.in/bilateral-documents.htm?dtl/5993/Tashkent+Declaration>, (last accessed on 26 June 2022).

<sup>54</sup> *Supra* note 11 at 304.

<sup>55</sup> Sushant Singh, "India-Pakistan 1971 war: 13 days that shook the subcontinent", *The Indian Express*, January 2, 2020 available at [https://indianexpress.com/article/explained/india-](https://indianexpress.com/article/explained/india-pakistan-1971-war-bangladesh-indira-gandhi-4429236/)

[india-pakistan-1971-war-bangladesh-indira-gandhi-4429236/](https://indianexpress.com/article/explained/india-pakistan-1971-war-bangladesh-indira-gandhi-4429236/) (last accessed on 07 September 2022)

<sup>56</sup> *Ibid.*

<sup>57</sup> Praveen Davar, "1971 India-Pak War: Revisiting the Battle on the Western Front", *The Wire*, December 16, 2020, available at <https://www.theweek.in/news/india/2020/12/16/1971-india-pak-war-revisiting-the-battle-on-the-western-front.html> (last accessed on 23 July 2022)



quo unilaterally. The Simla Agreement further provided that the final resolution of the dispute will only be done through bilateral negotiations between both the nations. No third party intervention would be allowed. India and Pakistan returned the territories to each other occupied by them in areas adjacent to international border for generation of mutual trust and goodwill. However, Pakistan and India retained few strategic areas they captured from the other side in Jammu and Kashmir. This agreement was recognized by both the signatories to be temporary with a provision for final settlement to be reached in future.<sup>58</sup> In pursuance of the agreement, the LoC was mutually delineated on 19 mosaic maps and the maps were formally exchanged by the military representatives of both the countries on 11 December 1972 at Suchetgarh. The delineated maps were then submitted for approval of respective governments who accordingly approved the maps on the same day. The Line of Control (LoC) ran from Manawar Tawi in south towards Thang in the north east and thence towards glaciers in the east.<sup>59</sup>

### (c) The Kargil War

The Kargil Sector along the LoC in Jammu and Kashmir constitutes a 168 km long frontier. This sector consists of five sub-sectors namely, Dras, Mashkoh, Kaksar, Turtuk and Batalik. Each of such sub-sector was the victim of the incursion and

concomitant war. At the LoC between India and Pakistan during winter months, forward outposts at higher elevations such as in the Kargil sector were evacuated by India and Pakistan primarily due to inhospitable conditions. However, Pakistani forces and Pakistan backed militants taking advantage of such practice started incursions in the area in the early months of 1999 and established themselves in each sub-sector by April 1999.<sup>60</sup> Following the incursion, India launched offensive exercise named Operation Vijay on 26 May 1999. The primary objective of the operation was to contain further intrusions and the secondary objective was to evict the intruders.<sup>61</sup> By second week of July 1999, the sub-sectors were substantially cleared of enemy personnel.<sup>62</sup>

After Indian forces started pushing back the Pakistani intruders, the Pakistani PM requested the US to intervene to stop the war. The US president refused to intervene until complete Pakistani withdrawal to the LoC. The Pakistani PM reluctantly conceded to the demand of US and agreed to a complete withdrawal. In pursuance of the agreement, the Pakistan regular troops withdrew from the Indian Territory by 11 July 1999. India declared operations Vijay a success on 14 July 1999.<sup>63</sup> The Kargil war officially ended on 26 July when India declared that all Pakistani infiltrators have been cleared of

<sup>58</sup> Brian Farrell, "The role of International Law in the Kashmir Conflict" 21(2) *Penn State International Law Review* 305 (2003).

<sup>59</sup> Strategic Analysis, Journal of the IDSA, October 2001 (Vol. XXV, No.7), Appendix 8, [https://ciaotest.cc.columbia.edu/olj/sa/sa\\_oct01app01.html](https://ciaotest.cc.columbia.edu/olj/sa/sa_oct01app01.html)

<sup>60</sup> Alok Deb, "Kargil and its Impact on National Security" *Journal of Defence Studies* 7 (2019)

<sup>61</sup> *Ibid.*

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

<sup>63</sup> Brude Ridell, "American Diplomacy and the 1999 Kargil Summit at Blair House", *Policy Paper Series*, Centre for Advanced Study of India, University of Pennsylvania (2002).



their territory and all the peaks have been recaptured.<sup>64</sup>

Majority of war observers have opined that Pakistan achieved nothing through this haphazardly planned military misadventure.<sup>65</sup> Pakistan forces withdrew to positions behind the Line of Control agreed to by both the nations in the Simla Agreement 1972 lending greater credibility to LoC.<sup>66</sup>

#### (d) Abrogation of Article 370

The Indian government abrogated Article 370 in August 2019 carving out two Union Territories of Kashmir and Ladakh from the hitherto state. The move was labelled as illegal and a unilateral change in status quo by Pakistan and China. India has so far maintained that such change is internal and sovereign exercise of power. India justified the abrogation as step undertaken for better administration and socio-economic development of erstwhile state. India further contends that abrogation does not affect the international status of the Kashmir or in any way violates the international agreements entered into by India.

#### INTERNATIONAL LAW PERSPECTIVE

The aforesaid legal facts and the respective contentions need to be assessed in accordance with the international legal principles.

<sup>64</sup> Srijan Shukla and Sajid Ali, "How Indian Army's valour and Vajpayee's diplomacy won the Kargil War for India", *The Print*, 8 July, 2019 available at <https://theprint.in/past-forward/how-indian-armys-valour-and-vajpayees-diplomacy-won-the-kargil-war-for-india/259362/>. (last accessed on 07 August 2022)

<sup>65</sup> Ashley Tellis, C Christine Fair and Jamison Jo Medby, *Limited Conflicts under the Nuclear*

#### (a) Validity of Instrument of Accession

The validity of the Instrument of Accession signed by the Maharaja is widely debated on the ground that it was only a temporary mechanism to facilitate Indian military intervention. Further, it is contended that Governor-General of India and Indian Prime Minister themselves agreed to referendum through unilateral pronouncements.<sup>67</sup>

The IoA was signed under the provisions of Indian Independence Act, 1947 and the Government of India Act 1935. Under these laws, the only requirement was signing of the IoA by the ruler of the princely states and its acceptance by the Governor-general of India.<sup>68</sup> There is no requirement of subsequent ratification of the accession by plebiscite or referendum either in the domestic laws (legality of IoA as per international will be discussed in the next section). Thus the state of Jammu and Kashmir lawfully acceded to the Dominion of India and became its integral part upon signing of IoA and its formal acceptance by Lord Mountbatten. This signing and acceptance remain unaffected by any subsequent personal letters or unilateral political statements.<sup>69</sup>

The invasion of Kashmir by Pakistan preceding execution of IoA is illegal being use of force in violation of UN Charter and

*Umbrella: Indian and Pakistani Lessons from the Kargil Crisis 8-11* ( Santa Monica: Rand Corporation, 2001).

<sup>66</sup> P. R. Chari, "Reflections on the Kargil War", *Strategic Analysis* 360-364 (2009).

<sup>67</sup> *Supra* note 11 at 309.

<sup>68</sup> Government of India Act 1935.

<sup>69</sup> *Supra* note 66.



violation of standstill agreement signed by Pakistan with Maharaja of Kashmir.<sup>70</sup>

### (b) Principle of Self-Determination

The principle of self determination, which essentially means right to take part in governance, has evolved into a legal norm of international law as of today. Pakistan claims that the Kashmir's accession to India violates the right to self determination of Kashmiri people. However, under the doctrine of inter-temporal law, legal question must be determined in the light of international legal principles as they existed at that time. Therefore, to examine the applicability of this principle to Kashmir dispute, the existence of this principle in 1947 must be examined. Although self-determination was mentioned in UN Charter itself but it was mentioned in a limited and restricted manner. The concept of self-determination at that time meant freedom from colonial rule.<sup>71</sup> The concept started gaining traction in the 1960's. Several international instruments were signed during this period giving concept of self-determination a legal recognition. In 1970, U.N. adopted the Declaration on Principles of International law concerning Friendly Relations and Co-operation Among States. This declaration is the culmination of the process of attaining full legality which began with the UN Charter.<sup>72</sup> Thus the principle of self determination does not apply to the accession of Kashmir as a binding law.<sup>73</sup>

On the other hand, while analysing the principle of self determination (read external

self-determination) to the Kashmir dispute in general, the principle of self determination is applicable. The pre-condition for application for such right is the oppression of population which remains debateable on either side of the border.<sup>74</sup> Nevertheless, the relevant point to be ascertained is that whether the entire state has to vote for external self determination or only a region such as Kashmir Valley as was proposed by Sir Owen Dixon. Several experts have opined in favour of one or the other option.<sup>75</sup> Notwithstanding the mode of application of this principle, India and Pakistan have indeed denied this right to the people of Kashmir. India offered Pakistani Premier in 1956 a plebiscite for the entire Kashmir but the offer was eventually rejected.<sup>76</sup> To this date, Pakistan has not withdrawn its forces and thus the first pre-condition for plebiscite still remains unfulfilled. India now remains non-committed for such a plebiscite citing election of constituent assembly, its ratification of accession and change of demography.<sup>77</sup>

### (c) Change of Demography

India contends that gradual change of demography in the Kashmir valley has rendered the plebiscite exercise a futile exercise now. Moreover, the demography of different regions of the state is different. The state taken as a whole one unit for referendum can lead to unjustifiable results as was observed by Sir Owen Dixon.<sup>78</sup>

On the Indian side, the demography of the state has overall remained similar although

<sup>70</sup> *Supra* note 51 at 497.

<sup>71</sup> Joshua Castellino, *International Law and Self-Determination* 20 (2000).

<sup>72</sup> *Id.* at 34.

<sup>73</sup> *Supra* note 11 at 310.

<sup>74</sup> *Supra* note 51 at 513

<sup>75</sup> *Supra* note 11 at 315.

<sup>76</sup> *Supra* note 51 at 500.

<sup>77</sup> Piotr Balcerowicz and Agnieszka Kuszewska, *Law and Conflict Resolution in Kashmir* (Routledge, first Edition, 2022).

<sup>78</sup> *Supra* note 11 at 315.



there has exodus of minorities from the Kashmir valley.<sup>79</sup> On Pakistan side of the Line of Control (LoC), the demographic change has been more profound and effective. The composition of population remained constant till 1970 but thereafter Pakistan made deliberate attempt to change the demography of Pakistan occupied Kashmir. Gilgit, Baltistan and other occupied areas were culturally distinct areas where native languages were spoken. Pakistan encouraged non-natives from its regular territory to settle down in Kashmir. The effect is that Pakistan occupied Kashmir as of today is dominated by Urdu and Punjabi speaking population. Thus the local demography has indeed been substantially altered so as to render plebiscite inequitable.<sup>80</sup>

#### (d) Legal force of the United Nations Resolutions

The United Nations Security Council resolutions including Resolution No.47 prescribed procedure of plebiscite for the state of Jammu and Kashmir. India and Pakistan till date blame each other for non-compliance of this resolution. India is blamed for failure to commit for a plebiscite while Pakistan is blamed for non-withdrawal of troops. However, the resolution as such was not binding on the state parties as they were not passed pursuant to Article 25 the UN Charter but rather as recommendations made under Article 38 of the UN Charter.<sup>81</sup>

<sup>79</sup> Supra note 51 at 503.

<sup>80</sup> Prabhash K Dutta, “Kashmir: Curious Case of Demographic Realities and Perceptions”, *India Today*, August 19, 2019, available at: <https://www.indiatoday.in/news-analysis/story/kashmir-curious-case-of-demographic-realities-and-perceptions-1582376-2019-08-19> (last accessed on 14 August 2022).

<sup>81</sup> Supra note 11 at 311.

Notwithstanding the non-binding nature and non-compliance of these resolutions, these resolutions indeed became a tool for the disputant states to legitimise their position on Kashmir.

With regard to the resolutions passed by the UNCIP, it has been observed by its Josef Korbel (member of UNCIP) that UNCIP was only an agency of good offices having no power to enforce its decisions.<sup>82</sup> Moreover, the 13<sup>th</sup> August resolution of the UNCIP was a proposal which was deemed to be rejected by the UNCIP itself.<sup>83</sup>

#### (e) Simla Agreement 1972

The Simla Agreement introduced bilateral framework for resolution of the dispute. The Agreement barred any third party intervention. The Agreement also barred any unilateral actions altering the situation. The Simla Agreement has also overridden the UN resolutions passed by the UNSC with regard to Kashmir as the treaty has been registered under Article 102 of the U.N. Charter.<sup>84</sup> It has been observed by international legal experts that Simla Agreement has imparted the Line of Control the character of a de-facto border.<sup>85</sup>

#### (f) Article 370 Abrogation

The legal effect of abrogation of Article 370 on the Kashmir dispute also needs to seen. The abrogation does not affect the international status of Kashmir. The internal

<sup>82</sup> Josef Korbel, “The Kashmir Dispute and the United Nations”, 3 *International Organisation* 281 (1949).

<sup>83</sup> *Id.* at 282.

<sup>84</sup> Asoke Mukerjee, “A Diplomatic Narrative of the 1971 War”, *The Wire*, 18 December 2021, available at <https://thewire.in/diplomacy/a-diplomatic-narrative-of-the-1971-war> (last accessed on 17 August 2022)

<sup>85</sup> Supra Note 11 at 313.



relation of Kashmir vis-a-vis the Central Government of India is not relevant for legal analysis of the dispute. The special status of Jammu Kashmir was not irrevocable under the international law as autonomy regimes can be abolished by mother states under international law. The minority rights under international law do not afford protection to special status of Kashmir. Moreover, it is debateable that whether Kashmiris constitute a legal minority under the international law. India has not violated Kashmir's external right to self determination although its actions are probably a breach of internal right to self determination. However, legal experts have opined that India has the discretion and freedom to act within its duty to protect and ensure peace under international law.<sup>86</sup>

## CONCLUSION

International legal experts have commented that although the legal claims of India and Pakistan have some extent of validity yet these claims have been gradually undermined by politics and lack of international will.<sup>87</sup> Experts are further of the view that the dispute has become intractable due to unilateral actions of each side. They are of the view that equitable approach rather than strict legalistic approach seems more plausible for any resolution.<sup>88</sup> Succinctly, a political solution rather than legal one seems more plausible and effective. The legal aspects of the dispute need to be used as a tool for effective and durable solution rather than using it for entrenchment of the conflict.

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<sup>86</sup> *Supra* Note 51 at 518.

<sup>87</sup> *Supra* Note 11 at 293.

<sup>88</sup> *Ibid.*