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**A SUBJECT OF DISPUTE:
A LEGAL ANALYSIS OF THE CLAIMS OF INDIA AND
PAKISTAN TO KASHMIR**

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ABSTRACT.

This thesis analyses the Kashmir dispute between India and Pakistan according to principles of international law. First, the British imperial background to the dispute is described; then, in four chapters, various aspects of the dispute are discussed. Chapter One focusses on the means by which Kashmir joined the Indian union and evaluates several legal objections to the accession of Kashmir to India. Chapter Two looks at the use of force by India, Pakistan, and others in Kashmir, whether force was used legally, and the legal consequences of the territorial situations resulting from the fighting. Chapter Three examines the efforts of the United Nations to resolve the dispute; it also discusses Indo-Pakistani bilateral diplomacy. Finally, Chapter Four addresses the question of self-determination in Kashmir, considering the claims of India and Pakistan as well as the notion that Kashmir may be legally entitled to independence. The conclusion of the thesis is that India and Pakistan both have valid claims to portions of Kashmir but that neither may claim it in its entirety; that Kashmir is not entitled to independence; and that the results of a UN-supervised plebiscite should be used to demarcate a permanent Indo-Pakistani boundary.

INTRODUCTION

For the past fifty-five years, India and Pakistan have been locked in a seemingly intractable territorial dispute over Kashmir.¹ At this writing, the well-entrenched armies of both countries face each other along a five hundred mile-long line that weaves its way through the foothills of the Himalayas. Known as the Line of Control (LOC), it is the *de facto* border between India and Pakistan. The LOC has been forged by three wars between the two countries, which took place in 1947-8, 1965 and 1971. Although no full-scale armed conflict has taken place there in over thirty years, artillery and small-arms skirmishing is common, and tensions frequently bring India and Pakistan to the brink of war; this occurred most recently in May 2002 and December 2001. Pakistan's successful test of an atomic bomb in 1998 parried India's nuclear capability, and now the spectre of nuclear war looms over the ongoing territorial dispute.

The dispute finds its origins in the structure of the British Indian Empire, a vast conglomeration of lands comprising modern-day India, Pakistan and Bangladesh. From the late eighteenth century until the middle of the twentieth, the British Crown ruled the Indian subcontinent. By the end of World War II, however, it became clear that Britain lacked the financial and military potential to maintain its enormous empire, and that it would have to relinquish power in India as well as in most of its other colonies. Although the Indian subcontinent had been united under the aegis of the Crown, negotiations

¹ A note on terminology is appropriate at the very beginning. I use the term "Kashmir" to mean the entire area disputed by India and Pakistan, not just the Vale of Kashmir, which is a small fraction of that territory. I also use "Kashmir" interchangeably with the "State of Jammu and Kashmir," which is a common shorthand device employed in the literature. When referring specifically to the Vale of Kashmir, I always use the term "Vale of Kashmir."

between the British and Hindu and Muslim leaders revealed that such a union would not be practical in the new India. Therefore, Lord Louis Mountbatten, the Viceroy, crafted a plan to partition the British Indian Empire along religious lines, creating two new nations: India and Pakistan.² The latter, led by Mohammed Ali Jinnah, would be an Islamic state; the former, led by Jawaharlal Nehru, would be a secular state, home to more Muslims than Pakistan. Mountbatten had formulated this plan by 3 June 1947; according to its terms, British India would achieve independence on 15 August of that same year.³

The task of delimiting the new Indo-Pakistani boundary fell to a boundary commission chaired by eminent jurist Sir Cyril Radcliffe. Sir Cyril's main "qualification" for the job was that he had never set foot on the subcontinent and so would not be biased in his deliberations. Nor did he linger unnecessarily—he boarded a ship for England on 15 August. During his brief stay in India, Sir Cyril oversaw the creation of the new Indo-Pakistani border. However, the division of Britain's subcontinental empire would be considerably more complicated. There were two types of administrative units within the empire: provinces of British India and princely states. The latter were semiautonomous fiefdoms, whose rulers had signed treaties with Britain recognising the paramountcy of the Crown, whereas the former had been conquered outright. Some princely states were huge; others just a few acres. Altogether, the 562 princely states represented 45 percent of the empire's land area. Under the Mountbatten Plan, the Radcliffe Commission would partition only the provinces. The princely states were to be kept intact, granted independence and given the option of joining India or Pakistan.⁴

² Bangladesh was part of Pakistan until 1971; formerly it was known as East Pakistan.

³ The Indian Independence Act 1947 implemented the Mountbatten Plan.

⁴ In reality, only states bordering both India and Pakistan (like Kashmir) would have a choice between the two.

The Kashmir dispute of today is the unresolved struggle between India and Pakistan for the princely State of Jammu and Kashmir, which lay at the northern end of the India-Pakistan frontier. The Radcliffe Commission had delimited a boundary running through the British India province of Punjab, forming the southern two-thirds of the new, international boundary. Delimitation of the northern end of the boundary, by virtue of the Mountbatten Plan, depended on the decision of the Maharaja of Jammu and Kashmir: Would he choose India or Pakistan?

The State of Jammu and Kashmir had been founded in 1846, when the British East India Company concluded the Treaty of Amristar with Maharaja Gulab Singh of Jammu. Under the terms of the treaty, the Hindu Maharaja and his heirs would rule over a newly constituted state comprising the Maharaja's homeland of Jammu as well as tens of thousands of square miles of additional territory, including the Vale of Kashmir, Baltistan, Ladakh and Gilgit, making it the largest of the princely states. In return for this, the Maharaja accepted the supremacy of the British Crown, an action that he reaffirmed on an annual basis by rendering to British authorities a tribute of one horse, twelve goats and six pashmina shawls. That relationship continued until 15 August 1947, when British rule came to an end.

In 1941, the State of Jammu and Kashmir had a population of approximately four million. Half of those people lived in Jammu, and 1.7 million in the Vale of Kashmir, with the remainder scattered across the more sparsely populated northern and eastern regions of the state, such as Baltistan and Ladakh. The state was 77 percent Muslim and 20 percent Hindu; Sikhs and Buddhists were tiny minorities.⁵ The Maharaja ruled over one of the world's most picturesque landscapes, and the mild, upland climate provided a

⁵ Almost all of the state's Hindu residents lived in Jammu.

welcome break from the searing plains to the south. Hindus and Muslims alike considered the Vale of Kashmir to be a sort of earthly paradise. Moreover, the state was strategically located on the rooftop of the subcontinent. Gulab Singh's ability to control this vital area had won him recognition from the British; now India and Pakistan would vie for the right to be the Maharaja's overlord.

The chapters that follow will offer a legal analysis of the claims of India and Pakistan to Kashmir. Chapter One examines the controversy surrounding the accession of the Maharaja to India in October 1947. It lays out the legal status of the princely states before, during and after independence and establishes that Jammu and Kashmir did indeed become an independent state upon the departure of the British. Next, the legal significance of the geographic, economic and cultural links between Pakistan and Kashmir are evaluated, including an agreement between the Maharaja and the new government of Pakistan to preserve the economic arrangements that had existed between Kashmir and the part of British India that became Pakistan. Then, I move on to a consideration of the legality of the accession itself to consider whether the accession was obtained by fraud or coercion, and whether the Maharaja had the legal capacity to accede to India despite a widespread rebellion against his rule. I also look briefly at the accessions of two other very large princely states—Hyderabad and Junagadh—to offer some comparisons with the accession of Kashmir.

Chapter Two evaluates the use of force by India and Pakistan in Kashmir. Shortly before 15 August 1947, violence erupted in Kashmir as various groups in the state tried to anticipate and shape the post-independence order. That violence included a Muslim rebellion against the Maharaja as well as repression of Muslim civilians by Hindu troops

loyal to the Maharaja. With possession of Kashmir hanging in the balance, both India and Pakistan became involved in the fighting. Accordingly, this chapter looks at the law of the use of force, especially as it relates to intervention in a civil war, the supply of weapons to parties in a civil war, and the use of irregular forces or armed bands. In this chapter I also examine the legal status of the far western and northwestern areas of the State of Jammu and Kashmir, which had been occupied by rebel forces before the Maharaja's accession, to determine whether Pakistan's current occupation of those areas is legal.

Chapter Three reviews the course that the Kashmir dispute followed through the United Nations (UN), as well as some of the relevant bilateral diplomacy between Islamabad and Delhi. The UN began to consider the dispute in 1948, upon India's complaint to the Security Council that Pakistan was guilty of aggression in Kashmir. First, I consider the role that the UN plays in international law and then discuss the resolutions that the UN generated with respect to Kashmir, including the extent to which those resolutions are legally binding on India and Pakistan. I also address the possibility that circumstances have changed since the passage of those resolutions, rendering them legally unenforceable. This chapter also looks at the reports of various UN officials who toured Kashmir—their observations help to clarify the legal positions of India and Pakistan in the post-independence period. Finally, I evaluate the legal significance of the bilateral treaties ending the Indo-Pakistani wars of 1965 and 1971, especially India's contention that the 1972 Simla Agreement supplants UN resolutions.

Chapter Four discusses the issue of self-determination as it relates to Kashmir. It traces the evolution of self-determination from a moral principle to an international legal

norm by looking at UN resolutions, international tribunal decisions and state practice. In spite of that development, self-determination is still a rather elusive concept, and some discussion of its application was necessary in order to clarify the meaning of the term. This chapter also addresses some of the practical implications of self-determination for Kashmir: for example, whether the Kashmiris are entitled to self-determination; the circumstances under which international law permits secession; and how self-determination can be reconciled with the principle of territorial integrity.

In the conclusion, I reflect on the more salient principles of international law in the Kashmir dispute and offer a critical summary of the arguments of India and Pakistan, addressing what I consider to be the most important points in the dispute.

Finally, a geographical note: Three states now possess portions of the territory formerly ruled by the Maharaja of Jammu and Kashmir—India, Pakistan and China. The northern boundaries of the princely state were very poorly defined, due to the desolate nature of inter-Himalayan terrain. In the 1950s China made claims to territory south of the northernmost border shown on British maps. China occupied that territory after a 1962 war with India and a 1963 treaty of cession with Pakistan. However, India still disputes its border with China. At any rate, China is a party to “the other Kashmir dispute.”

CHAPTER ONE: ACCESSION

The events surrounding the accession of the State of Jammu and Kashmir to India mark the beginning of the Kashmir dispute. As such, the accession controversy is an appropriate starting point for a critical evaluation of the claims of India and Pakistan to Kashmir. India bases its claim on the accession of the Maharaja of Jammu and Kashmir to India on 26 October 1947, and Pakistan refutes the legality of that accession on a number of grounds. The issue of accession is therefore crucial to both India and Pakistan's positions, and it requires substantial examination. To that end, a short review of the events leading up to accession will be offered, along with the identification of certain salient legal issues. An evaluation of those issues will follow, at which point some conclusions about the legality of accession should be possible.

The accession controversy arose from Britain's plan for the partition of its Indian empire, whose land area was divided roughly half-and-half between British India proper and the princely states. The British plan for the independence of the Indian subcontinent created the two new dominions of India and Pakistan. On Independence Day, 15 August 1947, those dominions succeeded to the territory known as British India. The boundary between them was delimited along religious lines.¹ The princely states became completely independent in theory, although this situation was neither feasible nor desirable for the vast majority of states, surrounded as they were by either India or Pakistan and generally too small to fend for themselves in the international arena. Some princely states were tiny and had very little autonomy under British rule; all princely states, however, relied to some extent on services from

¹Alistair Lamb, *Kashmir: A Disputed Legacy*, 104.

British India. Accordingly, the partition plan allowed for the states to sign instruments of accession to the dominion of their choice.²

For several reasons, it seemed as though Kashmir might be able to make a bid for independence. First, Kashmir was a very large princely state. At 84,000 square miles, it was bigger than England, and almost the size of the United Kingdom.³ Second, Kashmir shared a border with both India and Pakistan. As neither dominion surrounded Kashmir, neither could present itself as the obvious choice. Kashmir also bordered China and Afghanistan, and nearly the Soviet Union. Such great geopolitical importance, while perhaps a curse,⁴ ostensibly suggested that Kashmir had the geographical potential to be independent. Finally, Kashmir had a Hindu monarchy and a predominantly Muslim population. With its own communal divisions, it would not unanimously plump for one dominion over another.

Thus the Maharaja chose not to sign an instrument of accession initially. It appears that he wished for his nation to become a “Switzerland of the East,” an independent, mountainous country immune from the destructive rivalries of its more powerful neighbours.⁵ In an effort to maintain his precarious independence, he proposed “standstill agreements” with both of the new dominions. The Indian Independence Act 1947 provides that princely states could conclude standstill agreements with either or both dominions to maintain the administrative status quo and avoid chaos as the British departed.⁶ As their name suggests, standstill agreements would continue the relationship that had existed between a princely state

² Sheikh Abdullah, “India, Pakistan and Kashmir.” *Foreign Affairs* (1965) 528.

³ Ramatullah Khan, *Kashmir and the United Nations*, 27.

⁴ One of Lamb’s observations is that Kashmir’s position in the geopolitical cockpit of South Asia meant that strategic considerations, especially those of India, would stand as a barrier to Kashmiri independence.

⁵ H.O. Agarwal, *The Kashmir Problem: Its Legal Aspects*, 31. Ulster or Bosnia would be closer European analogies.

⁶ Indian Independence Act 1947 (10 & 11 Geo. VI), Section 7.

and British India during the transition from British rule to dominion government. Kashmir had relied on British India for infrastructure (road and rail links to the outside world, telegraph lines and post routes), trade and defence.⁷ The Maharaja proposed the standstill agreements in order to maintain those essential services, as well as to buy time to solidify Kashmir's independence.

Pakistan accepted the standstill agreement. India declined, stating that Kashmir should send representatives to Delhi to negotiate one. Meanwhile, Kashmiri Muslims, especially in the Poonch region, began to agitate for accession to Pakistan. That agitation turned to full-scale rebellion against the Maharaja, attracting sympathetic Pathan tribesmen from Pakistan. Kashmiri government forces were inadequate to meet the threat, and the Maharaja was forced to flee Srinagar ahead of rebel forces. With the State of Jammu and Kashmir teetering on the point of collapse, the Maharaja approached India and requested military assistance. India agreed to provide that assistance only if the Maharaja would sign an instrument of accession to India. The Maharaja signed the document, and Indian forces were rushed into Kashmir to deal with the rebels. Indian troops were able to push the rebels back, but eventually a line stabilised, running north-south about eighteen miles from the Pakistani border, then curving east such that extreme western and northwestern areas of Kashmir were under the control of the rebels. Areas west of the line became known as Azad (Free) Kashmir; those to the north of the line are known as the Northern Areas. The remainder fell within India.⁸

A number of issues emerge regarding the legal status of Kashmir on the eve of independence. First, did the State of Jammu and Kashmir ever gain full

⁷ Sheikh Abdullah, 528.

⁸ Lamb, 342.

independence? Did it really become a sovereign state, or was it just the personal demesne of an over-mighty nobleman who became a paper head-of-state? Second, if Kashmir was bound to join one dominion or another, did it naturally belong to Pakistan? How about the standstill agreement? Did the Maharaja's agreement with Pakistan to maintain the status quo debar Kashmir from negotiating with India on the issue of accession? Did it amount to an instrument of accession to Pakistan? There is also the issue of the alleged attempt by Pakistan to coerce Kashmir's accession by blockading Kashmir. Did this happen, and if so, was it a violation of the standstill agreement?

The competence of the Maharaja to sign the instrument of accession has also come into question. With the Maharaja running for his life from his own capital, was he really in a position to sign the country over to India? As to the instrument of accession itself: Lord Mountbatten, Governor-General of India, stated that the final disposition of Kashmir should be decided by "reference to the will of the people" after order had been restored in Kashmir. Does that make the accession conditional, or was it, as India claims, final and irrevocable? Finally, even if the instrument of accession was valid and final, was it coerced or obtained fraudulently? An evaluation of those questions will reveal the legal strength of the Indian and Pakistani arguments as the Kashmir dispute began.

A. *Was Kashmir an Independent, Sovereign State as of 15 August 1947?*

The Government of Jammu and Kashmir executed two agreements that are relevant to the issue of accession: the standstill agreement with Pakistan and the instrument of accession to India. For any discussion of those and related issues to proceed, the international standing of the government of Kashmir as of 15 August 1947, when the paramountcy of the British crown lapsed, must first be established.

Article I of the Montevideo Convention on Rights and Duties of States sets out four criteria that an independent, sovereign state must meet.⁹ A state must have a population, a defined territory, a government and the capacity to enter into relations with other states. Kashmir had a population, and its territorial limits were defined in the 1846 Treaty of Amristar. A population need not be all the same race or creed; thus in spite of Kashmir's Hindu-Muslim divisions, all people within the boundaries of Kashmir were considered to be the people of Kashmir.¹⁰ Regarding the government of Kashmir: The rule of the Maharaja had been recognised by the Treaty of Amristar and confirmed by the Jammu and Kashmir Constitution Act 1939, which provided that "all powers, legislative, executive and judicial in relation to the State and its Government [belong to] His Highness [the Maharaja]."¹¹ It is true that the powers of the Maharaja were somewhat circumscribed under British paramountcy—the Crown assumed responsibility for communications and defence, and it reserved the right to interfere in the internal affairs of the state. However, the Maharaja controlled the apparatus of government, governing Kashmir through a council. At any rate, when paramountcy lapsed, the Crown's powers reverted to the Maharaja in accordance with the provisions of Section 7 of the Indian Independence Act.¹²

A state must also have the capacity to enter into relations with other states. There is some debate among writers as to whether *de facto* or *de jure* capacity is required. Some authorities have indicated that the state must not only have the capacity in law to enter into relations with other states—it must also have the

⁹ Signed 26 December 1933. Quoted in Ian Brownlie, *Principles of Public International Law*, 70. Brownlie indicates that while the four criteria must be met, they are no more than a basis for further investigation.

¹⁰ L.F.L. Oppenheim et al., *Oppenheim's International Law*, vol. 1, 118.

¹¹ Jammu & Kashmir Constitution Act of 1939.

¹² Agarwal, 27.

political, technical and financial capabilities to do so.¹³ Such requirements allude to the problem of recognition, and they also suggest a normative approach to determining capacity for foreign relations. The more prevalent view, however, is the positive one: that the state has the capacity to enter into foreign relations when it is subject to the sovereignty of no other state.¹⁴ Therefore, the state's capacity in law is the issue, not whether it can afford to buy embassies all over the world or retain a large coterie of ambassadors.¹⁵ It is even possible for a state to transfer control of its foreign relations to another state without surrendering its own sovereignty. For example in the 1955 *Nottebohm* case, Liechtenstein was admitted as a party before the ICJ despite having transferred control of its foreign relations to Switzerland.¹⁶ According to Shaw, the essence of capacity is the independence of the state from other states or international organisations.¹⁷

Upon the lapse of British paramountcy, the princely states became fully independent in an international sense. The Indian Independence Act Section 7 (b) and (c) indicates that the Crown's paramountcy over the princely states was to terminate. Lord Listowel, the Secretary of State for India, said in the weeks preceding independence that the princely states would be "entirely free to choose whether to associate with one or the other of the Dominion Governments, or to stand alone, and His Majesty's Government will not use the slightest pressure to influence their momentous and voluntary decision."¹⁸ Lord Mountbatten, the Viceroy, echoed those sentiments when he stated that the princely states would "have complete freedom—

¹³ Restatement (Third) of the Foreign Relations Laws of the United States.

¹⁴ Malcolm Shaw, *International Law*, 143; Doehring, "State," *EPIL*, 603.

¹⁵ Mountbatten mentioned these practical concerns to the princes to convince them of the wisdom of accession.

¹⁶ Henkin et al., *Cases and Materials in International Law*, 249.

¹⁷ Shaw, 143.

¹⁸ Lord Listowel, 16/7/47, quoted by Clive Eagleton in "The Case of Hyderabad before the Security Council." 44 *AJIL* (1950), 282.

technically and legally they are independent.”¹⁹ Thus there is a presumption that Kashmir did become an independent, sovereign state upon the lapse of British paramountcy.

However, the notion that Kashmir ever gained full independence has been attacked on a number of grounds. First, it is possible to object that Kashmir lacked the capacity for foreign relations because foreign relations had been the province of the paramount power, and the standstill agreement transferred the power to conduct foreign relations to Pakistan. This point will be considered in Part C below, which examines the standstill agreement in detail. For now it will suffice to point out that Kashmir did indeed become independent on 15 August pursuant to the terms of the Indian Independence Act; as of 15 August Kashmir was not subject to any outside authority.

Another objection is that the sovereignty of the princely states existed only in theory and on paper. In reality, some argue, Kashmir might have been technically independent for short time, but it never had the potential to sustain itself as an independent state.²⁰ That view, which is confirmed substantially by hindsight, helps to illustrate the true nature of Kashmir’s status in the brief period between independence and accession. First, the Indian Independence Act did indeed dissolve the paramountcy of the Crown, as well as treaties between Britain and the princely states related thereto. But Section 7(c) of the Act preserves certain state functions (customs, transit, communications, post and telegraph) until those arrangements were either denounced by the princely state or new dominion, or superseded by a subsequent

¹⁹ Lord Mountbatten, quoted by Paras Diwan in “Kashmir and the Indian Union: The Legal Position.” ICLQ (1953), 339.

²⁰ Gururaj Rao, *The Legal Aspects of the Kashmir Problem*, 21-24. It is further argued by Taraknath Das, in “The Status of Hyderabad during and after British Rule in India,” that the princely states never possessed any international status, whether theoretical or actual. 43 AJIL (1949) 57.

agreement. Full sovereignty for the princely states would have been unprecedented. Although some rulers may have aspired to independence, that was not something that they had heretofore possessed.²¹ Princely states thus had little potential for independence, and Section 7(c) strongly implies that the accession of each princely state to one of the dominions was just a matter of time.²²

The case of the princely state of Hyderabad tends to support that proposition. Like Kashmir, Hyderabad was a very large princely state toying with the notion of full-fledged independence, but unlike Kashmir it was surrounded by India. It had a land area the size of Italy. The Nizam of Hyderabad, a Muslim, ruled over a predominantly Hindu population of sixteen million. Upon independence the Nizam entered into a standstill agreement with India. Under pressure from India to sign an instrument of accession, the Nizam offered to submit the question of accession to a plebiscite supervised by the United Nations. India insisted that the Nizam accede first and hold the plebiscite later; negotiations eventually broke down when the Indian Government, citing border raids by Hyderabad Muslims against Hindus in India proper, sent troops to occupy Hyderabad in a so-called police action.²³ The Nizam brought his case before the UN Security Council, which ended its deliberations on the matter when the Nizam withdrew his case. Occupied by Indian troops, Hyderabad finally acceded to India after over a year of arm-twisting.²⁴

²¹ Das, 69-70.

²² Rao: "The accession of a State to either Dominion, although optional on paper became obligatory from a practical point of view, i. e., a state could not have refused to join either of the two Dominions" (21).

²³ Khan, 77-79.

²⁴ Eagleton, 301-302.

The Hyderabad episode demonstrates that India viewed as a foregone conclusion the accession of those princely states within its catchment area.²⁵ India could find substantial justification for that view in the logic of the British partition plan, which suggested that the princely states were not only obligated to join one dominion or the other; they were further obligated to join the dominion that surrounded them, if there was one. The Dominions of India and Pakistan were the successor states to British India, and as such they would assume the role of paramount power to fill the vacuum left by Britain.

Prime Minister Jawaharlal Nehru of India stated that he considered the accession of a princely state to be complete once the state had acceded on three basic subjects—foreign affairs, communication and defence.²⁶ Those three subjects, which had been the province of the paramount power, Britain, would be assumed by India (or Pakistan) in the princely states. Once a state had acceded in those key areas, full incorporation into the Indian Union (for example) would follow. States within India's catchment area could delay accession through a standstill agreement, but they could not avoid it. The standstill agreement could be seen as a stopgap measure to prevent a breakdown of order while accession arrangements were being finalised. Such a reading of Section 7(c) of the Indian Independence Act makes sense when one considers that accession was the only means for India and Pakistan to succeed to British paramountcy in the princely states. While the Act denied the successor dominions paramountcy over the princely states by granting them independence, the relationship between paramount power and princely state remained essential to the

²⁵ By "catchment area" I mean sphere of influence with respect to partition; in other words, princely states surrounded by India could be said to fall within India's catchment area.

²⁶ Nehru, quoted in Diwan at 341-342.

survival of the princely states. It seemed clear that those states would perform create similar relationship with one of the dominions.²⁷

Moreover, certain statements by British officials in the run-up to independence stress that the princely states were duty-bound to accede to one of the dominions in due course. For example, Sir Anthony Shawcross, the Attorney General, stated that the British Government would not recognise the international status of the governments of the princely states, as Britain hoped that the states would “associate themselves with one or the other of the Dominions.” Lord Mountbatten, after stating that the states were “theoretically free” to join either dominion, went on to say that for all intents and purposes those states surrounded by India had no real choice.²⁸

Mountbatten’s statement of course leaves open the question of the accession of Kashmir, as Kashmir was not surrounded by either dominion. His statement does, however, cast aspersions on the notion, expressed by Mountbatten himself among others, that independence would be an option for princely states such as Kashmir.²⁹

It is crucial to distinguish the letter of such official statements from the spirit in which they were made. Without a doubt, the governments of India, Pakistan and Britain wanted to avoid “plan Balkan,” a nightmare scenario in which the five-hundred-odd princely states would assert their new international personalities.³⁰ The Indian Independence Act, when read alongside British statements, indicates that the intention of the departing British was to convey paramountcy over the princely states to the

²⁷ Das, 70.

²⁸ Mountbatten: “You cannot run away from the Dominion Government which is your neighbour any more than you can run away from the subjects for whose welfare you are responsible.” (Address to Chamber of Princes, 25/7/47).

²⁹ Mountbatten: “The Indian Independence Act released the states from all obligations to the Crown. The states will have complete freedom—technically and legally they become independent. But there was... a system of coordinated administration. . . which meant that the sub-continent of India acted as an economic unit. That link is now to be broken. If nothing can be put in its place, only chaos can result and that chaos I submit will hurt the states first.” (Address to Chamber of Princes, 25/7/47).

³⁰ Lamb, 102 and 102 fn. 2. “Thus the great achievement of a united India would not have outlasted the Raj; the temple, as it were, would be brought down along with the British.”

successor dominions, India and Pakistan. But Britain did not convey paramountcy to the dominions. Instead Britain relied on the princely states themselves to render to the dominions those trappings of sovereignty that they gained as a result of independence. Not surprisingly, some of the larger princely states lagged in their enthusiasm for this rather convoluted method of partition, not least because the legal apparatus for British withdrawal, the Indian Independence Act, had granted them independence.

Notwithstanding that independence for the princely states was destined to be fleeting, independence was indeed the legal result of the Indian Independence Act. Section 7 of the Act, which deals with the princely states, explicitly renounces all British rights and prerogatives with respect to the princely states. It dissolves all treaties between Britain and the princely states, such as the Treaty of Amritsar, which established the paramountcy of the Crown in Kashmir. From that moment on, Britain had no authority over the princely states. It could advise, but not legally compel, the princely states to sign standstill agreements or instruments of accession. The Act states that existing arrangements between British India and the princely states would continue, but the Act itself had no force in the princely states after 15 August 1947. A state could not be both independent and governed by provisions of the Indian Independence Act. The Act served as the basic law of successor states India and Pakistan, but only upon its incorporation by those dominions themselves.³¹ Any powers reserved by the Crown in the imperial period reverted to the rulers of the princely states, in law and in fact. Thus before the Maharaja's accession to India, the State of Jammu and Kashmir became fully sovereign and independent. That

³¹ India and Pakistan's dominion status meant that the King (Queen after 1952) was still the nominal head of state. India became a republic in 1950, Pakistan in 1956.

Kashmir's independence would necessarily be short-lived does not mean that it never existed.

Finally, it has been argued that the failure of the international community to recognise the State of Jammu and Kashmir means that in spite of the foregoing, it was not really a sovereign state in international law.³² Writers differ on the place of recognition within international law: Is recognition by other states an essential characteristic of any state, or is recognition merely an acknowledgment of the state's existence?³³ It is possible to view lack of recognition as undermining a state's capacity for foreign relations, one of the four Montevideo criteria for statehood. However, the Montevideo Convention itself stipulates that the existence of a state is "independent of recognition by the other States."

On the one hand, the legal fact of independence cannot depend on the recognition of that fact by other states.³⁴ Prima facie a new state granted full formal independence by a former sovereign has the international right to govern its territory.³⁵ Neither India nor Pakistan was likely to recognise Kashmir's independence, as both nations were trying to acquire the former princely state for themselves.³⁶ On the other, Kashmir could not, realistically speaking, conduct foreign relations if no other nation would recognise it. It could not form alliances with other states. In any case, Kashmir's period of independence was ephemeral. From the moment that British paramountcy lapsed, Kashmir was an independent state in every

³² Rao asserts that Kashmir had no international status because, among other reasons, it was not recognised internationally.

³³ James Crawford, "The Criteria for Statehood in International Law." 48 BYIL (1976), 99-105. These positions are known as the constitutive and declaratory theories of recognition. In the former, statehood depends on international recognition; in the latter, statehood exists independent of recognition. See Brownlie, 87-89.

³⁴ Agarwal, 28-29, obviates the suggestion that a lack of recognition by the world community impinges on the fact that Kashmir became independent on 15 August 1947.

³⁵ Crawford, 117.

³⁶ Ibid.

legal sense. But the gap between theory and reality would widen as Kashmir struggled to stand on its own.

B. The Legal Significance of Kashmir's Contiguity to Pakistan

Kashmir's independence was precarious indeed. As autumn 1947 approached, the state was beset by internal violence and external pressures. This instability was related to partition generally, and the question of Kashmir's (inevitable) accession to one of the dominions in particular.

Of the 561 other princely states, only Hyderabad had declined to accede to India or Pakistan. The British plan for Indian independence envisaged that all princely states would eventually find their natural home in one dominion or the other.³⁷ The accession of each princely state to the appropriate dominion would complete the partition work that the Radcliffe Commission had started. Conventional wisdom held that the princely states would have to accede to one of the dominions eventually.³⁸ With reference to Kashmir, Pakistan argued that the theory that underlay partition should also guide accession: Muslim areas that were geographically contiguous to the Muslim core area in the West Punjab should go to Pakistan. Therefore, Kashmir belonged in Pakistan because Kashmir fell within Pakistan's catchment area.³⁹ That argument lies at the bottom of Pakistan's claim to Kashmir and find its basis in the close connections between Kashmir and Pakistan.

Kashmir is a predominantly Muslim area.⁴⁰ It is geographically contiguous to Pakistan.⁴¹ The main rivers that run through Pakistan (which converge to form the

³⁷ Lord Listowel hoped that "in the fullness of time all the [princely] States should find their appropriate place within on or the other of the new Dominions." Quoted by Eagleton at 283.

³⁸ Rao, 21.

³⁹ Rudolf Geiger, "Kashmir." *EPIL*, 71. Pakistan made this argument before the UN Security Council.

⁴⁰ Please note the discussion of the religious composition of Jammu and Kashmir in the introduction above.

River Indus) rise in Kashmir, and India is separated from Kashmir by mountains. On topographical maps of South Asia, Kashmir appears to be an extension of Pakistan.⁴²

During the all-important summer of 1947, the following conditions obtained in Kashmir: The only road to the outside world ran through the Jhelum Valley and into Pakistan; the only rail line into Kashmir came up from Sialkot in Pakistan; postal and telegraphic services operated along routes that led into Pakistan. Almost all Kashmiri trade went through Pakistan.

The infrastructure established during British rule, which linked the landlocked princely state to the rest of the world, connected Kashmir to Pakistan. Alistair Lamb documents the way in which British imperial policy makers viewed Kashmir as an integral part of the strategically important northwest frontier of British India. Lamb goes on to declare that in light of the cultural and geographical ties between Pakistan and Kashmir, there is little doubt that the Radcliffe Commission would have awarded most of the State of Jammu and Kashmir to Pakistan had the area been part of British India proper and not a princely state.⁴³

Doctrines of geographical contiguity do not, however, occupy a place of honour in the canons of international law. Judge Huber in the *Isle of Palmas* case declared that contiguity “as a basis of territorial sovereignty, has no foundation in international law.”⁴⁴ Contiguity was also brushed aside in the *Beagle Channel* arbitration, in which Argentina advanced the “oceanic” principle in its boundary

⁴¹ The word “Pakistan” is an acronym: P for Punjab, A for Afghanistan, K for Kashmir; –istan alludes to Baluchistan and is also a common ending for an Asian country.

⁴² Pitman Potter, “The Principal Legal and Political Problems Involved in the Kashmir Dispute.” 44 AJIL (1950) 362-363.

⁴³ Lamb, 12.

⁴⁴ 2 RIAA 829.

dispute with Chile.⁴⁵ There, the tribunal held that treaties and former administrative boundaries were more salient than Argentina's appeal to contiguity. According to Santiago Torres Bernardez, the notion of contiguity has historically been abused to circumvent the normal requirements for effective possession.⁴⁶ In some cases—*Eastern Greenland* for example—the contiguity argument has been accepted, but only because of the remote and inhospitable nature of the territory in question, and the absence of competing claims thereto. Ian Brownlie writes that contiguity is merely a technique in the application of normal principles of effective occupation. Contiguity is a “logical and equitable” principle, which is not by itself a root of title. It is used in determining the actual extent of sovereignty derived from some orthodox source of title such as a treaty of cession or effective occupation.⁴⁷

Under a simpler imperial system Kashmir might have fallen within the same administrative unit as the area that became Pakistan. Indeed Pakistan's contiguity argument would be bolstered to the point of being dispositive if it could have applied the doctrine of *uti possidetis* to support its contention that Kashmir should have gone to Pakistan.⁴⁸ However, as has been established in the foregoing paragraphs, Kashmir was not only a princely state (and therefore not part of West Punjab province), but it also became an independent and sovereign state with the coming into force of the Indian Independence Act. Legally at least, the State of Jammu and Kashmir was the master of its own fate. Although the British partition plan had never seriously contemplated Kashmiri independence, Pakistan could not instantly present a valid legal claim to Kashmir. The administrative, geographical and cultural ties between

⁴⁵ Beagle Channel Award, 17 ILM (1978), 634. The “oceanic” or “Atlantic” principle asserted that the natural domains of Chile and Argentina, south of the Andes Cordillera, were the lands adjacent to the Pacific and Atlantic Oceans, respectively.

⁴⁶ Santiago Torres Bernardez, “Territory, Acquisition.” *EPIL*, 837.

⁴⁷ Brownlie, 147.

⁴⁸ Lamb, 103.

Pakistan and Kashmir would have to be solidified by accession, or at least continued through a standstill agreement.

C. The Standstill Agreement

In a telegram of 12 August 1947, the Government of Jammu and Kashmir requested a standstill agreement with Pakistan; Pakistan agreed to that request on 15 August. No standstill agreement was ever reached with India, as it was India's policy not to conclude standstill agreements with a princely state until the state had signed an instrument of accession.⁴⁹ The standstill agreement with Pakistan represents Kashmir's first act as a sovereign state, and as such the agreement could rebut the suggestion that Kashmir lacked the capacity to conduct foreign relations.⁵⁰ The standstill agreement is a treaty under the rules of international law, in that it is an international agreement concluded between states in written form and governed by international law.⁵¹ The primary purpose of the standstill agreement was to preserve the administrative connexions that Kashmir depended on.

The wording of the standstill agreement is economical, but some important legal issues arise from it. The first item to consider is the text of the agreement. It says: "Jammu and Kashmir Government would welcome Standstill Agreements with Pakistan on all matters on which these exist at present moment with outgoing British India Government. It is suggested that existing arrangements should continue pending settlement of details and formal execution of fresh arrangements."⁵² An affirmative reply from Pakistan's foreign ministry concluded the agreement. The agreement, however, fails to enumerate the "existing arrangements." To discover what those

⁴⁹ Agarwal, 21. This policy was altered in the case of Hyderabad, where a standstill agreement with the Nizam preceded the Nizam's accession to India.

⁵⁰ Or, it could support that presumption by showing that Kashmir had to rely on Pakistan from day one.

⁵¹ Definition from Vienna Convention, Article 2.

⁵² Kashmir-Pakistan Standstill Agreement, 12 August 1947 (completed 15 August 1947).

arrangements were, one must look at the Indian Independence Act.⁵³ Section 7(c) states that standstill agreements will cover “customs, transit and communications, posts and telegraphs, or other like matters” until the establishment of a more permanent relationship.⁵⁴ Although that section alludes to the technical independence of the princely states, it suggests that they relied a great deal on British India; Section 7(c) therefore provides a mechanism for the continuation of that vital relationship. It was especially important for Kashmir to negotiate a standstill agreement with Pakistan—Kashmir’s communication and transport infrastructure linked Kashmir to the outside world via Pakistan.⁵⁵ The military and strategic connections that Lamb documents further explain the need for a speedy standstill agreement between Kashmir and Pakistan, which is perhaps why Kashmir proposed the agreement three days before independence.

Some advocates of Pakistan’s claim have suggested that the standstill agreement debarred Kashmir from entering into the negotiations with India that resulted in accession.⁵⁶ There are two possible bases for this argument. The first is that the standstill agreement preserves existing arrangements pending the execution of fresh agreements. Therefore, the links between Kashmir and Pakistan would be maintained while Kashmir and Pakistan negotiated an accession agreement, not while Kashmir and India negotiated one. The second is that Kashmir, by concluding the standstill agreement with Pakistan, relinquished its ability to conduct its foreign relations.⁵⁷ Foreign relations had been the responsibility of the paramount power;

⁵³ Ijaz Hussain, *Kashmir Dispute: An International Law Perspective*, 85, fn. 85.

⁵⁴ Indian Independence Act, Section 7(c).

⁵⁵ This will become important in the discussion of the alleged Pakistani blockade of Kashmir.

⁵⁶ Hussain, (70) raises this issue but appears to belittle it somewhat; Geiger also mentions this at 69.

⁵⁷ Khan, 84.

therefore, the standstill agreement meant that Kashmir would have to conduct its foreign policy through Pakistan, thereby precluding the Maharaja's accession to India.

In evaluating those arguments, it should be noted that the standstill agreement does not mention foreign affairs by name. It may be deduced from a reading of Section 7 of the Indian Independence Act that the conduct of foreign affairs falls under the umbrella of "existing arrangements," but nowhere in the agreement is there any indication that Kashmir wished to hand treaty-making power over to Pakistan. Indeed, the agreement implies that at a later date another treaty might be negotiated between Kashmir and Pakistan.

As to the suggestion that the standstill agreement committed Kashmir to acceding to Pakistan: The standstill agreement was a mechanism for the continuance of exiting relationships in order to prevent a breakdown of order during the transfer of power. Princely states were legally free to accede to one dominion or the other. The agreement between Kashmir and Pakistan maintained the links between Kashmir and Pakistan for the time being; it allowed for business as usual to continue despite the elevation of Kashmir's status in international law from princely to sovereign state. Kashmir did not accede to Pakistan, nor did Kashmir by means of the standstill agreement surrender its right to conduct its own foreign affairs.

Standstill agreements were typically a precursor to accession, Kashmir appeared to fall within Pakistan's catchment area, and the Kashmir-Pakistan standstill agreement alludes to impending accession of Kashmir to Pakistan. Yet that accession never took place. Nor did Pakistan gain any rights with respect to the territory or sovereignty of Kashmir as a result of the standstill agreement. It was possible for a princely state to have standstill agreements with both dominions simultaneously, something that the Maharaja attempted. Finally, the standstill agreement could not

affect India's right to conclude the treaty of accession with Kashmir, as third states cannot be affected by the terms of a treaty that they did not sign.⁵⁸ Thus the standstill agreement did not create a legal barrier to Kashmir's accession to India.

It is also appropriate to consider the allegation that Pakistan had violated the standstill agreement by blockading Kashmir in September/October 1947. As the Maharaja's fragile independence continued, vital goods such as petrol, oils, grain, salt and cloth became scarce in Kashmir. Those goods, of course, had to be brought in by road or rail from Pakistan. The Government of Jammu and Kashmir accused Pakistan of violating the standstill agreement by blockading Kashmir.⁵⁹ Pakistan, for its part, claimed that instability along the Kashmir-Pakistan border, especially in the Poonch region, made lorry drivers reluctant to ply their normal routes; that refugees were blocking the roads; and that a coal shortage had affected the Sialkot-Jammu railway.⁶⁰

It is difficult, from the record that exists, to determine the veracity of the charge that Pakistan blockaded Kashmir in order to coerce Kashmir's accession. If indeed it had been Pakistan's policy to withhold trade from Kashmir, such a policy would have violated the standstill agreement. However, the behaviour of India with respect to the accession of Hyderabad (and the India-Hyderabad standstill agreement for that matter) indicates that states wishing to remain independent were in a strategically untenable position.⁶¹ Kashmir, linked to the outside world through Pakistan, relied on trade with Pakistan for its existence just as Pakistan relied on Kashmir's rivers for water.

⁵⁸ Hans Ballreich, "Treaties, Effect on Third States." *EPIL*, 945.

⁵⁹ Agarwal, 31-32.

⁶⁰ Lamb, 126.

⁶¹ Eagleton, 283-284. India made an exception to its normal policy in this case, concluding a standstill agreement with Hyderabad even though Hyderabad had not signed an instrument of accession.

The logic of partition, if applied to Kashmir, would almost certainly have included Kashmir with Pakistan. Yet by the terms of decolonisation, Kashmir was granted its independence with the unwritten proviso that it would have to accede one of the dominions eventually. Although Kashmir was fully independent, the case of Hyderabad shows that even a concerted effort by a large princely state to remain independent would probably have failed. Kashmir's unique geographical position simply allowed it to choose between India and Pakistan, not between independence and accession.

D. The Validity of the Instrument of Accession

By late October 1947, it was clear that the Government of Jammu and Kashmir was breaking down. No longer able to stem communal violence within the state, the Maharaja's government was faced with the prospect of invasion from Pakistan. Pro-Pakistani rebels routed government troops in Poonch and surrounding provinces. In the northern areas, controlled by the Gilgit Scouts, sentiment favoured accession to Pakistan. Patiala State forces from India had arrived on the scene to help solidify Kashmiri positions around Srinagar Airport. On 22 October Kashmiri Muslim troops mutinied and pushed their former comrades back to Srinagar. On 25 October, the rebels advanced on Srinagar, and cut the city's power supply. The Maharaja fled the darkened capital in an old Jeep for the safety of Jammu. The next day, 26 October, the Maharaja requested military assistance from India. India accepted on the condition that the Maharaja accede to India. Accordingly, the Maharaja signed the instrument of accession and India deployed regular troops into Kashmir on 27 October.

Pakistan has presented several legal objections to the Maharaja's accession. First, Pakistan claims that the accession itself is not valid because the Kashmiri people had successfully rebelled against the Maharaja, who no longer controlled his own

country and therefore could not sign treaties on its behalf. Pakistan also alleges that the Indian military coerced Kashmir's accession to India; in the absence of such coercion, Kashmir might have been able to come to an arrangement with Pakistan, with whom it had a standstill agreement. Additionally, Lord Mountbatten, Governor-General of India, stated that the question of Kashmir's accession to India would be decided by a plebiscite, to be held once peace and order had been restored. That statement raises the issues of whether India was legally required to hold a plebiscite in Kashmir, and therefore, whether the Maharaja's accession was final and irrevocable.

First, it is necessary to examine whether the Maharaja possessed the legal capacity to accede to India in the circumstances that prevailed in Kashmir in late October 1947. Under normal conditions, there would be no question that the Maharaja had the capacity to accede to India. As head of the independent Kashmiri state, the Maharaja had ultimate responsibility for foreign affairs. His assent was not only sufficient to conclude an instrument of accession; it was also necessary. What must be determined is whether the accession of the state was valid under international law despite the existence of an armed insurrection within the state. The issue here is whether the Government of Jammu and Kashmir controlled the country to such an extent that it still had a legal personality. Advocates of the Pakistani claim assert that the rebellion had progressed to the point where the Maharaja's government was no longer really in power and therefore lacked the legal ability to accede to India.

Certain criteria have been established to determine whether a government exists in international law. These criteria resemble those used when determining whether to grant recognition, in that they seek to assess the government's legitimacy

and potential for stability.⁶² First, the government must be in actual control of the population and territory that it claims, or at least a substantial portion thereof. It must also have a reasonable chance of remaining in power. Finally, its authority must be separate from that of other governments and subordinate only to international law. As James Crawford points out, however, the application of those criteria is much less simple than it might seem.⁶³ Accordingly, it will be necessary to look at a few cases in which the legal existence of a government was evaluated.

In the *Aaland Islands* case, a tribunal was charged with determining the legal status of the government of the Republic of Finland in 1917. In 1807 Finland was incorporated within the Russian Empire as an autonomous region. It declared independence after the Revolution of 1917. However, the new government immediately faced an insurrection by pro-Russian revolutionaries and was not able to establish order readily. Civil war broke out, which eventually involved both Russian and German troops as the Eastern Front spilled over into Finland. Revolutionary forces dispersed the legislature, chased the government from Helsinki, and otherwise forcibly prevented the government from carrying out its duties. Order was finally restored with the end of World War I, and the removal of Russian troops by Sweden. According to the tribunal, the Finnish Republic possessed a legal personality only after it was able to assert its authority throughout Finland without the assistance of foreign troops.

Although recognition generally accompanies effective, stable control of territory, it is the extent of that control that determines whether a government is sovereign. In the *Tinoco* arbitration, W. H. Taft, the arbitrator, examined the status of

⁶² Hussain, 76. Shaw, 304.

⁶³ Crawford, 102.

the Tinoco government in Costa Rica. That government, although unrecognised by many nations, enjoyed popular support within Costa Rica. Citing the nature of the Tinoco government, Taft indicated that the absence of armed resistance to the government and its thorough control of the territory rendered it the *de facto* government of Costa Rica, irrespective of recognition by other states.

States which come into existence when granted independence by a former sovereign, however, appear to enjoy a special position with respect to the requirement of effective and stable control. For example, the Belgian Congo (later Zaire) was granted independence in 1960 by Belgium, but the successor government immediately faced a rebellion in the country's richest province, Katanga. Moreover, the government was bankrupt, divided and unable to prevent anarchy. Belgian and United Nations troops intervened to suppress the rebellion and restore order. Yet the Congo was widely recognised, and it was granted immediate UN membership.

Thus there is a presumption in favour of states that have acquired title through non-revolutionary means; the Congo government was recognised as sovereign despite its almost total inability to govern. The secessionist Republic of Finland gained legitimacy only after it was able to rule without the assistance of foreign troops, and the *Tinoco* opinion suggests that a government that comes to power by overthrowing a previous one will have to establish peaceful and thorough control of its territory before it even becomes the *de facto* government. Of course, the Government of Jammu and Kashmir gained sovereignty over its territory by a grant of independence from Britain, having held a semi-autonomous position within the British Empire for one hundred years before that. But large portions of the country were in the hands of rebels, the Maharaja had to flee the capital city with his family and belongings, and he had to seek the intervention of foreign troops. In light of the circumstances under

which the Maharaja signed the instrument of accession to India, it is questionable whether his government had sufficient control of the country to conclude the treaty.

In the case of *Guinea-Bissau v. Senegal*, the ICJ considered the validity of a maritime boundary delimited between the two countries by their former colonial masters Portugal and France. Guinea-Bissau claimed that the 1960 Franco-Portuguese boundary treaty was invalid because the Guinea-Bissau liberation movement had progressed to the point where Portugal lacked the capacity to conclude treaties affecting Guinea-Bissau. Rejecting that argument on the grounds that the liberation movement had not made sufficient progress by 1960, the ICJ went on to indicate that in certain cases of "national liberation" a colonial government's capacity to conclude treaties can be limited. A national liberation movement gains "international impact," according to the Court, when the government has to "resort to means which are not those used normally to deal with occasional disturbances," or to "extraordinary measures to ensure the normal conduct of civil activities." Thus the Court indicated that once that point of international impact has been reached, the government cannot conclude treaties affecting the territorial integrity of the country.

It is uncertain whether such a standard would nullify the Maharaja's accession to India. For one thing, the rule applied by the ICJ in the Guinea-Bissau case is an extension of the doctrine of self-determination for colonised peoples, in that it establishes a legal mechanism by which liberated countries can deny the validity of treaties concluded during the twilight of colonial rule. The implication is that once a liberation movement has taken hold, the colonial master no longer effectively controls the territory. However, as with the self-determination doctrine itself, this standard

would perhaps best be applied to cases of African or Asian countries engaged in a liberation movement against a metropolitan European power.⁶⁴

Yet the idea that a government's treaty-making capacity can be limited by a reasonably successful rebellion, coupled with the principle of effective, peaceful control, creates serious legal doubts as to the capacity of the Maharaja to accede to India. Although the Maharaja had ruled Kashmir since 1925, the Poonch rebellion had broken out almost immediately upon independence and made rapid territorial gains. And despite the Maharaja's legally sound method of acquiring sovereignty, he only effectively controlled Jammu and Ladakh, relying on foreign troops to shore up his position both before and after acceding to India.⁶⁵ Indeed that accession was a direct result of the Maharaja's admitted inability to maintain order in Kashmir.⁶⁶ Thus the accession was accomplished under legally dubious circumstances.

Some sources also allege that India obtained the Maharaja's accession by coercion.⁶⁷ According to this argument, the Maharaja acceded to India after the arrival of Indian troops in Srinagar, not before. Kashmir was therefore a warm-up for the operations that would prompt the Nizam of Hyderabad to accede to India in the following year. An application of the law of treaties to the facts surrounding the Maharaja's accession will allow an evaluation of that contention.

Prior to the founding of the League of Nations, there was no provision in international law for nullifying a treaty on the basis of coercion. That view simply reflected the era's permissive attitude toward the use of force in resolving territorial disputes. After the establishment of the League, and especially as a result of the hard bargains driven by Adolf Hitler and Joachim von Ribbentrop, world opinion turned

⁶² See Chapter Four below for a discussion of self-determination.

⁶⁵ Patiala State forces joined in the defence of Srinagar Airport from 17 October 1947.

⁶⁶ Maharaja's letter to Mountbatten requesting accession

⁶⁷ Khan, 82.

against both the use of force and the threat of force in procuring territorial concessions by treaty. Article 2(4) of the Charter of the United Nations expressly forbids the threat of force; additionally, Articles 51 and 52 of the Vienna Convention prohibit the coercion of states and their representatives.⁶⁸ That a treaty is invalid if coerced is now a settled matter of international law, as it was in 1947.⁶⁹

The question then is whether India used force or the threat of force to obtain the accession of Jammu and Kashmir. It seems unlikely that this was the case. The basis for the coercion argument is that India had troops in Kashmir before the Maharaja actually signed the instrument of accession, and that the Maharaja was therefore in no position to refuse the Indian request for accession.⁷⁰ But the Maharaja was the one who originally requested military assistance; Patiala State forces, whatever their international status, were fighting on his side against the Muslim rebels; India offered assistance in exchange for accession; and without Indian intervention the Maharaja's government might have only lasted another few hours.

There is some evidence that Indian regular troops may have arrived on 26 October, the day before the instrument of accession was actually signed.⁷¹ Yet the Maharaja requested military assistance from India before those troops arrived. Although the Maharaja may have wished most for independence, accession to India was preferable to having his government scattered to the four winds by the rebels. It is true that India was in a good position to demand the accession of Kashmir, something

⁶⁸ Lenkin, "Treaties, Coercion," *EPIL*, 528-532

⁶⁹ Rao asserts that even if the instrument of accession was coerced it is still valid (43). In debate at the Vienna Convention, the United States and Australia recommended that the coerced party have the option of enforcing the treaty, but that suggestion was not incorporated into the final draft. See Kearney and Dalton, "The Treaty on Treaties," 64 *AJIL* 495 (1970).

⁷⁰ Hussain, 72.

⁷¹ Lamb, 117.

that it certainly wanted. But there is no evidence available that the instrument of accession was coerced.

Additionally, some publicists have claimed that the instrument of accession is itself a fraud. Various factual assertions have been submitted to support the claim of fraud: for example, that the Maharaja never signed the document, that Indian officials forged his signature, or that the instrument of accession has never seen the light of day.⁷² Fraudulent conduct by a party to a treaty is grounds for its invalidation pursuant to Article 49 of the Vienna Convention. Yet there is little evidence for the charge that instrument of accession is a fraud. No one can prove that the document never existed by not being able to find it today. Especially in view of the circumstances of the accession, it is not inconceivable that the Maharaja signed it. The debate over fraud in the Maharaja's accession simply demonstrates that no point goes uncontested in the Kashmir dispute, which has been characterised by this sort of meticulous mistrust.

Because of that contentiousness, Lord Mountbatten, as Governor-General of India, made a statement pledging that India would confirm the accession by some sort of popular referendum.⁷³ In his reply to the Maharaja's instrument of accession and accompanying letter, Mountbatten states that as the accession of Kashmir had been "a subject of dispute," the accession issue should be decided "by a reference to the people" as soon as order had been restored and Kashmir's territory "cleared of the invader."⁷⁴ Mountbatten's statements appear to endorse the principle of Kashmiri self-determination, and they have established for posterity the proposition that the dispute should be settled by plebiscite. The issue of self-determination is explored in Chapter

⁷² Robert Wirsing, "War or Peace on the Line of Control?: The India-Pakistan Dispute over Kashmir Turns Fifty." BTB 2:5, 4.

⁷³ Lord Mountbatten to Maharaja Hari Singh of Jammu and Kashmir, 27 October 1947.

⁷⁴ Ibid.

Four below; at the moment we are concerned with the legal effect of Mountbatten's statements on the accession of Kashmir to India.

It has been suggested that Mountbatten's letter contractually bound India to hold a plebiscite in Kashmir, and that the accession will never be final in the absence of a plebiscite confirming it. That contention may be supported on two grounds. The first is that Mountbatten's letter amounts to a rider to the treaty and therefore confers an obligation on India by the principle of *pacta sunt servanda*.

The instrument of accession was indeed a treaty under international law.⁷⁵ As concerns the contention that Mountbatten's letter is part of the treaty: Article 31 of the Vienna Convention provides that correspondence between the two contracting parties that is related to the treaty shall be used in construing the terms of the treaty.⁷⁶

However, the terms of the letter, even if one accepts them as addenda to the instrument of accession, provide for a "reference to the people." The ambiguity of that phrase is further compounded by the condition that the "reference" will only take place once "peace and order" were restored, and the land "cleared of the invader." Such terms may be defined in any number of ways.⁷⁷ A more fundamental objection to the argument that Mountbatten's letter creates a contractual obligation for India to hold a plebiscite is that any treaty between Kashmir and India ceased to operate upon the extinction of the State of Jammu and Kashmir. Bilateral treaties terminate by the extinction of at least one of the contracting parties.⁷⁸ In the instrument of accession, the Maharaja acceded to India on the subjects of defence, external affairs and

⁷⁵ This is assuming for the sake of argument that the treaty is not invalid *ab initio* on the grounds that the Maharaja lacked competency.

⁷⁶ Hussain, 60-61.

⁷⁷ The US delegation to the UN noted in a position paper that it would be entirely possible for India, in 1948, to hold a plebiscite based on the extant electoral rolls in Jammu and Kashmir State. Those rolls were said to contain only 7% of the total population of the state, those included being disproportionately Hindu.

⁷⁸ Michael Akehurst, "Treaties, Termination" *EPIL*, 989.

communications. Although Kashmir retained “sovereignty” in all other areas, the state could be said to be extinct the minute it no longer possessed all the essential criteria for statehood. In this case the capacity for foreign relations had been permanently ceded to India.⁷⁹ India followed up its acquisition of sovereignty with an occupation of Kashmir by its troops. The instrument of accession, as a treaty, could not continue to operate between Kashmir and India even after the extinction of the State of Jammu and Kashmir; nor could it operate between India and Pakistan, as Pakistan was not a party to the treaty.

The second way that Mountbatten’s letter may have contractually bound India to hold a plebiscite is through the principle of unilateral declaration. Under certain circumstances, unilateral declarations may give rise to international legal obligations.⁸⁰ Brownlie writes that a state “may evidence a clear intention to accept obligations vis-à-vis certain other states by a public declaration which is not an offer or otherwise dependent on reciprocal undertakings from the states concerned.”⁸¹ Public, official statements expressing the intention to be bound can create legal obligations for states. A look at the development and application of this principle will provide some insight into its relevance here.

The principle of unilateral declaration emanates from the *Eastern Greenland* case, in which the PCIJ considered competing Danish and Norwegian territorial claims.⁸² In the course of negotiations between Denmark and Norway prior to international arbitration, Norwegian Foreign Minister Ihlen stated to his Danish counterpart that Denmark’s plans to treat Greenland as its own sovereign territory would “meet with no difficulties on the part of Norway.” Denmark contended that

⁷⁹ Some writers call this “partial extinction.”

⁸⁰ Shaw, 95.

⁸¹ Brownlie, 643.

⁸² *The Legal Status of Eastern Greenland*, PCIJ Series A/B, No. 53 (1933).

Ihlen's statement amounted to Norwegian recognition of Danish sovereignty over Greenland, an argument that the PCIJ ostensibly rejected. However, the Court found that because the "Ihlen Declaration" had been made in an official capacity regarding a matter within the purview of the Norwegian Foreign Ministry, the declaration therefore bound Norway to the course of action set out in the Ihlen Declaration.⁸³

The principle of unilateral declaration proved decisive in the 1974 *Nuclear Tests* case, in which Australia and New Zealand brought an action against France to stop above-ground French nuclear tests in the South Pacific. While the case was pending, the French Foreign Minister stated that France had completed all its tests for that year and would no longer test nuclear weapons in the South Pacific. Upon France's request, the Court dismissed the action, citing the legally binding nature of the Foreign Minister's declaration. In evaluating statements by the French president and foreign minister, the ICJ held that France's intention to be bound, coupled with the public and official nature of the French statements, created a legal obligation for France to cease atmospheric nuclear tests.⁸⁴

The principle also figured prominently in the 1986 *Frontier Dispute* case. In 1974, Burkina Faso (then Upper Volta) and Mali had come to blows over a small strip of land on their shared border; accordingly, a special commission was established under the auspices of the Organisation of African Unity (OAU) to resolve the boundary dispute. Speaking at a press conference in 1975, the Head of State of Mali said that even if the commission ruled against Mali, he would accept its findings. The commission ruled in favour of Burkina Faso, but Mali nevertheless took the case to the ICJ for arbitration. Burkina Faso argued that the Malian statements amounted to a

⁸³ Ibid.

⁸⁴ *Nuclear Tests* case, 1974 ICJ Reports, 3.

unilateral declaration that Mali would accept the commission's findings in any case, thus estopping Mali from bringing the ICJ action. Rejecting that argument, the ICJ found that there had been no intention on the part of the Head of State of Mali to be legally bound by his statements.⁸⁵

Also in 1986, the ICJ considered the *Military and Paramilitary Activities* case, in which Nicaragua brought action against the United States over the US policy of providing technical support to the Contra insurgency. The US justified its intervention by citing, *inter alia*, a 1979 declaration by the Nicaragua government before the Organization of American States (OAS) in which Nicaragua pledged to hold free elections. The elections were never held. By not upholding its commitment, the US argued, Nicaragua had rendered itself liable to intervention. The ICJ rejected the American argument as inconsistent with the fundamental principle of state sovereignty. Regarding the promise made by Nicaragua at the OAS, the Court found that the Nicaraguan statements did not amount to a formal offer, which if accepted, would constitute a promise in law. Nicaragua's statements were held to be purely political in nature. They were not, in the opinion of the Court, evidence of Nicaragua's intention to be bound to the other member states of the OAS. They were merely suggestions for how future Nicaraguan governments should be formed.⁸⁶

Unilateral declarations create obligations for states when those declarations are made publicly and officially, and with the intention of legally binding the state to a particular course of action. Did certain statements by Mountbatten and Nehru on the subject of a plebiscite for Kashmir rise to the level of an international obligation? Although it does not mention Pakistan specifically, Mountbatten's letter accepting the

⁸⁵ 1986 ICJ Reports, 554.

⁸⁶ 1986 ICJ Reports, 132.

Maharaja's accession acknowledges that accession had been disputed. It also expresses the wish that accession be settled by popular referendum as soon as possible. Further Indian government statements express a firm commitment to holding a plebiscite to confirm the instrument of accession. A 1948 White Paper states that India regarded the accession of Kashmir as "temporary and provisional until such time as the will of the people can be ascertained."⁸⁷ That report cites a speech made by Prime Minister Nehru in which Nehru stated "that the fate of Kashmir is ultimately to be decided by the people. That pledge we have given, and the Maharaja has supported it, not only to the people of Kashmir but to the world. We will not, and cannot, back out of it."⁸⁸ Before the United Nations in January 1948, the Government of India stated that the accession was to be conditional upon the vote of the Kashmiri people as to whether they prefer union with India, accession to Pakistan, or independence.⁸⁹

One condition that India has consistently attached to the plebiscite is that order be restored in Kashmir before the vote is taken. The existence of the Azad Kashmir government, the loss of the Northern Areas, and the activities of the JKLF and other underground groups have all given India reasons to postpone the plebiscite indefinitely. Some pro-Indian authors have even made the argument that the pledges made by Mountbatten and Nehru were purely political in nature and do not confer upon India any legal obligation to hold a plebiscite in Kashmir, even if peace and order are restored.⁹⁰ According to this theory, the accession of the Maharaja is final and irrevocable and need not be made subject to a plebiscite. International law does not require that territorial cessions be ratified by plebiscite. India will always be free

⁸⁷ Sheikh Abdullah, 530.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Agarwal, 44.

to alienate Kashmir, they argue, but India is not legally obliged to put that question to the Kashmiri people.

Yet from the foregoing ICJ opinions, it seems that international law might indeed recognise the conditional nature of the Maharaja's accession to India. Mountbatten emphasised that the accession should be decided by plebiscite because of the distinct possibility that the Kashmiri people would opt for union with Pakistan. Nehru's statements suggest that India viewed its commitment to a plebiscite as binding. Because of the official nature of Indian statements and India's expressed intention to be bound to the commitment to a plebiscite, the accession of the Maharaja really cannot be viewed as final and irrevocable in international law, despite the fact that the plebiscite is now only a theoretical possibility.⁹¹ The Maharaja's accession was accomplished under circumstances that raise serious doubts as to his legal capacity to determine the fate of his country. The geographical, economic and cultural links between Pakistan and Kashmir suggested that Kashmir, while technically independent after 15 August 1947, would accede to Pakistan. The standstill agreement also points to the presumption that Kashmir would go to Pakistan. The Maharaja believed that he would not continue to rule Kashmir if he acceded to Pakistan.⁹² Recognising the inequitable and legally questionable nature of the Maharaja's accession, India committed itself to confirming that accession by a plebiscite. Although that plebiscite is unlikely ever to be held, the plebiscite issue continues to sap strength from India's arguments.

⁹¹ Chapters 3 and 4 address the practical impediments to the plebiscite that Mountbatten and Nehru called for.

⁹² Lamb, 128. "While never happy about joining India, [the Maharaja] believed that he was unlikely to survive as a Ruler in any capacity whatsoever if he joined Pakistan."

E. Accession Counterpoint: Junagadh

A short look at the fate of the princely state of Junagadh concludes our discussion of accession. Lamb calls Junagadh a “mirror image” of Kashmir; the case of Junagadh therefore helps to put the Kashmir’s accession in perspective. Junagadh lies on the west coast of the subcontinent, on the Kathiawar peninsula. It is enclosed by India and has no border with Pakistan. At 3,337 square miles, it covers roughly the same area as Greater London and the Home Counties. Communications and transport were part of the Indian system. In 1947 the population was 80 percent Hindu and 20 percent Muslim. The ruler of Junagadh, the Nawob, was a Muslim.⁹³

Upon independence the Nawob opted to go it alone; however, on 15 September he acceded to Pakistan. India immediately protested the Nawob’s accession on the grounds that Junagadh was geographically contiguous to India; that the partition plan demanded that predominantly Hindu areas go to India; and that the people of Junagadh, not the ruler, should decide the question of accession. Pakistan replied that the partition plan did not apply to the princely states and that the ruler of each princely state was empowered to accede to the dominion of his choice without referring the matter to his people. In November 1947 Indian troops occupied Junagadh. In February, a “plebiscite” was held in which 190,000 voted to accede to India with only 91 votes for Pakistan. Unfortunately, in Junagadh, as well as in Hyderabad, the matter of accession was decided by force; this despite the widely held belief that a deal could be struck giving Kashmir to Pakistan and Junagadh and Hyderabad to India.⁹⁴ But there would be no such deals. India and Pakistan would soon resort to force in the Kashmir dispute. We will now examine that use of force.

⁹³ Sir Shah Nawaz Bhutto. The Nawob of Junagadh was the father of Zulfikar Ali Bhutto, Prime Minister of Pakistan, and the grandfather of Benazir Bhutto, also Prime Minister of Pakistan.

⁹⁴ Owen Bennett Jones, *Pakistan: Eye of the Storm*, 69.

CHAPTER TWO: THE USE OF FORCE

India derives its title to Kashmir from the accession of the Maharaja. Pakistan emphasises irregularities associated with that accession, as well as the notion that Kashmir should have gone to Pakistan in accordance with the logic of the British partition plan. Both India and Pakistan claim the territory defined by the boundaries of the former State of Jammu and Kashmir, but those old boundaries no longer exist.¹ Instead, the following territorial situation prevails: Pakistan directly controls the Northern Areas, and indirectly controls Azad Kashmir, which is nominally autonomous. India controls the Vale of Kashmir, Jammu and Ladakh. That arrangement has changed very little since the initial involvement of the Indian military in October 1947, when the Kashmiri rebels were pushed back from positions near Srinagar and the LOC began to take shape. Today, despite two additional Indo-Pakistani wars (1965 and 1971) and the passage of over fifty years, the LOC is in roughly the same position as it was in the autumn of 1947.

Armed conflict between India and Pakistan grew out of the Poonch rebellion, and although the fighting of 1947-8 began as a rebellion against the Maharaja, it was from the start a conflict over whether Kashmir would join India or Pakistan. The rebels aimed to secure the accession of Kashmir to Pakistan, and the Maharaja quickly turned to India once his own forces were on the ropes. In that way, the Poonch rebellion matured into the first Indo-Pakistani war and established the violent nature of the territorial dispute over Kashmir. The fighting also delimited a *de facto* boundary between India and Pakistan. As one might expect, the controversy over the

¹ Cf. the discussion of Chinese claims to the northern edge of the former princely state in the Introduction. Pakistan ceded territory claimed by China in 1963; India lost its portion of the Chinese claim in the 1962 Sino-Indian war, but it has not repudiated its claim to those areas.

use of force in 1947-8 is one of the main areas of contention in the Kashmir dispute. India and Pakistan each level charges of illegality against each other, and any analysis of the dispute must consider the manner in which force was employed. Accordingly, we will attempt to establish the factual background and the principles of law associated with the use of force, and then subject the positions of India and Pakistan to a critical evaluation in light of the applicable legal principles.

A. Synopsis of Events

Fighting began in Kashmir as early as July 1947. Communal violence involving Hindus, Sikhs and Muslims had erupted in anticipation of partition. The violence gained intensity as independence approached. In areas where Muslims and Hindus lived in close proximity, such as the Vale of Kashmir or Jammu, reports of atrocities abounded. Consequently, large numbers of refugees were on the move: Hindus heading south and east, Muslims north and west. Civil order quickly broke down as violence became endemic and refugees took to the roads.² As August 1947 drew nearer, the main challenge for the Maharaja was not the question of accession, which could hopefully be staved off through standstill agreements, but rather the maintenance of control over his own territories.³ Aware of the incipient rebellion in the Poonch district, the Government of Jammu and Kashmir ordered all Muslims to hand over their weapons and ammunition.⁴ Many complied with this order, and much of the materiel obtained from the Poonch Muslims found its way into the hands of Hindus and Sikhs, to be used against Muslims. That situation prompted the

² Estimates of the number of refugees in the West Punjab-Jammu-Kashmir corridor run as high as 16 million, with an estimated 500,000 killed.

³ Lamb, *Kashmir: A Disputed Legacy*, 122.

⁴ Poonch was home to around 60,000 veterans of the World War II Indian Army.

establishment of an informal supply chain extending west across the River Jhelum into Pakistan, by which the Poonch Muslims could rearm themselves.⁵

Meanwhile, the Maharaja was never at any time able to make his writ run into the Northern Areas.⁶ His appointed governor for the region, Wazir Gansara Singh, arrived in Gilgit on 30 July to find the Gilgit Scouts as well as the majority of the civilian population in favour of accession to Pakistan. On 1 November, the Scouts arrested Singh, and they declared the area for Pakistan three days later. Thus by the time Kashmir achieved independence on 15 August, there was a strip of land from Hunza in the north to Poonch in the south where the population openly favoured accession to Pakistan. That situation allowed for the easy movement of weapons and personnel across the border from Pakistan into Kashmir, with or without the knowledge of Pakistani authorities. By mid-September, Pathan tribesmen from the Northwest Frontier Province of Pakistan were filtering into Kashmir, augmenting the Poonch rebel forces, which had acquired a command structure. Pakistan Army troops “taking leave” on the Kashmir front helped to round out their numbers. The Poonch rebels formed the nucleus of the Azad Kashmir forces, which came into being on 24 October with the declaration of the independence of Azad Kashmir.

As the inadequacy of the Maharaja’s forces became apparent, the Maharaja of the State of Patiala lent some of his troops for the defence of Srinagar. Upon the accession of Kashmir, the regular Indian Army moved in to engage the tribesmen and Azad forces, halting the rebel advance and creating a stable line of control. Finally, in May 1948, Pakistan committed its regular forces to the Kashmir front.⁷ As the prospect of an all-out war between the two new dominions looked more likely, India

⁵ Lamb, 124.

⁶ The Northern Areas are the remnants of the Gilgit Lease.

⁷ Lamb, 162.

and Pakistan began negotiations resulting in a cease-fire agreement, and the LOC became an established feature of the Kashmiri landscape.⁸

Organised fighting began with the Poonch rebellion in August 1947. According to the Indian view, Pakistan illegally fomented the rebellion by permitting arms and materiel to pass over the River Jhelum into Kashmir. More provocatively, Pakistan permitted the transit of armed men along the same route on their way to the front. Pakistani sympathisers counter by noting that the deployment of Patiala troops in Kashmir before the Maharaja's accession amounts to aggression by India. That deployment on 17 October may well have triggered the principal invasion by the Pathan tribesmen on 21-22 October, which India denounces as a clear case of the illegal use of force. Furthermore, as regular forces of the two new dominions began to engage each other along the LOC, the legal status of areas controlled by Pakistan became an issue. India accuses Pakistan of aggression for deploying troops in any part of Kashmir. But is it possible that Pakistan could claim the right to place its troops in Northern areas and Azad Kashmir? Finally, the legality of the initial actions of the regular forces will be appraised. As with other phases of the Kashmir dispute, the armed conflict in 1947-8 has generated a series of allegations and denials. A review of the applicable principles of international law will be necessary before embarking on an evaluation of the Indian and Pakistani contentions.

B. The Law of the Use of Force

Article 2(4) of the UN Charter generally forbids the use of force against the "territorial integrity or political independence" of any state. According to one eminent

⁸ In 1947 the high commands of both armies were still British. Lamb points out that they maintained close contact despite the "strained relations" between their countries, and that such contact probably prevented a much wider and more destructive conflict.

authority, Article 2(4) is the “basic rule of today’s public international law.”⁹ Prior to the twentieth century, the concept of the just war was the province of theologians; international law gave every sovereign state the right to use force to pursue its policies.¹⁰ The apocalyptic nature of World Wars I and II prompted efforts to prevent future conflicts and limit the scope of those that were inevitable. Article 2(4) is the result of those efforts, and its provisions should be analysed briefly here.¹¹

The 1970 Declaration on Principles of International Law provides some guidance on how to interpret Article 2(4).¹² First, Article 2(4) bans wars of aggression. Second, states must not use or threaten force in order to solve disputes with their neighbours. States are also under a duty to refrain from using force in acts of reprisal. States must not use force to deprive peoples of their right to self-determination and independence. Finally, states must not instigate, assist, or participate in acts of civil strife or terrorist acts in another state, nor may they encourage the formation of armed bands for incursion into another state’s territory.

There is some debate as to whether the injunction not to use force “against the territorial integrity or political independence” should be construed strictly, to allow uses of force that do not explicitly contravene the clause, or broadly, to ban the use of force generally, but especially in the types of cases enumerated in the Article. The prevailing opinion seems to favour a broad interpretation.¹³ Thus there is a presumption in international law that the use of force is illegal.

The central exception to Article 2(4) arises in cases of “self-defence.” The customary definition of self-defence in international law comes from the 1837

⁹ Jimenez de Arechaga, “Use of Force,” *EPIL*, 1249. Article 2(4)’s ancestor is the 1928 Kellogg-Briand Pact, which outlawed armed conflict.

¹⁰ L.F.L. Oppenheim et al., *Oppenheim’s International Law*, vol 1. 177-78.

¹¹ India and Pakistan were both members of United Nations by November 1947.

¹² Malcolm Shaw, *International Law*, 781-2.

¹³ Shaw, 784.

Caroline case.¹⁴ The *Caroline* was a boat docked on the American side of the Niagara River, which was being used to support an insurrection against the British Government in Canada. One night a group of armed men from the Canadian side of the river boarded the *Caroline*, scattered its crew, and sent it over Niagara Falls. Correspondence between American and British authorities over the incident established the basic elements of self-defence, namely, that there had to be a “necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”¹⁵ Moreover, the chosen means of self-defence must be proportional to the threat; the need to act cannot justify actions that go beyond the bounds established by the original necessity.¹⁶

Modern international law has upheld the basic doctrine of self-defence. Article 51 of the UN Charter states that nothing in Article 2 shall “impair the inherent right of individual or collective self-defence.” Individual self-defence means that a state may use force to protect itself in the event of “armed attack.” For example, the Security Council upheld the right of Britain to use force to recover possession of the Falkland Islands in 1982.¹⁷ States may also group themselves together and assert the principle of collective self-defence, in which an armed attack on one is treated as an attack on all. The philosophical underpinnings of NATO and the late Warsaw Pact provide recent examples of collective defence arrangements.

An apparent corollary to the principle of collective self-defence is the concept of intervention. Foreign troops may be sent into a state upon the invitation of that

¹⁴ 2 Moore’s Digest of International Law 412 (1906).

¹⁵ Shaw, 787.

¹⁶ Henkin et al., *Cases and Materials in International Law*, 872.

¹⁷ Shaw, 794.

state's government.¹⁸ This situation is most commonly observed in cases of civil war, in which a government seeks outside assistance in quelling a rebellion. Traditional doctrine holds that a foreign state may, if invited, use force to assist the government but not the rebels.¹⁹ Rebel groups have typically been viewed not only as enemies of the state, but also of the state system. Consequently, they have no international standing, and aid to rebels in another state is generally considered illegal. Customary international law does, however, require the neutrality of foreign governments when a rebel group attains the status of belligerency. Rebel groups become belligerent powers when they maintain an army and control a substantial part of the national territory.²⁰ The essence of the doctrine is that once a rebel group has achieved a certain measure of success, the sovereign government can no longer claim the exclusive right to speak for the state. The very fact of civil war, as long as the contest is relatively even, places the legal personality of the sovereign government in doubt. Resort to foreign troops also brings into question the ability of the government to control its own territory, an essential characteristic of sovereignty.

In modern times, the doctrine of belligerency has fallen into disuse.²¹ It has essentially been supplanted by the doctrine of non-intervention in the internal affairs of states,²² which prohibits interventions of any kind when an organized insurgency controls significant areas of the country or involves a substantial number of people.²³ That doctrine maintains continuity with traditional notions of belligerency by

¹⁸ Louise Doswald-Beck, "The Legal Validity of Military Intervention by Invitation of the Government," 56 BYIL 189 (1985).

¹⁹ Henkin et al, 947.

²⁰ Doswald-Beck, 197.

²¹ The last rebel group to achieve belligerent status in international law was the Confederate States of America in 1862, which from 1861 to 1865 was the *de facto* government of the southern states in the American Civil War. Britain and France recognised the CSA's belligerency but stopped short of full recognition due to the CSA's inability to win a decisive battlefield victory and its unsuccessful attempt to corner the world cotton market.

²² Doswald-Beck, 198.

²³ Oscar Schachter, "The Right of States to Use Armed Force," 82 MILR 1620.

imposing an obligation on states to refrain from participating in civil wars that genuinely reflect an internal struggle for the destiny of the nation. As such, non-intervention ties into the requirement in Article 2(4) that states refrain from using force in a manner that affects the political independence of a sovereign state. An established principle of state sovereignty is that states have the unfettered right to determine what type of government will prevail in their territory. In cases of civil war, a state is in the process of deciding what form its government will take. Therefore the state's political independence would be compromised by the intervention of foreign troops, and Article 2(4) would appear to declare illegal all such interventions.

Yet there have been countless examples of foreign interventions in civil wars. Most of those interventions, however, have been carried out on the pretext of opposing an earlier, illegal intervention. Such states, when they intervene, do not directly contradict the principles laid down in Article 2(4). On the contrary, they claim to be fighting in support of those principles.²⁴ So-called counter-intervention may be justified on the grounds that the initial intervention poses a threat to the political independence of the state; that the faction supported by the counter-intervening forces represents the state's political independence; and that the right of collective self-defence enshrined in Article 51 allows that faction to form defensive alliances when it becomes the victim of an armed attack. Counter-interventions often occur on behalf of rebel forces, as governments fighting insurrection can secure foreign aid without running afoul of Article 2(4) as long as the rebellion has not progressed beyond its infancy. If the rebellion does reach maturity in spite of the

²⁴ Schachter, 1641-5

government's foreign-supported efforts to crush it, the rebels appear to be entitled to seek outside support of their own.²⁵

C. The War and Its Participants

Probably the best way to analyse the legality of the use of force in Kashmir is to look at the actions of each group of participants in the light of the law of the use of force. The situation is complicated by the fact that there were eight identifiable groups of forces operating in the Kashmir theatre at various points between summer 1947 and the cease-fire of 1 January 1949.²⁶ It is possible to generalise about the objectives of those factions, and so place them in one of two categories: pro-India or pro-Pakistan. However, given the irregular nature of many of the forces, one must take care when assigning legal culpability to the dominion in whose interest those forces may have been acting. Another problem is the lack of reliable, detailed information about the course of events, especially in the early stages of the armed conflict in Kashmir, from August to October 1947. Alistair Lamb, the leading British authority on Kashmir, expresses doubts as to whether such information will ever become complete.²⁷ At any rate, holes in the record must occasionally be filled by accounts that are less authoritative than Lamb's. At those points, issues of provenance become paramount. Accusations of the illegal use of force imply that nations, and indeed certain individuals, may be guilty of war crimes. Accordingly such accusations must have a firm factual basis. Therefore, this paper will not search for a guilty party; it will merely analyse the extant record in the light of applicable legal principles.

²⁵ Michael Akehurst, "Civil War," *EPIL*, 598.

²⁶ The Jammu and Kashmir State Army, the Poonch Rebels, the Gilgit Scouts, the Pathan Tribesmen, the Patiala State Army, the Indian Army, the Pakistan Army, and the Azad Kashmir Army.

²⁷ Lamb, 122: "What exactly went on in the remoter corners of the State of Jammu and Kashmir may never be described with certainty; but that the region suffered its share of disturbances is not open to doubt."

The issue of the use of force arises first with the coalescing of the Poonch rebellion in August 1947. In June certain residents of Poonch had begun a campaign to secede from Kashmir. As Independence Day approached, campaigners began to clamour for accession to Pakistan. Public demonstrations continued despite the Maharaja's prohibition against them; this defiance resulted in the imposition of martial law. The demonstrations continued, now amounting to clashes with the Jammu and Kashmir State Army. Large numbers of civilians were killed. Meanwhile, in Jammu, Hindu extremists began attacking Muslim villages. Muslim Refugees from Jammu reported that the Jammu and Kashmir State Army had joined in the carnage. Consequently, the Poonch rebels engaged the Maharaja's forces in Poonch and the western part of Jammu. At this point, the conflict in Kashmir was a civil war between the Poonch rebels and government forces, notwithstanding that the issue of accession overshadowed the fighting. The Maharaja's regime maintained its independent, sovereign status in international law, and its actions in suppressing the Poonch rebellion did not amount to an illegal use of force.

The first issue to be considered is the legal significance of the informal supply chain stretching across the River Jhelum and west into Pakistan's North-West Frontier Province, an area with a reputation for weapons manufacture and trading. The Poonch rebels, whose arsenals had been decimated by the Maharaja's preemptive disarming in July 1947, received fresh weapons and ammunition from the Pakistan side of the river, probably from late August 1947. At this point there it is unclear whether Pakistan was officially involved in, or even aware of, the train of arms making its way to the rebels in Kashmir. There is also some evidence that individuals crossed the

border into Kashmir to aid the rebels, even at this early date.²⁸ The question to be addressed is whether a state violates international law by its failure to prevent the privately directed flow of arms and munitions from its territory into a neighbouring state, where those weapons will be used to support a rebellion against that state.

Traditional international law distinguishes between the supply of arms by private individuals and the supply of arms by the state.²⁹ The law governing the supply of arms by the state depended on the status of the belligerent party receiving those weapons: neutral states were obliged to refrain from supplying weapons to either party in an international war, or to the government in a civil war if the rebels had achieved the status of belligerency. The supply of weapons to rebels in a civil war was prohibited. Private individuals, on the other hand, had complete freedom to supply weapons to anyone they wanted, at least in theory. That freedom could be circumscribed by interdiction efforts, but international law did not impose an obligation on states to restrict in any way the participation of their citizens in the international arms trade.³⁰ For example, in the Spanish Civil War, France refused to intervene officially but permitted the private sale of weapons under the theory that France would not relinquish its neutral status simply by permitting such sales.³¹

Since the development of that rule, however, states have tried to exert as complete control as possible over the export of weapons from their territory.³² The supply of arms by private individuals, although theoretically distinct from overt, official involvement in a conflict, still has the effect of supplying one party or another with weapons. Efforts by the international community to abolish armed conflict have

²⁸ Lamb, 124.

²⁹ W. Friedmann, "State Control over Individuals and Its Effect upon the Rules of International State Responsibility," 19 BYIL (1938), 131-2.

³⁰ Henkin et al., 947, note 1.

³¹ Henkin et al., 946.

³² Friedmann, 132-3.

led to legal restrictions on the movement of weapons across borders. It is now considered an act of aggression for a state to supply weapons to an insurgency in a neighbouring state.³³ Moreover, the Institut de Droit, in its Resolution on the Principle of Non-Intervention in Civil wars, makes no distinction between private and official supply. Section 2(c) states that states shall refrain from “supplying weapons or other war material to any party to a civil war, or allowing them to be supplied.”³⁴ Section 2(e) enjoins states from “making their territories available to any party to a civil war, or allowing them to be used by any such party, as bases of operations or of supplies... for the passage of regular or irregular forces, or for the transit of war material.”³⁵ The standards set by the Institut are not legally binding, and they are considerably more restrictive than those of traditional international law. Yet as the Institut’s recommendations reflect current opinion, there appears to be a trend toward imposing greater liability on states in cases where their citizens are supplying weapons to insurgents.

It is debatable, however, whether Pakistan was guilty of aggression by virtue of the mere existence of the informal supply chain. It is unlikely that Pakistan wanted to that flow to stop; it is also unlikely that Pakistan could have stopped it. No official Pakistani involvement in the supply of weapons is evident in the very early stages of the rebellion. One finds it hard to believe that Pakistani officials were unaware of the shipment of arms from Pakistan into Kashmir, but the extent to which they condoned it cannot be demonstrated. Although the Institut’s standards appear to impose on states an obligation to maintain a *cordon sanitaire* around their borders, Pakistan’s behaviour in respect of the movement of arms into Kashmir in August-September

³³ 1986 ICJ Reports, 132. (Nicaragua v. United States); G.A. Resolution 3314 (XXIX) Resolution on the Definition of Aggression.

³⁴ 56 Annuaire de l’Institut de Droit International, 1975.

³⁵ Ibid.

1947 probably does not amount to aggression against Kashmir under customary international law.

More important is the issue of the movement of armed warriors across that border during the same period. There is no question that a massive *lashkar* of Pathan tribesmen crossed the Pakistan-Kashmir border and invaded Kashmir on 21-22 October. The legal implications of that incursion will be addressed below. For the moment we will consider whether a determination of aggression can be made from the fact that small groups of armed warriors from Pakistan entered Kashmir to participate in the civil war in August and September 1947.

According to Julius Stone, efforts by the international community to outlaw war have resulted in efforts by states to fight wars in ways that circumvent legal principles.³⁶ To that end, one of the main techniques employed by states in the modern era has been the use of irregular troops. Known as “volunteers” or “armed bands,” irregular troops have allowed states to wage war vicariously and still technically abide by the prohibition on the use of force in Article 2(4).³⁷ Such behaviour, however, is clearly aggression under customary international law, which prohibits states from organising, encouraging, assisting, or sending armed bands into another state.³⁸ Furthermore, states are forbidden from permitting their territory to be used as a base for armed bands,³⁹ and they are required to exercise due diligence in preventing those groups from using their territory as a base.⁴⁰ Those rules are reflected in the language of section 2(e) of the Institut de Droit’s resolution, which would ban state sponsorship or even toleration of armed bands. UN Resolution 3314,

³⁶ Julius Stone, “Hopes and Loopholes in the Definition of Aggression,” 71 AJIL 237 (1977).

³⁷ Article 2(4) says that “all *members* shall refrain” from the use or threat of force (*italics added*).

³⁸ Stone, 237.

³⁹ Lillich and Paxman, “State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities,” 26 AULR (1977), 217.

⁴⁰ H.O. Agarwal, *The Kashmir Problem: Its Legal Aspects*, 47.

however, which provides a consensus definition of aggression, sets a less strict standard for states.⁴¹ Article 3(g) prohibits the “sending by or on behalf of a State of armed bands... which carry out acts of force against another State of such gravity as to amount to... [armed attack], or its substantial involvement therein.”⁴² Resolution 3314, when read in conjunction with customary international law, creates a general rule prohibiting state use of irregular forces. The presence of those forces on a state’s soil will create a rebuttable presumption that the state is using the forces in an aggressive manner. Only if the forces are operating without the state’s knowledge, with objectives unrelated to the foreign policy of the state whose territory they are using as a base, might the state might escape legal culpability.

From the record it seems clear that Pakistani officials were aware that armed men from Pakistan were crossing the border into Kashmir to fight for the rebels against the Maharaja’s forces, although Pakistan’s leadership conspicuously distanced itself from the tribesmen.⁴³ The centre of the Poonch rebellion was only a few miles from Rawalpindi in Pakistan, and the irregular troops would have found it difficult to escape official detection in transit to Kashmir.⁴⁴ Moreover, those men were fighting on behalf of the Poonch rebels, whose objective was the accession of Kashmir to Pakistan. Pakistan therefore stood to benefit from the success of that rebellion. As such, Pakistan’s blind-eye approach to the issue of armed bands does not insulate it from charges of aggression.

The incursion of armed bands into Kashmir in the late summer of 1947 represents a general escalation in the conflict. With Jammu and Kashmir State forces

⁴¹ Stone, 237.

⁴² GA Resolution 3314 (XXIX), Article 3(g).

⁴³ Mohammed Ali Jinnah stated that he did not want to know about the movements of the tribesmen because “my conscience must be clear.” See Owen Bennett Jones, *Pakistan: Eye of the Storm*, 64.

⁴⁴ Lamb, 125. Jones (65) found evidence that Pakistan troops, in addition to disowning the tribesmen, were actually attempting to prevent them from reaching Kashmir.

back on their heels, the Maharaja turned to the Indian State of Patiala for help. Patiala is a mountainous state in the Punjab region, which had acceded to India on 5 May 1947. Upon the Maharaja's invitation, Patiala State troops arrived in Kashmir on 17 October and established defensive positions around the strategically vital Srinagar airfield. By virtue of its accession to India, Patiala had transferred to India responsibility for defence, communications and external relations. Patiala intervention thus represents, for all intents and purposes, Indian intervention. The Patiala deployment marks the first participation of non-Kashmiri regular troops in the Kashmir conflict, and the presence of those troops raises the question of whether their intervention took place legally.

As set out above, the principle of non-intervention dictates that states should not intervene in the civil wars of another state. States may, however, intervene at the request of the government as long as the rebellion does not control a significant area of the country or involve substantial numbers of people. Otherwise, intervention amounts to a use of force against the state's political independence. This rule places governments facing rebellion in somewhat of a catch-22: Requests for foreign assistance point to an inability of the government to control the country sufficiently; insufficient control of the country undermines the capacity of the government to seek foreign assistance. State practice, however, provides many examples of interventions at the behest of regimes whose positions were threatened, and a look at some examples of such interventions will help clarify the state of the law in this area.

In 1958, King Hussein of Jordan requested military assistance from Britain to solidify his position as monarch in the face of an expected coup d'etat inspired by the recent deposition of King Faisal in neighbouring Iraq. The new Iraqi regime made one of its objectives the overthrow of the monarchy in Jordan, and it began a radio and

press campaign advocating violent revolution in Jordan. Shortly before the arrival of the British troops, several armed “infiltrators,” allegedly supplied with arms by Syria, were captured along Jordan’s border with Syria. The UK, citing Article 51 and collective self-defence, justified intervention on behalf of King Hussein as necessary to protect Jordan’s political independence against the armed attack by Iraqi and Syrian agents.⁴⁵

In 1964 in the Congo, a UN peacekeeping force had been used to shore up the regime of President Tshombe during a rebellion that enjoyed wide support and participation. Although the peacekeeping force had departed, the rebels still controlled the capital city, Stanleyville (now Kinshasa). After Tshombe took office, the rebels denounced his government as a Belgian puppet and placed all white people under house arrest. Tshombe then invited Belgian troops to send a “rescue force” to evacuate civilians in the capital, a move that had the salutary effect of liquidating the rebel force holding the city. In the General Assembly, a number of African nations criticised Belgium’s intervention as a sham designed to prop up the pro-European Tshombe regime. Belgium responded with the contention that the intervention had been purely humanitarian in nature. Regardless of the merits of that argument, it is noteworthy that Belgium did not plead government invitation.⁴⁶

In 1979, the government of Afghanistan faced a widespread rebellion that controlled large portions of the country and had successfully encouraged the mutiny of a portion of the army. Afghanistan was at the time a Marxist-Leninist regime; accordingly, it blamed the United States and regional Islamic powers for the civil strife and requested military assistance from the Soviet Union, which was

⁴⁵ Doswald-Beck, 214.

⁴⁶ Doswald-Beck, 217-218.

immediately forthcoming. Although it was alleged that Moscow manufactured or coerced its "invitation" from Kabul, debate in the UN over a resolution condemning the USSR centred on the Afghan-Soviet contention that the rebellion was the work of foreign powers. Many of the majority of nations voting to condemn Soviet intervention emphasised their belief that the USSR was doing little more than stepping in to crush a popular rebellion in Afghanistan. The USSR cited a 1978 joint-defence treaty with Afghanistan and armed attack by foreign insurgents to justify its intervention under Article 51.⁴⁷

In each case, although intervention followed the invitation of the government, the intervening power sought some other justification for its actions, especially Article 51's provision for collective self-defence. According to Louise Doswald-Beck, the tendency of governments to avoid justifying intervention on the ground of government invitation is one indication of the replacement of the traditional rule allowing intervention in a civil war with the principle of non-intervention of states.⁴⁸

As to the Patiala intervention in October 1947, it is possible to suggest that the principle of inter-temporal law provides a clear justification, as the principle of non-intervention may not have developed sufficiently by 1947 to the point where the principle regulated the intervention of Patiala troops. Classical international law unequivocally permitted the intervention of foreign troops in a civil war at government request.⁴⁹ It is clear that the Maharaja needed assistance in order to remain in power, and that his invitation was genuine. Yet the principle of non-intervention derives from the UN Charter, which was in force in 1947. That principle ostensibly forbids intervention on behalf of the government in cases in which the

⁴⁷ Ibid, 232-3.

⁴⁸ Ibid, 213.

⁴⁹ James W. Garner, "Questions of International Law in the Spanish Civil War." 31 AJIL (1937) 67.

rebels control sizeable sectors of the state's population or territory, as was the case with the Poonch rebellion.

One could argue for the legality of Patiala intervention on the grounds that armed bands were infiltrating Kashmir from Pakistan, augmenting the size of the Poonch rebel contingent, and that assistance from Patiala troops was necessary to defend Kashmir against foreign invasion. Although the Poonch rebels controlled sizeable areas in western Jammu and Kashmir State and enjoyed the support of that state's Muslim population, they were receiving aid from Pakistan in the form of weapons and irregular troops. No degree of official Pakistani participation in the rebellion can be demonstrated at this early stage in the conflict, but the norm regarding intervention would appear to render irrelevant the distinction between support by a foreign government and support emanating from the territory of that government. In both cases, a government fighting insurrection could reasonably make a plea of self-defence. Patiala involvement almost certainly stemmed from India's desire to prevent the Poonch rebels from overthrowing the Maharaja and acceding to Pakistan; likewise, Pakistani toleration of the movement of troops and materiel through Pakistan found its basis in Pakistan's wish to see the Poonch rebels succeed.

Pakistani involvement in Kashmir reached a new level after the deployment of Patiala forces. On 21-22 October, a large group of irregular Pathan troops, known as a *lashkar*, crossed the border into Kashmir. Numbering around 5,000 men,⁵⁰ the *lashkar* crossed into Kashmir at the same time that a large contingent of Muslim troops in the Maharaja's army mutinied in support of the Poonch rebels. The Pathan tribesmen and the Muslim soldiers then combined for an all-out attack on the Maharaja's forces in Kashmir. Having secured large portions of western Jammu and Kashmir State, the

⁵⁰ Some Indian estimates of the size of this force run as high as 70-100,000.

rebels proclaimed the independence of Azad Kashmir on 24 October. At this point Pakistan was overtly supporting the rebels, who now called themselves the Azad Kashmir Army. The combined strength of Patiala and Jammu and Kashmir forces could not contain the Azad troops, many of whom indulged in rampant pillage and booty-taking. As forces loyal to the Maharaja melted away in front of Srinagar, the Maharaja was advised to flee at once for the safety of Jammu. With no options save accession to India or surrender to Azad troops, the Maharaja chose the former. Full Indian deployment followed within twenty-four hours.

At this point the conflict was no longer a civil war. Kashmir had surrendered its independence to India, which followed accession with a well-executed campaign against Azad forces. By spring 1948, the Pakistan Army was involved in the fighting, and what had started as a rebellion had turned into the first Indo-Pakistani war. India claims that Pakistan, through its military campaigns, was committing aggression against Indian territorial integrity in violation of Article 2(4). India brought its claim of Pakistani aggression to the UN Security Council on 1 January 1948. The merits of that claim and the role of the UN in the Kashmir dispute will be addressed at length in the following chapter. At present it will be necessary to examine the legal status of the areas to the north and west of the LOC, which were controlled either by Pakistan or Azad forces by the time the Maharaja acceded to India.

D. The Legal Status of Azad Kashmir and the Northern Areas

India claims that the presence of Pakistani troops within the boundaries of the former State of Jammu and Kashmir amounts to aggression. The Maharaja acceded to India; therefore, all territory formerly ruled by the Maharaja became Indian, and any Pakistani military presence there becomes *prima facie* illegal. Assuming, without deciding, that Ladakh, the eastern Vale of Kashmir and Jammu fell under Indian

sovereignty after the stabilisation of the LOC, there would still be a question as to the status of Azad Kashmir and the Northern Areas, which lie on Pakistan's side of that line. The legal status of those areas will be evaluated below.

1. The Northern Areas

The Northern Areas are essentially those parts of the former State of Jammu and Kashmir that were leased to Britain in 1935 under an arrangement known as the Gilgit Lease. An area of great strategic importance, Gilgit was the northernmost fortress in Britain's intricate Indian defence system. Gilgit provided Britain with a vantage point from which it could more clearly observe the deceptive movements of imperial rivals China and Russia. Gilgit also served as a first line of defence in case of an attack on India by one of the aforementioned regional powers. To accomplish those twin objectives of intelligence gathering and defence, Britain formed the Gilgit Scouts. A locally recruited unit commanded by British officers, the Gilgit Scouts were linked to Lahore in the West Punjab by telegraph and supply lines.⁵¹ In order to maintain even firmer control of Gilgit, Britain insisted on leasing the area from the Maharaja of Jammu and Kashmir starting in 1935 for a period of sixty years.⁵² The Gilgit Lease bypassed the administration of the Maharaja and placed the area under the direct control of British India.

In theory the Gilgit Lease would have reverted to the Maharaja upon the lapse of paramountcy on 15 August 1947, and Wazir Gansara Singh was despatched from Srinagar to represent the Maharaja in Gilgit after the lapse of paramountcy. It is debatable, however, whether the Maharaja gained sovereignty over Gilgit with the lapse of paramountcy. The standstill agreement between Kashmir and Pakistan

⁵¹ Lamb, 60.

⁵² Lamb, 61.

stipulates that “existing arrangements” between Kashmir and British India would continue in “all matters.”⁵³ The Gilgit Lease was a treaty between British India and Kashmir establishing an arrangement in which Gilgit was administered directly by Britain, using a military unit commanded and supplied from Lahore. During the Maharaja’s short-lived independence, the Gilgit Lease never came under his effective control. The standstill agreement should therefore have continued that form of administration under the auspices of Pakistan, at least until the accession of the Maharaja to India.

Upon accession, it is submitted, the Gilgit Lease did not come under the sovereignty of India. It is well established that a treaty of cession cannot dispose of territory not possessed by the ceding party, nor may the acquiring party possess more rights over a territory than its predecessor had enjoyed.⁵⁴ It is possible to view the Indian Independence Act as a treaty of cession as well, in which Britain ceded territory in its Indian empire to India, Pakistan or one of the princely states. For title to pass pursuant to a treaty of cession, it is necessary that the acquiring state take actual possession of the territory in question.⁵⁵ The Maharaja was not able to take possession of the Gilgit Lease, as the Gilgit Scouts placed the Maharaja’s Wazir under house arrest and refused to recognise the authority of Srinagar. Indeed no authority but that of the Gilgit Scouts or Pakistan has been exercised in the area since. Accordingly, it is doubtful that the presence of Pakistani troops in the Northern Areas has ever constituted aggression.

⁵³ Ijaz Hussain, *Kashmir Dispute: An International Law Perspective*, Appendix I, 243.

⁵⁴ Shaw, 339.

⁵⁵ Brownlie, 131.

2. *Azad Kashmir*

The question of the status of Azad Kashmir is very similar, namely, whether the Maharaja's accession to India transferred title to India, such that Pakistan's support of troops in the area amounted to an act of aggression against India.

The State of Azad Kashmir was the creation of the Poonch rebels, who on 24 October 1947 declared the independence from Jammu and Kashmir of the areas of the Poonch and Vale of Kashmir districts that lay behind their lines. The new state had a government, with a president and minister of education. Its territory, however, was rather poorly defined. From 24 October, Azad Kashmir forces continued to advance to the east, toward Sringar, making territorial gains as they went; conversely, as Indian forces deployed on 27 October came into action, the territory of Azad Kashmir shrank from the east with the retreat of Azad forces. The population of the new state was consequently somewhat nebulous as well, a situation that was exacerbated by the mass movement of refugees. And while Pakistani regular troops were not yet officially in action, Azad Kashmir relied heavily on fighters from outside its borders to maintain control of its territory. It almost certainly lacked the capacity for foreign relations. While autonomous on paper, it has relied on Pakistan for its defence since coming into being.

The Poonch rebellion had begun as a campaign for the secession of Poonch from Kashmir, and the subsequent formation of Azad Kashmir represents an instance of secession; a review of the rules regarding secession will be useful in determining the status of Azad Kashmir after 24 October. Strictly speaking, international law views secession as an internal matter. There is no international right to secede.⁵⁶ Successful secession movements will result in new states that meet the Montevideo

⁵⁶ Christine Haverland, "Secession," *EPIL*, 354.

criteria; those states will probably also be recognised by third states once those criteria have been met. A lack of permanently defined boundaries, however, does not necessarily create an impediment to the existence of statehood; what is more important is the degree of independent public authority exercised by the new government.⁵⁷ The test for whether a seceding state has reached independence was laid down in the *Aaland Islands* case.⁵⁸ A state formed through secession must have a stable government that is strong enough to assert its authority throughout the territory of the state without the assistance of foreign troops.⁵⁹ In light of the fact that the Azad government relied on military support from Pakistan for its survival, it is unlikely that Azad Kashmir could be considered an independent state.

If Azad Kashmir did not become independent on 24 October, its legal status would depend on the capacity of the Maharaja to accede to India. As set out in the previous chapter, that capacity was in doubt because the Maharaja did not effectively control the State of Jammu and Kashmir. Nowhere in Kashmir (outside the Gilgit Lease) had that control been less effective than in the areas that made up Azad Kashmir, which were in the hands of Azad forces (and essentially under Pakistani control) well before the Maharaja signed the instrument of accession. Thus although the claims of Azad Kashmir to complete independence were somewhat hollow, the Maharaja's government had no control over the area when it acceded to India. Accordingly, the presence of Pakistan-supported troops in western Poonch and the Vale of Kashmir does not present a clear case of aggression by Pakistan against India.

⁵⁷ David Ijalaye, "Was Biafra at Any Time a State in International Law?" 65 AJIL (1971) 551.

⁵⁸ Crawford, 137.

⁵⁹ Henkin, 248; *Aaland Islands* Case.

E. Conclusion: The Military Campaigns

As winter 1947 set in, the fighting between Indian and Azad forces had reached a stalemate, with the former State of Jammu and Kashmir being effectively partitioned by what Alistair Lamb calls an “elastic but impenetrable battle front.”⁶⁰ With the spring thaw, a new round of fighting began, characterised by attacks and counterattacks. In the Northern Areas, the Gilgit Scouts pressed south and east into Baltistan; India responded with flanking manoeuvres that took the line of battle northward, higher and higher into the Himalayas. Attempts by Indian and Pakistani forces to outflank each other on this front led ultimately to the miseries of the world’s highest battlefield, the Siachen glacier.⁶¹

In the south, Indian forces had stymied the Azad advance and begun to press Azad forces deep into their own territory, threatening to cut Azad Kashmir in two by taking the “capital” city of Muzaffarabad and pushing west to the River Jhelum. Consequently, in May 1948, the Pakistan Army involved itself officially for the first time, committing troops to reinforce the Azad army and halt India’s advance. Thus by spring 1948, the regular armies of the two new dominions were engaging each other all along the battle front, from northern Baltistan to southern Poonch. What had begun as a civil war between a Hindu ruler and some of his Muslim subjects had escalated into an armed conflict between the two new dominions. As preparations began for war between India and Pakistan, cooler heads prevailed: cease-fire negotiations began, which culminated with the agreement of a cease-fire line marking the effective limit of the sovereignties of the two dominions.⁶² Meanwhile, India had brought its case

⁶⁰ Lamb, 161.

⁶¹ Robert Wirsing, “War or Peace on the Line of Control?: The India-Pakistan Dispute over Kashmir Turns Fifty.” BTB 2:5, 19-20.

⁶² Lamb, 164.

before the United Nations, charging Pakistan with aggression. This takes us into the next phase of the Kashmir dispute, to be addressed in Chapter Three.

As to the use of force in 1947-8, it must be observed that the rules of international law regarding the use of force are most effective in preventing armed conflict from flaring up in the first instance. Accordingly, violations of those rules would most likely be found in the conflict's early stages: for example, in Pakistan's policy of permitting the use of its territory as a staging ground for armed bands, or in India's use of Patiala troops to prop up the Maharaja before he had acceded to India. Both India and Pakistan could probably justify the uses of their regular armies in terms of self-defence. India received the accession of the Maharaja at a time when the Azad forces were advancing east toward Srinagar. Therefore, India was defending itself against invasion. Pakistan, for its part, could make a similar claim: India would have cleared out the Northern Areas and Azad Kashmir but not for Pakistan's defence of those areas. However, neither the British partition plan nor the battlefield had offered a lasting solution to the Kashmir question. The United Nations would soon become involved in efforts to break the stalemate.

CHAPTER THREE: DIPLOMACY

On 1 January 1948, India lodged a complaint with the UN Security Council against Pakistan. In its complaint, India alleged that the situation in Kashmir had reached a point where the maintenance of international peace and security was endangered.¹ The essence of the Indian position was that Kashmir had become an integral part of India upon the accession of the Maharaja, and that the continued occupation of a portion of India by Pakistan-supported forces necessitated Indian military action against Pakistan in accordance with Article 51 of the UN Charter—action that could conceivably result in open warfare between the two nations.² Pakistan replied by stating that the accession was legally null and void; therefore, Kashmir did not become a part of India, and the actions of the Azad forces merely represented a rebellion by the Kashmiri people against the oppressive rule of the Maharaja, who was now an Indian puppet.³ Both of those positions had been established long before the dispute reached the UN. The involvement of the UN does, however, represent a turning point in the dispute, because it marks the beginning of the international community's consideration of the Kashmir question. Moreover, debate in the UN produced certain resolutions recommending how the dispute should be resolved. Finally, the failure of the UN to solve the Kashmir problem highlights the irreconcilable nature of the Indian and Pakistani positions and suggests that self-determination might be the only principle offering a solution.

As set out in the preceding chapters, the accession crisis brought about a civil war in Kashmir in which both India and Pakistan intervened. Although it could be

¹ Rudolf Geiger, "Kashmir." *EPIL*, 72

² H.O. Agarwal, *The Kashmir Problem: Its Legal Aspects*, 57.

³ Alistair Lamb, *Kashmir: A Disputed Legacy*, 165.

argued that neither India nor Pakistan had a legal interest in what was an internal Kashmiri matter, our review of the process of the partition of British India demonstrates that Kashmir was destined to join either India or Pakistan. Both dominions coveted Kashmir, and consequently, both took steps to incorporate Kashmir within their territories. Those steps included supporting opposite sides in the Kashmiri civil war, which ultimately resulted in Indian and Pakistani regular troops facing each other across the LOC. Accordingly, the physical and legal positions of the two sides were entrenched before the involvement of the UN. We will now consider the legal basis for that involvement, the specific content of the resolutions that emerged from it, and the extent to which those resolutions were legally binding on India and Pakistan. It should be noted at this point that UN involvement was largely ineffective—India and Pakistan fought two additional wars over Kashmir in 1965 and 1971, and conditions may deteriorate into armed conflict once again. The treaties concluded at the end of those wars and the course of bilateral diplomacy between Delhi and Islamabad are also essential facets of the dispute. Therefore this chapter will consider the gamut of diplomacy in the Kashmir dispute.

A. The United Nations—Its Legal Status

As stated above, India made its complaint regarding Pakistani aggression to the UN Security Council. Before considering the mechanics of Security Council involvement, it will be necessary to examine the status in international law of the United Nations generally, and of the Security Council in particular.

The United Nations was established by the victorious Allied powers at the end of World War II.⁴ Heir to the doomed League of Nations, the UN was founded with

⁴ The essential components of the organisation were formulated at Dumbarton Oaks, Washington, DC, in October 1944 at a meeting of the governments of the United States, Britain, China, and the Soviet Union.

the goal of providing a worldwide authority for the promotion of peace and justice, and for the protection of the inherent rights of nations and human beings. Article 1 of the UN Charter, setting out the organisation's goals, comprises a mixture of lofty goals and noble principles, and in its recent practice the UN has focused on decolonisation efforts, regulation of self-determination, dismantling of apartheid, and amelioration of conditions in the underdeveloped world. The UN has six principal organs, designed to meet the various goals outlined in the charter: the General Assembly, the Economic and Social Council, the Trusteeship Council, the Secretariat, the ICJ, and the Security Council. The structure of the UN is set out in the UN Charter, which serves as the organisation's constitution. The Charter is also a multilateral treaty to which all member states are signatories.⁵ Thus membership in the UN and adherence to the UN's basic law are regulated under customary international law by the principle of *pacta sunt servanda*. Interpretation of the Charter is the province of the ICJ, which has employed the theory of implied powers to expand the power of UN organs.⁶ Imitating the efforts of the United States Supreme Court to enhance federal power at the expense of the states, the ICJ has held that every organ of the UN has not only the powers expressly delegated to it in the charter, but also the power to do anything else that is necessary in exercising its express powers.⁷ Primary executive authority is vested in the Security Council, which has the ultimate responsibility under the UN Charter for the maintenance of international peace and security.⁸

The Security Council is an outgrowth of the military alliance that defeated the Axis powers in 1945. First proposed at the Dumbarton Oaks conference, the Security

⁵ India became a UN member on 15 August 1947; Pakistan joined on 30 September 1947.

⁶ Benedetto Conforti, *The Law and Practice of the United Nations*, 13.

⁷ ICJ Reports 1949, 174. *Matter of Reparation for Injuries Suffered in UN Service*.

⁸ Malcolm Shaw, *International Law*, 826.

Council is composed of fifteen member states, five of which have permanent seats.⁹ All four Dumbarton Oaks governments have a permanent seat; France has the fifth, and the other ten are awarded on a rotating basis for two years, according to a geographical quota system. Except in cases of self-defence by states, the use of force in current international law is permitted only by the decision of the Security Council. Security Council decisions must include the unanimous approval of the five permanent members. Veto power does not extend to “procedural” decisions, but the distinction between procedural and substantive decisions may be challenged by any member, and the determination of procedural status is itself subject to veto by one of the five permanent members.¹⁰ Not surprisingly, the Security Council has been criticised for a lack of effectiveness, a weakness that was measurably exacerbated in the period 1946-1990 by Cold War divisions among the permanent members. Yet actions taken by the Security Council have consequently benefited from an undeniable international consensus, and the Council’s authority has always been highly regarded.¹¹

The precise role of the Security Council in settling disputes and enforcing settlements is laid down in Chapters V, VI, VII, VIII, and XII of the UN Charter. Chapter V (Articles 23-32) establishes the existence of the Council and its general mission to maintain international peace and security. Chapter VI (Articles 33-38) states the Council’s jurisdiction in matters that threaten that peace and security, and it sets up a procedure for the submission of pressing matters by states. Chapter VII (Articles 39-51) enumerates the Security Council’s powers to determine when a breach of peace has taken place, and to take remedial action, including the use of

⁹ Before 1965, the breakdown was five permanent (same five) and six non-permanent members.

¹⁰ Conforti, 70. Shaw, 826, notes that the rules of procedure allow the Security Council President to declare a matter procedural if his decision is supported by nine members of the Council.

¹¹ Shaw, 827.

force if necessary. It further requires member states to assist in any operation undertaken by the Council under those auspices. Chapter VIII (Articles 52-54) allows the Security Council to delegate its aforementioned powers to a regional authority, and Chapter XII (Articles 75-85) allows for the establishment of trusteeships in cases where continuous supervision becomes necessary to prevent chronic breaches of the peace.¹² In sum, the UN Charter gives broad and comprehensive powers to the Security Council to investigate, prevent, and manage cases of armed conflict whenever they arise.¹³ With the structure of the UN in mind, we can proceed to an evaluation of the disposition of India's complaint.

B. The "India-Pakistan Question"

India made its complaint to the Security Council under Chapter VI of the Charter. The Indian complaint mentioned the activities of the Pathan tribesmen and alleged that Pakistan's actions in abetting the rebellion against the Maharaja were endangering international peace and security. India requested that the Security Council prevent "the Pakistan Government personnel, military and civil from participating in or assisting in the invasion of Jammu and Kashmir."¹⁴ It requested that the Security Council call upon Pakistani nationals "to desist from taking any part in the fighting" in Kashmir, and that Pakistan deny the Pathan tribesmen the use of Pakistani territory and supplies.¹⁵ This Indian position was based on the contention that the Maharaja's accession had unequivocally conferred sovereignty to India over the whole of Jammu and Kashmir. Yet India also expressed its commitment to a plebiscite to confirm the validity of that accession. According to India's proposal, the plebiscite would be held

¹² The UN Charter. In Louis B. Sohn, ed., *The Basic Documents of the United Nations*.

¹³ Technically this applies only to member states, as non-signatory nations cannot be affected by the terms of the UN Charter.

¹⁴ Agarwal, 59.

¹⁵ Ibid.

once Pakistan had “vacated its aggression,” in other words, once Pakistan had evacuated the portions of Jammu and Kashmir that it controlled.

Pakistan replied by denying that its actions in aiding the tribesmen were illegal, portraying the situation as one in which Pakistan was aiding a popular revolt against the oppressive regime of the Maharaja. Pakistan claimed that the Maharaja’s accession to India was invalid on the grounds that it was obtained via coercion, fraud and violence. Pakistan also raised the issue of the accessions of Junagadh and Hyderabad and asserted that India was involved in a massive land grab, making it the real aggressor.¹⁶ Pakistan also put forth a plebiscite proposal. Under Pakistan’s plan, the Security Council would set up a commission, which would arrange for a cease-fire, to be followed by the removal of all outside troops from the State of Jammu and Kashmir, whether Indian or Pakistani. A plebiscite would then be held under UN auspices.¹⁷ The Pakistani plan differed principally in its insistence that the plebiscite be conducted under international supervision; this was urged because it seemed likely that the Government of Jammu and Kashmir would use the restricted franchise established by its 1939 constitution. A vote taken under such restrictions would almost certainly have favoured India. India, however, was not eager to get the plebiscite under way until Pakistan-supported troops completely vacated the State of Jammu and Kashmir. Pakistan had cited the manner in which accession took place to justify its support of the rebellion against the Maharaja; likewise, it might cite a fraudulent plebiscite to justify an ongoing presence in Kashmir. Thus although the two states could agree that a plebiscite was the best way to resolve the dispute, the differences over how that vote would be taken were irreconcilable. The Security

¹⁶ Lamb, 165.

¹⁷ Ibid.

Council would therefore find it difficult to suggest a plebiscite proposal that would not favour one state over another.

The Security Council's first resolution with respect to the "India-Pakistan Question" asked India and Pakistan to take "all measures within their power" to improve the situation and to refrain from actions or statements that might aggravate it. The resolution also requested that India and Pakistan inform the Security Council immediately upon any "material change in the situation" which should occur.¹⁸ In two subsequent resolutions, the Security Council formed the United Nations Commission for India and Pakistan (UNCIP).¹⁹ UNCIP was authorised to investigate the situation on the ground, to help India and Pakistan bring about law and order in Kashmir, and to arrange for a plebiscite. A resolution of 21 April 1948 made some more specific recommendations. It recommended that UNCIP officials proceed directly to the subcontinent to facilitate the cooperation of the two governments; that Pakistan should be asked to procure the withdrawal of Pakistani fighters from Kashmir and desist from furnishing material aid to those men; and that India should be urged to reduce its forces greatly, to the minimum strength required for the maintenance of law and order. The Security Council also recommended that a coalition government should be installed in Kashmir and that the UN appoint a plebiscite administrator to supervise a vote on Kashmir's future.

On 13 August 1948, the UNCIP, after meeting with Indian and Pakistani leaders, produced a series of proposals. The first part of the resolution called for a cease-fire order to apply to all forces under the control of India and Pakistan in the Jammu and Kashmir at the earliest practical date.²⁰ The second part envisaged

¹⁸ Security Council resolution S/651, 17 January 1948.

¹⁹ S/654 & S/655, 20 January 1948 and 6 February 1948.

²⁰ S/1100, 13 August 1948.

conditions for the demilitarisation of the state. Demilitarisation, in the context of this resolution, meant the withdrawal of Pathan tribesmen and other Pakistani nationals who had entered Kashmir for the purpose of fighting in the civil war, the subsequent withdrawal of Indian forces, UNCIP stationing of observers where necessary, and a commitment by India to safeguard human and political rights.²¹ Finally, in the third part, the two governments were to affirm their wish that the status of Jammu and Kashmir should be determined in accordance with the will of the people.²²

Pakistan did not accept those provisions immediately. Instead, Pakistan requested clarification of certain points, which resulted in the promulgation of a catalogue of "Basic Principles for a Plebiscite."²³ Those principles included the notion that the accession of the Maharaja would have to be confirmed by a free and impartial plebiscite, and that that plebiscite would be held only after the UNCIP was satisfied that the cease-fire and truce agreements set forth in the resolution of 13 August had been carried out.²⁴ With the clarifications provided by the resolution of 11 December, UNCIP passed a final resolution of 5 January 1949. UNCIP then reported to the Security Council that India and Pakistan had accepted its mediation plan.²⁵ In accordance with the above resolutions, the Indian and Pakistani high commands instructed their forces to implement the cease-fire on 1 January 1949. The cease-fire line, with slight variations occasioned by the hostilities of 1965 and 1971, is today's LOC.

²¹ Agarwal, 77.

²² Geiger, 72.

²³ S/1196, 11 December 1948.

²⁴ Agarwal, 79.

²⁵ That is, the resolution of 13 August as clarified by that of 11 December.

C. The Legal Implications of the UNCIP Resolutions

The UNCIP resolutions established a regime for the peaceful settlement of the dispute, and those resolutions were accepted by India and Pakistan. The question emerges as to whether those resolutions became legally binding on the two countries. To answer this, an examination will be necessary of the legal mechanism by which those resolutions came into being, followed by a discussion of when and in what cases Security Council resolutions are binding.

The Security Council investigated the Kashmir situation by the powers accorded to it under Chapter VI of the Charter. Specifically, Article 35 allows member states to bring to the Security Council any dispute likely to endanger the maintenance of international peace and security.²⁶ Article 36 allows the Security Council to make “recommendations” for the alleviation of situations brought to its attention under Article 35. Chapter VI, however, provides for the “peaceful settlement” of disputes. Accordingly, the powers of the Security Council under Chapter VI are less clear than under Chapter VII, which allows for the use of force by the Security Council to restore peace after a breach thereof. The powers given to the Security Council under Chapter VI do not provide for the enforcement of Security Council recommendations. Thus the issue is not whether the UNCIP resolutions are enforceable under Chapter VII, but rather, whether international law imposes a legal obligation on states to follow recommendations for the peaceful settlement of disputes that are made under Chapter VI.

In the *Corfu Channel* case, the ICJ had the opportunity to consider whether a Chapter VI recommendation by the Security Council was binding. The case emerged from a dispute between the United Kingdom and Albania over the international status

²⁶ UN Charter, VI, 34-35

of waters in the Corfu Channel. Albania had attempted to prevent the passage of British naval vessels through the channel, first by firing on those ships from shore batteries, and later by laying mines across the main portion of the channel.²⁷ When two British ships were destroyed by mines in October 1946, the United Kingdom brought the case to the Security Council, which passed a resolution under Chapter VI (Article 36) requiring the United Kingdom and Albania to submit the dispute to the ICJ.²⁸ The United Kingdom unilaterally instituted proceedings before the ICJ, whose jurisdiction Albania challenged on the grounds that the Security Council resolution was not binding. Albania was subsequently judged to have acquiesced to the jurisdiction of the Court by participating in the merits phase of the proceedings. However, the question of the binding nature of a Security Council resolution was considered important enough to warrant separate consideration by some of the judges.²⁹

The United Kingdom, in refuting Albania's argument against the jurisdiction of the Court, suggested that Article 25 of the Charter, which requires member states to "accept and carry out the decisions of the Security Council," created a legal obligation for Albania to submit to ICJ jurisdiction.³⁰ The judges rejected the British contention, stating that the Security Council resolution could not be construed to create compulsory jurisdiction in this case.³¹ Specifically, the judges noted that any "recommendation" would necessarily be optional, and that recommendations of the Security Council were not "decisions" under Article 25. The conflict between the

²⁷ ICJ Reports 1948, 15.

²⁸ J. Mervyn Jones, "Corfu Channel Case," 35 *Grotius* 1948, 91.

²⁹ *Ibid.*, 93.

³⁰ Albania, although not a UN member in 1947-8, had agreed to participate in Security Council proceedings, and agreed to accept all the obligations of a UN member state for the purposes of those proceedings.

³¹ ICJ Reports 1948, 32.

obligation of member states to adhere to Security Council decisions under Article 25, and the recommendatory nature of resolutions under Chapter VI, can perhaps best be resolved by stating that resolutions made with the intention of binding the parties are binding, while others are not.³² Consequently, most Chapter VI resolutions are non-binding.

In 1971 the ICJ faced head-on the question of whether Article 25 of the Charter applies only to decisions taken by the Security Council under Chapter VII. The Security Council had exercised its right under Article 96 to request an advisory opinion from the ICJ on the legal status of the South African administration of Namibia. Namibia had been administered by South Africa as the Mandate of South-West Africa; the mandate was subsequently revoked by the General Assembly, and a Security Council resolution declared illegal the continued occupation of Namibia by South Africa.³³ South Africa refused to comply with the resolution, asserting that resolutions not made under Chapter VII powers are not binding on member states. It is not clear under which Charter provisions the Security Council resolutions were made in this case; what is certain is that they were not made under Chapter VII.³⁴

Two schools of thought emerged in the course of the consideration of the case. One essentially reiterated the arguments of the United Kingdom in the *Corfu Channel* case, namely, that any resolution of the Security Council is a type of decision; Article 25 thus requires member states to carry out Security Council resolutions regardless of the resolution's source in the Charter. Advocates of that line of reasoning pointed out that there is no exemption under Article 25 for Chapter VI resolutions. Moreover, Article 25 stands quite apart from Chapters VI and VII: if Article 25 was intended to

³² Hussain, 183, fn. 11.

³³ Rosalyn Higgins, "The Advisory Opinion on Namibia: Which UN Resolutions Are Binding under Article 25?" 21 ICLQ 1972, 271-274.

³⁴ *Ibid.*, 276. The ICJ ultimately held that the resolutions were made under Article 24 of the Charter.

apply only to Chapter VII decisions, then it would have been included under that subheading. Finally, Chapter VII allows for the use of force to ensure compliance with resolutions passed under that chapter. Therefore, a mechanism already exists to render Chapter VII resolutions binding, and Article 25, if applicable only to Chapter VII, would be entirely superfluous.

The opposite view simply held that only Chapter VII resolutions are binding. It was further submitted, following the logic of the judges in the *Corfu Channel* case, that Security Council resolutions passed under Article VI are, by definition, mere recommendations.³⁵ In the event, the Court took a contextual approach, holding that the Namibia resolutions were made under Article 24 of the Charter, which accords the Security Council primary responsibility for the maintenance of international peace and security. The Court went on to state that Article 25 does not apply only to Chapter VII resolutions, and that Security Council resolutions made under other chapters may indeed be binding if an analysis of the language of those resolutions reveals that they were intended to be so.³⁶

As to the UNCIP resolutions in question, a look at the relevant language in those resolutions will allow an evaluation of them according to the ICJ's *Namibia* framework. The resolutions of 13 August 1948 and 5 January 1949 outline a specific process for settling the dispute. Those provisions are discussed above; their central components are cease-fire, demilitarisation and the plebiscite. The resolutions, however, are framed in this manner: the first (13 August) resolves "to submit simultaneously to the Governments of India and Pakistan" proposals for a final

³⁵ The UK seems to have learned the lessons of *Corfu Channel* well—it led the charge against an inclusive interpretation of Article 25 in the *Namibia* case. Higgins, 279.

³⁶ 1971 ICJ Reports, 52-53.

settlement of the situation.³⁷ The second (5 January) merely acknowledges receipt of the “acceptance” by India and Pakistan of the resolution of 13 August along with certain supplementary provisions. Nowhere in either resolution is there any language suggesting that the Security Council had itself decided that the proposals contained therein were to be implemented. The language of the resolutions is consistent with the spirit of Chapter VI, which establishes the Security Council as an international mediator, investigating disputes and suggesting methods for their pacific settlement. The most imperative language found in Chapter VI is that of Article 36, which states that legal disputes as a general rule should be referred to the ICJ; however, even that language has been found to be non-binding.³⁸ Moreover, according to Rosalyn Higgins, an informal rule “now endowed with the status of law” has emerged in the drafting of Security Council resolutions such that Chapter VII resolutions are binding, while those made under Chapter VI are not.³⁹ Accordingly, it is doubtful that India and Pakistan would be required under Article 25 to carry out the UNCIP resolutions.

That is not to say, however, that no legal obligation whatsoever derived from India and Pakistan’s acceptance of the UNCIP resolutions. First, that acceptance could be said to have created a treaty between the two countries: a treaty is defined as an international agreement concluded between states in written form and governed by international law.⁴⁰ Of course, an obligation may also be created simply by unilateral declaration of an intention to be bound. Both India and Pakistan asserted, in the course of debates before the Security Council, that an obligation to settle the Kashmir dispute could be based on the UNCIP resolutions that they had accepted. Therefore, one could say that India and Pakistan were legally bound to follow the terms of the

³⁷ S/1100. *Italics added.*

³⁸ That is, by the judges in *Corfu Channel*.

³⁹ Higgins, 283.

⁴⁰ Vienna Convention, Article 2.

settlement envisaged by the UNCIP resolutions, not because those resolutions themselves were binding, but rather because India and Pakistan had agreed to be bound by them.

D. The Failure of UN Involvement

Although the UNCIP resolutions created a legal obligation for India and Pakistan to pursue a solution to the Kashmir dispute in a specific manner, execution of that obligation proved problematic in two key areas—demilitarisation and the plebiscite. From Pakistan's point of view, India had committed to confirming the accession of the Maharaja by plebiscite, and its continued refusal to do so constituted a breach of the UNCIP agreement. India, on the other hand, stressed the demilitarisation aspect of the agreement, pointing out that the plebiscite could not be conducted until Pakistan secured the removal of all troops from within the boundaries of the State of Jammu and Kashmir. The UN maintained its efforts to bring about a mediated settlement in Kashmir, despatching various eminent international figures to the subcontinent in an effort to bring the two sides closer through direct talks intended to bring about further agreements on how to implement the UNCIP resolutions. No such agreements were ever made; however, a brief sketch of the work of those mediators will highlight the development of the legal positions of India and Pakistan in the period 1949-1965.

The first UN mediator was Security Council President A.G.L. McNaughton of Canada, who began work in December 1949. McNaughton proposed that the entirety of Kashmir (including the Northern Areas) should remain under the control of local authorities in the run-up to the plebiscite, subject to UN supervision. The McNaughton proposals also made a distinction between Azad forces and Pakistani regular forces for the purposes of demilitarisation. India rejected these proposals on

the grounds that they legitimated the concept of Azad Kashmir and did not require the evacuation of Azad forces.⁴¹

Early 1950 saw the appointment by the Security Council of Sir Owen Dixon of Australia as UN Representative in India. Sir Owen, after a thorough tour of the region in that same year, produced proposals that were most notable for their advancement of the notion of “regional plebiscites.” He proposed separate plebiscites for each of four regions—the Northern Areas, Jammu, Ladakh, and the Vale of Kashmir—thus allowing for the State of Jammu and Kashmir to be effectively partitioned between India and Pakistan. The fate of the first three regions would be predictable; only in the Vale of Kashmir would any fair vote be close. Contention as to the merits of the Dixon proposals therefore centred on the question of a plebiscite for the Vale of Kashmir, which revealed a gap between Indian and Pakistani notions of what form any plebiscite should take. Pakistan asserted that the plebiscite should be administered by the UN, in order to neutralise the influence of India or the pro-Indian Jammu and Kashmir government of Sheikh Abdullah. Pakistan also contended that the plebiscite should decide the fate of Kashmir as a whole. India conversely maintained that no plebiscite could take place until the evacuation of Azad areas, the same position it took with respect to the plebiscite component of the UNCIP resolutions. Dixon himself ultimately concluded that the LOC should become the international boundary, but the UN persevered in its efforts to bring about a mediated settlement in accordance with its resolutions.

In March 1951, the Security Council appointed Frank P. Graham, a former United States Senator from North Carolina, to succeed Sir Owen Dixon. Graham also toured the region, studied the issue of the plebiscite and, like his Australian

⁴¹ Lamb, 170.

predecessor, produced written reports of the highest literary standard. However, Graham was no more successful than Dixon. He encountered the same obstacles to settlement, namely, Pakistan's insistence that a plebiscite be supervised internationally and India's refusal to contemplate a plebiscite before Pakistan "vacated its aggression."⁴² Graham's lack of success prompted the Security Council to send Gunnar Jarring of Sweden to investigate. Jarring reported that he had been no more successful than Graham. The Security Council's resolution on the Jarring report requested that India and Pakistan avoid attempts to settle the matter unilaterally; it also recommended that Graham be sent back to the subcontinent to attempt a mediated settlement. Graham once again returned indicating that no significant progress had been achieved. Graham's efforts represent the last attempt by the Security Council to resolve the dispute before serious fighting broke out again in 1965.

E. A Change in Circumstances?

As the UNCIP resolutions were never implemented, the question arises whether circumstances in the region had changed such that the agreement between India and Pakistan to resolve the dispute according to the UNCIP resolutions became invalid. On 5 February 1964, Krishna Menon, the Indian representative to the UN, indicated that India no longer felt bound by the UNCIP resolutions of 13 August 1948 and 5 January 1949.⁴³ India contended that the basis for a plebiscite had disappeared because Pakistan had refused to remove its forces from the Azad and Northern Areas. Moreover, Pakistan's membership in collective defence arrangements with the United States (SEATO and CENTO) constituted a fundamental change in the strategic situation in Kashmir, and India had accepted the UNCIP resolutions under the

⁴² Lamb, 176.

⁴³ Geiger, 73.

circumstances that had prevailed in 1949.⁴⁴ Finally, India argued that by the incorporation of the State of Jammu and Kashmir into the Indian Union as a constituent state, the pledge to hold a plebiscite became irrelevant: Kashmir was now an integral part of the Indian Union and a vote expressing a desire by Kashmiris to join Pakistan would be of no legal consequence.⁴⁵

Those objections by India raised will be critically evaluated below; first an exploration will be necessary of the general principle by which a state may terminate a treaty on the ground of changed circumstances. One of the most basic rules of international law is that of *pacta sunt servanda*, which holds that treaty obligations must always be honoured. If states were allowed to alter or abrogate treaties at will, then the type of negotiation necessary for the maintenance of stability would not be possible. States simply could not trust other states to honour treaty obligations, and the state system would cease to function. It is possible, however, for circumstances to change so radically that the assumptions on which a treaty were predicated are no longer valid, giving rise to a situation in which the continued application of the treaty may be both contrary to the original expectations of the parties and an intolerable burden on at least one party.⁴⁶ In such cases, states may invoke the principle of *rebus sic stantibus* as an exception to *pacta sunt servanda* and terminate the treaty.

The principle of *rebus sic stantibus*, however, would provide such a clear avenue for abuse that its application must be severely restricted to cases in which the original intent of the contracting parties has been frustrated.⁴⁷ The traditional view is that it is applicable under conditions which would have negated implementation of the

⁴⁴ Gururaj Rao, *The Legal Aspects of the Kashmir Problem*, 355-6 fn. 261.

⁴⁵ Agarwal, 144-5.

⁴⁶ Oliver J. Lissitzyn, "Treaties and Changed Circumstances (Rebus Sic Stantibus)" 61 AJIL (1967), 897-8.

⁴⁷ Henkin et al, 516.

treaty had they prevailed at the time of the treaty's negotiation.⁴⁸ As such, the principle is analogous to that of "implied terms" in English municipal contract law: the principle attempts not to defeat the intention of the parties, but to fulfil it.⁴⁹ It seeks a reasonable state of affairs by releasing states from obsolete treaty obligations, as contrasted with the unreasonable situation that would result from literal adherence to an obsolete treaty's express provisions.⁵⁰ It should be emphasised that the trend has been toward a very restrictive interpretation of *rebus sic stantibus*, and today it is agreed that the principle is to be applied only in the most exceptional circumstances. Revision is the preferred method for bringing an old treaty up to date; application of *rebus sic stantibus* terminates the treaty.⁵¹

Article 62 of the Vienna Convention provides a codification of customary international law as it pertains to *rebus sic stantibus*. Article 62 states that a "fundamental change of circumstances" that was unknown and unforeseen by the parties may invalidate a treaty if "the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty" and if the effect of continued enforcement of the treaty would be "radically to transform the extent of obligations still to be performed under the treaty."⁵² Judicial application of the principle has been rare. Tribunals have generally avoided giving it effect, preferring instead to make their determinations on other legal grounds, or finding that although circumstances might have changed, those circumstances were not the bases on which

⁴⁸ Charles Cheney Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, 2ed, 1945, p. 1524.

⁴⁹ The "implied term" is that the validity of the contract is subject to the conditions that prevailed when it was executed.

⁵⁰ J.L. Brierty, *The Law of Nations*, 336-7. Waldock 6th edition, 1963.

⁵¹ Michael Akehurst, "Treaties, Termination." *EPIL*, 989.

⁵² Vienna Convention, Article 62.

the parties entered into the treaty.⁵³ Yet tribunals have had occasion to consider the merits of *rebus sic stantibus*; a look at two of those decisions should shed some light on India's claim that its adherence to the UNCIP resolutions was no longer required due to a fundamental change in circumstances.

In the case of the *Free Zones of Upper Savoy and Gex*, the Permanent Court of International Justice considered the question of whether certain Franco-Swiss treaties concluded after the Napoleonic Wars were still valid.⁵⁴ According to those treaties, free zones benefiting the Canton of Geneva were established within French territory. France challenged the continued existence of the free zones on the grounds that the Treaty of Versailles, ending World War I, had brought about conditions that were no longer conducive to the maintenance of the zones. France also argued that the consolidation of the Confederation Helvétique (Switzerland) over the course of the nineteenth century had changed the legal status of the Canton of Geneva thereby invalidating the original treaties.⁵⁵ The Court ruled that as France's case failed on the facts,⁵⁶ an interpretation of *rebus sic stantibus* would not be necessary; however, the Court went on to note that circumstances alleged by France to have changed were not those on which the treaty was based, implying that the change in circumstances must relate strictly to the treaty in question.⁵⁷

The ICJ gave more thorough consideration to the principle of *rebus sic stantibus* in the *Fisheries Jurisdiction* case.⁵⁸ The case was brought before the ICJ as a result of an exchange of notes between the UK and Iceland in 1961, according to

⁵³ Henkin, 519.

⁵⁴ PCIJ Series C, No.17, Vol. 1 (1932).

⁵⁵ Gyorgy Haraszti, "Treaties and Fundamental Change of Circumstances," HR 146 1975 III, p. 39-40.

⁵⁶ Switzerland did not sign the Treaty of Versailles, nor had France raised the issue of Geneva's legal status within a sufficient amount of time.

⁵⁷ Hussain, 200.

⁵⁸ ICJ Reports 1973, 3. The Fisheries Jurisdiction Case (UK v. Iceland).

which the UK recognised Iceland's claim of a twelve-mile exclusive fisheries zone in exchange for a promise by Iceland that it would submit any future claims in excess of twelve miles to the ICJ for arbitration. In 1972 Iceland extended its claim to fifty miles, prompting the UK to bring the ICJ action. Iceland denied that the exchange of notes established ICJ jurisdiction, alleging that improvements in fishing techniques since 1961 had made it possible for British trawlers to decimate stocks in the waters adjacent to Iceland, and that international legal opinion had become more receptive to extensions of exclusive fishing zones beyond twelve miles. The Court declined to consider the facts, focussing instead on the question of jurisdiction as established by the exchange of notes. Effectively construing Article 62, the Court declared that the change in circumstances, while relevant to the merits of the case, did not relate to the basis on which the UK and Iceland had agreed to ICJ jurisdiction. Moreover, although circumstances had changed, they did not result in a radical transformation of the obligation created by the original agreement, namely, to submit disputes to the ICJ.⁵⁹ Thus the ICJ indicated the framework under which *rebus sic stantibus* claims would be adjudicated. With that in mind, we can now proceed to an evaluation of India's claims of changed circumstances.

First, India contended that it was no longer bound by its pledge to a plebiscite in accordance with the UNCIP resolutions because Pakistan had failed to "vacate its aggression" by evacuating the Azad and Northern Areas. The UNCIP resolutions, *inter alia*, call for the withdrawal of Pakistan Army troops as well as persons who entered the State of Jammu and Kashmir for the purpose of fighting.⁶⁰ The resolutions also state that once the Pakistan-controlled areas were evacuated, they would continue

⁵⁹ Ibid.

⁶⁰ S/1100, Part II(A).

to be administered by local authorities. It is clear from the record not only that Pakistan did not withdraw the aforementioned personnel, but the distinction between them and the local authorities was a fine one indeed.⁶¹ Accordingly it must have been difficult to determine the precise extent of Pakistan's compliance, but the issue is whether Pakistan's failure to comply would have amounted to a fundamental change of circumstances such that India was no longer bound by the UNCIP resolutions.

With respect to the failure of Pakistan to evacuate the areas it controlled, India in fact alleged that circumstances had remained the same. Such circumstances could probably be cited to justify India's temporary non-performance of its obligations, as Article 60(2) of the Vienna Convention allows a party to a multilateral treaty that is specially affected by a breach of that treaty to suspend operation of the treaty between itself and the defaulting state.⁶² However, those circumstances would probably not result in complete termination of the obligation. In the *Tacna-Arica* arbitration, for example, the arbitrator held that an agreement to hold a plebiscite in former Peruvian territory occupied by Chile would not be terminated by allegations of administrative abuses unless it could be shown that the consequence of those abuses operated to frustrate the purpose of the agreement.⁶³ Pakistan's withdrawal was required by the UNCIP resolutions, but Pakistan's continued failure to withdraw its forces did not suddenly result in a frustration of the purpose of those resolutions. Moreover, India's obligations under the UNCIP resolutions were multilateral ones, made before the UN. Other nations therefore had an interest, technically speaking at least, in seeing those resolutions implemented.⁶⁴ Therefore, the position of Pakistan Army and Azad troops

⁶¹ Lamb, 172.

⁶² Vienna Convention, Article 60.

⁶³ 2 RIAA, 921 (1925).

⁶⁴ Shaw, 668.

probably does not support India's claim that its obligations under the UNCIP resolutions had been terminated.

India also alleged a fundamental change in circumstances as a result of Pakistan's entry into a military alliance with the United States in the form of membership in SEATO and CENTO.⁶⁵ According to this view, Pakistan's entry into those alliances had created a security situation in Kashmir that was fundamentally different from the one which prevailed at the time that India accepted the UNCIP resolutions. This contention, however, fails to be persuasive. Although the balance of power in the subcontinent might have changed with the new alliances, the 1949 balance of power was not the basis for India's agreement to subject its possession of Kashmir to a plebiscite. Pakistan's new strategic partnerships also did not result in a radical transformation of India's obligations with respect to the UNCIP resolutions; confirmation of accession by plebiscite remained the central obligation. As such, it is difficult to substantiate India's claim of a fundamental change in circumstances as a result of Pakistani membership in SEATO and CENTO.

India's final argument for a fundamental change in circumstances bears a closer examination. India argued that the State of Jammu and Kashmir had become incorporated into India by virtue of the Maharaja's accession, and that Kashmir had become an integral part of the Indian Union through the acceptance of the Indian constitution by the Jammu and Kashmir assembly. The implications of those developments, according to India, were twofold: First, acceptance of the constitution by the Jammu and Kashmir assembly meant that the territory had become fully integrated into India, precluding the possibility that India could relinquish Kashmir

⁶⁵ This alliance triggered the Cold-War stagnation of the Security Council, characterised by consistent Soviet efforts to prevent an international disposition of the dispute.

after an internationally supervised plebiscite. Thus the plebiscite was unnecessary as its results in any case would be inconsequential.⁶⁶ Second, the assembly of Kashmir represented the will of the Kashmiri people, and the assembly's vote to integrate with India constituted a reference to that will. As the people's wishes had been ascertained, there was no need to put the question to them again via plebiscite.⁶⁷ Each of those contentions will be evaluated in turn.

Princely states joined India first by acceding to Delhi on the subjects of foreign affairs, communications and defence; those states would then complete integration by ratifying the Indian constitution once it had been framed. The Indian constitution emerged in January 1950 and conferred a special status on Jammu and Kashmir. While other states joined the Indian Union as Part (B) states,⁶⁸ Article 370 of the Indian constitution established a position of greater autonomy for Jammu and Kashmir within the union by limiting the power of Delhi to those subjects on which the Maharaja had acceded.⁶⁹ It left residual power in the hands of a duly constituted Kashmir assembly, which was of course left free to cede additional powers to Delhi through mutual arrangement.⁷⁰ That assembly was convened in October 1951, and in 1957 the Jammu and Kashmir Constitution came into force. Establishing the structure of state government in accordance with Article 370, the Jammu and Kashmir Constitution contained provisions establishing the jurisdiction of the Indian Supreme Court and the Indian Comptroller and Auditor-General.⁷¹ By establishing its own state constitution according to the terms of the Indian Constitution, the State of Jammu and

⁶⁶ Paras Diwan, "Kashmir and the Indian Union: The Legal Position," 346.

⁶⁷ Lamb, 192-3.

⁶⁸ Part (B) states were the former princely states. Part (A) states were the former provinces of British India.

⁶⁹ According to Lamb, Article 370 was essentially the work of Sheikh Abdullah, the pro-Indian Union Muslim leader of Kashmir installed by India after accession. Abdullah wanted independence for Kashmir and sought principally to avoid union with Pakistan.

⁷⁰ Constitution of India, Article 370.

⁷¹ Lamb, 203.

Kashmir became fully integrated into the Indian Union. Unilateral secession is prohibited by the Indian Constitution; likewise, the Indian Union may not expel a member state against its will. Departures from the union by states may be accomplished only with the consent of both the state and the union.⁷²

It must be determined whether the legal position of Kashmir within the Indian Union after 1957 constituted a change in circumstances significant enough to relieve India of its obligations under the UNCIP resolutions. It is true that the Indian Union, prior to 1957, had no obligation under its own constitution to maintain Kashmir as part of its territory, and that such an obligation may have arisen as a result of full incorporation into that union by the Jammu and Kashmir assembly. However, the international status of Kashmir would not necessarily have changed by such means; India of course bases its claim to Kashmir on the accession of the Maharaja. Moreover, it is an established principle of international law that a state may not cite a conflict with its municipal law as a justification for nullifying a treaty.⁷³ In the *Polish Nationals* case, the PCIJ noted that although application of a state's constitution is an internal matter, a state "cannot adduce as against another State its own Constitution with a view to evading obligations."⁷⁴ Finally, Article 27 of the Vienna Convention provides that a state "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."⁷⁵ Although India's commitment under the UNCIP resolutions to subject the status of Kashmir to a plebiscite may be at variance with provisions of the Indian Constitution, those provisions may not be cited to support the proposition that India is no longer bound by the UNCIP resolutions.

⁷² Diwan, 346.

⁷³ Shaw, 662.

⁷⁴ Hussain, 210-211; PCIJ Series A/B, No. 44, p.24 (1931).

⁷⁵ Vienna Convention, Article 27.

A related notion is that India was no longer bound to its plebiscite commitment because the duly constituted assembly of Jammu and Kashmir had expressed the will of the people by ratifying a constitution that integrated the state fully within the Indian Union. In evaluating this contention it should first be noted that only about five percent of the potential electorate actually participated in elections for representatives to the Constituent Assembly. Sheikh Abdullah's National Conference party returned a significant number of delegates who had run unopposed.⁷⁶ While the manner in which the Constituent Assembly was elected is not subject to review here, the assembly's actions cannot really be seen as an expression of the people's will with respect to the question of the future status of the territory. More significantly, the resolution of 5 January 1949 calls for a plebiscite to be administered by the UN, and the resolution makes certain other specific provisions to ensure that the vote is free and impartial.⁷⁷ Therefore, an act by the Constituent Assembly cannot be a legally sufficient substitute for the plebiscite required by the UNCIP resolutions.

India's claims of changed circumstances made before the Security Council in 1964 cannot be upheld as a basis for vacating India's obligation to act in accordance with UNCIP resolutions. Although both India and Pakistan found it difficult to adhere to the provisions of the resolutions, that fact could not terminate the existence of obligations stemming from them. United Nations involvement since 1965 has been limited to observation of the cease-fire line; the outbreak of war in that year marks the end of UN efforts to bring about a mediated settlement.

⁷⁶ Lamb, 192.

⁷⁷ S/1196, 5 January 1949.

F. War and Peace: Tashkent and Simla

In 1965 and again in 1971, India and Pakistan went to war. Neither conflict began in Kashmir, but both brought fighting to the state and raised the possibility that the Kashmir dispute would be settled on the battlefield. In the event, neither side was able to gain much of a territorial advantage in Kashmir: the position of the LOC essentially remained unchanged. The two Indo-Pakistani wars were significant, however, because they underlined the volatility of the Kashmir dispute, and because bilateral negotiations at the end of the 1971 war resulted in an agreement that changed the legal complexion of the dispute.

The Indo-Pakistani war of 1965 began as a border dispute over the Rann of Kutch, a strange topographical feature at the southern end of the border between India and Pakistan. Suitable only for limited grazing during the dry season, the Rann is flooded with several feet of salt water during monsoon. Historically the Rann was part of the princely state of Kutch, which acceded to India in 1947. India thus claimed the entire Rann, which posed no real problems during the dry season, but during monsoon India claimed the western shore of the Rann and placed Indian military personnel within easy striking distance of Karachi.⁷⁸ Action in the Rann of Kutch phase of the war was well contained, ending with a settlement mediated by Britain which called for the dispute over the Rann to be submitted to international arbitration. The conflict flared up again in Kashmir later that year as Pakistan launched Operation Gibraltar, an incursion of trained guerrillas supported by the Pakistan Army whose objective was to foment rebellion in Indian-held Kashmir. There are two important distinctions to make between 1947 and 1965 with respect to the legality of Pakistani actions. First, in 1947, the Kashmiri civil war was already raging. Second, in 1965 it is clear that the

⁷⁸ Lamb, 255.

incursions were part of official Pakistani policy.⁷⁹ As discussed in Chapter Two, the use of force by nations may be justified on the grounds of self-defence, whether individual or collective. Due to conditions in Kashmir in 1947-8, much of the Pakistani action in the first conflict could be explained using the vocabulary of self-defence. However, the action in 1965 lacks legal justification, as Pakistani guerrillas were deployed in the first instance, before any fighting had begun. India responded with “defensive” operations designed to close the routes of those guerrillas, and the conflict quickly widened into a general war.⁸⁰

The international community sought a way to end the war as soon as possible. The United States and Britain, the two principal arms suppliers to Pakistan and India respectively, instituted embargoes on all materiel. The UN Secretary General attempted to negotiate a cease-fire; on 20 September 1965 the Security Council passed a resolution demanding a cease-fire within three days. India and Pakistan agreed to that cease fire, and then signed a treaty brokered by the Soviet Union at Tashkent. The Tashkent accord did not offer a solution to the Kashmir dispute; it merely included an item in which India and Pakistan agreed to withdraw their forces behind the cease-fire line established in 1949. The agreement attempted little more with respect to Kashmir than a restoration of the *status quo ante* and a cessation of hostilities. Yet with the primary issues in Kashmir unresolved, the dispute would continue to simmer.

The East Pakistan secession movement of 1970 once again brought the Kashmir dispute to the boiling point. India supported East Pakistan (now Bangladesh) in its successful bid for independence, eventually supporting the rebellion there with

⁷⁹ Lamb, 258.

⁸⁰ Action included raids by the Indian Air Force on Pakistan, Pakistani naval bombardment of the Indian radar station of Dwarka, and an unsuccessful Indian siege of Lahore.

regular ground forces in late 1971. Pakistan retaliated with an invasion of India from the west, and the third Indo-Pakistani war was under way.⁸¹ As with the second war, Pakistan fared poorly but did not suffer any significant territorial losses in Kashmir.⁸² Bilateral talks brought the end of the 1971 war, and those negotiations culminated in the 1972 Simla Agreement, which provided, *inter alia*, that India and Pakistan would settle all future differences through bilateral negotiations.⁸³ The question thus arises whether the Simla Agreement relieved India of its obligation to hold a plebiscite in Kashmir, as that obligation stems from a multilateral agreement.

Advocates of the Indian case have asserted that the Simla Agreement abrogates the terms of the UNCIP resolutions because the Simla Agreement establishes a regime for the settlement of the Kashmir dispute that is incompatible with the terms of the UNCIP resolutions.⁸⁴ As the UNCIP resolutions preceded the Simla Agreement, the resolutions are thereby invalid. This view finds some support in the Vienna Convention, where Articles 30 and 59 restate the principle of customary international law that a later treaty takes precedence over an earlier one.⁸⁵ Supporters of Pakistan's case point to a provision in the Simla Agreement in which the two sides pledge that the principles and purposes of the UN Charter will govern bilateral relations.⁸⁶ Furthermore, they argue that Article 103 of the UN Charter requires member states to give their obligations under the Charter precedence over the terms of any other international agreement in the event of a conflict between the two.

⁸¹ Lamb, 295.

⁸² Pakistan lost 280 square miles of territory in Kashmir.

⁸³ Simla Agreement, Para I (ii): "That the two countries are resolved to settle their differences by peaceful means mutually agreed upon between them... [and] neither side shall unilaterally alter the situation..."

⁸⁴ See Hussain, 185-190.

⁸⁵ Shaw, 650-651.

⁸⁶ Simla Agreement, I (i).

In evaluating the propositions outlined above, the legal mechanisms by which the relevant agreements came into force should be addressed first. The UNCIP resolutions became operative upon declarations by India and Pakistan of their intention to be bound by those resolutions. As the Indian and Pakistani declarations were made before the UN, the obligation to carry out the terms of the resolutions became a multilateral obligation. Therefore, even if India and Pakistan's obligations to each other changed as a result of their conclusion of the Simla Agreement, their obligations to the other member states of the UN to abide by the terms of the UNCIP resolutions would remain in force until abrogated by the UN. The Simla Agreement, as a bilateral treaty, could only affect obligations owed by India and Pakistan to each other. Thus it is submitted that Article 103 does not apply in the present matter because India and Pakistan are bound by the UNCIP resolutions through their unilateral declarations, not by a specific provision of the Charter. Finally, it may be asked whether the Simla Agreement erects a legal barrier to UN involvement in the Kashmir dispute by requiring that all subsequent proposals for a solution to the dispute emanate from either India or Pakistan.⁸⁷ This query must be answered in the negative, as Article 103 prevents nations from citing the existence of a bilateral accord as justification for avoiding obligations under the UN Charter. One such obligation might arise if the UN should decide that Kashmir is entitled to self-determination. India and Pakistan's interests in Kashmir partially overlap with respect to the issue of self-determination, in that neither state wishes for Kashmir to become independent. The UN could demand a settlement in Kashmir through application of the principle of self-determination. It is to that principle that our discussion now turns.

⁸⁷ Hussain, 223, fn. 31. Hussain addresses the issue of whether Simla undermines the power of the UN to grant self-determination to Kashmir (190-196).

CHAPTER FOUR: SELF-DETERMINATION

Notions of self-determination have figured prominently in the Kashmir dispute since the dispute began. The partition of the British Indian Empire reflected the desire of Muslims to have a nation separate from Hindu-dominated India; the Indian Independence Act ostensibly allowed princely states to choose between accession to India or Pakistan and independence; Lord Mountbatten and subsequent Indian leaders promised to refer the accession of Kashmir to a popular referendum; and efforts by the UN have focussed on creating conditions favourable to a plebiscite with a view toward achieving a final resolution of the dispute via the ballot box. The question of self-determination in Kashmir has been further complicated by the demographics of the State of Jammu and Kashmir, which led Sir Owen Dixon among others to suggest that a partition of Kashmir itself may be necessary. Such a suggestion raises the fundamental question of what territory is actually in dispute and what choices should be given to the people of those areas.

This chapter will consider the relevance of the principle of self-determination to the Kashmir dispute. Self-determination, which began as a rather simple moral principle, has evolved into a complex legal one. Accordingly, a discussion of the historical evolution of the principle will be necessary to arrive at a functional definition of the principle in international law. That discussion will be followed by an examination of self-determination as applied in the modern era, which will help to elucidate the principle further through examples provided by arbitral awards and state practice. Lastly, an attempt will be made to apply the principle to the Kashmir dispute, in light of the theoretical and practical framework established in the first part of this chapter.

A. Self-Determination: The Historical Background

Scholars trace the principle of self-determination to the late eighteenth century, when it was first articulated in the American Revolution and in revolutionary France¹. The American Declaration of Independence (1776) advanced the notions that government must be politically accountable to the people that it governs and that the people may create a new government. Thus one of the “revolutionary” principles of American government is that the government belongs to the people, a departure from the prevailing legal order of the eighteenth century, which held that all people were subjects of the head of state. Revolutionary France likewise rejected the *ancien regime* model of sovereignty and asserted that France could annex territory if the inhabitants of that territory should vote to become part of France, and furthermore, that any territorial annexations by France should be confirmed by plebiscite. But principles of popular sovereignty soon came into conflict with political reality, foreshadowing today’s conflict between guaranteeing self-determination and preserving the territorial integrity of states. France, for example, settled on a policy of admitting the result of an annexation plebiscite only when the vote was for union with France; it annexed other areas by force. In the United States, the secession of the southern states in 1861 necessitated a substantial qualification of the arguments of 1776. Both the American and French doctrines, however, established that the wishes of the people could be of consequence when determining sovereignty.²

Such concepts of self-determination would arrive on the international scene by the end of World War I, especially with respect to Woodrow Wilson’s plan for the disposition of lands previously possessed by the Central Powers, as well as with the

¹ Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, 11; Geiger, “Self-Determination,” *EPIL*, 364.

² Cassese, 13.

emergence of the Soviet state.³ In the case of the latter, Soviet doctrine championed the right of peoples to secede from “imperial” states in order to form socialist republics. The Soviet conception of self-determination was designed principally as a means of furthering socialism in particular as opposed to popular sovereignty in general; however, Soviet insistence on the right of colonised peoples to secede from an imperial power formed the basis for the anti-colonialism inherent in the modern doctrine of self-determination.⁴ Wilsonian self-determination, crystallised in Wilson’s famous Fourteen Points, championed popular sovereignty as the only just basis for redrawing the map of Central Europe after World War I, yet application of the principle was very limited. Wilson’s view of self-determination was reflected in certain plebiscites held after World War I,⁵ but the principle was not incorporated into the League of Nations Charter, nor would its application trump the territorial prerogatives of the victorious Allies, with their extensive colonial possessions. Thus self-determination remained a selectively applied political principle that had yet to be enshrined in law.

Self-determination as a legal principle was considered for the first time in the *Aaland Islands* case (1920), in which the ethnically Swedish population of the islands sought secession from Finland and union with Sweden.⁶ Sweden argued for an application of the principle of self-determination; Finland countered by asserting that international law had no jurisdiction in the matter.⁷ The League of Nations appointed a tribunal to investigate the merits of the Swedish claim, and it ultimately decided that self-determination was a political principle and not an international legal norm. The

³ Geiger, 364.

⁴ Cassesse, 19.

⁵ Plebiscites were held in Upper Silesia, the Saarland, part of East Prussia and Northern Schleswig.

⁶ 1920 LNOJ Spec. Supp. No. 3.

⁷ Halperin et al., *Self-Determination in the New World Order*, 19-20.

tribunal did, however, impose a settlement on Finland in which Finland promised to guarantee a degree of autonomy to the islanders. The tribunal pointed out that its involvement had been justified and necessitated by the chronic instability of Finland, as opposed to the international rights of the islanders to self-government. Yet it cited with approval the notion that the rights of ethnic minorities, if totally abused by a sovereign government, may require international protection—a statement that approximates modern notions of self-determination.⁸

Self-determination emerged as a true legal principle during the drafting of the United Nations Charter. Article 1(2) of the Charter states that one of the purposes of the UN is to “develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”; in Article 55 the UN membership pledges to promote conditions favourable to the principles of “equal rights and self-determination of peoples”; Articles 73 and 74 envisage self-government for all “non-self governing” (trust) territories, and Article 76 states that UN trusteeships are to be seen as a step on the road to self-government.⁹

Yet the relevant language in the UN Charter appears to be more hortatory than mandatory.¹⁰ Certain objections were raised to the principle of self-determination during the Charter’s drafting. For example, a broad application of self-determination could be seen as creating an international right of secession, which would undermine the state system on which the UN is founded. Moreover, Germany’s behaviour during World War II demonstrated that intervention on behalf of “oppressed minorities” could merely be a legal fig leaf covering naked territorial aggression, as was the case

⁸ Cassese, 30-31.

⁹ UN Charter.

¹⁰ Ian Brownlie, *Principles of Public International Law*, 599. Brownlie writes that until recently the majority of Western jurists “assumed or asserted that the principle had no legal content, being an ill-defined concept of policy and morality.”

with the German “liberation” of Polish and Czech areas with large German-speaking populations. Accordingly, the language of Article 2 of the Charter places certain limitations on the concept of self-determination as expressed in other areas of the Charter. Article 2(1) states that the UN is based on the “principle of the sovereign equality of all its members,” and Article 2(7) provides that “nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state, or require the members to submit such matters to settlement under the present Charter.”

As such there is considerable ambiguity in the Charter on the question of an international right to self-determination. For example, Articles 1 and 55 champion self-determination and equal rights for “all peoples.” But it is doubtful that this provision gives all of the world’s peoples a legal personality entitled to self-government, as many of the world’s nations are multiethnic arrangements, and the basic unit of international law is the sovereign state, not the ethnic group. Therefore it cannot be said that all peoples possess *prima facie* a legal right under the Charter to independence. Moreover, the Charter neither defines what constitutes a people nor lays down the specific content of the principle of self-determination.¹¹ Self-determination in the Charter thus appears to be another of the organisation’s lofty goals, a concept too vague and imprecise to permit legal application. Yet despite the questions of scope left unanswered in the Charter, the fact remains that self-determination had been incorporated into a multilateral treaty to which most of the world’s nations were signatories (i.e., the Charter). Adoption of the UN Charter thus marks a turning point in the development of self-determination from a political theory

¹¹ M.H. Mendelson, “Self-Determination in Jammu and Kashmir,” *IJIL* (1995), 8-9.

to an international legal standard.¹² Subsequent clarification of the concept through General Assembly resolutions and ICJ decisions has gradually refined that standard to create provisions that are binding on states.

B. Self-Determination: The Legal Background

With the coming of the Cold War era, three separate views of self-determination emerged from the world's major blocs. Third World states emphasised so-called external self-determination, that is, the right of nations to be free of domination by a foreign power; that right especially applied to cases of the domination of non-white nations by colonial powers, or "salt-water" colonialism. Socialist states echoed that anti-colonialism but insisted on a measure of "internal" self-determination, which in a socialist context meant the freedom of a people to choose a socialist form of government. Western nations initially opposed those interpretations of the principle but eventually supported both internal and external self-determination, insisting that external self-determination be applied to all cases of foreign domination and that internal self-determination required a degree of civil and political freedom tantamount to democracy.¹³

Consensus on certain aspects of self-determination led to important resolutions affecting its legal definition. On 14 December 1960, the General Assembly passed Resolution 1514(XV), the Declaration on the Granting of Independence to Colonial Countries and Peoples. An assertion of external self-determination, this resolution essentially bans colonisation and calls for the immediate departure of colonial powers from areas that they controlled. Paragraph 2 states that "all peoples have the right to self-determination," and paragraph 3 indicates that a lack of preparedness on the part

¹² Hussain, *Kashmir Dispute: An International Law Perspective*, 143.

¹³ Cassese, 44-46.

of the colonised people would not be grounds for delaying independence any further. The resolution directed administrative powers to transfer sovereignty to the peoples of their non-self-governing territories. Paragraph 6, however, prohibits use of the principle of self-determination to bring about the “partial or total disruption of the national unity and the territorial integrity of a country,” thereby ruling out a right of secession and reconciling the language of the resolution with Article 2(7) of the Charter. Thus although the resolution appears to endorse a universal right to self-determination, its specific provisions are tailored to decolonisation.¹⁴

The General Assembly’s adoption of the International Covenants on Economic, Social and Cultural Rights was a further step in the development of self-determination. This resolution of 16 December 1966 asserts the right of all peoples to self-determination, using the same language as Resolution 1514. But the Covenants, which entered into force in 1976, link self-determination with notions of individual rights, which expands the UN definition of self-determination to include internal self-determination. Paragraph 3 implores states to promote the realisation of self-determination; the Covenants also shed light on the concept of self-determination by affirming that its central goal is the free choice by peoples of their political status, without internal or external interference.¹⁵

The General Assembly’s most authoritative and comprehensive definition of self-determination is found in Resolution 2625(XXV) of 24 October 1970, the Friendly Relations Resolution. This resolution reiterates notions of self-determination expressed in prior resolutions, namely, the right of all peoples freely to determine their political status without external interference, and the duty of member states to

¹⁴ Shaw, *International Law*, 179.

¹⁵ Cassesse, 55.

promote principles of equal rights and self-determination of peoples. Paragraph 4 indicates that the important feature of the principle is the right of the people to choose their political status, whether that status is independence, integration with an independent state or any other political status freely determined by the people. Therefore, the resolution stresses that the critical issue is the method by which the people decide their political status and not the result of their choice.¹⁶ However, Resolution 2625, like Resolution 1514, contains a provision indicating that nothing in the resolution shall encourage actions that would compromise the territorial integrity or political unity of a sovereign state.

A fundamental question of law emerges upon a review of the General Assembly's self-determination resolutions—how to define “all peoples.” The resolutions indicate that self-determination is something to which all peoples have a right, but they do not spell out a manner in which to decide what constitutes a “people.” Moreover, the resolutions aim to protect the territorial integrity of states, a goal that would be compromised by a ubiquitous exercise of the right of self-determination. According to Sir Gerald Fitzmaurice, the concept of self-determination is ostensibly unsound because an entity that lacks a legal identity cannot be the possessor of a legal right; clearly the ability of a people to exercise their right to self-determination depends upon their ability to achieve recognition as a people in law as well as fact.¹⁷ It would seem that any group that attains international recognition as “a people” is entitled to self-determination. Therefore, some clarification of what groups qualify as “peoples” will be useful.

¹⁶ Geiger, 366.

¹⁷ Sir Gerald Fitzmaurice, “The Future of Public International Law,” AIDI, (1973), 233.

Generally speaking, external self-determination in the post-World War II era refers to decolonisation, and internal self-determination to the notion that the people in a given state should have the right to choose their own form of government. Cassese identifies three groups of people who are most clearly entitled to self-determination: entire populations of sovereign and independent states; entire populations of non-self-governing territories that have yet to gain independence; and finally, populations living under foreign military occupation.¹⁸ In each of the above cases, the territory inhabited by the people is already defined, and the people are defined by the settled limits of the territory they occupy. In the case of minority groups within a sovereign state, however, guarantees that the territorial integrity of states will be preserved seem to preclude the international right of a minority group to secede.¹⁹ The right of minority groups to express themselves politically is contemplated as part of internal self-determination. Secession may be permitted in cases of so-called *carence de souveraineté* (bankruptcy of sovereignty) in which a state either lacks the ability to govern its territory effectively or perpetrates gross human rights abuses in a particular section of its territory, yet this exception would probably apply only in the rarest and most extreme cases.²⁰

The attempted secession of Biafra from Nigeria in 1967 provides a good example of just how far a state can go in its repression of a minority group seeking independence. In 1966, mobs killed tens of thousands of Ibo people after an Ibo coup against the Nigerian federal government, which had been dominated by the Muslim Hausa and Fulani peoples. Military officers of the latter groups staged a counter coup and retook control of Nigeria, causing nearly one million Ibo refugees to flee to their

¹⁸ Cassese, 59.

¹⁹ Emerson, "Self-Determination," AJIL (1971), 464.

²⁰ Mendelson, 13.

homeland in southeast Nigeria. The new federal military government then tripled the number of administrative divisions in the country in an effort to dilute Ibo power. In response, southeastern Nigeria declared itself the independent state of Biafra. By the time of Biafran secession on 30 May 1967, it is estimated that nearly 30,000 Ibos had been massacred; with secession and the ensuing civil war, the number of dead approached one million. Biafra attempted to gain international recognition of its independence, citing blatant oppression of the Ibo people in its claim to self-determination. However, only a handful of governments recognised the secessionist state,²¹ and the UN, far from championing Biafran self-determination, indicated its unwavering support for Nigerian territorial integrity. Without outside assistance, secessionist Biafra was handily reduced by Nigerian federal forces and reincorporated within the Nigerian federal state by 1970.²²

The one case in which the principle of *carence de souveraineté* seems to apply is that of the secession of East Pakistan (Bangladesh) in 1971.²³ East Pakistan, ethnically and culturally distinct from West Pakistan and separated by over 1,000 miles, began to agitate for independence because of its second-class status within the Pakistani state. In response, Pakistan state forces in the area began a brutal campaign of repression involving mass killings. The Bangladesh rebels, attracting support from India as the conflict merged with the general Indo-Pakistani war of 1971, obtained international recognition of their independence, although the UN was careful to couch its support for Bangladesh in terms of supporting a fledgling nation rather than endorsing secession.²⁴

²¹ Gabon, Ivory Coast, Tanzania, and Zambia.

²² David Ijalaye, "Was Biafra at Any Time a State in International Law," *AJIL* (1971), 551.

²³ Mendelson, 18.

²⁴ Halperin, 15-16.

The cases of the secessions of Biafra and Bangladesh may be distinguished in two ways: first, Bangladesh, in addition to being ethnically distinct from West Pakistan, was also geographically separate; and second, India ensured the success of the secession movement by intervening in the conflict and defeating Pakistan in the 1971 war. Thus Bangladesh succeeded where Biafra did not—largely because Pakistan was not able to hold Bangladesh by force. As the *Aaland Islands* case had foreshadowed, the right of a minority group to self-determination in the modern era probably depends most on the strength and stability of the regime from which that group would secede. Writers agree that as a general rule, the principle of self-determination does not comprise right to secede.

With the scope of the doctrine outlined, the extent to which self-determination is binding as an international legal norm should also be addressed. Immediately after the promulgation of the three UN resolutions mentioned above, there was some question as to whether the General Assembly was competent to create new principles of international law.²⁵ However, that debate was resolved by two ICJ decisions in the 1970s in which the principle of self-determination, as expounded in the UN resolutions, was incorporated into customary international law.²⁶

In the case of the *Namibia* advisory opinion, the ICJ considered the right of the Namibians to self-determination upon the extinction of the mandate under which they had previously been governed. The Court noted that the development of the law of non-self-governing territories, especially Resolution 1514, had made the principle of self-determination applicable to all such territories. Stating that self-determination clearly embraced territories under a colonial regime, the ICJ related Resolution 1514

²⁵ Emerson, 460.

²⁶ Shaw, 180.

to the case at hand by holding that the resolution applies to all peoples and territories which have not yet attained independence.²⁷

Four years later in the *Western Sahara* advisory opinion, the ICJ restated its incorporation of self-determination resolutions into customary law; the Court also expanded somewhat on its statements in the Namibia case by citing with approval Resolution 2625 as well. The case arose from the decision on the part of the Spanish government to embark on a liberalisation programme, which included decolonisation of all Spanish overseas territories, including the province of Western Sahara on the Atlantic Coast of Africa between Morocco and Mauritania. Spain contended that the future of the province would have to be decided through an internationally supervised plebiscite, while Morocco and Mauritania each presented historic claims to the Western Sahara.²⁸ The ICJ stated that principles of self-determination as expressed in Resolutions 1514 and 2625 required that the freely expressed wishes of the people be taken into account when determining the future of a colonial territory.

Finally, in the case of *East Timor (Portugal v. Australia)*, the ICJ once again asserted the place of self-determination in international law.²⁹ The case arose from an oil-drilling concession obtained by Australia from Indonesia off the coast of East Timor. In 1975 Indonesia invaded Portuguese East Timor and claimed the territory (and after 1982, a 200-mile Exclusive Economic Zone);³⁰ however many within East Timor pushed for independence, asserting the right to self-determination in accordance with principles of decolonisation. Indonesia violently crushed an incipient East Timorese independence movement in 1991, prompting Portugal to question the validity of Indonesia's presence in East Timor, and consequently, Australia's lease.

²⁷ 1971 ICJ Reports, 16.

²⁸ 1975 ICJ Reports, 12.

²⁹ 1995 ICJ Reports, 90.

³⁰ The 1982 UN Convention on Law of the Sea provides for a 200-mile EEZ.

The Court's opinion in the case was substantially insignificant, because it sidestepped the central question of sovereignty over East Timor: Noting Indonesia's refusal to participate in the proceedings, the Court stated that it could not make a determination on the sovereignty question without Indonesia present. In a formal sense, however, the Court's opinion was an important reaffirmation of the status of self-determination as an international legal norm.³¹

The ICJ opinions above did not fundamentally alter the principle of self-determination as expressed in the UN resolutions, but they established the binding nature of self-determination in international law. Therefore, in light of the development of the principle since the founding of the UN, it is possible to identify three types of cases in which self-determination is applicable. First, self-determination includes the right of existing states to choose freely their own political system and to pursue their own economic, social and cultural development. That is not to say that states have a duty to guarantee democracy to their citizens; rather, the state should be free from outside interference in accordance with principles of sovereign equality and non-intervention. Self-determination also applies to situations where the existence and extent of territorial sovereignty are unclear, or where the government is powerless or unwilling to protect a specific minority group from abuses of its most basic human rights. However, any group must have a clearly defined territorial base in order to apply the principle of *carence de souveraineté*. Finally, self-determination applies in cases of decolonisation, as set out in the *Namibia* and *Western Sahara* opinions. The latter, which incorporates Resolution 2625, recognised that any non-self-governing territory has a legal status which is distinct from the entity administering it.

³¹ Shaw, 180.



C. Application of the Principle

A review of state practice with respect to self-determination allows for a more concrete appraisal of the manner in which self-determination is applied. Each claim of self-determination is of course unique, but one may generalise to some extent about the elements of those which have been successful. Indeed it is also possible to distinguish between different types of self-determination claims: for example, Halperin and Scheffer identify six such categories.³² For the purposes of clarifying the applicability of the principle, however, it will suffice to make a few general observations about the doctrine with reference to recent, specific cases.

First, a “people” have a definite advantage in international law when their territory is already defined. Such a situation allows for a simple determination of exactly which people will have recourse to self-determination, and it also does not require the redrawing of international borders. For example, in cases of decolonisation, the principle of *uti possidetis* was applied to transfer territorial sovereignty from the colonial power to the new, native government. On the other hand, peoples whose “territory” spans several states must necessarily disrupt the territorial integrity of those states if their claims are to be successful, and it is clear from the relevant UN resolutions and Charter provisions that an exercise of self-determination would not be permitted in those cases; such an action would compromise principles of sovereign equality and the state system. Consequently, the Kurds, who inhabit lands stretching across Turkey, Iraq, Azerbaijan and Iran, and the Basques, whose territory straddles the border between France and Spain, will probably not achieve political independence even though they are “peoples.”³³

³² Halperin et al., 46-52. Their six categories of self-determination are: anti-colonial, sub-state, trans-state, dispersed peoples, indigenous, and representative.

³³ Halperin et al., 50.

A well-defined territory, however, is no guarantee that self-determination will obtain. As we have seen, there is no international right to secession. As with trans-state populations, peoples located within a well-defined area of a sovereign state face the substantial qualification that self-determination must not upset a state's territorial integrity. Many states have emerged through secession, but those secessions, when accomplished peacefully, have generally taken place during a period of marked instability within the territory of the former sovereign. For example, the Baltic republics of Estonia, Lithuania and Latvia seceded from the Soviet Union in 1990. Within one year, all three had achieved international recognition of independence, largely because of the imminent collapse of the Soviet Union itself.³⁴ Similarly, Slovakia split away from the Czech Republic after the fall of communism in Eastern Europe. Claims by peoples to separate status can often be resolved in a manner that quells the desire for secession—for example, Quebec and Scotland have attained privileged, semi-autonomous positions within Canada and the United Kingdom respectively³⁵—but most groups seeking independence generally find little more than moral support for their positions in the doctrine of self-determination.

The inability of secessionist groups to achieve their goals through an application of self-determination represents a clear limit to the doctrine. Indeed self-determination, if carried to its utmost logical extent, could easily result in the total disintegration of the state system as smaller and smaller groups successfully claimed independence.³⁶ Thus it stands to reason that the community of states would resist efforts to apply self-determination in a manner inconsistent with its own survival. This position was plainly articulated by UN Secretary-General U Thant during the

³⁴ Halperin et al., 28.

³⁵ The Scottish Parliament reopened in 1997 after almost 300 years of dormancy; the other Canadian provinces have accorded the French language a special status in an effort to keep Quebec in Canada.

³⁶ Emerson, 470.

civil war that followed the attempted secession of Biafra from Nigeria in early 1967. Referring to the UN's successful efforts to prevent the secession of Katanga from the Congo a few years earlier, Thant stated that as "an international organization, the United Nations has never accepted and does not accept and I do not believe will ever accept the principle of secession of a part" of a member state.³⁷

Yet decolonisation presents an apparent exception to the rule against the disruption of territorial integrity. If colonies could leave empires because they wished to, why could portions of states not leave states, especially if the areas seeking independence had a "colonial" relationship with the central government? That rather glaring contradiction has been resolved in two ways: first, through the decolonisation resolution (1514(XV)), which categorically abolishes colonialism in international law, and second, through the theory of continuing aggression.³⁸ The latter, expounded by India during its forced removal of the Portuguese from Goa in 1960, holds that decolonisation is not secession at all; rather, it is the restoration of the legitimate, native sovereignty of which the people had been illegitimately deprived by the colonial power. International acceptance of India's arguments underscores the notion that self-determination was primarily intended to abolish European overseas empires, or salt-water colonialism.³⁹ Subsequent state practice outside the colonial context has affirmed that self-determination also applies in cases where state disintegration was already in progress, as with the Soviet Union or Federal Yugoslavia. Indeed decolonisation mirrors the Soviet and Balkan cases in that it occurred at a time when the influence of European powers in Africa and Asia was on the wane; post-World War II Europe lacked the financial might to maintain vast empires, and self-

³⁷ Emerson, 464.

³⁸ Emerson, 465.

³⁹ Shaw, 796.

determination provided the moral and legal framework for the “return” of African and Asian countries to native sovereignty, something that was made practically inevitable by the general diminution of European power worldwide.⁴⁰

How, then, does the principle of self-determination apply to groups seeking independence from a well-established state? One answer is provided by the case of Eritrea, which gained its independence in 1992 by defeating former overlord Ethiopia in a thirty-year war that claimed half a million lives. Eritrea asserted its right to self-determination the old-fashioned way, yet international law is supposed to provide a more peaceful means for dispute resolution. In theory, it is the province of the UN to counteract infringements of the right to self-determination, and the UN has acted in such a manner in a few cases: in *apartheid* South Africa, in Rhodesia (now Zimbabwe), and in northern Iraq.⁴¹ However, because of the political and military factors involved in enforcing self-determination, the UN has often moved very cautiously in determining that a violation has occurred in the first place. The perpetual slipperiness of such key concepts as “peoples” or “alien subjugation” ensures that any debate in the UN on the merits of a self-determination claim will be highly politicised, as was the case with the Falkland Islands dispute in 1982.⁴² Yet the question of whether a self-determination claim has legal merit may still be evaluated according to established principles of international law, and it is to this task that we now turn with respect to the case of Jammu and Kashmir.

⁴⁰ Of course most African and Asian international boundaries reflect administrative boundaries drawn during colonial rule. See Ian Brownlie, *African Boundaries*,

⁴¹ Cassese, 158.

⁴² Lowell Gustafson, *The Sovereignty Dispute over the Falkland (Malvinas) Islands*, Chapter 3: “Self-Determination.”

D. Application of the Principle: Jammu and Kashmir

The central question that one encounters in applying the principle of self-determination to the Kashmir dispute is whether there exists a population on which an exercise of popular sovereignty could be based. Attempts to achieve a final territorial disposition in Kashmir have usually recommended that some barometer of the people's will be consulted. All of those attempts, however, have failed for lack of a mutually agreed procedure for consulting the people. Negotiations have broken down over the questions of what territory would be subject to the plebiscite and which people would participate in the vote, those questions of course being outgrowths of the underlying territorial dispute. Thus in order to evaluate the question of self-determination in Kashmir, it will be necessary to consider both territory and population as bases for an exercise of the right.⁴³

Territory

The territory of the former princely state of Jammu and Kashmir is now divided among three countries. Cases in which self-determination has been applied to a particular territory have involved territories with settled and defined boundaries. Although self-determination purports to be a right that is exercised by peoples, those peoples are often defined by the limits of the territory that they inhabit. Self-determination in cases of decolonisation (Western Sahara) or Article 73 non-self-governing territories (Namibia) proceeded according to the territorial limits of those areas. Self-determination, as a principle of international law, has contemplated secession only in "colonial" situations, and resolutions clarifying the principle have stressed that an exercise of self-determination must not disrupt the territorial integrity of an established state. The State of Jammu and Kashmir was not a non-self-

⁴³ Robert McCorquodale, "Self-Determination: A Human Rights Approach," ICLQ (1994), 866-870.

governing territory under Article 73, and although it was under the “alien subjugation” of Britain until 1947, the British relinquished sovereignty to the Maharaja, whose forbears had been the legitimate rulers of the area prior to accepting the suzerainty of the Crown in 1846. After 15 August 1947, the State of Jammu and Kashmir was legally independent, although circumstances in the region subsequently brought about its disintegration in the period 1947-62.

The first question that arises in connection with self-determination for Kashmir is whether the people of Jammu and Kashmir had an international right to be consulted prior to the Maharaja’s accession to India; if so, then the current territorial regime would be illegal until confirmed by plebiscite. It is clear, however, that international law in 1947 did not prohibit the princely form of government, nor did it require that the accession of the princely states to India or Pakistan be ratified by plebiscite.⁴⁴ Moreover, as set out above, self-determination in 1947 retained much of its purely moral character and had not yet matured into an international legal norm. Thus even if the modern principle of self-determination required a plebiscite in order to confirm a territorial change like the one occasioned by the Maharaja’s accession to India, the principle of inter-temporal law requires that that accession be evaluated accorded to standards prevailing in 1947.⁴⁵

The binding force of Lord Mountbatten’s promise that the Maharaja’s accession would be confirmed by plebiscite has been assessed above.⁴⁶ For the purposes of self-determination analysis, it should be noted that such a vote is not feasible now that the State of Jammu and Kashmir no longer exists.⁴⁷ Even if the population of the former princely state had been entitled to self-determination at one

⁴⁴ Mendelson, 22.

⁴⁵ *Isle of Palmas Case*, 2 RIAA 829.

⁴⁶ See Chapters 1 and 3.

⁴⁷ Mendelson, 22.

time, that state is now defunct and its boundaries have been fundamentally altered. Proposals for a plebiscite must instead consider smaller territorial units defined by the presence of ethnically distinct groups of inhabitants.

Population

The legal right of self-determination properly resides with those peoples who are entitled to exercise it.⁴⁸ In the case of Kashmir, it is difficult to identify such a singular people. One method would be to consider all those people residing within the territorial limits of the former princely state to be the people of Kashmir; however, to pursue such an approach would contradict the rule that an exercise of self-determination cannot disrupt a state's territorial integrity. If that objection is neglected for the sake of argument, there remains a great deal of ethnic and religious diversity within those lands that had been ruled by the Maharaja. Accordingly, some smaller group must be selected in order for there to be "a people" entitled to exercise self-determination. This is the quandary that led to Sir Owen Dixon's proposal for regional plebiscites based on demographic divisions within the boundaries of the former princely state. Yet Sir Owen's proposals were designed as a means of resolving the dispute between India and Pakistan over Kashmir: never was it submitted that any of the peoples who might have participated in such plebiscites possessed a right in international law to determine their territorial status. An appraisal of the regions comprised by the former State of Jammu and Kashmir leads to the conclusion that the only people who would likely wish to alter their territorial status are the predominantly Muslim residents of the Vale of Kashmir.⁴⁹ However, both accession to Pakistan and complete independence would require the Vale's secession

⁴⁸ Robert McCorquodale, "Self Determination: A Human Rights Approach," 868, fn. 59.

⁴⁹ Gururaj Rao, *Legal Aspects of the Kashmir Problem*, 113. Jammu and Ladakh, whose populations are predominantly Hindu and Buddhist respectively, would prefer to remain in India; Azad Kashmir and the Northern Areas are pro-Pakistan

from India, something not contemplated by modern notions of self-determination as articulated in UN resolutions and state practice. We will now address whether secession may be permitted on the grounds that India has abused its sovereignty through oppression of the Muslim residents of the Vale.

Carence de Souveraineté (Bankruptcy of Sovereignty)

As stated above, only in the most extreme cases of oppression would a minority group acquire a right to secede from an independent state. State practice and international legal norms generally abhor secession, and even the abuses of the Nigerian federal government in the late 1960s were not sufficient to provoke international recognition of Biafra. Oppressed minorities have successfully gained international rights only in cases where the central government was weak or coming apart; brutality alone has not been sufficient to trigger a right to self-determination. Moreover, as demonstrated by the cases of Biafra and Bangladesh, the world community is more prepared to countenance secession when it is instigated by peoples living in a geographically distinct area. Recognition of the rights of such peoples does not present such an obvious conflict with the rule that self-determination must not disrupt the territorial integrity of states.

It is clear that the Indian government has perpetrated gross abuses in Kashmir. Amnesty International, Human Rights Watch and the National Human Rights Commission (of India) have produced many reports documenting the routine use of extrajudicial execution, rape and torture by Indian security forces in Kashmir since the late 1980s.⁵⁰ The reports suggest that those practices are part of an official policy of repression, as few of the perpetrators have ever faced prosecution despite the fact that India's municipal law prohibits such conduct.

⁵⁰ Owen Bennett Jones, *Pakistan: Eye of the Storm*, 84.

Yet Kashmir is geographically contiguous with India; it has been incorporated within the Indian union under Article 370 of the Indian constitution; and even the Vale of Kashmir has been home to a large Hindu population, which fled en masse in 1990 in response to campaigns of violence directed against them by Muslim insurgents.⁵¹ An even greater obstacle to Kashmiri self-determination may be found in the disparate goals of those protesting Indian rule. Some groups favour union with Pakistan while others advocate complete independence.⁵² Thus while Indian rule has been demonstrably oppressive, its opponents are divided on the question of what new territorial situation ought to succeed the present one. Moreover, Kashmiri secessionists do not have a clear territorial base from which to operate, nor does it appear that Kashmiri territory is geographically separate to the extent that secessionists could successfully claim that Kashmir is an internal colony.

One point when a “bankruptcy of sovereignty” might have been observed is during the accession crisis in 1947, with the Poonch rebellion and the collapse of the Maharaja’s regime. In that case the Maharaja’s subjects had nearly rebelled successfully against oppressive rule. However, as the legality of that accession may itself be called into question, it is more appropriate to consider the events accession crisis separately, as has been done here. In sum, because of Kashmir’s contiguity with India and the extreme nature of the oppression required by the bankruptcy of sovereignty doctrine, as well as the lack of applicable precedents, one can conclude that international law would not permit the secession of all or part of Kashmir from India on the grounds that India has abused its sovereignty there.

⁵¹ Ibid.

⁵²Some of these movements (and their goals) are: the Jammu and Kashmir Liberation Front (independence); Jamaat-e-Islami (union with Pakistan); Harakat-e-Jihad-e-Islami (pan-Islamic liberation).

E. Conclusion—Self-Determination and Territorial Integrity

The principle of self-determination has, from its inception, represented a challenge to established government. Self-determination means that all peoples and all non-self-governing territories can freely determine their territorial status. In theory, self-determination may be exercised by all peoples, but the international community has consistently refused to recognise applications of self-determination that would compromise the territorial integrity of an established state. The contradiction between allowing for self-determination and preserving territorial integrity has been resolved by using self-determination as the legal framework for determining a new territorial order in cases where change is inevitable.

Thus, self-determination was used to manage decolonisation, which became necessary when the European powers were no longer financially capable of maintaining their overseas empires; self-determination has also been the mechanism by which trust territories have gained independence; and self-determination guided the breakup of the Soviet Union and the fall of Communism in Europe. Self-determination can also be seen as creating a general requirement that popular will should be consulted before any territorial change is made. Yet self-determination does not appear to have been intended to bring about territorial changes in the first instance. On the contrary, the relevant UN resolutions, ICJ opinions and instances of state practice point unanimously to a desire to preclude secessionist groups or landless peoples from availing themselves of the doctrine and threatening the stability of the state system. Consequently, although a plebiscite has consistently been seen as the only way to resolve the Kashmir dispute, it cannot be maintained that the Kashmiri people have an international right to secession or independence.

CONCLUSION

A commonly held belief about the Kashmir dispute is that Pakistan seeks the involvement of the world community while India considers the matter to be strictly internal. Although that belief finds substantial justification in the policies of the two nations, it would be incorrect to infer that an analysis of the Kashmir dispute in international law would necessarily favour Pakistan. If at some point India and Pakistan decide to submit the dispute to an international tribunal for arbitration according to principles of international law, both sides will be able to present persuasive arguments.

This paper has addressed the most salient legal points in the dispute. India and Pakistan might bolster their legal dossiers with additional points in the event of international arbitration, but the issues of accession, the use of force, diplomacy, and self-determination would be paramount in those proceedings. To conclude this analysis of the Kashmir dispute, it will be appropriate to review those issues and reflect upon the relative strength of the claims of India and Pakistan to Kashmir.

India's claim rests on the accession of the Maharaja to India on 27 October 1947. Hundreds of other princely states acceded to India without incident—the prince signed a document in which he gave India the power conduct defence, foreign affairs and communications in the state. Integration within the Indian Union as a Part (B) state would follow. At no time were the princes required to consult their people before acceding. They had a moral obligation to act in the best interests of their people, but that is all. Generally speaking the instrument of accession was simply a rubber stamp giving India or Pakistan sovereignty over the princely states, which had some degree

of autonomy within the British Empire and which became technically independent with British departure.

However, the accession of Jammu and Kashmir was anything but a mere formality. Both India and Pakistan hoped for the Maharaja's accession, while the Maharaja himself sought to avoid it. The complexity surrounding accession indicates that on the eve of Indian independence, there was an incipient dispute between India and Pakistan over who would get Kashmir. That disagreement prevented accession from being accomplished in a straightforward manner, which in turn set the stage for today's sovereignty dispute. In an attempt to unravel the issue of accession, the following observations can be made.

First, there is little doubt that the Maharaja actually signed the instrument of accession, and that there was no coercion or fraud on the part of India in that respect. Perhaps the Maharaja dreamed of being ruler of the "Switzerland of the East," but he could not control his own territory with the forces available to him, and he acceded to India to gain military assistance and save his government. Accession to Pakistan would have brought the Maharaja's rule to an abrupt end. That of course was the goal of the rebels who had forced his hand. The Maharaja's days were numbered in any case—he was eventually deposed by the Indian government in 1949.¹

The strongest argument against the validity of accession is that the Maharaja lacked the legal capacity to accede. Kashmir was in full-scale rebellion. The Maharaja was forced to flee Srinagar for his own safety, the Jammu and Kashmir state forces had essentially been defeated on the battlefield, and the Maharaja had to seek outside assistance to maintain his position as ruler. Tribunals have held that in such

¹ In June 1949 the Indian government persuaded the Maharaja to take an extended holiday outside Kashmir and then advised him never to return to Kashmir. He died in Bombay in 1962 without having returned.

circumstances a government may cease to have a legal personality. It was probably for that reason that Lord Mountbatten, then Governor-General of India, recommended that a “reference to the people” decide the question of accession. It was unlikely that a vote based on the extant electoral rolls in Kashmir in 1947 would have gone against India, or that India would have recommended such a vote otherwise. More probably, Mountbatten and other Indian leaders recognised that the Maharaja’s legal capacity to accede was shaky, and that Kashmir’s accession to the Indian Union should be confirmed by a vote in order to put the accession of Kashmir beyond question.² Calls by India for a plebiscite in the period just after accession should therefore be seen as an attempt to solidify title to Kashmir, something that India felt had not been accomplished by the instrument of accession in the circumstances under which it was signed. In the case of another controversial accession—Junagadh—India held a lop-sided plebiscite after occupying the predominantly Hindu state, whose Muslim ruler had acceded to Pakistan. In that way the plebiscite, however fair or accurate, conferred some legitimacy on India’s territorial ambitions.

Pakistan, too, had territorial ambitions, especially in Kashmir, which Mohammed Ali Jinnah believed would fall into Pakistan “like a ripe fruit.” Pakistan must have quickly realised that a more proactive approach would be necessary to secure the mountainous princely state. It cannot be demonstrated that Pakistan attempted to coerce the Maharaja by instituting a blockade of Kashmir, nor is there any proof of official involvement by Pakistan in supporting the Poonch rebels. Yet while supplies became scarce in Srinagar, weapons and ammunition were finding their way into Kashmir from Pakistan. More importantly, the Pathan tribesmen used

² Mountbatten may have personally believed that a plebiscite was the right thing to do. During a meeting with the Maharaja in late June 1947, he suggested that the Maharaja should “consult the will of the people” before acceding to India or Pakistan.

Pakistan as a base of operations for attacks against the Maharaja in Kashmir. The international legal norms regarding the use of force prohibit states from tolerating the presence of armed bands or other irregular forces plotting incursions into a neighbouring state, especially when those forces are fighting on the host state's behalf. Thus it appears from the record that Pakistan's attempt in 1947 to fight for Kashmir by proxy represents an illegal use of force; the ill-starred Operation Gibraltar venture in 1965 being a more egregious example still.³

The territorial implications of that finding, however, are less clear. When the dust from the first Indo-Pakistani war began to settle in 1949, there were two major areas of the former princely state that India did not control despite the Maharaja's accession and the intervention of the formidable Indian Army. These were the Northern Areas and Azad Kashmir, both of which saw popular revolts against the Maharaja in autumn 1947. Pakistan's illegal support of the armed bands very nearly brought down the Maharaja's government, but in the end Pakistan was left defending only the Northern Areas and Azad Kashmir. Although charges of illegality may be substantiated against Pakistan for its behaviour in October 1947, the subsequent occupation of both areas by Pakistan troops may be justified on the grounds that neither area had ever been effectively possessed by India after accession. Because India was unable to occupy those areas, India never gained sovereignty over them, and Pakistan's presence there cannot be considered aggression.

India's referral of the dispute to the United Nations in 1948, while very much in the spirit of the UN Charter, represents somewhat of a tactical failure on India's part. Complaining of Pakistani "aggression" in Azad Kashmir and the Northern

³ India alleges that Pakistan's intelligence service, the ISI, continues to train and fund terrorist groups in Kashmir.

Areas, India requested that the Security Council order Pakistan to depart those areas. Instead, the UN became fixated on the concept of a plebiscite to determine territorial sovereignty, generating resolutions in which India and Pakistan pledged to resolve the dispute by referring it to the Kashmiri people. Thus the involvement of the UN transformed the plebiscite issue from a domestic Indian matter into an international one—precisely the sort of internationalisation that India has tried to avoid ever since. UN involvement also appeared to recognise the legitimacy of the Azad government and Pakistan's control of the Northern Areas. Although the UN's plebiscite requests were never heeded, UN involvement in the Kashmir dispute has firmly established the principle that a plebiscite should be used to resolve any outstanding territorial disagreements in Kashmir. India's pledges to take a vote in Kashmir, which began as a moral obligation to the Kashmiri people, became a legal obligation to the world once they were made in an international forum. It is submitted that India's efforts to extricate itself have not been successful from a legal point of view. Neither the ratification of the Indian Constitution by the Kashmir Assembly, nor the 1972 Simla Agreement, nor India's claims of changed circumstances have released India from this obligation.

As stated previously, not all of the lands of the former princely state of Jammu and Kashmir are truly in controversy. The current LOC represents a rough *de facto* international boundary, and plebiscites would probably be superfluous in Jammu, Ladakh, Azad Kashmir and the Northern Areas. It is only in the Vale of Kashmir that the LOC fails to offer a territorial division acceptable to both sides. It is clear today, as it was to UN officials at the beginning of the dispute, that Kashmir will itself have to be partitioned in some manner, with the Indo-Pakistani frontier snaking north-south

through the western portion of the former princely state. It is in drawing a permanent, undefended line that plebiscite results could be most useful.

Indeed the international legal norm of self-determination would appear to require that the people of the Vale of Kashmir be consulted before a border is finalised by UN action, and especially if territorial changes are made. Claims that Kashmiris may invoke self-determination to secede from India cannot be substantiated. However, the principle of self-determination has definitely applied in cases where a territorial change is necessary. Hopefully India and Pakistan will decide to settle the Kashmir dispute, which is probably not as intractable than the nations' official positions would suggest. UN-supervised plebiscites could be held in the Vale of Kashmir and in any other contested areas adjacent to the LOC to determine the final shape of the border. Once that border has been agreed, India and Pakistan can devote their scarce resources to more constructive ends.

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ABBREVIATIONS

AIDI	Annuaire de l'Institut de Droit International
AJIL	American Journal of International Law
AULR	American University Law Review
BTB	Boundary and Territory Briefing
BYIL	British Yearbook of International Law
EPIL	Encyclopaedia of Public International Law
GROT	Grotius Society Transactions
HR	Hague Recueil
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ILM	International Legal Materials
IJIL	Indian Journal of International Law
LNOJ	League of Nations Official Journal
MILR	Michigan Law Review
PCIJ	Permanent Court of International Justice
RIAA	Reports of International Arbitral Awards

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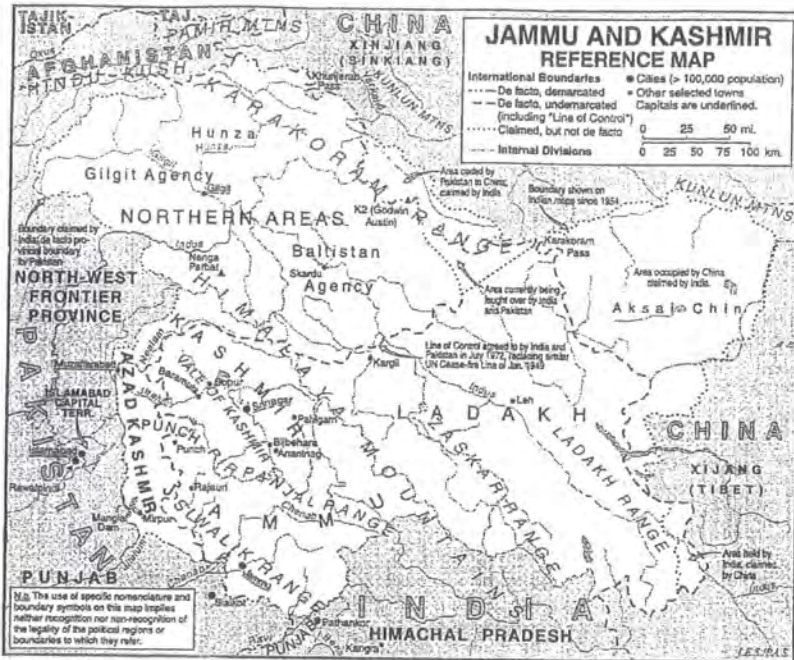
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MAPS

Map 1



Map 2

