

KASHMIR CONFLICT:
**THE ROLE OF MEDIATION AND INTERNATIONAL
LAW IN DISPUTE RESOLUTION**

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Introduction

One of the focal points of mediation in India is in the state of Jammu and Kashmir. The primary source of tension stems from the disagreement between India and Pakistan regarding which country the state truly belongs to. A history of wars, diplomatic strains at various points of time and differing agendas of the political leadership and the military between the two have hindered all efforts at rapprochement. Thus, this paper aims to delve into the past to understand how this issue was to be mediated and how the efforts of the concerned stakeholders have not been successful. The status of minority communities including Kashmiri Pandits is virtually extinct in the state and they have been forced to take refuge in other parts of the country. This offers a glaring example of the repercussions of this conflict on the demographic standing within the state itself. The ethnic complexities coupled with the inter-state tensions have resulted in a rather tense atmosphere in the region. Moreover, by laying down the standpoints of both these countries and the role of the United Nations (herein, referred to as the UN) in trying to resolve the conflict, this paper aims to obtain an unbiased and complete understanding of why mediation proceedings have failed to be fruitful. The legal mechanisms of domestic and international laws previously employed to decide the terms and conditions for a solution acceptable to India and Pakistan are looked at.

These include legal documents, agreements and devices used to arrive at a 'fair' conclusion. The massive civil unrest unfolding in the state and the role of the state government, the central government, the separatist leaders and terror outfits is of tremendous influence in understanding the situation. It also links the legal implications that these methods have to the role and efficacy of mediation in such conflicts. Lastly, the latest "surgical" strikes carried out by the Indian army under the leadership of Prime Minister Narendra Modi and its impact on the contemporary relations between the two is examined. Basically, the role of mediation in seeking to solve the Kashmir dilemma is looked at in detail through the lens of law and international relations. Thus, it is pivotal to understand what this altercation means to the international community as a whole as this dispute put up the sternest test of the instrument of mediation in resolving international disputes.

Background of post-independence Kashmir

Kashmir was a princely state right up until the mid twentieth century. For the purpose of this paper, we shall look at the issue from a post-independence outlook. Till 1947, the policy of suzerainty of the British crown was in place, which meant that the power to run the province was given to the Maharaja, provided the supremacy of the crown was accepted. This paramountcy of British rule ultimately came to end with Indian independence. Since the status of a number of British princely states, estimated to be 462 in number, was undecided at the time of Partition, a precarious situation was brewing. The British drove the final nail into the coffin by stating that the decision as to whether the provinces wanted to become a part of India or carve out an independent state or join Pakistan was to be left to the rulers themselves instead of the Union of India.

It thus became an independent nation, with an understanding that it would soon decide its future.¹ The Sheikh Abdullah led Nationalist Conference along with other political parties ushered in this right to self-determination. Standstill agreements with both countries were signed so that the inhabitants could decide their own fate. The ruler of Kashmir, Maharajah Hari Singh, stalled in making a decision about accession in the hopes of negotiating to become an independent state, which placed the region in a legal no-man's-land. All such negotiations, however, came to a halt in early October 1947 when Pakistani "tribesmen" of the North West Frontier Province (NWFP) and some alleged agents of Azad Kashmir crossed the northern border of Kashmir with cooperation from pro-Pakistani Muslims in the northern part of Kashmir and occupied one-third of the region.² In response, Maharaja Hari Singh sought India's help, which sent troops to Srinagar to help the locals fight the invasion, and successfully did so. During this period, the Maharaja signed the Instrument of Accession, a legal document that affirmed that Kashmir had acceded to the Union of India and would come under their sovereign control once the law and order situation was brought under control. On the same day that troops were sent to Srinagar to counter the rebel forces, the Viceroy wrote to the Maharaja asking whether Kashmir would accede to the Union or not. It is therefore argued that the decision was taken in haste and under duress from India as well as the British and was not a democratic process. This arbitrary approach was taken by the Maharaja only to receive military aid to fight off the rebels and defend itself. The flipside, as argued by India, is that there was no pressure imposed at all and that the decision was not influenced and was thought over. From here itself, the dispute arises as Pakistan till date claims that the instrument is fraudulent and was signed by the Maharaja under pressure from the Indian Union.

¹ Priyanka Bakaya and Sumeet Bhatti, Kashmir Conflict: "A Study of What Led to the Insurgency in Kashmir Valley & Proposed Future Solutions" *Stanford University Press*

² Sumathi Subbiah, "Security Council Mediation And The Kashmir Dispute: Reflections On Its Failures And Possibilities For Renewal", *Student Publications House*

They also question Sheikh Abdullah's authority in deciding the fate of the state without being a representative of the entire state population and deem such an authority to be of a severely unrepresentative character. Thus, the validity of this legal document is impugned in the first place and this itself fuels the conflict as both sides feel they have legitimate grounds to fight for Kashmir.

The 1947 war, also known as the first war of independence, resulted in the formation of Pakistan occupied Kashmir (PoK), referred to by Pakistan as *Azad Kashmir*. The United Nations first came into the picture on January 1, 1948 when India complained to the UN Security Council that Pakistan had helped these tribal invaders and stated that the plebiscite demand would only be met once these forces left Kashmir and the state was under full control of the Union of India.

India had approached the UN, seeing no end to the fighting and the violence. Two articles, namely Article 34 and 35 of Chapter VI the UN Charter that were invoked are especially important.

Article 34 reads –

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

Article 35 reads –

- 1. Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.*
- 2. A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly*

any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.

3. *The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12.*

Pakistan responded to the complaint by denying the allegation that they aided the tribal invasion of 1947. They also raised the broader objection of the accession of Kashmir to India and argued for a fair plebiscite to decide the future of Kashmir. The United Nations Security Council passed Resolutions 38³ and 39⁴ that established the three-member United Nations Commission for India and Pakistan (UNCIP). Its purpose was to investigate into the facts that caused the dispute, exercise mediatory influence in the matter, follow the directions of the Security Council and to report the progress to it. However, the implementation of the Security Council resolution was unable to come into action as the Council passed another resolution, Resolution 47.⁵ Although no mention of the Instrument of Accession was made, the resolution made a two-fold recommendation of demilitarization and plebiscite. It instructed Pakistan to ensure the withdrawal of its nationals from the region after which the military levels would be minimized and an unbiased UN appointed Plebiscite Administrator would conduct a fair plebiscite after normalcy had returned to the region. On 30th March 1950, another U.N Resolution 91⁶ was passed which reaffirmed the desire for free and impartial plebiscite observing that as both the countries have accepted earlier resolutions.

³ [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/38\(1948\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/38(1948))

⁴ [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/39\(1948\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/39(1948))

⁵ [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/47\(1948\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/47(1948))

⁶ [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/91\(1951\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/91(1951))

This Resolution decided that the UN Military Observer's Group in India and Pakistan (UNMOGIP) would continue in place of the UNCIP. Its functions were to investigate into ceasefire violations and report them to the UN Secretary General. On 4th January 1951 in London the Commonwealth P.M Conference was held Kashmir was part of informal discussion. There three options of forces for plebiscite were presented; i) Commonwealth force, ii) Joint Indo Pakistan force, iii) UN Forces. On 30th April 1951, another U.N Resolution/decision about the Kashmir issue was passed which asked state's assembly to refrain from taking any decisions regarding Kashmir against the will of the people.⁷ This was probably the first major confabulation carried out to resolve the issue. However, Pakistan continued to have a large military presence in the region and raised many objections to the resolution, making the enforceability of the resolution a distinct impossibility. After many attempts, a mutually agreed upon ceasefire line agreement was drawn on January 1, 1949. It gave India control of two thirds of the region and the remaining to Pakistan. Resolution 98⁸ was passed to decide upon, through negotiations, the size of the troops on both sides. But the demilitarization disagreement delayed the happening of the plebiscite. After multiple efforts, the UNCIP was dissolved and Special Representative appointed by the UN was to carry out demilitarization and plebiscite talks with both nations. However, nothing constructive came out of it as different representatives took different stances and even mediation to be carried out by the World Bank was proposed, which was categorically rejected by both parties. The first United Nations Representative in India and Pakistan (UNRIP) appointed to mediate the dispute was Sir Owen Dixon, an Australian jurist. Dixon's suggestion of conducting a plebiscite regionally, rather than on a statewide basis was rejected. A year later, Frank Graham, an American diplomat, took Dixon's place.

⁷ Dr. Sabahat Akram and Ms. Midhat Shahzad, "UN Mediation On Kashmir Dispute: Past And Future" *International Journal of History and Philosophical Research*, Vol.3, No2 , pp.1-9. November 2015, Published by the European Center for Research Training and Development UK

⁸ <https://www.mtholyoke.edu/acad/intrel/kashun98.htm>

The UNSC proposed a reduction in military presence by both sides on December 23, 1952, which was accepted by Pakistan and rejected by India. The last serious UNRIP effort to find a solution was Graham's proposal of February 14, 1953 which was rejected by both sides. Mediation attempts continued to focus on creating optimal conditions for plebiscite, while internal and external political and societal developments were continually shifting India away from the idea of plebiscite. India's increasing resistance to plebiscite can be attributed to several factors, including "the de facto partition of the state, the cold war, the state's proximity to the Soviet Union and China, the United Nations' failure to mediate, the political developments within Jammu and Kashmir and India's resolve to retain the territories under its control."⁹

Eventually, it was seen that international attempts at mediation were more or less a failure. All mediation attempts adopted by the UN fizzled out and they advised the parties to resolve the issue bilaterally or through a third party. This represented the failure of the UN itself in resolving the conflict through mediation as 23 resolutions had been passed until 1965 and none of them could find a suitable solution.

Meanwhile, the demand for a plebiscite had not lost its way. In 1955, the Plebiscite Front emerged and slowly gained momentum in the state, calling for a popular plebiscite to decide the fate of the state. Though Sheikh Abdullah never joined it, he unofficially spearheaded this campaign. This front opposed the state government, headed by Bakshi Ghulam Mohammad. They were biased towards India because of Sheikh Abdullah's previous dealings with Jinnah and Pakistan's view that Abdullah did not have a good equation with the locals. This is where the role of the United Nations became prominent. But as the years went by, the UN failed to create the necessary conditions for this democratic process to take place.

⁹ Sheila Rajan, "The Prospect of Third-Party Mediation of the Kashmir Dispute: Is There A Way to Re-engage India in a Facilitated Discussion?" *Digital Commons at Michigan State University College of Law* - King Scholar Thesis Paper - Upper Level Writing Requirement (2005)

India too remained silent on the issue, to tide by this pressing demand and retain control of this strategically invaluable state, making Pakistan impatient and prompting further action, as was seen in 1965.

1965 war

Despite somewhat tense relations after Partition, the decade or so after it saw relative stability between the two states. However, in April 1965, Pakistan chose the military route and went on the offensive, launching Operation Gibraltar that was aimed at dismantling the government and exploiting the insurgency to seize control of Kashmir. Indian forces retaliated with great ferocity and invaded West Pakistan, threatening to take over many cities if Pakistani forces did not retreat. India came out on top, though there were huge casualties on both ends. Here too, though the UN mediated and a ceasefire line was drawn, it was the superpowers in the form of the U.S.A. A third party, in the form of the U.S.S.R., helped in mediation by making India and Pakistan to withdraw forces from each other's territories to their positions before this military engagement and agreeing to discuss all future matters. The erstwhile Soviet Union ended the war through the signing of the Tashkent Declaration in Uzbekistan. After the invasion, a distinct anti-Pakistan sentiment hovered over majority of the local population in Kashmir. The war lasted five months, ending with the UN Security Council passing Resolution 209 and 210.¹⁰ This called for an immediate ceasefire and urged the two nations to respect the UNMOGIP and requested the Secretary General to exercise all possible influence to strengthen this UN body and seek resolutions for the area. What is noteworthy is that the UN did not intervene, instead told both parties to use the means of negotiation and mediation under Article 33 of the UN Charter

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[http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/209\(1965\)&referer=http://www.un.org/en/peacekeeping/missions/unmogip/documents.shtml&Lang=E](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/209(1965)&referer=http://www.un.org/en/peacekeeping/missions/unmogip/documents.shtml&Lang=E)

and come to a solution bilaterally. This shows the hesitance of the UN to mediate itself, owing to multiple failures earlier.

1971 war

Meanwhile, in Pakistan, the minority East Pakistanis sought Indian aid to defend themselves against years of oppression by West Pakistani armed forces led by General Yahya Khan. For providing aid to the region, Pakistan attacked Indian air bases in response. The war ended in yet another Indian victory and the formation of Bangladesh in 1971. In Kashmir, the Plebiscite Front merged with the Nationalist Conference and declared that it was no longer interested in holding a plebiscite. Sheikh Abdullah was unanimously elected as the new Chief Minister of the state. Rather than the issue of accession, the new movement focused on the ‘amount of autonomy’ to be exercised by the state government.¹¹ Despite the subsistence of a ‘special status’ accorded to the state, the Kashmir Accord, called the Simla Agreement, was signed by Prime Minister Indira Gandhi and Sheikh Abdullah and it increased the control of the central government over the state. This was a significant step that established bilateral negotiations as the path to dispute resolution. The border, called the Line of Control (LOC) was to divide the territory under the control of India and Pakistan. It laid down the UN Charter as the guiding rulebook in bilateral negotiations as well as in third party mediations. It was also agreed upon that the ceasefire line, howsoever decided, was to be respected at all times without prejudice to any of the parties. Thus, India responded to any UN resolution previously passed as redundant. During wartime, the UN did not get directly involved despite the Pakistan’s Permanent Representative to the UN writing to the Security Council stating that by sending Indian troops to Pakistan, the terms of the ceasefire line agreement had been infringed.

¹¹ ¹¹ Priyanka Bakaya and Sumeet Bhatti, Kashmir Conflict: “A Study of What Led to the Insurgency in Kashmir Valley & Proposed Future Solutions” *Stanford University Press*

However, the UN was involved in December 1971, when it passed Resolution 307¹² by which it demanded that a durable ceasefire in all areas of conflict remain in effect until all armed forces had withdrawn to their respective territories and to positions that fully respected the ceasefire line in Jammu and Kashmir supervised by UNMOGIP. In July 1972, India and Pakistan signed an agreement defining a Line of Control in Kashmir that, with minor deviations, followed the same course as the ceasefire line established by the Karachi Agreement in 1949. India took the position that the mandate of UNMOGIP had lapsed, since it related specifically to the ceasefire line under the Karachi Agreement. Pakistan, however, did not accept this position. Given the disagreement between the two parties over the mandate and the functions of the UNMOGIP, the Secretary-General's position has been that UNMOGIP could be terminated only by a decision of the Security Council. In the absence of such an agreement, UNMOGIP has been maintained with the same arrangements as established following December 1971 ceasefire. The task of UNMOGIP has been to observe, to the greatest extent possible, developments pertaining to the strict observance of the ceasefire of 17 December 1971 and to report thereon to the Secretary-General. The military authorities of Pakistan have continued to lodge complaints with UNMOGIP about ceasefire violations. The military authorities of India have lodged no complaints since January 1972 and have restricted the activities of the UN observers on the Indian side of the Line of Control. They have, however, continued to provide accommodation, transport and other facilities to UNMOGIP.¹³

The Insurgency

In the mid-nineteen eighties, Islamic fundamentalist groups began attacking the minority Kashmiri Pandits. With the failure

¹² [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/307\(1971\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/307(1971))

¹³“United Nations Military Observer Group in India and Pakistan”, accessed December 9, 2016, <http://www.un.org/en/peacekeeping/missions/unmogip/background.shtml#>

to capture Kashmir militarily, Pakistan employed persuasion and ideological propaganda to fuel the insurgency. The Pakistanis supposedly started aiding the locals in their tussle with the “oppressive” Indian army, which committed many excesses and human rights abuses. This extremist form of Islam, distinct from the Kashmiri Islam that was dictated by the Rishi order, took over. Militant violence became commonplace, threatening the principles of pacifism which had dictated the order in the state since times immemorial. Over a span of only a few years, the young and impressionable minds were indoctrinated with these fascist Islamic dictates that basically were distortions of the religious principles. In addition, the widespread unemployment, lawlessness and the apathetic attitude by the central government prompted militant approaches to grab center stage and voice their demands, at the cost of peace in the state. Though the Nationalist Conference-Congress won the 1987 election by a margin, Islamist groups did not subside. A dormant central government along with a corrupt start government ignited these groups, who began inciting violence against the incumbent government despite heavy military presence along the LOC. The number of armed secessionists increased from hundreds to the thousands. The organizations of the secessionists were strengthened; the most prominent were the Hisbul-Mujahideen and the Jammu and Kashmir Liberation Front (JKLF). Other organizations joined under the umbrella of Hurriyat Conference that campaigned peacefully to resist Indian forces' presence in the Indian held Kashmir. In the result of a political crisis India dissolved the government of Farooq Abdullah and placed the Indian held Kashmir under direct control of the governor appointed by the Central Government of India. From 26th January 1990 onwards, the almost continuous curfew remained the order of the day and this situation continued for eight months. Almost civil war broke out in Kashmir and Indian forces started a crackdown.¹⁴

¹⁴ Musarat Javed Cheema, “Pakistan-India Conflict with Special Reference to Kashmir” *South Asian Studies A Research Journal of South Asian Studies Vol. 30, No.1, January – June 2015, pp. 45 – 69*

One of the most serious consequences of this insurgency was the mass exodus of the minority Kashmiri Pandits. Pretty much the entire community was wiped out by 1990 and this strengthened Pakistan's demand to take control over the Muslim majority in Kashmir. The secular voices were attacked and these extremist movements actually swayed many peoples. It is strongly suggested that Pakistan played a major role in propelling this divide. India has repeatedly sent out a message to its neighbor to stop this state-sponsored terrorism. Pakistan has retorted saying India has failed to abide by Security Council Resolutions and denies any funding of fundamentalists and terrorist groups. It is interesting to note that India and Pakistan failed to seek third party negotiations to come to a solution, largely due to their fear of a repeat of the Security Council mediation episode, which proved to be a failure. The legal framework needed to be looked at rather than approaching the dispute from a political viewpoint, something that the Council failed to do. Post 1990, a series of talks between the neighboring counterparts took place and in 1997, eight working groups were formed to resolve the Kashmir issue, only to be thawed by the Kargil war in 1999.

But the larger picture is often forgotten here that is the resettlement of Kashmiri Pandits and Sikhs, being the largest minorities. They can be categorized as Internally Displaced People's (IDP) under refugee law. They are not covered under the 1951 refugee convention, though they come under humanitarian law and human rights law. They are civilians who are forced to flee from their place of inhabitation and thus are subject to the domestic law in force at that time. They thus lose out on the benefits accorded to refugees and have been left homeless with only false promises from political parties playing vote bank politics over the years. This aspect must be addressed and proper rehabilitation of these minorities is necessary.

Role of Mediation

The term “mediation has been used most extensively in this paper as it is the main theme. In order to fully understand the Kashmir issue, it is important to highlight what mediation is, the role it plays in conflicts and what it legally entails. Bercovitch identifies the following factors as benchmarks of a conflict ripe for mediation efforts, “(a) a conflict is long, drawn out or complex; (b) the parties’ own conflict-management efforts have reached an impasse; (c) neither party is prepared to countenance further costs or loss of life; and (d) both parties are prepared to cooperate, tacitly or openly, to break their stalemate. The Kashmir conflict exemplifies the first two benchmarks identified by Bercovitch; in fact it is difficult to identify another international dispute that has for so long proved so resistant to resolution.¹⁵ Mediation is the act of a third person that interferes between two contending parties with a view to reconcile them or persuade them to adjust or settle their dispute. In international law and diplomacy, the word denotes the friendly interference of a state in the controversies of others, for the purpose, by its influence and by adjusting their difficulties, of keeping the peace in the family of nations.¹⁶ It is essentially a form of dispute resolution where aggrieved parties approach an impartial third party who does not decide the issue for them but merely acts as a facilitator and helps them reach their own solution. The UN did not succeed in its mission to successfully mediate the issue as it undermined the complexities involved. Religious diversities, political positions and military stances needed to be weighted to reach a well-balanced solution.

¹⁵ Sheila Rajan, “The Prospect of Third-Party Mediation of the Kashmir Dispute: Is There A Way to Re-engage India in a Facilitated Discussion?” *Digital Commons at Michigan State University College of Law* - King Scholar Thesis Paper - Upper Level Writing Requirement (2005)

¹⁶ *Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.* - <http://thelawdictionary.org/mediation/>

The UN was approached first in 1947, no concrete progress can be said to have taken place in Indo-Pak relations. The reason lies in the Security Council treating this as a political conflict instead of a legal one. This has given India and Pakistan a certain amount of political leverage over the state and the Council has had to accede to the demands from both nations owing to their differing political standpoints on the issue. Tracing the historical genesis of this dispute has naturally made the UN a fair mediator. However, it has been unable to take a permanent stance on the developments since. What was required was a far more strict approach to the issue. For instance, ceasefire violations by Pakistan on numerous occasions have not been met with no-nonsense response as was needed. Likewise, India has indeed refrained from carrying out the democratic mandate of a plebiscite to carry the idea of self-determination to its conclusion. Instead of leveling allegations time and again, bilateral negotiations ought to have been respected and adhered to. That being said, India has on the receiving end of a series of attacks that makes cooperation that much harder.

As S.K. Nath puts it, “the large-scale Pakistani infiltration of Kashmir and her powerful armored thrust through Chhamb towards the life-line of Kashmir made inevitable all the military actions which we took. No matter how willing some Indian Government might have been to negotiate for a permanent and mutually agreed solution of Kashmir, it could never let Pakistan annex Kashmir by force. Granting that our response was inevitable, it is perhaps not useless to examine the likely aftermath of this war.”¹⁷ He also goes on to say, “It is to our advantage that the cease-fire resolution of the U.N. recognizes that the hostilities began on August 5, when Pakistan sent her armed infiltrators into Kashmir.

¹⁷ “UN’s failure in Kashmir: A Factual Survey”

But if the cease fire is going to mean that we shall not exercise out rights to continue rounding up these raiders, then this agreement is greatly to our disadvantage.”¹⁸

India and Pakistan have sought mediation at several points over this period of time. Situations as grave as those, for instance, relating to both nations testing their nuclear capacities called for an urgent need to mediate their differences. Moreover, the instability faced by India and Pakistan with respect to the military, regional commerce, technological advancements and other forms of development amplify this urgency. As stated earlier, any sort of mediation into the Kashmir issue had to pay specific attention to the dynamics involved. We have seen that some armed insurgency groups campaign for total independence and some to join Pakistan, They do not have any clear representative ready to represent a certain section of their followers to actually put their point across and sometimes engage in action on a whim or by taking advantage of some situation unfolding in the valley, which is a frequent occurrence. Perhaps the UN and other third parties involved ought to have taken on board benefits accorded to the insurgent groups and should have addressed their grievances more seriously. However, certain internal quarrels have disrupted deliberations. They include, for instance, the differing agendas of the central government and the state government where the former prioritizes restoration of civilian power and the latter focusing on the disarmament of paramilitary groups.

Typically, a mediator identifies mutual interests and helps the parties move towards their respective priorities that are in tandem with each other. But the fear of bias or of the state exercising its domestic law (which supersedes international law) limits the scope of mediation. Although mediation did not work out in Kashmir, some of its plus points are worth taking forward as the process itself is nascent and needs time to evolve.

¹⁸ Ibid

De-escalation in the form of demilitarization, ceasefire agreements, logic of deterrence and other bilateral truces has helped contain the conflict in Kashmir in a massive way. The benefit of mediation must not be ignored and it is the most effective way forward for countries seemingly unable to resolve the issue *suo moto*. Renewed efforts of mediation must be immediately introduced as the current situation treats military superiority as an irrelevant factor. Policies must be re-visited and the mediator to the two parties can thereby propose a solution. Regional forums such as the SAARC have been implored to include dispute resolution and conflict management in their agenda to engage countries more extensively and have better cooperation. Constant deliberation at conferences, seminars and other meetings is necessary to keep in touch. Superpowers such as China and U.S.A also must balance their relations with the two and not side with one over the other only to advance their own interests. A mediator, most likely, has to be the United Nations again as a country in the form of a mediator will always be creating suspicions relating to its preferences and biases. A biased mediator in the eyes of the party not favored can worsen ties rather than rectifying them. Thus, the UN or any other international organization as the parties deem fit, must conduct the mediation process. By identifying the scope and the issues involved, moving on to bilateral cooperation and ultimately helping them to settle their dispute peacefully, mediation is an instrument that can surely come to the rescue. With such adversaries, a powerful mediator is useful to gradually shift the state rivals away from their competitive national security perceptions towards a cooperative and interdependent security arrangement. International mediation in enduring rivalries has been one of the principal methods of international conflict and crisis management. Although it has not sufficed to deter India and Pakistan from war, mediation is nonetheless highly compatible with the structure of the international system, and principles of state sovereignty and non-interference dictate that mediation

(especially when perceived as beneficial and non-coercive) is the most acceptable method of third-party intervention.¹⁹

Legal Issues in the Kashmir Conflict

The role that both domestic and international law play in this dispute is without doubt the most important aspect of this issue. A number of legal implications arise through this conflict. Before we delve into these implications, it is important to fathom the distinction between domestic and international jurisdiction. Domestic jurisdiction is the residuum of sovereignty remaining outside a state's international obligations. While the UN cannot make recommendations to a state concerning matters within the state's domestic jurisdiction, it can certainly make recommendations concerning the fulfillment of the state's international obligations in so far as these obligations come within the general scope of the UN Charter. By entering into international obligations, states are presumed to have consented to receiving, as members of the United Nations recommendations of its organs concerning the fulfillment of their obligations.²⁰ The self-determination theory recognized under international law and the UNO charter as well is the foremost issue that remains unfulfilled till date despite the presence of covenants such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Social, Economic and Cultural Rights (ICESCR) – Article 1 (common to both). Another issue involves the legality of the instrument of accession. The State of Jammu and Kashmir had 'class A' status, enjoying special autonomy and was sold to Gulab Singh by East India Company in 1846 through Kashmir Sale Deed (KDS). The provision of this article slabs Maharaja Sir Hari Singh to be the legal ruler of the state after August 15, 1947.

¹⁹ Anthony Wanis St. John, "Third Party Mediation over Kashmir: A Modest Proposal" *American University*

²⁰ Aman Hingorani, "International Relations and Security Network – The Kashmir Issue: Differing Perceptions" *International Relations and Security Network (ISN) 2007 – ETH Zurich*

If he was not the legal ruler of the state, how could he sign the instrument of accession (if at all it was signed) with India? Moreover, there is no proof that the Maharaja did in fact sign the instrument as any treaty entered into by a UN member is to be registered with the UN Secretariat, which was not done in this case. For arguments' sake, even if it is concluded that the instrument was legal, the way it was signed, as under duress from the Indian state, makes it worthless, as any agreement signed under threat is void under Article 52 of the Vienna Convention on the Law of Treaties. The counter argument to this is that the Instrument of Accession was executed by its sovereign ruler was in favor of the dominion of India, though Pakistan refuses to recognize it. But then, it is a well-known principle of international law that third states do not have a right to veto the act of accession or secession. Pakistan was not party to the accession of the princely Indian state to the dominion of India and, hence, has no standing with respect to the accession. The ruler of the state was legally sovereign when he opted to accede to India on 26 October 1947 and owed no allegiance to the dominion of Pakistan, nor did the territory form part of Pakistan's territory or sovereignty.²¹ Another issue that pops up is the authority of the Security Council resolutions that were passed. Since all of them were passed under Chapter VI that is of non-binding character unlike in Chapter VII, which has binding authority, it is argued that they really did not carry any authority at all. The Simla Agreement, signed in 1972, focused on bilateral negotiations was in fact not bilateral as they recognized the UN to be the governing document between the two. Lastly, the issue of human rights violations is one of the most serious issues that have borne out of this conflict. The enactment of the Armed Forces Special Powers Act (AFSPA) in J&K along with the special status under Article 370 of the Indian constitution have failed to stabilize the law and order situation in the state.

²¹ Aman Hingorani, "International Relations and Security Network – The Kashmir Issue: Differing Perceptions" International Relations and Security Network (ISN) 2007 – ETH Zurich

In fact, it has been the complete opposite. Powers such as the “shoot at sight” or “arrest without a warrant” accorded to members of the armed forces have led to many unaccounted excesses and have caused fatalities with the perpetrators inflicting them with impunity. However, the government argues that certain powers have to be given to the armed forces to maintain security in these sensitive areas. Civilian casualties, rapes, lootings and large-scale devastation seem to be the hallmark of this dispute despite various human rights instruments in place in the international arena. Article 6 of the International Covenant on Civil and Political Rights (ICCPR) prohibits derogation from the right to life even during Emergency. International Humanitarian Law (IHL) deals with the laws of war and the insurgency in the 1980’s, according to the Human Rights Watch, met the threshold of. Armed hostilities have led to violations of Article 3 of the Geneva Conventions that call for humane treatment and non-discrimination of all civilians, unarmed members of armed forces and those all those placed *hors de combat*. Articles 4 and 7 of the ICCPR explicitly ban torture, even in times of national emergency or when the security of the country is threatened (xvi). The Indian armies special task force (STF), Border security force (BSF), and state sponsored paramilitary groups and village defense committee - the principal government forces operating in Jammu and Kashmir (xvii), have systematically violated these fundamental norms of international human rights law.²² No execution of any accused can take place without any previous judgment of a regularly constituted court and which has followed the due process of law, including appeals. The Human Rights Watch, though, maintains that these entities may be punished under domestic law for crimes provided the proper legal procedure is followed and the inalienable rights are granted to them. The Geneva Conventions also call for proper treatment and care, including providing food and shelter, to those wounded in these hostilities.

²² “Kashmir and Self-Determination: International Law as a Way Forward”, Islamic Human Rights Commission, July 17, 2007

Unfortunately, it has not prevented hostage taking, abductions, torture, mutilations and rapes from taking place and deaths as a result of torture or direct executions amount to murder. Degrading treatment in the course of detention, interrogations and short-term confinement have taken place. Amnesty International and Human Rights Watch/Asia, amongst others, have provided substantial evidence that Indian security forces in Kashmir have killed and raped civilians and rebels in custody, and practiced torture as a means to obtain information from suspected militants. These same reports, however, also accuse Pakistan-backed militants of similar human rights violations. Other sources provide substantial evidence that Pakistan commits equally horrendous human rights violations in Azad Kashmir.²³ Thus, human rights violations are blatantly committed and it is a cause of grave concern to the international community as this is not limited just to the Kashmir conflict but is taking place in almost every conflict.^{24 25 26} The final segment is that of state sponsored terrorism that was mentioned earlier. Although the UN has not defined terrorism, Pakistan's actions have not gone unnoticed by some of the more dedicated Kashmiri freedom fighters. Kashmiri's have grown increasingly perturbed by the growing number of foreign mercenaries in Kashmir and by increased domination from Islamabad. Sumantra Bose, in his account of India's actions in Kashmir in *The Challenge in Kashmir*, states "it is increasingly clear that Pakistan's heavy-handed, self-interested meddling in the uprising has boomeranged on the civilian and military establishment of that country, and has seriously damaged the latter's credentials in the eyes of most Kashmiris."⁴⁹ Apart from clearly violating international law with its support of terrorism, Pakistan may unwittingly be creating a much larger legal problem: a threat to international peace and stability.

²³ Vikas Kapur and Vipin Narang, "The Fate of Kashmir: International Law or Lawlessness?" *Stanford Journal of International Relations*

²⁴ Dr. Raja Muhammad Khan, "Kashmir Dispute: A Legal Perspective" *NDU Journal* 2015

²⁵ "Behind the Kashmir Conflict: Abuses by Indian security Forces and Militant Groups Continue" *Human Rights Watch*

²⁶ "Kashmir and Self-Determination: International Law as a Way Forward", Islamic Human Rights Commission, July 17, 2007

The fact that both nations now have nuclear weapons makes a solution to Kashmir that much more pressing, as nuclear power may serve to only encourage violations of international law and sovereignty, threatening the future of the subcontinent.²⁷

Current situation

Jammu and Kashmir, despite being accorded the “special status” under Article 370 of the Indian constitution and having its own penal code (Ranbir Penal Code) that is distinct from and beyond the purview of the Indian Penal Code, is perhaps the most troubled region of India. The timeline of this conflict has spanned over more than half a century. Before we discuss the contemporary situation, it is important to state exactly who the stakeholders are. It is a common misconception that this conflict is a conflict between the two governments. However, it includes many other actors as well. The People’s Democratic Party under Mehbooba Mufti that currently is the ruling party. Along with the Nationalist Conference under Omar Abdullah, these are the two largest parties in the state. At the center, the Congress and the ruling Bharatiya Janata Party (BJP) are constantly involved in arguments regarding the handling of the Kashmir issue. In addition, some of the militant groups including the Lashkar-e-Taiba, Jaish-iMohammed, al Badr, and Harkat-ul-Mujahideen are perpetually carrying out attacks and plotting plans to mount pressure on the Indian state to give up Kashmir. Majority of these militant groups support the alliance of Kashmir with Pakistan. Hizb-ul-Mujahideen is the militant group with a substantial Kashmiri cadre. It insists that New Delhi must formally recognize that Kashmir is a disputed territory yet seeks the status of the principal interlocutor. The commanders of the Hizb-ul-Mujahideen feel that the wages of war are greater than any payouts that may come with peace, albeit for different reasons.

²⁷ Vikas Kapur and Vipin Narang, “The Fate of Kashmir: International Law or Lawlessness?” *Stanford Journal of International Relations*

Finally fourth player whom India tries to give importance is the group of political leaders of the minority communities—the Kashmiri Pandits, Ladakhi Buddhists, Shia Muslims (of Kargil), Gujjars, Paharis, and Dogras (Behara, 2006). In Azad Kashmir three sets of political forces are important to be taken into account as key players. One set is controlled by traditional players such as the Muslim Conference and Pakistan People's Party (PPP), which believe that the Kashmir conflict revolves around the IHK and hope to bring it into Pakistan's fold. They pursue the agenda of uniting Kashmir with great passion. The Jammu and Kashmir Liberation Front (JKLF) is another political force that seeks a united, sovereign, and independent Kashmir. Finally, there are the militant organizations with the strength of more than one hundred, which function jointly in AJK and Azad Kashmir.²⁸ Various separatist groups, nationalist parties and extremists (called “ultras”) are constantly at play. Some are opting for secession and others to join Pakistan, and their exclusion in mediation proceedings is a big reason for the failure of the UN. They include the Hurriyat Conference, Kashmir Muslim Conference, J&K Democratic Freedom Party, J&K Democratic Liberation Party and the United Kashmir People's Party. India's neighbors including China, Bangladesh, Afghanistan as well as the major powers across the globe including Russia, U.S.A, United Kingdom and France are key players in this conflict in terms of their stances and positions on the issue. Lastly, the most important stakeholder is the people living in the state irrespective of their religious status. They are the ultimate bearers of anything that happens and it directly affects their daily life. Their voice, therefore, can and should never be forgotten.

In the twenty first century, a combination of complex factors has motivated India to pursue a bilateral system of negotiation with Pakistan. One significant factor is India's mistrust of the West, including the United States. Furthermore, India considers itself a

²⁸ Musarat Javed Cheema, “Pakistan-India Conflict with Special Reference to Kashmir” *South Asian Studies A Research Journal of South Asian Studies Vol. 30, No.1, January – June 2015, pp. 45 – 69*

regional superpower and feels that it is independently capable of handling regional disputes. India resents the implication that a third party would be necessary or involved in resolving a dispute on its border. Another vital component in re-engaging India in facilitated discussions is international pressure through UN initiatives and diplomatic influence by independent nations. For India's own sake, it must resolve this conflict. The first step to the end is to make good-faith efforts toward resolving contentious issues within its own backyard. India has a strong interest in maintaining and expanding its reputation in the international community.²⁹

Since the end of the twentieth century, relations between India and Pakistan have had its ups and downs. The Kargil war in 1999 and the Parliament attack in 2001 severed ties between the countries for substantial amounts of time. India has relentlessly attacked the Pakistani government for actively supporting this terrorist racket. Pakistan on the other hand denies all such allegations and hurls its own counter-arguments, making the entire dialogue a blame game. However, it can be safely assumed that although the Pakistani state may not have directly aided these networks, all the major terror outfits, ranging from the Lashkar-e-Toiba to the Tehreek-e-Taliban, all have their bases in Pakistan. The reason for this seemingly insurmountable impasse between India and Pakistan is the mutual suspicion that the other is going back on its bilateral promises. While India alleges that the Pakistani government along with its intelligence agency, the Inter Services Intelligence (ISI) is carrying out anti-India campaign, fuelling elements of enmity and hatred against the government and aggravating the already sensitive situation in the valley. On the other hand, Pakistan, while denying these allegations, stresses on the reneged promise by the Indian state to carry out a plebiscite.

²⁹ Sheila Rajan, "The Prospect of Third-Party Mediation of the Kashmir Dispute: Is There A Way to Re-engage India in a Facilitated Discussion?" *Digital Commons at Michigan State University College of Law* - King Scholar Thesis Paper - Upper Level Writing Requirement (2005)

It acknowledges the presence of these independent actors and says they are beyond the control of the state. But it is naïve to rule out the possibility of some sort of connivance and a deliberate blind eye towards these infiltrators by the Pakistani government. The larger picture of restoring ties bilaterally and through mediation is lost in this barrage of accusations. India and Pakistan also chose not to place all their bets on only mediation due to its inability to mend relations since Partition. Despite signs of improvement in the Vajpayee-Sharif era and from Manmohan Singh, the situation has remained stagnant. The emergency declared by General Mushrraf in 2007 disrupted existing bonds between the two. However, the Nawaz Sharif has returned to power in Pakistan. In India, the decade long Congress regime came to an end and the coming in of the Bharatiya Janata Party has sparked hope for improving bilateral ties. But what has been seen is that Prime Minister Narendra Modi has taken a hard stance against Pakistan. Pakistan was accused on an international stage at the UN General Assembly of harboring terrorists. India, under Defence Minister Manohar Parrikar, has stepped up defense expenditures by purchasing jets, building a number of naval warships and strengthening its military capacity. This marks an unprecedented position of Indian foreign policy as seldom have Indian governments gone to this extent in their fight for Kashmir and against terrorism. It is important to note that though currently the fight is majorly against terrorism, the entire scenario stems primarily from the Kashmir issue. It has been observed that attacks have increased since 2015, with the killings in the Pathankot Air Force station and Gurdaspur attacks being the most prominent of them all. A new range of *fedayeens*, a mob of irregular self-sacrificers has plagued the region. They include militant groups such as the by Jaish-e-Mohammad, which has masterminded these series of attacks. India has responded recently with a lot of vigor. In July 2016, a Hizbul Mujahideen (a large rebel group) commander by the name of Burhan Wani died in an Indian army encounter. This marked the beginning of months of protests in Kashmir over the role of the Indian army.

However, it is worth noting that entities like Wani were fuelling unrest and plotted against the Indian army. The government maintains that such anti-India elements must be exterminated whereas their critics bring the issue of human rights and protest against the excessive power accorded to the army and the excesses committed thereafter. Thus, this tussle between the law and order situation on one hand and human rights on the other became a heated area of discussion among the elite intelligentsia. In September of the same year, militants attacked an Indian army brigade in Uri as a result of which 18 Indian soldiers died. 11 days later, the Indian army carried out surgical strikes in the Pakistan administered Kashmir region and destroyed various terrorist launch pads. The move was defended as a measure in self-defense and only targeted certain entities, thereby avoiding any criticism for causing collateral damage. It marked a historic move to affirm India's fight against terror and in a way, its control over Kashmir.

Technically, surgical strikes are legal for self-defense under Article 51 of the UN Charter that sanctions the policy of self-defense against an armed attack as a legitimate use of force that does not require any authorization from the Security Council. This authorization is normally used when there is no immediate alternate remedy available—like the immediate support from the Security Council. It is also important to note that the right of self-defense mentioned under Article 51 does not stipulate any particular types of aggressors and does not limit the right of self-defense to attacks by states alone. It could be exercised against the non-state actors, especially terrorists. This is substantiated by the Security Council resolutions 1368 (2001)³⁰ and 1373 (2001)³¹. Hence India's action in attacking the terrorist camps is justified. However, the International Court of Justice (ICJ), in its advisory opinion on legal consequences of the construction of a wall in the occupied Palestinian territory, differed on this point and opined that Article 51 of the Charter recognizes existence of

³⁰ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement>

³¹ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>

an inherent right of self-defense only in the cases of armed attack by one state against another state. The justification of the International Court of Justice, in this case, was given considering the fact that Israel does not recognize Palestine and the attacks against it are not imputable to a foreign state. Another reasoning ICJ projected was that Israel exercises control over the territory from where the threat emanates and hence the threat originates within the territory, not from outside. In the present Indian scenario, even though India does not recognize PoK (Pakistan occupied Kashmir), it does accept the LoC (Line of Control). Also, unlike Israel, India does not exercise control over PoK. This effectively vitiates the effect of this advisory opinion on the present case. The text of Article 51 does not speak on any scope of pre-emptive attack as employed by India before the real attack happens from the other side. However, customary international law has many a time recognized (however with criticisms) the right to use armed force pre-emptively for self-defense even without actual attack from the other side if it is evidenced by noticeable preparations for offensive military action. In such cases, 'the necessity of self-defense should be instant, overwhelming, and leaving no choice of means, and no moment of deliberation' and the force used is proportional to the actual attack (the Caroline criteria-based on an 1837 US-UK dispute).³²

Conclusion

This paper extensively explores the role of mediation in trying to resolve the long lasting tussle for Kashmir between India and Pakistan. It traces the evolution of their relations since India gained independence from the British in 1947. A series of wars, diplomatic fall outs and intermittent skirmishes have made it a tumultuous to solve this impending issue and makes it an extremely arduous endeavor for any entity seeking to decide this

³² Dr. Sanoj Rajan, "Legality of India's pre-emptive surgical strike in PoK" *The Week*, October 10, 2016

contentious matter once and for all. From various third parties at different points in time to the United Nations itself, no one has successfully mediated the issue and has at best achieved temporary success. This paper examines the role that various treaties, conventions and other instruments play in dispute resolution under international law and discusses their efficacy. Moreover, what is vital in this paper is the topic of Kashmir in the contemporary era. Changes in political leadership have ushered in fresh hope for negotiation but terrorism continues to be dampening ties between India and Pakistan. Through the lens of mediation and international law, this paper examines what went wrong in the process and why the two countries have not benefited from mediation proceedings. A number of actors, including separatist groups, organizations, the locals and other countries are in some way or the other, connected to this dispute. Finally, the role of mediation, though a failure in this case, is still the best chance these two countries have of reaching a peaceful solution so that all this violence can be ended and normalcy can return in the region. It is important not just for the Indian subcontinent but for the entire world that Jammu and Kashmir remains a heaven on Earth.

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