

INTERNATIONAL RELATIONS AND SECURITY NETWORK
**THE KASHMIR ISSUE:
DIFFERING PERCEPTIONS**



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INTRODUCTION

For almost 60 years now, the Kashmir issue between India and Pakistan has dominated security concerns on the Indian sub-continent, and fuelled weapons and nuclear proliferation in and around the region. India and Pakistan have already been at war on several occasions, and given that both countries have nuclear capabilities, Kashmir has been characterized as the nuclear flashpoint in the Indian sub-continent.

The Kashmir issue and its resolution is too complex and too large a subject to encapsulate in few pages. This paper focuses on one element of the Kashmir issue, namely, the difference between India and Pakistan since 1947 in the very perception of what comprises the Kashmir issue. While both countries do want to talk on the Kashmir issue, they differ on what they want to talk about. It is this difference that has effectively doomed every peace initiative taken so far, and will continue to plague the resolution of the Kashmir issue.

Varying Stands

Both India and Pakistan claim that Kashmir belongs to them. Since Kashmir did execute an instrument of accession in favour of India, New Delhi considers all questions relating to Kashmir, including New Delhi's commitment to hold a referendum or plebiscite in the state to decide its future, as falling within its domestic jurisdiction. India terms the material, political and diplomatic support given overtly by Pakistan to the militant and terrorist outfits active in the territory of Kashmir with India as being nothing but state-sponsored cross-border terrorism. Consequently, the only dialogue India wants with Pakistan today is how and when Pakistan will vacate the territories of the state it has forcibly occupied since 1947 through invasion and to stop supporting terrorist activities in India.

Pakistan views the Muslim majority Kashmir, which is contiguous to Pakistan, as rightfully belonging to it. Pakistan argues that the basis of the partition of the British Empire in the Indian subcontinent was "that Pakistan would be constituted by the contiguous Muslim-majority areas in the northwest and the northeast of the subcontinent, and India would comprise contiguous non-Muslim-majority areas," and it "was thus universally assumed that, following the basis adopted for Partition," states with "a Muslim majority in population contiguous to Pakistan would accede to Pakistan." Pakistan has refused to recognise the accession by Kashmir in favour of India. The dialogue that Pakistan wants to have with India today is that India should view the state as disputed territory and hold the plebiscite under international auspices so as to enable the state to accede to Pakistan. Thus, Pakistan calls the violence in the territory of Kashmir with India a "*Jihad*" or "freedom struggle" rather than terrorism, and sees nothing wrong in providing material, political and diplomatic support for the supposed "*Jihad*".

Ground Realities

The violence in the territory of Kashmir under Indian sovereignty, which has escalated since early 1990s, has killed tens of thousands of civilians and security personnel, rendered millions homeless and an equal number of refugees. Hardly a day passes without a large number of terrorism related incidents such as grenade and bomb explosions, rocket attacks, sniper attacks, killings, abductions and rape. The militant outfits use state-of-the-art weaponry that includes anti-aircraft guns, electronically fired anti-tank and surface-to-surface missiles, automatic grenade launchers and remote

controlled aircrafts. They possess satellite phones and extremely sophisticated communications systems effective in detecting and homing in on military broadcasts. These outfits are thriving on their nexus with international narcotics traffickers and counterfeiters. Fighting the supposed "*Jihad*" in Kashmir with foreign mercenaries recruited from almost every Islamic country as also from countries like the UK, are highly educated and youth with highly technical education, such as commercial pilots and medical students.

Counterterrorism measures, too, have not been without human rights violations of innocent civilians caught in the crossfire. In Kashmiri society, violence has now become endemic, with a sizeable proportion of the population suffering from acute psychiatric problems as a result of post-traumatic stress disorders. Terrorism from Kashmir has spilled over to other parts of India and has included attacks on the Indian Parliament and the historic Red Fort, bomb blasts in trains and crowded places, and the hijacking of airplanes.

Human right violations are equally rampant in the territories of Kashmir under Pakistan's control, where the ongoing popular movement protesting against inhuman living conditions and the denial of basic human needs and civil liberties, and the movement for independence from Pakistan's rule is quelled by ruthless state force.

Failed Accords

There have been numerous, though unsuccessful, accords between India and Pakistan to resolve the Kashmir issue. The Agreement on Bilateral Relations Between India and Pakistan (the Simla Agreement) of 2 July 1972, resolved that that the two countries put an end to the conflict and confrontation that have hitherto marred the relations and work for the promotion of a friendly and harmonious relationship and the establishment of durable peace in the subcontinent. Both countries agreed to settle their differences by peaceful means through bilateral negotiations or by any other peaceful means mutually agreed upon between them, and to prevent the organisation, assistance or encouragement of any acts detrimental to the maintenance of peaceful and harmonious relations. The Lahore Declaration of 21 February 1999 between India and Pakistan reiterated "the determination of both countries to implement the Simla Agreement." However, the inconclusive status of bilateral negotiations resulted in there being no forward movement at the subsequent Agra Summit

between the two countries in 2001. Then came the Indo-Pakistan Joint Statement of 6 January 2004 issued from the sidelines of the SAARC Summit in Islamabad. Both countries resolved to continue the stalled dialogue process, with Pakistan assuring India that it would end terrorism permanently. This was followed by the New Delhi Summit on 18 April 2005 at which the Indian prime minister and the Pakistani president agreed that they would not allow terrorism to impede the peace process. Despite such resolutions, there has been no progress on the ground. The stalemate continues.

Forward Movement on the Kashmir Issue

The Kashmir issue has generally been viewed as a political one, having legal and constitutional ramifications. This perception may not be entirely correct, as a political stance must invariably be grounded in law. The respective claims of India and Pakistan have to be seen in context of the legal status of Kashmir at the time when colonial India attained independence on 15 August 1947, with the creation of two sovereign dominions: India and Pakistan. Simply put, should the future of Kashmir be dictated by it being a Muslim majority state and being contiguous to Pakistan, Pakistan may have a point in staking a claim to it. However, should Kashmir have been a sovereign state in international law as of 15 August 1947, it would have had the competence to decide its own future. More importantly, in that event, neither of the dominions of India and Pakistan would have had to stake a claim to a sovereign Kashmir as of 15 August 1947.

The subsequent accession of Kashmir to India does give India standing with respect to the state. But then, does the commitment of New Delhi to hold the plebiscite in the state to test the accession fall within the domestic jurisdiction of India so as to deny Pakistan as also the international community standing to insist on such plebiscite? On the other hand, can Pakistan, a stranger to the accession, challenge such accession?

The responses to these issues would necessarily make one venture into the legal maze in order to make sense of the respective stands of India and Pakistan and to appreciate the fallacies therein. The paper begins with a brief description of the process of independence of colonial India, followed by developments in Kashmir. The paper then discusses the referral of the Kashmir question to the United Nations by India and, in light of India's stance, considers the implications of the internationalization of the Kashmir issue. The paper

finally evaluates Pakistan's stance towards Kashmir before concluding as to the propositions that both India and Pakistan need to bear in mind to take forward the peace process.

Independence of Colonial India

Prior to 15 August, 1947, the Indian subcontinent was under British colonial rule. The Indian territories comprised huge provinces annexed by the British, known as British India, and about 560 princely Indian states headed by monarchical Indian rulers owing allegiance to the British Crown. The princely Indian states covered an area of 715,964 square miles out of the total area of 1,581,410 square miles under British rule; that is, about 45 percent of the total Indian territories. Kashmir, or rather, the princely Indian state of Jammu and Kashmir, was one of these princely Indian states.

The historic freedom struggle against colonial rule, the aftermath of World War II, and the growing realisation of the fact that that it was impossible to keep under subjugation 400 million exasperated people compelled the British authorities to transfer power to Indian hands.

British India

With regards to British India, the decision handed down to the Indian leadership in 1947 was the partition of the subcontinent on the basis of the two-nation theory. To put it simplistically, the theory asserted that Hindus and Muslims were to be considered as two separate nations in every respect, and hence Muslim majority areas of British India should comprise a separate homeland. The territory comprising British India was to be partitioned into the dominions of Hindu India and Islamic Pakistan. However, the position was different with respect to the princely Indian states.

Princely Indian States

Though the princely Indian states under British paramountcy (or sovereignty) had no international personality and the British Crown had exclusive authority to make peace and war, or to negotiate or communicate with foreign states, the British Crown had not annexed the territories of the princely Indian states and normally had not intervened in the internal affairs of the states, which continued to be governed by their respective rulers.

It may be noted that the fact that the rulers of the princely Indian states owed allegiance to the British Crown did not, however, mean that the rulers of the states possessed no sovereignty at

all. It has long been held that independent states may “have their sovereignty limited and qualified in various degrees, either by the character of their internal constitution, by stipulations of unequal treaties of alliance, or by treaties of protection or of guarantee made by a third Power.” There are judicial precedents in common law for the proposition that “a state may, without ceasing to be a sovereign state, be bound to another more powerful state by an unequal alliance.”

Thus, merely because the princely Indian states ceded certain powers to the British Crown, they did not cease to be sovereign. In fact, this position has been recognised by the Supreme Court of India with respect to Kashmir itself, by holding that insofar as “the internal administration and governance of the State” were concerned the ruler was “an absolute monarch” even under British paramountcy; and “all powers legislative, executive and judicial in relation to his State and its governance inherently vested in him.”

Constitutional Process

The British Cabinet Mission Plan of 16 May 1946, therefore, stated that with the attainment of independence by British India, the paramountcy of the British Crown over the princely Indian states “can neither be retained by the British Crown nor transferred to the new Government (of India or Pakistan).” [Emphasis added.] The Memorandum of the Cabinet Delegation dated 12 May 1946, explained that British Crown “will cease to exercise the power of paramountcy, and therefore, all the rights surrendered by the States to the Paramount Power will return to the States.” [Emphasis added.]

Prior to 1947, the constitutional law in force in colonial India was the Government of India Act of 1935 enacted by the British (Imperial) Parliament. On 18 July 1947, the British Parliament enacted the Indian Independence Act of 1947 to make provision for the setting up of the two independent dominions in the Indian subcontinent and to amend the prevailing Government of India Act of 1935. With regard to the princely Indian states, Section 7 of the 1947 Act declared that as of 15 August 1947 “the suzerainty of His Majesty over the Indian States lapses.” The amended Government of India Act of 1935 provided in Section 6 that “a princely Indian state shall be deemed to have acceded to either of the dominions on the acceptance of the Instrument of Accession executed by the Ruler thereof.”

Differing Views

The inescapable conclusion, thus, is that the princely Indian states ceased to owe any allegiance to the British Crown on lapse of British paramountcy and became legally sovereign in the full sense of the term. Ironically, it is Pakistan, which, right from 1947 until the present, has taken this correct view of the lapse of British paramountcy. Pakistan took this stand to rebut New Delhi’s contention that the Government of India succeeded to the British Crown on 15 August 1947 as the Paramount Power on the Indian subcontinent and those princely Indian states that did not accede to the newly created dominion of Pakistan remained under the supposed paramountcy of the dominion of India.

New Delhi had reasoned that “a declaration issued by the Crown terminating its relationship with the princely Indian states could determine only the Crown’s own future relationship with the states: it could not have the effect of divesting the successor government of its status vis-à-vis the states and its rights and obligations in relation to them inhering in it as the supreme power in India.” New Delhi argued that all the “factors which established the paramountcy of the British Government over the states operated to assign a similar position to the Government of India,” and hence it was “the duty of the Government of India to ensure that the vacuum caused by the withdrawal of the British did not disturb the peace and tranquillity of the country.” New Delhi, therefore, reasoned that “none of the Indian States had sovereign rights in the full sense of the term; nor did they have individually the necessary resources to claim or enjoy the attributes of a sovereign independent power.”

Pakistan had differed. It repeatedly stated in national and international fora that with the lapse of paramountcy on the transfer of power by the British, all princely Indian states “would automatically regain the full sovereign and independent status,” and “are therefore free to join either of the two dominions or to remain independent.”

That New Delhi’s stand was legally misconceived has been concluded by the judicial authority of the Supreme Court of India. In *Madhav Rao*, the Supreme Court found it “strange” that New Delhi should have claimed that the Government of India inherited any aspects of the paramountcy exercised by the British Crown. The Court observed

that paramountcy as claimed by the British rulers was one of the manifestations of imperialism; a power exercised by a superior sovereign over the subordinate sovereign. The Court concluded that the “paramountcy of the British Crown was not inherited either by India or Pakistan, (but) was allowed to lapse,” and that on 15 August 1947, the “[r]ulers became absolute sovereigns. In law they were free to accede to either of the dominions of India or Pakistan or to remain independent.”

As far as the princely state of Jammu and Kashmir was concerned, both the Indian Supreme Court in *Premnath Kaul* and the Jammu and Kashmir High Court, in *Magher Singh*, observed that with the lapse of the British paramountcy, the princely Indian state became an independent and sovereign state in the fullest sense in international law. Let us now consider the case of Kashmir in some detail.

Princely Indian State of Jammu and Kashmir

The then princely Indian state of Jammu and Kashmir was strategically situated in the north of the Indian subcontinent and in the heart of South Central Asia. The state shared borders with both the dominions of India and Pakistan as also with Afghanistan and China.

Though the state was under Hindu rule right up to the lapse of the British paramountcy, the state has three distinct regions, namely the Hindu majority Jammu, the Muslim majority Kashmir and the Buddhist majority Ladakh. The white paper on Jammu and Kashmir records that according to the 1941 census, the total population of the state was 4,021,616. This was made up of 77.11 percent Muslims, 20.12 percent Hindus, and 2.77 percent Sikhs, Buddhists and others.

Thus, as of 15 August 1947, the state, having a predominantly Muslim population, and being adjacent to Pakistan, had a Hindu Dogra ruler, who was unlikely to find favour with Islamic Pakistan. On the other hand, the then ruler had his differences with the Indian leadership that had overtly supported the popular movement in the state against monarchical rule. The ruler, therefore, wanted to retain his sovereignty of the state on the lapse of British paramountcy.

Around the same time, there had been the somewhat controversial instances of the accession of the princely Indian states of Hyderabad and Junagadh. While Kashmir had a predominantly

Muslim population and a Hindu Ruler, the Hindu majority princely Indian states of Hyderabad and Junagadh had Muslim Rulers. This led New Delhi to enunciate a policy stating that “the people of the states must have a dominating voice in any decision regarding them,” and proposing a plebiscite or referendum to ascertain the wishes of the people to determine the future of their respective states. While Hyderabad eventually acceded to the dominion of India, a plebiscite was held in Junagadh, which opted to accede to the dominion of India. Pakistan, though not endorsing such policy, had reasoned that New Delhi should apply such policy to the parallel case of Kashmir.

Coming back to Kashmir, the ruler’s hope of an independent state was short-lived with Pakistan implementing in September 1947 the scheme to send infiltrators and saboteurs in the state to create disturbances followed by a full-scale tribal invasion the next month. The ruler, by his letter dated 26 October 1947, appealed to the Dominion of India for immediate assistance and enclosed the Instrument of Accession duly executed by him on behalf of his state in favour of the Dominion of India. The said Instrument was accepted by India on 27 October 1947, in terms of the Indian Independence Act of 1947, read with the Government of India Act of 1935. The acceptance of the Instrument of Accession on 27 October 1947, was accompanied by a letter from New Delhi stating that in view of its policy “that in the case of any State where the issue of accession should be decided in accordance with the wishes of the people of the State,” it was New Delhi’s “wish that as soon as law and order have been restored and her soil cleared of the invader the question of the state’s accession should be settled by a reference to the people.”

New Delhi, thereafter, repeatedly reiterated at every conceivable occasion that while accepting the accession, the Government of India made it clear that India would regard the accession as purely provisional until the aggression is vacated and the will of the people of the state could be ascertained. New Delhi then made a reference to the United Nations Security Council against Pakistan complaining of what it termed as aggression, and committed in such reference that it would hold plebiscite in Kashmir under international auspices once Pakistan vacates the territories occupied by it. Let us briefly now consider the happenings at the United Nations.

United Nations and Kashmir

The reference made by India to the United Nations Security Council under Articles 34 and 35 of Chapter VI of the UN Charter was transmitted to the President of the UN Security Council on 1 January 1948. The reference detailed the facts of the invasion in Kashmir to establish that the invaders were allowed transit across Pakistan; that they were allowed to use Pakistan territory as a base of operations; that they included Pakistani nationals; that they drew much of their military equipment, transportation and supplies (including petrol) from Pakistan; and that Pakistan officers were training, guiding and otherwise actively helping them. New Delhi called upon the UN Security Council to ask the government of Pakistan to desist from such activities. New Delhi did state in the reference that in “order to avoid any possible suggestion that India had utilized the state’s immediate peril for her own political advantage, the government of India made it clear that once the soil of the state had been cleared of the invader and normal conditions restored, its people would be free to decide their future by the recognized democratic method of plebiscite or referendum which, in order to ensure complete impartiality, might be held under international auspices.”

But then, the West saw Cold War objectives in Kashmir. Much has been written about how the then Indian Prime Minister had been persuaded by Lord Mountbatten, the then-Governor General of India, to make the reference to the UN Security Council and to somehow commit to the holding of a plebiscite in Kashmir. Vivek Sengupta refers to the autobiography of Lord Mountbatten, wherein he acknowledged that he wanted Kashmir to join Pakistan “(f)or one simple reason, it made Pakistan more viable.” According to Narendra Singh Saria, declassified top secret material from pre-1947 British archives reveal that the Partition of the Indian sub-continent was one of the earliest confrontations of the Cold War, preceding Winston Churchill’s famous “Iron Curtain” speech and ranked with the divisions of Germany and Korea. The Partition had been finalised by Field Marshall Lord Wavell and his Chief of Staff in early 1946 as part of the “Great Game” mindset. The idea was to create a Northwest Islamic salient on the Indian subcontinent as a rampart to protect the “wells of power” – the Middle East oil fields – against a much-feared Soviet advance. British strategists believed that Britain could not afford to lose control over the entire Indian subcontinent, if the Western powers were to block perceived Soviet

designs on the oil fields along the Gulf and develop a base for counter-action against possible Soviet intrusions. Since the Indian National Congress was not likely to support this policy, the British encouraged the Muslim League to seek Partition, ostensibly to protect Muslim interests on the basis of the two-nation theory. Kashmir, with its access to Sinkiang, was considered as part of India’s strategic northwest and would fit into British and Western strategic purposes.

Given that the West saw Cold War objectives in Kashmir and an ally in Pakistan, the UN Security Council neatly sidestepped India’s charge of aggression and resolved that both India and Pakistan agree that the question of accession of the princely Indian state be determined by a plebiscite under UN auspices.

On 20 January 1948, the UN Security Council, by its Resolution, established a three-member United Nations Commission for India and Pakistan (UNCIP) with three objectives: a cease-fire, a truce period during which the withdrawal of forces was to take place, and finally, consultations to establish the conditions by means of which the free will of the people of Kashmir would be expressed. The UNCIP arrived on the subcontinent on 7 July 1948, only to find that regular Pakistan troops had moved into the territories of the state under its occupation. Pakistan admitted before the UNCIP that it had sent its regular troops to Kashmir on 8 May 1948.

On 27 July 1949, the military representatives of India and Pakistan signed an agreement at Karachi, under the auspices of UNCIP, establishing a cease-fire line. The UNCIP, however, failed to secure the withdrawal of the forces or the creation of the conditions for a plebiscite and returned to New York in September 1949. The 1950 *Yearbook of the United Nations* records that the UNCIP, in its third interim report submitted on 5 December 1949, stated that the main difficulty had arisen concerning the withdrawal of troops, which was the condition precedent to the holding of the plebiscite.

Hence, by making the reference to the United Nations on what India termed as aggression, India found itself being treated on par with Pakistan and being forced to honour a cease-fire line that ensured that Pakistan got to consolidate its control over the 86,023 square kilometres of territory it had occupied and continues to occupy at present. Pakistan has since split the occupied territories of the state into the Federally Administered Northern Areas (which

is the substantial part of the state and is directly ruled by Pakistan); “Azad Kashmir” (a small part of the state whose constitution recognises Pakistan’s direct control in certain matters and the final say in others), and the Shaksgam Valley ceded by Pakistan to China under the Sino-Pakistan Boundary Agreement of 1963. An equally damaging fall-out of making the reference to the United Nations has been the internationalisation of the Kashmir issue.

Internationalization of the Kashmir issue

New Delhi has refused to see Kashmir as an international issue. The eventual stand taken by New Delhi before the UN Security Council is that following the princely Indian state of Jammu and Kashmir’s accession to the Dominion of India, India’s commitment to hold the plebiscite to decide the state’s future – after peace was restored and the state was cleared of the invaders – was made only to the people of the state as part of domestic policy. According to India, such commitment does not constitute an “international obligation” but is merely an “engagement” that falls within the domestic jurisdiction of India. Further, since Pakistan has not vacated its occupation and withdrawn its troops, nationals and tribesmen from the Pakistan-held Kashmir in terms of the UNCIP resolutions, the conditional and contingent “engagement”, if at all, of India to hold a plebiscite in the state does not mature. Amongst other legal defences taken by India was that it was released from giving effect to such an “engagement” due to vital changes in the circumstances on the principle of *rebus sic stantibus*.

Any question regarding that princely Indian state, having acceded to the dominion of India, should logically fall within the domestic jurisdiction of India and be excluded from discussion at the United Nations or other international fora. But then, if India itself raises the question of accession of the princely Indian state before the UN Security Council and pledges a plebiscite under international auspices to settle the accession, does not the Kashmir question, originally within the domestic jurisdiction of India, become an international issue so as to confirm standing on the international community (including Pakistan) to require New Delhi to honour its pledge?

Domestic Jurisdiction

The keenness of the government of India to emphasize before the UN Security Council that the holding of the plebiscite in the princely Indian state was a matter of “domestic jurisdiction”

stems from the provisions of Article 2 (7) of the UN Charter which prohibit the UN from intervening in matters which are essentially within the domestic jurisdiction of any state or from requiring the members to submit such matters to settlement under the UN Charter.

That brings us to the question of what is meant in international law by the term “domestic jurisdiction”. Domestic jurisdiction is the residuum of sovereignty remaining outside a state’s international obligations. The sphere of domestic jurisdiction of a state cannot be determined directly, but only indirectly by ascertaining the international obligations of that state in a given situation.

While the UN cannot make recommendations to a state concerning matters within the state’s domestic jurisdiction, it can certainly make recommendations concerning the fulfilment 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 fulfilment of their obligations. Consequently, UN resolutions, which address a particular state with respect to a definite international obligation of that state, are not considered to constitute intervention in “a matter within its domestic jurisdiction.”

Thus, the prohibition of Article 2 (7) of the UN Charter applies only to a resolution of the UN which is both an “intervention” and on a matter within the domestic jurisdiction of a state – that is, when the UN seeks to intervene in respect of a domestic matter with regard to which the state has made no international commitment or engagement.

Since it is the presence or absence of an international obligation that determines whether a matter is a domestic one, the issue is necessarily one of international law. Further, the very question of whether or not a state has assumed an international obligation is again one of international law. Moreover, the provisions of the UN Charter and of the Statute of the International Court of Justice (ICJ), which was established by the UN Charter as the principal judicial organ of the UN, support the proposition that only an international authority can finally determine the validity of a state’s claim that a matter is essentially within its domestic jurisdiction.

The Permanent Court of International Justice (PCIJ), in its Advisory Opinion in the *Tunis Nationality Decrees* case, considered whether the “dispute between France and Great Britain as to the Nationality Decrees issued in Tunis and Morocco (French Zone) on 8 November 1921 and their application to British subjects by international law were solely a matter of domestic jurisdiction.” The PCIJ ruled in the negative, opining that where a state’s discretion in dealing with a matter is limited by its obligations either under the general international law or its treaties, that matter is not within its “domestic jurisdiction.”

Reference can also be made in this regard to Competence of the General Assembly For The Admission of a State to the United Nations, wherein the International Court of Justice (ICJ) examined the contention that the UN General Assembly could not consider the procedure to determine treaty obligations of Bulgaria, Hungary and Romania concerning human rights because the matter was essentially within the domestic jurisdiction of these states. The ICJ held that “the interpretation of the terms of the treaty for this purpose could not be considered as a question essentially within the domestic jurisdiction of a state,” it being a question of international law.

Let us now consider whether New Delhi was correct in contending before the United Nations that its “wish” that the question of accession be determined by a plebiscite was a matter within its “domestic jurisdiction” which the UNCIP resolutions, at best, constituted an international “engagement” rather than an international “obligation” to do so.

Kashmir and Domestic Jurisdiction

It is evident that as long as the government of India had not expressed any such “wish” before the UN Security Council or to a foreign state, the question of assuming an international obligation or engagement did not arise, and the matter did indeed fall within its “domestic jurisdiction” of India. But, the moment that New Delhi expressed the “wish” before the United Nations (as well as at bilateral and multilateral conventions and fora on numerous occasions), that the question of accession be determined by a plebiscite, and that such a “wish” was recognised and accepted by the United Nations and other states (including Pakistan), New Delhi entered into at least an international engagement to hold the plebiscite, thereby taking the matter outside its “domestic jurisdiction.”

Now, Pakistan contends that the UNCIP resolutions contain an international obligation on the parties to hold the plebiscite. India submits that it is merely an international “engagement.” But then, whether the UNCIP resolutions constituted an international “engagement” or an international obligation is again a matter of international law, which by its very nature takes the Kashmir issue out of the domestic jurisdiction of India. Whether such an international engagement was a conditional and contingent one is entirely a different matter. And so is the contention that it was made in the context of certain circumstances and subject to certain assurances. That such an international engagement is not enforceable, having been made under Chapter VI of the UN Charter, is also besides the point. The point is that New Delhi, by its own admission, had accepted at least an international engagement, albeit a conditional, contingent and non-enforceable one. That is sufficient to take the Kashmir issue out of the domestic jurisdiction of India and make it an international matter. More importantly, it permitted the international community to at least argue that India is under an international obligation to hold a plebiscite to determine the accession of the princely Indian state. The determination of whether or not India is under an international obligation to do so is itself a matter of international law.

While there is nothing much the United Nations or the international community can do to enforce the UNCIP resolutions passed in proceedings under Chapter VI of the UN Charter, the significance of the Kashmir issue being taken out of the domestic jurisdiction and becoming an international matter lies in the fact that it confers standing on the United Nations and its member states, including Pakistan, to discuss the happenings in Kashmir – which they could not have done, had the matter remained within the “domestic jurisdiction” of India.

Fall-out of the International Engagement

A crucial fall-out of India assuming at least an international “engagement” to have a plebiscite under international auspices to settle the accession of Kashmir to India has been upon the world opinion, heavily influenced by the world media. The more New Delhi seeks to avoid the international “engagement” to hold the plebiscite, the more justified the propaganda of Pakistan appears to the Western public opinion. Francois Gautier, a French reporter covering the 1999 invasion by Pakistan into India wrote that irrespective of whether India ultimately wins the battle, there is

“...one war, which India has been constantly losing since 1947. It is the public relations battle. Look at this particular case. Not only is Pakistan the aggressor – it trained, armed, and financed the Kashmiri separatists, put them under the command of Pakistani soldiers in civil and Afghan Mujahideens and pushed them into Indian held territory – but now it is able to portray itself as a peacemaker (and blackmail the world with the threat of a nuclear war).

What an irony....whatever the Indian government says, Western public opinion is still not on its side, as Kashmir proves. For 15 years, various Indian governments have been saying that Pakistan was sponsoring, arming and training Kashmiri militants. In the beginning, we foreign journalists were a bit skeptical, but after some years, it became obvious to a few of us that it was the truth, because it made sense, it was logical – we were even shown aerial photographs of training camps inside Pakistan. Yet today, if we dare to mention in our dispatches on Kashmir “the Pakistan-trained Kashmiri militants,” some of our editors in Paris, London or New York will immediately correct the text to: “India says that the Kashmiri militants are backed by Pakistan.”

Thus, the effect of New Delhi’s entering into an international “engagement” to hold a plebiscite to settle the question of accession of the princely Indian state has altered the entire international political discourse on Kashmir. Ironically, it is India that is routinely hauled up for the violence and human rights violations in the part of the state under its sovereignty. In fact, the Kashmir issue is now portrayed internationally as the supposed struggle for independence said to be underway in the Kashmir valley, which constitutes just 9 percent of the princely Indian state. The focus is no more on the territory of the princely Indian state occupied by Pakistan. Pakistan, thus, refuses to vacate its occupation, has directly annexed most of the territory of the princely Indian state it occupied, denies its people basic human rights and compounds its occupation by what India calls as cross-border terrorism. Pakistan justifies its acts by refusing to recognise the accession of the princely Indian state to the dominion of India. Rather, the 1952 Constitution of Pakistan contemplates the accession of the princely Indian state to Pakistan. But then, let us consider whether it is open to Pakistan to challenge the accession made by the princely Indian state.

Pakistan and Kashmir

It has been noted that the princely Indian states were explicitly excluded from the application of the two-nation theory. Rather, on the lapse of British paramountcy on 15 August 1947, the princely Indian states became legally sovereign states, free to accede to either dominion or retain their sovereignty. This, indeed, has been Pakistan’s own stand before the United Nations with regard to Kashmir, Hyderabad and Junagadh. Such position rules out any standing of Pakistan and India with respect to Kashmir as of 15 August 1947.

Occupation of Part of Kashmir

Regarding the question of accession of the princely Indian state of Jammu and Kashmir, the only instrument of accession executed by its sovereign ruler was in favour of the dominion of India, though Pakistan refuses to recognise 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. In fact, according to A S Anand, C.J., the accession of the princely Indian state to the dominion of India was analogous to that of Texas to the United States. The judge recalls that when Mexico separated from the Spanish Empire, Texas was a part of the new independent state. Subsequently, Texas revolted against Mexican authorities and established itself as an independent entity. The independent status of Texas was recognised by the United States and the European powers. In 1844, the government of Texas, threatened by predatory incursions by Mexico, asked the United States to annex the state; an appeal that was accepted by the United States Congress in March 1845. The United States sent its Army to defend the western frontiers of Texas. The judge notes that when Mexico protested and alleged the violation of its rights, the United States reply was that the “[g]overnment of United States did not consider this joint resolution as a violation of any of the rights of Mexico, or that it offered any just cause or offence to its government; that the Republic of Texas is an independent power, owing no allegiance to Mexico, and constituting no part of her territory or rightful sovereignty and jurisdiction.”

The case of the princely Indian state of Jammu and Kashmir is on much stronger footing as the princely Indian state was admittedly never – constitutionally, legally or factually – a part of the dominion of Pakistan, whereas Texas had, at one point of time, been a part of the independent state of Mexico.

The accession of the sovereign princely Indian state to the sovereign dominion of India was an “act of state” that precludes Pakistan, and for that matter any country or other authority, including the United Nations, from questioning the accession of the princely Indian state to the dominion of India or, from considering the question of the status of the princely Indian state within the Union of India. The occupation by Pakistan of the territories of the sovereign princely Indian state was, therefore, in international law a pure and simple act of aggression.

The question may arise as to the purpose of the international community (including Pakistan), requiring India to honour its international “engagement” to hold a plebiscite in Kashmir under international auspices, if the accession cannot be challenged. To say that Pakistan has been conferred standing by India itself to insist on India honouring its international “engagement” of holding a plebiscite is one thing. But to say that Pakistan has the right to challenge the accession made by a sovereign princely Indian state in favour of a sovereign India is an entirely different matter. In the former situation, the accession of the princely Indian state is not in issue. Rather, the princely Indian state is considered as part of India, with the rider that the wishes of the people are to be ascertained by plebiscite as to whether they wish to remain part of India. The incident of the holding such plebiscite – assuming that Pakistan complies with the conditions imposed upon it by the UNCIP resolutions and vacates the state, and that the cession of territory is constitutionally permissible for India – would be that the state, being part of India, could choose to cede (as distinct from accede) from the India.

Further, even if one assumes for argument’s sake that the accession in favour of the dominion of India is a nullity, the princely Indian state of Jammu and Kashmir would still not automatically become a part of Pakistan; rather, it would simply resume its status of a legally sovereign state. The obvious reason for this is that the sovereign princely Indian state has not, at any point of time, acceded to Pakistan.

Thus, in any view of the matter, Pakistan simply has no standing in respect of the territories of Kashmir nor can it challenge its accession to India. In fact, it is not even permissible for Pakistan to offer moral, diplomatic, political and/or material support for what it terms as the ongoing “Jihad” or “freedom movement” in Kashmir and what India terms as cross-border terrorism.

Terrorism and Subversive Activities

It is a well-settled principle of international law that states must not engage in or support international terrorism and subversive activities. Oppenheim notes that while a state may not have a duty to suppress criticism of (or propaganda directed against) other states or governments on the part of private persons, customary international law confers an obligation on each state to prevent hostile expeditions from its territory, and itself to refrain, directly or indirectly through organizations receiving from it financial or other assistance or closely associated with it by virtue of the state’s constitution, from engaging in or actively supporting subversive activities against another state. This rule forms the basis of the anti-terrorism instruments formulated over the decades.

In Nicaragua, the International Court of Justice (ICJ) held that the support given by the United States to the military and paramilitary activities of the contras in Nicaragua, by financial aid, training, supply of weapons, intelligence and logistic support, constitutes a clear breach of the principle of non-use of force and of non-intervention. The ICJ also considered “whether there might be indications of a practice illustrative of a belief in a kind of a general right for states to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another state, whose cause appeared particularly worthy by reason of the political and moral value with which it was identified.” It held that:

“...such a general right to come into existence would involve a fundamental modification of the customary law principle of non-intervention....The Court, therefore, finds that no such general rights of intervention, in support of an opposition within another state, exists in contemporary international law. The Court concludes that acts constituting a breach of customary principle of non-intervention will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations.”

On a parity of reasoning, the fact that Pakistan might find the supposed “*Jihad*” in Kashmir to be a worthy cause does not justify it sponsoring or supporting what India calls as cross-border terrorism.

The case of Nicaragua also represents another principle relevant for the purpose of the Kashmir problem. It appears that the Nicaraguan Junta of National Reconstruction had – following the recommendation of the XVIIth Meeting of the Consultation of Foreign Ministers of the Organisation of American States – made a pledge to the Organisation of American States and to the people of Nicaragua to hold free elections. The question arose whether the United States could assume the task of compelling Nicaragua to honour the pledge. The ICJ held that:

“...even supposing that such a political pledge had had the force of a legal commitment...even supposing the United States were entitled to act in lieu of the Organisation, it could hardly make use of the purpose of methods which the Organisation could not use itself; in particular, it could not be authorised to use force in that event. Of its nature, a commitment like this is one of a category which, if violated, cannot justify the use of force against a sovereign State.”

Thus, it is, even otherwise, not open to Pakistan to cite the non-compliance by India of the United Nations resolutions for the plebiscite as a justification for its occupation or to provide all-out support for the supposed “*Jihad*” in Kashmir.

CONCLUSION

It is evident that both India and Pakistan need to revisit their respective stance on the Kashmir issue. It may be useful to summarise the propositions that could help redefine the nature and content of the dialogue now between the two countries.

First, the princely Indian state of Jammu and Kashmir became a sovereign state as of 15 August 1947 and neither India nor Pakistan had any standing with respect to it as of that date. The question of India staking a claim to Kashmir on the grounds that New Delhi succeeded the British Crown as the paramount power did not arise. Nor did the question of Pakistan staking claim to Kashmir on the basis of the two-nation theory.

Second, India has – by committing before the United Nations to hold a plebiscite under international auspices to settle the subsequent accession of the princely Indian state to the dominion of India – itself conferred standing upon the international community (including Pakistan) to insist on India honouring its commitment and to comment on the happenings in the state. The issue is not whether a plebiscite is legally permissible, conditional, feasible or practical. The point is that Kashmir has become an international issue.

Third, Pakistan has no standing to veto the subsequent accession by the princely Indian state in favour of India. The princely Indian state was a sovereign state as of 15 August 1947 and chose to accede to the sovereign dominion of India. Pakistan was a stranger to that accession. Moreover, the princely Indian state has never been part of Pakistan nor executed any instrument of accession in favour of Pakistan.

Fourth, since Pakistan has no standing to challenge the accession, its occupation of the territories of the princely Indian state constitutes aggression, regardless of India's commitment before the United Nations. Such aggression by Pakistan has been further compounded by its support of cross-border terrorism.

Fifth, the Kashmir issue is not confined to the Kashmir Valley that is controlled by India. The Kashmir issue encompasses all the territories of the princely Indian state, including the territories under Pakistan's control since 1947.

Both India and Pakistan have committed to the peaceful resolution of the Kashmir issue by various accords, including the Simla Agreement of 1972 and the Lahore Declaration of 1999. The peace process and track-two diplomacy is in place, though occasionally jolted by terrorist attacks in various parts of India. However, given the differing perceptions of India and Pakistan on the Kashmir issue, it is not surprising that there is no forward movement at all. New Delhi would have to reconcile with the fact that Pakistan has the standing to at least remind New Delhi of its commitment to hold a plebiscite in Kashmir. Pakistan needs to come to terms with the fact that it lacks competence to challenge the accession of Kashmir to India. Pakistan would also do well to realize that by compounding its aggression with terrorism, it runs the risk of international censure, particularly when post-9/11, the West is more receptive to the dangers of nurturing or condoning terrorism. It is, after all, now part of the coalition fighting the “global war against terror.”

HISTORICAL EVENT TIMELINE: KASHMIR

1925: Maharaja Hari Singh of the Hindu Dogra dynasty succeeds to the throne of the princely Indian state of Jammu and Kashmir.

1935: The Government of India Act is enacted by the British (Imperial) Parliament.

16 May 1946: The British Cabinet Mission plan is issued and states the paramountcy of the British Crown over the princely Indian states can neither be retained by the British Crown nor transferred to the new government.

18 July 1947: The British (Imperial) Parliament enacts the Indian Independence Act, which declares that from 15 August 1947 the suzerainty of the British Crown over the princely Indian states lapses.

15 August 1947: India, Pakistan and the princely Indian states gain independence from Britain.

22 October 1947: Pakistan invades the princely Indian state of Jammu and Kashmir.

26 October 1947: Maharaja Hari Singh of the princely Indian state of Jammu and Kashmir signs the Instrument of Accession in favour of India.

27 October 1947: India formally accepts the Instrument of Accession, and expresses its wish to refer the question of accession to the people once the invading forces had vacated the territory. India moves to repel the Pakistani invasion.

1 January 1948: India makes a reference to the United Nations citing of aggression by Pakistan.

20 January 1948: United Nations Security Council establishes the United Nations Commission for India and Pakistan (UNCIP).

8 May 1948: Pakistan send its regular troops to Kashmir.

13 August 1948: The UNCIP submits proposal to India and Pakistan, through its Resolution, detailing cease-fire terms.

5 January 1949: UNCIP adopts the Resolution containing further terms, pursuant to which a cease-fire is agreed between India and Pakistan

15 August 1965: Pakistan launches attack on the territory of Kashmir.

22 September 1965: United Nations Security Council passes resolution calling for a cease-fire. India and Pakistan agree to withdraw to pre-August 1965 areas, known as the Line of Control.

3 December 1971: The third war between India and Pakistan begins.

2 July 1972: The Agreement on Bilateral Relations Between India and Pakistan (the Simla Agreement) is signed. India and Pakistan agree to settle their differences by peaceful means and to respect the Line of Control until the issue is resolved bilaterally.

21 February 1999: The Lahore Declaration between India and Pakistan is signed, it reiterates their determination to implement the Simla Agreement.

May 1999- July 1999: The Kargil conflict begins with the infiltration of the 1972 Line of Control into India by Pakistani soldiers and Kashmiri militants, instigating a wider conflict. Forces were repelled by India back to the Line of Control.

14 - 16 July 2001: The Agra Summit between India and Pakistan is held, no agreement between the two is reached.

6 January 2004: India and Pakistan hold summit on the sidelines of the SAARC (South Asian Association for Regional Cooperation) Summit in Islamabad. The resulting India-Pakistan Joint Statement resolves that India and Pakistan agree to continue the stalled dialogue process. Pakistan assures India that it will end its support of militants.

16 - 18 April 2005 : The New Delhi summit leads to joint statement by India and Pakistan that outlines a number of common goals and asserts that progress on the peace process is irreversible.

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- ² *White Paper on Indian States*, Ministry of States, Government of India, 1950, p. 17.
- ³ For detailed discussion on the relationship between the British Crown and the Princely Indian States, see *White Paper on Indian States, Supra*, p 22-23, and *Madhav Rao v Union of India (1973)* 2 S.C.R. 9, p. 49.
- ⁴ *Duff Development Company Limited v Government of Kelantan and Anr.*: 1924 A.C. 797, p. 830.
- ⁵ *Ibid*, p. 807.
- ⁶ *Premnath Kaul v State of Jammu and Kashmir*: A.I.R 1959 S.C. 749, p. 756.
- ⁷ *White Paper on Indian States, Supra* Note 2, p. 142.
- ⁸ *Ibid*, 143.
- ⁹ *Ibid*, 144.
- ¹⁰ *Ibid*.
- ¹¹ "Statement of M A Jinnah, Governor-General Designate of the Dominion of Pakistan," reproduced in Noorani, A G, *The Kashmir Question*, Manaktalas, Bombay, 1964, p. 22. Also see Krishna Menon (India), *The India – Pakistan Question, S/PV 763*, 23 January 1957, p. 31 and Mohammad Zafrullah Khan (Pakistan), *The India – Pakistan Question, S/PV 425*, 19 May 1949.
- ¹² *supra* note 3, p. 166.
- ¹³ *Ibid*, p. 157.
- ¹⁴ *Ibid*, p. 154.
- ¹⁵ *Supra*, note 6.
- ¹⁶ *Magher Singh v Principal Secretary, Jammu and Kashmir*: A.I.R. 1953 J & K 25.
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- ¹⁹ Extracted in Noorani, A G, *supra*, note 11, p. 23.
- ²⁰ The instances of the accession of both Hyderabad and Junagadh were raised before the UN Security Council. Pakistan alleged that India marched its troops into Hyderabad and secured its accession, whereas the plebiscite held in Junagadh was farcical.
- ²¹ Mohammad Zafrullah Khan (Pakistan), *The India – Pakistan Question, S/PV 257*, 26 February 1948, p. 341; Mohammad Zafrullah Khan (Pakistan), *The India – Pakistan Question, S/PV 264*, 8 March 1948, p. 64; Mohammad Zafrullah Khan (Pakistan), *The India – Pakistan Question S/PV 610*, 23 December 1952, p. 15.
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- ²³ see *White Paper on Jammu And Kashmir, supra*, note 17, p. 46 – 47.
- ²⁴ see *White Paper on Jammu And Kashmir, supra*, note 17, p. 3; *Selected Works of Jawaharlal Nehru*, Second Series, Vol. 4, Jawaharlal Nehru Memorial Fund, New Delhi, 1996, pp. 286, 288, 292, 294, 296, 299, 300, 302, 306c, 314, 315, 320e, 332, and 334-335; Mohammad Zafrullah Khan (Pakistan), *The India – Pakistan Question, SPV/228*, 18 January 1948, p. 84.
- ²⁵ These articles enable any member of the United Nations to bring to the attention of the UN Security Council any dispute or 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.
- ²⁶ see *White Paper on Jammu And Kashmir, supra*, note 17, p. 75-79.
- ²⁷ Sengupta, Vivek, "Mountbatten and Nehru," *Sunday, Ananda Bazar Patrika*, Calcutta, 8 April 1984 – 14 April 1984, p. 23.
- ²⁸ Saria, Narendra Singh, "Creation of Pakistan," *Times of India, Delhi Edition*, 17 March 2000; "Cold War and Kashmir," *Hindustan Times, Delhi Edition*, 18 March 2000.
- ²⁹ The success of this strategy is evident from the fact that soon after Partition, Pakistan entered into several military pacts with the Western powers and provided a base at Peshawar for US planes to spy over the then Soviet Union. Later, Pakistan used its good offices to help the US build relations with China, and its proximity with Afghanistan to help the US evict the Soviet presence from Afghanistan.
- ³⁰ *The Blue Helmets: A Review of the United Nations Peace-Keeping*, United Nations, 3rd Edition, Department of Public Information, New York, 1996, p. 133.
- ³¹ *Ibid* at 134. See Krishna Menon (India), *The India – Pakistan Question, S/PV 763*, 23 January 1957, p. 3.
- ³² *Ibid* at 135-136.
- ³³ Wright, Quincy, *International Law and the United Nations*, Asia Publishing House, Bombay, 1960. p. 67.
- ³⁴ Lauterpacht, Hersh, *International Law and Human Rights*, London, Stevens, 1950, p. 177.
- ³⁵ Wright, Quincy, *supra*, note 33, p. 68.

- ³⁶ Wright notes that the UN has also felt free to pass resolutions dealing with matters that are essentially within the domestic jurisdiction of a state, so long as the resolution applies a principle and is formally addressed to all members or to all members of a particular class, and does not propose action against, or in the territory of a particular state. (Such resolutions are not regarded as “interventions” by the UN.) A resolution seeking the protection of universal and inalienable human rights is an example of such a resolution (see Wright, Quincy, *supra*, note 31, p. 62). As put by Perez De Cuellar, former UN Secretary General, the “principle of non-interference with domestic jurisdiction of state cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity,” cited in Wani, Gull Mohd, *supra*, note 18, p. 8.
- ³⁷ Wright, Quincy, *supra*, note 33, p. 63.
- ³⁸ However, even such an intervention by the UN Security Council against a state or within its territory has been expressly permitted, if it constitutes an “enforcement measure under Chapter VII.”
- ³⁹ Wright, Quincy, *supra*, note 33, p. 58.
- ⁴⁰ P.C.I.J., 1923, Series B, 4.
- ⁴¹ *Ibid*, p. 24.
- ⁴² *Competence of the General Assembly For The Admission of a State to the United Nations, Advisory Opinion: I.C.J. Reports*, 1950, p. 4.
- ⁴³ *Ibid*, p. 70-71.
- ⁴⁴ Pitman B. Potter writes that, “(t)he Maharaja of Kashmir in fact acceded to India on 27 October 1947... this accession was accepted, but at the same time the Indian Government through Prime Minister Nehru, declared that this accession would have to be confirmed, not to say tested, by a plebiscite. For this declaration nothing in the original stipulation (based on British and Indian agreement) or in international law could be cited, but it corresponded closely to Indian professions of self-determination. Once made, and noted by Pakistan and other countries, it has become more or less binding” (see Potter, Pitman B., “The Principles of Legal and Political Problems involved in the Kashmir Case,” *American Journal of International Law*, Vol. 44, 1950, p. 361).
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- ⁴⁷ Anand, A S, *supra*, note 18, p. 97.
- ⁴⁸ *Ibid*.
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- ⁵⁰ “Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits Judgement,” *I.C.J. Reports*, 1986.
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- ⁵² *Ibid*, p. 108.
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- ⁵⁴ *Ibid*, p. 132-133.

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