



RESEARCH PAPER

Diplomacy to Lawfare: Analyzing Legal Claims in Jammu and Kashmir

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ABSTRACT

Jammu and Kashmir, a region nestled in the northern part of the Indian subcontinent, has been a long-standing source of political and territorial dispute between India, Pakistan, and China. This comprehensive analysis delves into the intricate web of historical, geopolitical, and legal aspects surrounding the Jammu and Kashmir issue. It explores how diplomacy has been employed as a tool to address the dispute and how the matter has evolved into "lawfare," where international legal claims and arguments play a central role. This paper examines the various legal perspectives and claims put forth by the involved parties, including India, Pakistan, and the people of Jammu and Kashmir, and assesses the impact of these claims on the ongoing conflict. Through this analysis, we aim to shed light on the complex interplay between diplomacy and international law in the context of the Jammu and Kashmir dispute.

KEYWORDS Article 35A, Article 370, Conflict Resolution, International Law, Jammu and Kashmir, Diplomacy, Kashmir Conflict, Lawfare, Simla Agreement

Introduction

In the modern lexicon of global conflicts, the term "lawfare" resonates as a powerful and transformative concept. Coined at the turn of the 20th century, it emerged as a response to evolving geopolitical dynamics, challenging traditional notions of warfare. This neologism, born from the insights of two Chinese colonels, Qiao Liang and Wang Xiangsui, who authored "Unrestricted Warfare," expanded the realm of warfare beyond conventional battles. It encompassed the subtler dimensions of "psychological warfare," "media warfare," and notably, "judicial warfare," a facet increasingly instrumentalized to criminalize dissent and advance strategic objectives. (Liang & Xiangsui, 1999)

Almost simultaneously, American Air Force colonel Charles Dunlap recognized the pivotal role of law in contemporary warfare. He introduced the term "lawfare," a fusion of "law" and "warfare," to characterize the 21st-century paradigm where legal systems become instruments of conflict. Lawfare entails leveraging the judicial domain as a means to achieve military objectives, emphasizing the intrinsic link between law and war, where legal maneuvers are deployed as tactical weapons. (Dunlap, 2001)

Drawing from the rich tapestry of lawfare's origins, we pivot our gaze to the labyrinthine conflict enshrouding Jammu and Kashmir, a region marred by protracted strife. While conventional diplomacy has long been at the forefront, concealed beneath the surface lies a parallel arena characterized by astute legal maneuvering, the orchestration of international instruments, and the calculated deployment of law as a formidable weapon. This realm is the crucible of our inquiry, where scholars have christened it "lawfare."

Our research embarks on a comprehensive exploration of the Jammu and Kashmir conflict, a saga intimately entwined with the essence of lawfare. This portmanteau of "law" and "warfare" embodies the intricate interplay between legal instruments and doctrines wielded to attain strategic objectives, frequently within the complex theater of international disputes and conflicts. In the case of Jammu and Kashmir, it manifests as a multifaceted web of legal claims and counterclaims meticulously employed by India and Pakistan in their relentless pursuit of control over this embattled region.

Lawfare encompasses a diverse array of legal strategies, ranging from harnessing international law and agreements to exploiting the mechanisms of international institutions, employing litigation as a tactical weapon, and crafting persuasive narratives to mold public opinion. Within the crucible of Jammu and Kashmir, lawfare materializes through the relentless contestation of the region's status, the probing examination of its accession, and the fervent advocacy for self-determination. These legal contentions, intricately interwoven with political and historical dimensions, stand as the epicenter of our analysis.

As we navigate the intricate landscape of this enduring conflict, our inquiry embarks on a critical examination of the legal bedrock underpinning India and Pakistan's claims and counterclaims concerning Jammu and Kashmir. We delve deep into historical archives and pivotal international legal instruments, tracing the evolution of these legal strategies from the nascent days of accession to contemporary debates on self-determination.

Through this meticulous and nuanced analysis, our objective is to illuminate the subtle interplay between law, diplomacy, and politics within the Jammu and Kashmir conflict. Our investigation underscores the profound implications of lawfare in shaping the trajectory of this dispute, offering profound insights into the ongoing struggle for authority, identity, and sovereignty in one of the world's most contentious regions.

Literature Review

The paper draws its paradigm of understanding from two important academic works. Firstly, in "Unrestricted Warfare" by Qiao Liang and Wang Xiangsui, the authors offer a compelling examination of the concept of "judicial warfare," shedding light on how it has become increasingly instrumentalized to criminalize dissent and advance strategic objectives in contemporary conflicts. They astutely illuminate the multifaceted ways in which legal mechanisms and international judicial bodies are employed not only to address legitimate grievances but also as tools of political manipulation and coercion. By delving into the strategic use of law and the manipulation of international legal norms, the authors provide a thought-provoking perspective on the evolving nature of conflict in a globalized world, where "judicial warfare" has emerged as a powerful, yet contentious, facet of modern statecraft.

Secondly, In "Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts," the author brilliantly introduces the concept of "Lawfare," which has had a profound influence on contemporary discussions surrounding the interaction of law and warfare. This term, coined by the author, serves as a crucial paradigm that has undoubtedly shaped the way modern conflicts are understood and analyzed. The book not only elucidates the complex interplay between international humanitarian law, human rights, and military interventions but also delves into the strategic manipulation of legal processes for political and military advantage. By establishing a framework that focuses on the weaponization of law as a means of achieving military and political objectives, the author sets the stage for a comprehensive

examination of how "Lawfare" has become a central component in the arsenal of state and non-state actors in 21st-century conflicts. This seminal work provides a foundational basis for understanding the multifaceted dimensions of contemporary warfare, making it an indispensable resource for scholars and researchers like myself, seeking to explore the intricate dynamics of the Kashmir conflict.

Two understand the intricate play of politics, diplomacy, and lawfare following works have been examined:

"Kashmir: A Disputed Legacy" and "Birth of a Tragedy, Kashmir," authored by Alastair Lamb, stand as pivotal works that have significantly enriched the scholarly understanding of the historical developments surrounding the partition of India and the ongoing Kashmir dispute. Lamb's meticulous research and nuanced analysis in these books offer invaluable insights into the intricate historical underpinnings of the region's enduring conflict. Through a comprehensive exploration of the socio-political factors, the competing national narratives of India and Pakistan, and the aspirations of the Kashmiri people, these texts have served as foundational resources for this research (Masood, & Muzaffar, 2019).

Christopher Snedden's "Understanding Kashmir and Kashmiris" stands as an invaluable addition to the corpus of literature concerning the Kashmir conflict. The book offered a comprehensive and insightful exploration of the sociopolitical dynamics, historical accounts, and the complex societal fabric of the Kashmir region. Snedden's meticulous research, combined with a nuanced analysis, provided the author with a deeper understanding of the multifaceted nature of the Kashmiri society, as well as the historical developments that have contributed to the region's ongoing turmoil. His work has been a crucial resource for this research, facilitating a more holistic examination of the issue beyond the geopolitical and legal dimensions.

Ijaz Hussain's "Kashmir Dispute: An International Law Perspective" provides a comprehensive analysis of the enduring Kashmir conflict from the standpoint of international law. This seminal work delves into the historical, political, and legal dimensions of the Kashmir dispute, elucidating the complex web of international agreements, United Nations resolutions, and bilateral accords that have shaped the region's contentious history. Hussain's meticulous examination of the principles of self-determination and territorial sovereignty, as well as the role of key stakeholders such as India, Pakistan, and the Kashmiri people, offers valuable insights for researchers seeking to comprehend the multifaceted nature of the Kashmir issue within the context of international legal norms. His work underscores the importance of international law as a critical framework for understanding and potentially resolving this protracted conflict, making it an indispensable resource for scholars and policymakers alike.

The Genesis of the Issue

Pre-partition scenario

The pivotal moment of August 1947 marked the partition of the British Indian Empire into two independent states, India and Pakistan, significantly shaping the future of the subcontinent. This division was grounded in the principle that regions with non-Muslim majorities would be integrated into India, while those with Muslim majorities would become part of Pakistan. Amid this colossal transformation, the fate of over 560 princely states remained uncertain.

These princely states, while enjoying internal autonomy, depended on the British government for defense and foreign affairs. Paramountcy, a concept where the British

Crown held ultimate authority over these states' external matters, loomed over their sovereignty.

The issue of paramountcy was resolved with the enactment of the Indian Independence Act of 1947. Article 7 of this act explicitly stated that British suzerainty over these princely states had lapsed, granting them full independence and sovereignty. This newfound sovereignty gave them the liberty to decide whether to join India, Pakistan, or remain independent (Masood, Sultana, & Muzaffar, 2020).

The unique legal status of the princely state of Jammu and Kashmir is particularly noteworthy. In a case such as Prem Nath vs State of Jammu and Kashmir, the Indian Supreme Court acknowledged the Maharaja's quasi-sovereign status, a potential sovereign and independent state under international law.

However, it was clear that the British government preferred none of these princely states to remain fully independent due to their geographical integration within the subcontinent.

Comparative Analysis of Hyderabad, Junagadh, and Kashmir

By August 15, 1947, most princely states, with the notable exceptions of Hyderabad, Junagadh, and Kashmir, had acceded to either India or Pakistan based on the partition principle.

Junagadh, with a Muslim ruler but a Hindu majority, initially chose to accede to Pakistan, a decision contested by India. The subsequent integration of Junagadh into India followed a plebiscite.

Hyderabad, characterized by a Muslim ruling authority and a Hindu majority population, expressed a desire for independence or accession to Pakistan. India, however, exerted immense pressure on Hyderabad to join India, even employing military force when necessary.

In the case of Jodhpur, Maharaja Hanwant Singh initially leaned towards Pakistan but was convinced by Lord Mountbatten to align with India, in accordance with the partition principle.

In the three cases cited above leaders of the Princely States wished and tried to go against the principle of partition but were compelled forcefully (by political and in some cases military means) to do otherwise. Every possible option was used to induce them to follow the principle of the Partition of British India.

However, in the case of the Princely state of Jammu and Kashmir, the rationale of partition was deliberately neglected. The State of Jammu and Kashmir had 72% of the Muslim population and 25% of Hindu residents under the kingship of a Hindu Dogra. So as per the Partition principle, Jammu and Kashmir should go to Pakistan. Apart from the religious factor, many other factors also linked the State of Jammu and Kashmir to West Pakistan. Besides religion, Geographical connectivity was the most important principle, devised by Lord Mountbatten in his Speech to the rulers of Princely States, to be considered while choosing India or Pakistan as their patron state. In the context of Jammu and Kashmir, its primary lifelines to the outside world were restricted to routes through Pakistan, specifically Rawalpindi for road access and Sialkot for rail connections. Postal and telegraphic services were reliant on connections through Pakistan as well. Moreover, Pakistan served as the principal channel for the importation of vital commodities such as petroleum, sugar, and salt. The Jhelum valley route, which traversed Pakistan, represented the sole means by which Kashmiri fruits were

transported to the wider world. The primary source of income for the people of Kashmir, namely tourists, predominantly arrived from the Pakistani sector of the subcontinent. Similarly, timber from Kashmir was transported downstream through the Jhelum River for export purposes.

The Genesis of the Trouble

As the partition of India approached, emissaries from both the Indian National Congress and the Muslim League sought to persuade Maharaja Hari Singh of Jammu and Kashmir to align with their respective dominions. In May, Acharya Kripalani, President of the Indian National Congress, attempted to convince the Maharaja to join India during his visit to Kashmir, but was unsuccessful. In June 1947, Lord Mountbatten visited Kashmir and advised the Maharaja to make a decision based on the will of the people, whether to join India or Pakistan.

Following Lord Mountbatten's visit, Mahatma Gandhi arrived in Kashmir, leading to some significant changes. Prime Minister Ram Chandra Kak, who was pro-independence, was replaced by Dogra leader Janak Singh. Shortly thereafter, Sheikh Abdullah, a pro-Congress figure, was released from prison. By mid-October, Prime Minister Janak Singh was replaced by Indian Congress nominee Mehr Chand Mahajan, who was promised military assistance at his discretion.

Amid these political shifts, Maharaja Hari Singh took actions influenced by the ethnic cleansing occurring in East Punjab and neighboring states like Patiala, Faridkot, and Kapurthala. He attempted to disarm Muslim personnel within his army and introduced Rashtriya Swayam Sewak Sang and Sikh groups into Jammu. These actions met resistance and sparked the beginning of a guerrilla movement, largely initiated by approximately 70,000 Poonchis, former soldiers in the British Indian Army during World War II.

This marked the genesis of the conflict in Kashmir. A grim chapter unfolded as the Muslim population was forced to flee, facing cold-blooded killings and the destruction of their homes. Aljazeera reported on the massacre, describing it as "state-sponsored and state-supported," with the involvement of the Dogra Army, Sikh forces, and RSS, a right-wing Hindu organization. This violence aimed to bring about demographic changes in Jammu, a region with an overwhelmingly Muslim population.

News of these atrocities inflamed the passions of Muslims in Kashmir and Pakistan. Guerrilla tactics were employed against Dogra forces, and Pathan tribesmen from the tribal belt of the Northwest Frontier Province joined the conflict to aid their fellow Muslims.

With the Poonch revolt and the arrival of tribesmen near Baramulla, the Maharaja feared losing his capital, Srinagar. On 24th October, he appealed to India for military assistance and, on 25th October, fled to Jammu, the winter capital. In Jammu, on 26th October, he formally requested military help from India, stating that he had no option but to seek assistance given the dire situation.

This request, along with the Instrument of Accession, was handed over to V.P. Menon, the Secretary in the Ministry of States, who brought it to Delhi. In his letter, the Maharaja expressed that given the current circumstances within his State and the pressing nature of the situation, he had no choice but to request assistance from the Indian Dominion.

On October 27th, Lord Mountbatten replied to the Maharaja's request. The Indian Government opted to acknowledge the accession of the Kashmir State to the Dominion of India. Yet, consistent with their approach, they aimed to resolve the matter of accession by consulting the will of people once normalcy was reestablished in Kashmir.

Indian troops arrived at Srinagar's airport at nine in the morning on the same day. Meanwhile, in the liberated regions of Poonch, Muzaffarabad, and Mirpur divisions of Kashmir, the Muslim Conference, which had approved a resolution on July 19 endorsing Kashmir's accession to Pakistan, established the government of Azad Kashmir on October 24.

An assessment of Jammu and Kashmir's accession

To evaluate the legitimacy and legality of the accession we have to answer the following questions:

- Was the document of Kashmir's Accession signed under coercion?
- Did Maharaja of Kashmir have the capacity to accede to Indian dominion?

The signing of the Instrument of Accession has been shrouded in uncertainty and controversy. According to established principles of international law, any treaty made by a United Nations member state is required to be registered with the United Nations Secretariat. However, the Instrument of Accession was never formally presented to either the United Nations or Pakistan. While this omission does not invalidate the treaty, it does mean that India cannot invoke this treaty before any United Nations body. Furthermore, Indian authorities claimed in 1995 that the original copy of the treaty was either stolen or lost. This further casts a shadow on the treaty's validity.

Historian Alastair Lamb has questioned whether the Maharaja of Kashmir ever actually signed an Instrument of Accession. Based on available evidence, the existence of such a document remains unclear and may not have occurred by March 1948, as indicated in the Government of India's White Paper on Jammu and Kashmir issued in 1948.

Victoria Schofield, author of "Kashmir in Conflict," has highlighted the contentious timing of the signing of the Instrument of Accession. Official Indian accounts claim that Hari Singh fled Srinagar in the early hours of October 26th, reaching Jammu later that day, where he reportedly signed the Instrument of Accession with India. An alternative timeframe, meanwhile, appears to be suggested by a current study based on British sources. It shows that PM Jawaharlal Nehru's emissary, V.P. Menon, was unable to get to Jammu until the early hours of October 27th, and Hari Singh arrived in the city on the evening of October 26. Indian forces were already arriving in Srinagar by then. To support the argument that the Maharaja had acceded before the arrival of Indian troops, Indian sources have proposed that Hari Singh signed the Instrument of Accession while still in Srinagar but kept it confidential until later.

Alastair Lamb contends that the accession of Kashmir to India may lack validity due to its alleged acquisition under duress. He argues that the presence of Indian troops in Srinagar at the time when the Maharaja signed the Instrument of Accession rendered the process coercive. Given that the signature had not been acquired by October 26, and the prospects of obtaining it were dim, there was a perceived need to orchestrate a series of events that would create the appearance that the accession had already been formalized – a sort of document manipulation. (Lamb, 1997) Article 49 of the Vienna Convention addresses situations involving fraudulent conduct in treaty negotiations. It states that if a State is led to enter into a treaty due to deceptive actions by another

negotiating State, the deceived State can declare the treaty as invalid because its consent to be bound by the treaty was based on fraud. (Vienna Convention on the Law of Treaties, 1969)

In this situation, article 52 of the Vienna Convention on the Laws of treaties which has the customary law charter also comes into operation which states:

"A treaty is invalid if its conclusion is procured by the threat or use of force in violation of the principles of the Charter of United Nations" (Vienna Convention on the Law of Treaties, 1969)

Dr. Raja Muhammad Khan, in his article titled "Kashmir Dispute: A Legal Perspective," highlights a confidential letter from Mr. Alexander Simon, the British High Commissioner to India. The letter disclosed that on the morning of October 27, 1947, despite the absence of any formal accession treaty up to that date, ten Indian aircraft carrying troops and arms were dispatched from New Delhi to Kashmir.

Additionally, it's worth noting that if an accession treaty between the Indian government and the Maharaja did exist, it was conspicuously absent from the Indian White Paper of 1948. These observations raise legal questions regarding the Instrument of Accession and the unique status granted to Jammu and Kashmir through Article 370 of the Indian Constitution, distinct from any other Indian state.

In the face of these uncertainties and inconsistencies, the legality of the Instrument of Accession remains deeply questionable, casting doubt on India's claim over Kashmir.

As far as the second question is concerned, for a government or ruler to enter into international agreements and treaties, they must possess genuine and effective sovereign status, effective authority over population, and including control over their territory. International norms for recognizing governments follow the principle of effectiveness, which involves demonstrating actual territorial control, garnering the obedience of the majority of the population, and ensuring the government's lasting stability.

When applying these conditions to the situation at the time when Maharaja Hari Singh signed the Instrument of Accession, several critical shortcomings emerge. First, regarding the requirement of actual territorial control, the Maharaja had lost sway over substantial portions of his state. Poonch, Mirpur, Kotli, and the Gilgit Agency were under rebel control, with Azad Kashmir being established on October 24. Only Jammu and Ladakh remained under the Maharaja's control, and this was without external military assistance.

The Maharaja's precarious position is evident in his letter of accession to the Indian Governor-General, where he conveyed the pressing requirement for Indian aid, emphasizing that due to the prevailing conditions within his State and the critical nature of the situation, he had no alternative but to seek assistance from the Indian Dominion

This dire situation is further corroborated by V.P. Menon, who was present in Srinagar at the time. He noted, "The Maharaja was completely unnerved by the turn of events...the Maharaja had taken away all the available cars, and the only transport available was an old jeep."

Regarding the second condition, which relates to effective authority over the population, both the Maharaja's grip on power and the functioning of his governmental

machinery had disintegrated. Menon admitted that "there were practically no state forces left," indicating a severe breakdown of authority.

Concerning the third condition, the reasonable expectation of the government's staying power, it's doubtful that the Maharaja could have survived without Indian military assistance, as explicitly stated in his letter of Accession: "If my state has to be saved immediately, assistance must be available at Srinagar."

In light of this analysis, it becomes apparent that the Maharaja lacked the capacity to validly accede, as he had effectively been overthrown. Therefore, the Instrument of Accession he signed may be deemed null and void

In scrutinizing the circumstances surrounding the signing of the Instrument of Accession, a series of critical conclusions emerge. The Maharaja's tenuous control over his territory, his diminished grip on power, and the breakdown of the governmental machinery all cast doubt on the effectiveness of his rule. Moreover, the Maharaja's desperate plea for immediate military assistance from India underscores his lack of confidence in maintaining control independently. These factors collectively challenge the validity of the Instrument of Accession and raise questions about whether it was executed freely and voluntarily. Furthermore, the absence of the Instrument's registration with the United Nations and the disputed timeline of its signing add to the complexity of this historical matter. Ultimately, a comprehensive examination of the context surrounding the Instrument of Accession raises legitimate concerns about its legitimacy, leading to the assertion that it may be considered null and void according to international legal principles

Evolution of the Kashmir Dispute

Over time, the Kashmir issue becomes more and more complicated and protracted. Its dynamics changed because of the behavioral change of the actors involved in it. So, the legal dynamics of the dispute also evolved during the last seven decades. To understand this evolution systemically, the period of the last seven decades is divided into three eras: Multilateralism, Bilateralism, and Unilateralism. The first two eras will be under discussion in this chapter. The last era will be explained in the next section.

The Era of multilateralism; Kashmir question in the United Nations

Following the Maharaja's contentious accession to the Indian dominion, Indian troops arrived in Srinagar on October 27th. Although they managed to recapture Srinagar and partially reverse the insurgent gains, the harsh winter conditions curtailed further military operations to regain full control of the state of Jammu and Kashmir.

Recognizing the seasonal limitations and a military stalemate, Prime Minister Nehru sought intervention from the United Nations, hoping that it would pressurize Pakistan to withdraw its alleged support for the insurgents. As a result, Nehru wrote a letter to the UN Security Council on January 1, 1948, citing Article 35 of the UN Charter, which permits member states to notify the Council of circumstances that may jeopardize global peace and security. Nehru contended that such a situation had arisen between India and Pakistan due to Pakistan's alleged support for invaders against the Maharaja of Jammu and Kashmir. He earnestly requested the Security Council to urge Pakistan to cease its involvement in this matter. Notably, India filed this complaint under Article 35 of Chapter 6 of the UN Charter, related to the "peaceful settlement of disputes," rather than Chapter 7, which pertains to acts of aggression.

In response to India's complaint, Pakistan denied assisting the invaders, asserting that any tribal support provided was in a personal capacity and not sanctioned by the

Pakistani state. The Government of Pakistan also brought under article 35 of the Charter several charges against India, including accusations of genocide, attempts to undermine Pakistan, the forcible occupation of Junagadh, fraudulent acquisition of Kashmir, and India's failure to implement a partition agreement, particularly concerning cash balances and military stores.

After prolonged debates between Indian and Pakistani representatives, the Security Council adopted two resolutions. The first, passed on January 17, 1948, urged both governments to show restraint and requested them to inform the Council immediately of any material changes in the situation.

The second resolution, put into effect on January 20, 1948, resulted in the formation of the United Nations Commission for India and Pakistan (UNCIP). This commission was composed of delegates from three UN member nations: one nominated by India, one by Pakistan, and a third chosen jointly by both India and Pakistan. The fundamental purpose of the UNCIP was to act as an intermediary in the continuing conflict.

Subsequently, further negotiations between India and Pakistan resulted in an additional resolution issued on April 21, 1948. This resolution called upon the Pakistan government to ensure the withdrawal of tribal forces from Jammu and Kashmir, while India was urged to reduce its troop presence to the minimum necessary for maintaining law and order.

Additionally, this resolution stipulated the appointment of a Plebiscite Administrator, selected by the UN Secretary-General, to oversee and conduct a free and equitable plebiscite once specific preconditions were met.

By the time above mentioned resolution was being adopted, The India Army, taking advantage of the melting of the snow, launched a spring offensive in Kashmir. Pakistan perceived it as a serious threat not only to Azad Kashmir but also to the northeastern border region. A refugee problem was also perceived by Pakistan. So, Pakistan decided to not allow the Indian Army to advance beyond the general line Uri-Poonch Nowshera. Given the imminent threat by the Indian Army, Pakistan decided to place its troops in Azad Kashmir. Both India and Pakistan did not abide by the resolution of 17th January and did not notify the commission of the material change on the ground.

Commission was informed by Pakistan about the troops' deployment when it arrived in Karachi. As it was a material change without prior notification, the commission charged Pakistan with a violation of the resolution of 17th January. Pakistan responded to the charge by a counter-charge that the material change was first caused by India which mounted a big offensive in Kashmir.

Resolutions of 13 August 1948 and 5 January 1949

Following comprehensive on-site assessments and negotiations with leaders from India and Pakistan, the United Nations Commission for India and Pakistan (UNCIP) adopted two significant resolutions: one on August 13, 1948, and the other on January 5, 1949. The initial resolution consisted of three primary components.

Firstly, it called for an immediate ceasefire to halt the hostilities in the region. Secondly, it outlined the principles that would underpin a truce agreement:

a) Pakistan was required to withdraw its troops from the region. b) The Pakistan government was entrusted with the responsibility of ensuring the withdrawal of tribal

forces from Kashmir. c) Until a final resolution was achieved, the territory vacated by Pakistani troops would be administered by local authorities, operating under the supervision of the Commission. d) Following notification of the withdrawal of troops and tribal forces, the Government of India was obliged to commence a phased withdrawal of the majority of their forces from the region, in coordination with the Commission. e) It was mandated that the Indian government maintain a minimum force necessary to maintain law and order in Kashmir.

Finally, the third section of the resolution reaffirmed the mutual aspiration of the governments of India and Pakistan for the future status of the State of Jammu and Kashmir to be decided in accordance with the preferences of its populace.

It is noteworthy that India accepted this resolution, while Pakistan voiced objections on the grounds that it did not guarantee a free and impartial plebiscite in the presence of Indian troops. Pakistan advocated for parity in terms of troop removal. The Commission, through negotiations with both parties, succeeded in persuading them to a ceasefire, which was set to take effect on January 1, 1949. Additionally, both countries agreed to accept the resolution of January 5, 1949.

The resolution passed during the United Nations Commission for India and Pakistan's meeting on January 5, 1949, essentially served as an extension of the earlier resolution from August 13, 1948. According to the terms outlined in the January 5 resolution, the matter of accession would be resolved through a democratic process that entailed a free and unbiased plebiscite. This plebiscite was to be conducted once the Commission had verified the successful implementation of the ceasefire and truce provisions detailed in Parts I and II of the Commission's August 13, 1948 resolution. This process also required the completion of arrangements for the plebiscite.

Furthermore, the resolution delineated the procedure for appointing a Plebiscite Administrator, to be nominated by the United Nations Secretary-General in consultation with the Commission. The formal appointment of this administrator was to be made by the Government of Jammu and Kashmir. Once the Commission was satisfied that a peaceful environment had been reestablished in the State, it would collaborate with the Plebiscite Administrator, alongside the Government of India, to determine the final disposition of Indian and State armed forces. This disposition would be executed while duly considering the State's security and the freedom of the plebiscite.

Additionally, the resolution stipulated that all State citizens who had departed due to disturbances would be invited and granted the freedom to return, fully exercising their citizenship rights. Conversely, individuals who had entered the State unlawfully since August 15, 1947, would be expelled.

Regrettably, the resolutions of August 13 and January 5 provided a framework for demilitarization and a plebiscite as a solution to the Kashmir dispute, but their practical impact remained limited. While they did result in a ceasefire agreement (often breached by both sides through cross-border shelling and infiltrations, even to this day), the broader resolutions largely remained unimplemented.

Subsequently, after the Commission's arbitration proposal faced rejection, the United Nations Security Council appointed General McNaughton of Canada, serving as the President of the Month, to take on this responsibility. On December 22, 1949, General McNaughton presented his proposal, outlining a gradual process of demilitarization in the region. The objective was to ensure that this demilitarization did not instill fear among the populations residing on either side of the ceasefire line (McNaughton, 1949). Pakistan accepted this proposal, whereas India rejected it.

In the wake of these developments, the United Nations Security Council, in a resolution dated March 14, 1950, dissolved the United Nations Commission for India and Pakistan. In its place, the office of the United Nations Representative for the Demilitarization of the State was established, with Sir Owen Dixon, Chief Justice of Australia, appointed to lead this office. Dixon earnestly endeavored to facilitate an agreement between India and Pakistan for a demilitarization plan. However, he encountered insurmountable challenges primarily attributable to the inflexible positions of both countries regarding the Kashmir issue. Consequently, in a state of frustration, Sir Owen Dixon resigned.

Prior to his resignation, Dixon proposed a partition plan for the state of Jammu and Kashmir. Under this plan, Ladakh would be allocated to India, the Northern Areas and Azad Kashmir to Pakistan, Jammu would be divided between the two, and a plebiscite in the Kashmir Valley was envisioned.

Dixon's report was one of the early documents to recognize the need to address Kashmir as a complex mosaic of overlapping territories, each necessitating separate examination, even down to the district and sub-district (tehsil) levels. This approach was deemed essential to account for the state's profound social, cultural, and religious diversity. Dixon astutely observed the regionalization of this diversity and the variations in political loyalties, acknowledging that the territories administered by Pakistan exhibited distinct identities compared to those in the Valley area, Ladakh, and the Jammu hills. Dixon also recognized that conducting a referendum at the state level of the former Dogra Kingdom could result in considerable injustice.

Despite Dixon's earnest efforts, his plan ultimately faltered due to adverse ground conditions and the reluctance of both countries to fulfill their demilitarization obligations.

In the absence of a defined goal or direction, the UN Security Council kept debating the Kashmir problem. It did not reiterate previous decisions, and the impasse was exacerbated by permanent members' veto power and India's increasing dependence on the Soviet Union for assistance. Resolutions 80, 91, 96, 98, 122, and 126 were enacted in 1957, among other resolutions that were passed in the years preceding the Tashkent Declaration of 1966, but the Security Council's approach to the central problem seemed to stray from an equitable course.

The Era of Bilateralism

The year 1971 witnessed a pivotal moment in South Asian history when the war led to the disintegration of Pakistan's Eastern wing, ultimately giving rise to the independent nation of Bangladesh. This momentous transformation not only reshaped regional power dynamics but also had a profound impact on how both India and Pakistan approached the long-standing Kashmir issue. The Shimla Accord of 1972, a historic accord signed in July in the erstwhile summer capital of the British Raj by Prime Ministers Indira Gandhi and Zulfikar Ali Bhutto, was the culmination of these evolving dynamics.

The Shimla Accord was initially hailed as a significant breakthrough in bilateral relations, particularly concerning the complex Kashmir question. Initially, it ushered in a period of relative peace that extended well into the 1980s. However, from its inception, certain aspects of the accord were deeply contentious and, as events unfolded, revealed fundamental flaws.

From India's perspective, the Shimla Accord aimed at achieving a permanent resolution of the Kashmir dispute that would effectively remove it from the purview of the United Nations. It redefined the ceasefire line as a modified Line of Control (LOC), thereby creating a de facto "soft border" between the regions administered by India and Pakistan within the former Dogra Kingdom. The accord also envisioned the establishment of quasi-autonomous administrations in Muzaffarabad and Srinagar, fostering interrelationships between these regions. Furthermore, it implicitly recognized the potential for population shifts between regions that had long been divided by the ceasefire line but shared family and cultural links. Tacit in the Shimla Accord was a departure from the earlier notion of a referendum and a recognition that the resolution of the Kashmir issue could lie in a practical partition of the former Dogra Kingdom along the ceasefire line. With some adjustments, this partition was envisaged as a means to bring closure to the issue.

India sought to circumvent the elimination of the United Nations' involvement by referencing the international organization within the accord's text, stating, "That the principles and purposes of the Charter of the United Nations shall govern the relations between the two countries" (Simla Agreement, 1972). India interpreted this reference as a commitment to addressing any future challenges in a manner consistent with the principles of the United Nations, emphasizing the avoidance of armed conflict and the pledge to refrain from the use of force. In contrast, Pakistan perceived the mention of the UN Charter as an ongoing commitment to resolving the Kashmir issue in accordance with the numerous UN resolutions.

Are the United nations Kashmir Resolutions Invalidated by the Shimla agreement

It has been argued by many scholars that the Shimla agreement invalidated forever the UN Security Council resolutions by proclaiming that "*the two countries are resolved to settle their differences by peaceful means through bilateral negotiations or by any other peaceful means mutually agreed upon between them*" (Simla Agreement, 1972). In other words, this is an invocation of the international rule of *lex posterior derogat priori* (the later treaty abrogates the earlier one). This principle is outlined in Article 59 of the Vienna Convention on the Laws of Treaties as follows:

If all parties to a treaty enter into a new treaty covering the same subject matter, the old treaty will be deemed terminated. This can happen in one of two ways: either the parties intended for the new treaty to govern the matter, as shown by the new treaty's provisions, or the new treaty's provisions are so fundamentally at odds with the old one that they cannot be applied simultaneously.

The Shimla Pact superseded the UN Security Council Resolutions, as per New Delhi's above claimed viewpoint. The Shimla Agreement's section endorsing the bilateral approach to Kashmir and voiding the previous international or multilateral approach states that two nations have committed to address their differences via peaceful bilateral discussions.

A thorough examination of the Shimla Agreement and international law reveals that the Indian argument is highly unsustainable. The first clause of the Shimla Agreement asserts that the relations between the two countries shall be governed by the principles and purposes outlined in the United Nations Charter. (Simla Agreement, 1972)

As stipulated in Article 103 of the United Nations Charter, in the event of a discrepancy between the obligations of UN Member States under the current Charter and their responsibilities under any other international agreement, the former shall take precedence. (United Nations)

Article 103 of the UN Charter establishes the principle of *lex prior derogate posteriori*, meaning that a later treaty becomes invalid if it contradicts an earlier treaty. In the context of the Shimla Agreement, the provisions endorsing bilateral resolutions are not in harmony with the UN Security Council Resolutions. In terms of the legal ramifications of this conflict between the two norms, it's important to note that the treaty itself is not annulled or invalidated. Instead, only the treaty obligations that clash with the Charter become non-binding or inoperative.

So, it is evident from the above-mentioned arguments that despite Indian bid to make the Kashmir bilateral and to keep third parties away through an agreement that Pakistan has to make (because of the crisis situation it was passing through), the Kashmir issue is still convincingly an international issue and is demanding international attention.

Kashmir dispute, since the Shimla Agreement, was in cold storage because of a bilateral stalemate between India and Pakistan. However, the abrogation of Article 370 and 35A, in 2019, and the bifurcation of Indian-administered Kashmir have marked a major shift from the bilateral approach to the unilateral one. These developments marked a new era in the Kashmir dispute i.e the era of unilateralism. The next section will be shedding light on this turn in the history of the Kashmir imbroglio.

The era of Unilateralism; A post article 370 situation

Over time, the so-called "Shimla Spirit" started to vanish. Once again Both India and Pakistan found themselves trapped in their traditional dilemmas. The vows of confidence-building measures were soon broken and India started to inculcate its respective part of the Jammu and Kashmir into their mainland. This evolution of policy led the Kashmir dispute to a new era i.e. the era of Unilateralism.

On August 5, 2019, the ruling BJP-led central government of India took a significant and impactful step that is poised to have profound implications not only for Jammu and Kashmir but also for the broader region. Fulfilling a promise outlined in their election manifesto, the BJP government, guided by Hindutva principles, Article 370 of the Indian Constitution, which granted special status to the state of Jammu and Kashmir, was revoked. Simultaneously, the state was divided into two Union territories: Jammu and Kashmir became a Union territory with its own legislative body, while Ladakh was established as a Union territory without a legislative assembly. The Indian decision to revoke Article 370 marked a significant turning point in the Kashmir conflict, shifting it from an international matter to an internal one, from the Indian perspective. This evolution in the Kashmir discourse has unfolded over the past seven decades. India cited Pakistan's abrogation of the state-subject rule as a justification for revoking Article 370 from the Indian constitution. However, this reasoning does not hold up, as the legal basis for India's claim to Jammu and Kashmir lies in the Instrument of Accession signed with the Maharaja. Article 370 was a provision to which the Maharaja agreed when acceding to India. Therefore, the revocation of Article 370 can be seen as a breach of trust and a clear violation of the Instrument of Accession. In contrast, Pakistan had not entered into a similar agreement with the ruler of Jammu and Kashmir that would have prohibited it from making such constitutional changes.

Abrogation of article 370 and India's ingemination of Kashmir as an internal issue

On August 5, 2019, the BJP-led government of India fulfilled their inveterate desire to repeal Article 370 from the Indian Constitution. This was carried out through a presidential decree, unilaterally nullifying Article 370, which had conferred special status on the disputed region of Kashmir under Indian administration and transformed the

state into a Union Territory with a legislature. Despite the fact that many Kashmiris viewed Article 370 as a symbol of foreign occupation, they wished to safeguard it in the prevailing circumstances.

To suppress any reaction from the Kashmiri population, the government resorted to stringent measures, including a heavy-handed approach, extensive crackdowns, curfews, the abduction of local activists and leaders, and a communication blackout. The revocation of Article 370 was perceived as a betrayal by the people of Kashmir. In her interview with author and columnist Aatish Taseer on the BBC, Ms. Mehbooba Mufti, the former Chief Minister of Indian-administered Kashmir, expressed her disillusionment, remarking that people like her, who had faith in the Indian constitution, have felt let down by the nation they placed their trust in. She also alluded to a sense that the state may have made an unfortunate choice by aligning with India rather than Pakistan during the 1947 partition. (BBC, 2019).

What was article 370 and 35A

Article 370 served as the cornerstone for the accession of Jammu and Kashmir to the newly independent Indian dominion during the period when princely states had the choice to align themselves with either India or Pakistan in the aftermath of British colonial rule in 1947.

Enacted in 1949, this article conferred special privileges upon the state of Jammu and Kashmir, affording it exemptions from specific provisions of the Indian constitution. These exemptions granted the region the authority to legislate on a range of matters, excluding those concerning finance, defense, external affairs, and communications, which remained under the purview of the Indian government. Additionally, Article 370 established a unique constitution for Jammu and Kashmir, recognized a separate flag, and imposed restrictions on property rights in the region, particularly for individuals from outside the state.

Article 35A was added to these provisions in 1954 by a presidential order that strengthened the guidelines set forth in Article 370 of the Indian Constitution. In Indian-administered Kashmir, Article 35A gave the local legislature the power to decide who is a permanent resident in the area. It explicitly barred individuals from outside the territory from acquiring permanent residency, purchasing land, seeking local government employment, or accessing educational scholarships within the region (Aljazeera, 2019).

A legal perspective on article 370

To comprehend the legal intricacies of the abrogation of Article 370, it is essential to recognize that Article 370 serves as the constitutional embodiment of the conditions outlined in the Instrument of Accession, which was signed by the ruler of Kashmir and the Government of India in 1948. It reflects the contractual rights and responsibilities of both parties.

In 1947, as India gained independence from British rule, the process of princely states aligning themselves with either India or Pakistan required the formalization of their choice through a legal document known as the Instrument of Accession. Although the specific format of this instrument was not predefined, princely states choosing to accede to one of the new dominions, in essence, outlined the terms and conditions upon which this alignment would occur. These terms encompassed the subjects for which the princely state's ruler agreed to grant legislative authority to the dominion's legislature (the Indian Parliament). Furthermore, these terms established the boundaries within

which the dominion's legislature could enact laws and exercise executive control within the respective princely state.

The Instrument of Accession can be likened to a treaty between two sovereign entities opting for a collaborative association. It shared characteristics with other international agreements between distinct nations. Within the realm of international law governing state contracts or treaties, the principle of "Pacta Sunt Servanda" holds paramount, signifying the imperative nature of upholding agreements between states. This principle, rooted in good faith, underscores that a treaty party cannot evade its obligations, as set out in the treaty, by invoking provisions of its domestic law. In cases of treaty breaches, the general rule prescribes the restoration of the parties to their pre-agreement status, effectively returning circumstances to their state prior to the treaty's enactment (Mustafa, 2019).

Hence, the repeal of Article 370 constitutes a breach of the terms and conditions outlined in the Instrument of Accession. Consequently, from a legal perspective, the princely state of Kashmir reverts to its pre-accession status due to India's action.

The revocation of Article 370 also flagrantly violates the Security Council Resolutions. The commitment to hold a plebiscite, which the Indian government had made to the people of Kashmir and the United Nations when it brought the issue to the United Nations, is now virtually nullified due to the abrogation of Article 370 and the transformation of Jammu and Kashmir into a Union territory.

In the 1972 Shimla Agreement India had pledged for years to prevent any international body or foreign power from adjudicating on the Kashmir dispute. (Stimpson, 1972). Referring to the longstanding dispute over Kashmir, which had its origins 25 years earlier in 1947, the commitment in the Shimla Agreement that "neither side shall unilaterally alter the situation" renders the attempted removal of Jammu and Kashmir's special status void in international law. This action is viewed as a violation of both the bilateral agreement and the United Nations Security Council Resolutions.

In light of the arguments presented above, it becomes evident that India's legal claim to the state of Jammu and Kashmir has significantly weakened following the abrogation of Article 370.

Conclusion

In conclusion, the Kashmir dispute has been a longstanding subject of both diplomacy and lawfare over the past 76 years, marking one of the most protracted conflicts in modern history. The nuanced interplay between diplomatic efforts and legal claims has defined the trajectory of this conflict, with key turning points and agreements shaping the discourse.

The legal framework surrounding the dispute, particularly the Instrument of Accession and subsequent international resolutions, has significant implications for the competing claims of India and Pakistan. A critical analysis of this framework reveals that Indian claims to the entirety of Jammu and Kashmir stand on shaky ground from a legal and moral perspective. The Instrument of Accession itself, often cited by India as the legal basis for its sovereignty over the region, is tainted with questions regarding its validity, given the circumstances under which it was executed.

Furthermore, the resolutions passed by the UN, especially Resolutions 47 and 80, highlight the commitment of the international community to settling the Kashmir dispute by means of an impartial and fair plebiscite that will enable the Kashmiri people

to exercise their right to self-determination. These resolutions reaffirm the principle that the final disposition of the region should be determined by the will of its inhabitants, a principle that runs contrary to India's claims of absolute sovereignty.

Pakistan, on the other hand, maintains a stronger moral and legal position in light of these international resolutions and the commitment to a plebiscite. The legal obligations enshrined in these resolutions validate Pakistan's stance that the issue remains unresolved, with a plebiscite as the agreed-upon mechanism for determining the region's future.

In summary, while the Kashmir conflict has seen decades of diplomatic efforts and legal maneuvering, the legal framework, as articulated in international resolutions and agreements, casts a shadow of doubt over India's claims to the entire region. Pakistan, adhering to these resolutions, emerges with the upper moral and legal grounds for its claim over Jammu and Kashmir. The path to a peaceful and just resolution of this protracted dispute lies in a sincere commitment to the principles of self-determination and the aspirations of the Kashmiri people, as envisioned by the international community. The Kashmir issue remains a poignant reminder of the complex interplay between diplomacy and the rule of law in the realm of international conflicts.

Recommendations

Building upon the conclusions drawn in this research, the author wishes to offer additional recommendations for addressing the protracted Kashmir conflict.

1. **Multilateral Diplomacy:** Encourage all parties involved, including India, Pakistan, and representatives of the people of Jammu and Kashmir, to engage in sustained and meaningful multilateral diplomatic efforts. Facilitate dialogue through international forums like the United Nations to find a peaceful and just resolution to the conflict. Promote a comprehensive approach that considers the historical, political, and legal dimensions of the issue.
2. **Implementation of UN Resolutions:** Advocate for the implementation of United Nations resolutions, particularly Resolutions 47 and 80, which call for a fair and impartial plebiscite to allow the people of Jammu and Kashmir to exercise their right to self-determination. The international community should support these resolutions and encourage India and Pakistan to comply with them.
3. **Confidence-Building Measures:** Promote confidence-building measures between India and Pakistan to reduce tension and build trust. These measures could include cross-border trade, cultural exchanges, people-to-people contacts, and cooperation on issues of mutual interest.
4. **Involvement of Kashmiri People:** Ensure the active participation of the people of Jammu and Kashmir in any negotiation or decision-making process regarding the region's future. Respect their right to self-determination and involve their representatives in discussions and negotiations.
5. **Legal Clarification:** Encourage an independent and impartial legal assessment of the Instrument of Accession to determine its validity. This could help clarify the legal status of Jammu and Kashmir and address questions regarding its accession to India.
6. **International Mediation:** Consider the possibility of international mediation, possibly through a neutral third party or mediator, to facilitate discussions between India and Pakistan. The involvement of a trusted mediator may help bridge gaps and create an environment conducive to negotiation.

7. Human Rights Monitoring: Ensure the monitoring of human rights in the region and hold those responsible for human rights violations accountable. Promote transparency and accountability to address the grievances of the people of Jammu and Kashmir.

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