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*Kashmir, the Longest Unresolved Dispute on Security Council's  
Agenda*

*A Testing Case for the Council's Mandate of Maintaining  
International Peace and Security*

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# Secção I

## Investigação Científica\*

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## Kashmir, the Longest Unresolved Dispute on Security Council's Agenda A Testing Case for the Council's Mandate of Maintaining International Peace and Security

### Caxemira, o Conflito Mais Longo e Não Resolvido na Agenda do Conselho de Segurança Um Caso de Teste para o Mandato do Conselho de Manter a Paz e a Segurança Internacionais

Muhammad Imran KHAN<sup>1</sup>

**ABSTRACT:** International peace and security is a meta-principle upon which all the aspects of international development rests. Territorial disputes pose great threat to the objective of maintaining peace and security and consequently to sustainable development. Out of several colonial legacies, Kashmir dispute is one that has the potential, demonstrated in several instances, to become a grave threat to international peace and security. The Security Council has failed to resolve this vital dispute, which makes Kashmir the oldest unresolved dispute on its agenda. The reasons for failure are three. The lack of effective implementation mechanism in international legal order. Failure of international political system to comprehend the explosive nature of this dispute. The fact that the main architects of Sustainable Development Goals, also the P5, are the top arms suppliers to the parties in this dispute.

This research paper will provide a brief history of this dispute, timeline of Security Council's engagement with Kashmir, the obligations and failure of Security Council of maintaining peace and security. It will investigate the fact that how and to what extent this failure of the Security Council has undermined regional and international security and to what extent it can disturb the SDGs agenda.

**KEYWORDS:** territorial integrity; occupation; right to self-determination; oldest unresolved dispute on UNSC's Agenda; international peace and security; Sustainable Development Goals.

**RESUMO:** A paz e a segurança internacionais são um meta-princípio sobre o qual assentam todos os aspetos do desenvolvimento internacional. Os litígios territoriais constituem uma grande ameaça para o objetivo de manutenção da paz e da segurança e, conseqüentemente, para o desenvolvimento sustentável. De entre os vários legados coloniais, o conflito de Caxemira é um dos que tem potencialidades, demonstradas em vários casos, para se tornar uma grave ameaça à paz e à segurança internacionais. O Conselho de Segurança não conseguiu resolver este conflito vital, o que faz de Caxemira o mais antigo conflito por resolver na sua ordem de trabalhos. As razões do fracasso são três. A falta de um mecanismo de aplicação eficaz na ordem jurídica internacional. A incapacidade do sistema político internacional para compreender o carácter explosivo deste conflito. O facto de os principais arquitetos dos Objetivos de

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Desenvolvimento Sustentável, também os P5, serem os principais fornecedores de armas às partes em litígio.

Este trabalho de investigação apresentará uma breve história deste conflito, a cronologia do envolvimento do Conselho de Segurança com Caxemira, as obrigações e o fracasso do Conselho de Segurança na manutenção da paz e da segurança. Investigará o facto de como e em que medida este fracasso do Conselho de Segurança prejudicou a segurança regional e internacional e em que medida pode perturbar a agenda dos ODS. **PALAVRAS-CHAVE:** integridade territorial; ocupação; direito à autodeterminação; litígio mais antiga e não resolvida na agenda do CSNU; paz e segurança internacionais; Objetivos de Desenvolvimento Sustentável.

## I. Legal history of Kashmir

Earth is the mother of law as she (earth) “contains law within herself, as a reward of labor; she manifests law upon herself, as fixed boundaries; and she sustains law above herself, as a public sign of order”.<sup>2</sup>

In this sense, law is bound and related to the earth. However, there seem to be some exceptions including in the case of Kashmir. From the perspective of international legal order, the Kashmir dispute shall be resolved through putting an end to the illegal occupation followed by a plebiscite.<sup>3</sup> However, rather than fulfilling this obligation and putting an end to the unlawful occupation, Kashmir is being gradually incorporated into India.<sup>4</sup> The dispute of Kashmir that existed for generations has become more critical and challenging to be resolved in contemporary regional and international geo-political contexts.

Historically, Kashmir, Jammu, Ladakh and Gilgit were initially brought together through the Amritsar Sale deed of 1846 (Treaty of Amritsar), originally bordering China in the north, to Afghanistan in the northwest and between Indus and Ravi. The history of Kashmir is full of invaders that can be divided into four parts. The era of Hindu Rajas, Muslim Kashmiri rule otherwise known as *Salateen e Kashmir*, Mughal rule known as *Shahan e Mughlia*, and Pathans age known as *Shahan e Durrani*.<sup>5</sup> In the 14<sup>th</sup> century, Islam arrived in Kashmir and the majority

<sup>2</sup> SCHMITT, Carl. *The nomos of the earth*. New York: Telos Press Publishing, 2006. 42.

<sup>3</sup> UN Security Council, *Security Council resolution 47 (1948) [The India-Pakistan Question]*, 21 April 1948, S/RES/47 (1948).

<sup>4</sup> Initially, by giving Kashmir a special status within the Indian constitutional setup through the introduction of articles 35 (A) and 370 in Indian Constitution to evade obligations stemming from relevant international law. On 5 August 2019 India went a step further of its unlawful occupation when she revoked article 370 of the Indian constitution and made a unilateral accession of Jammu and Kashmir into India.

<sup>5</sup> KALHAN, Pandit. *Raj Tarangini – Kashmir ki Sab Say Mustanad Aur Qadeem Tarikh* راج ترنگینی - کشمیر کی سب مستند اور قدیم تاریخ. Jhelum: Book Corner, 2019.

population became Muslim. The Mughal Empire ruled Kashmir between 1586 and 1751. Subsequently, Ahmad Shah Abdali captured Kashmir from Mughals and brutally ruled it between 1752 and 1754. This was a mere two years rule followed by Afghan Durrani era remaining till 1819 when Maharaja Ranjeet Singh defeated Afghan Governor in Battle of Shopian.<sup>6</sup>

With the failure of Maharaja to pay the monetary sanctions of lost war against British India imposed through the Lahore Agreement of 1846 led to the handing over Kashmir and other territories to the East India Company. With this, Kashmir became property of the East India Company. In this war, Gulab Singh helped the East India Company against the then Maharaja. In return, Gulab Singh became Maharaja of Jammu and Kashmir. Through the Treaty of Amritsar 1846, the princely state of Kashmir was sold to the new Maharaja Gulab Singh for 75 lac rupees (equivalent of one hundred thousand pounds).<sup>7</sup>

In Kashmir, number of movements were on the go against the then Maharaja for their rights in 1931. Despite many reforms adopted between 1930 and 1940 there were still political movements against the Maharaja, i.e., the political movement led by the National Conference. In 1946, Sheikh Muhammad Abdullah of the National Conference challenged the superiority of Maharaja and initiated the “*Quit Kashmir Movement*” against Maharaja.<sup>8</sup>

*Kashmir accession to India: Background and the legal view to the 1947 Agreement of Accession between Maharaja Hari Singh and India.*

After World War II (WWII), Conservative Party of Winston Churchill lost elections in Britain and the Labour Party came into power. This was the time of severe economic challenges for Britain, which affected Britain's policy towards India. In India, not all the estates were part of British India. Except foreign affairs, security and telecommunication, the British Parliament was not entitled to legislate for those independent territories. Similarly, Kashmir was not forming part

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<sup>6</sup> SINGH, Surinder Johar. Annexation of Kashmir to the Sikh Kingdom. Calcutta: *The Sikh Cultural Review – The Sikh Cultural Center*, 2000, vol. 18, 186-195.

<sup>7</sup> The agreement was signed on March 16, 1846, applicable from Sind's east to Ravi river's west mountain range to connected areas including cham pata. This agreement was severely criticised back then as well as now, mainly because the seventy-five lac rupees which were paid by Maharaja Gulab Singh to the East India Company were collected through imposing heavy taxes on Kashmiris. The Kashmiris were sold, forced to pay their own price, and then made slaves for the Maharaja.

<sup>8</sup> AN-NAIM, Abdullahi Ahmed. *Decolonizing human rights*. Cambridge: Cambridge University Press, 2021. ISBN-13. 978-1108404570. The National Conference adopted the “نیا کشمیر” or New Kashmir manifesto in 1938 demanding political, social, cultural, and economic reforms.

of British India. It was an independent princely state within Britain's supervision having its own constitution and several agreements with Britain as well as with neighbouring states.

By the end of Britain's rule in subcontinent India, questions were raised about the relationship between Pakistan, India, and the princely states. Through Government of India Act 1935, Indian Independence Act 1947, and the statements given by British officials, it was made clear that the future two new states will not be Britain's successors and Britain's sovereignty over India and princely states will cease to exist upon its withdrawal. It was also made clear within Government of India Act 1935 that India (question of Pakistan emerged later) will not take precedence over the will of the princely states. The same stance was reiterated in 1946's British Cabinet Mission in India statement providing that *"the supremacy of the British Crown over India and princely states will cease to exist with Britain's withdrawal from India, this supremacy could neither remain with the British crown nor be transferred to a new government."*<sup>9</sup> Moreover, *"the Queen's Government of the United Kingdom has no intention of handing over the rights and duties of the British Raj to any Government of India."*<sup>10</sup>

However, the attitude and political statements of Britain's officials were in contrast with Britain's legal position adopted in the Indian Independence Act 1947 and the Government of India Act 1935. Viceroy Lord Mountbatten, Nehru's close friend and ambitious future first governor general of India, while addressing the gathering of Rajas and Maharajas, said, *"Every wise ruler will want and desire to be part of splendid India."*<sup>11</sup>

From the perspective of Indian Independence Act 1947, it was clear that that independent state has three options: Join Pakistan, join India, or opt for independence. In this respect, section 2 of the Indian Independence Act 1947 was required to be further interpreted and elaborated to determine what will be

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<sup>9</sup> Fifth paragraph, Memorandum on States' Treaties and Paramountcy presented by the Cabinet Mission to His Highness the Chancellor of the Chamber of Princes on 12 May 1946.

<sup>10</sup> Prime Minister of the United Kingdom, Clement Attlee's address to the British Parliament on February 20, 1947, on the position of the British Government. Similarly, British minister of State for India and Burmese Affairs, Lord Listowel stated the following while addressing the upper house of the British Parliament: *"From this moment, all the Princely States will decide for themselves whether they want to join India or Pakistan or stand alone. Over time, all the princely states must find their rightful place in one of the two new countries."*

<sup>11</sup> Mountbatten during his speech to the chamber of princess on July 25, 1947. In this meeting the question of the princely states was addressed which in total were 562.

the status of those territories that have not decided its fate before or on August 15, 1947. Pandit Nehru and Mountbatten were aware of this legal lacuna existing within the Indian Independence Act 1947 and wanted to use it for their benefit. Therefore, they tried their best to avoid discussing this lacuna any further in cabinet meetings or parliamentary speeches and debates.<sup>12</sup>

Maharaja Hari Singh neither made accession to India, nor Pakistan. On Mountbatten's persuasion, Maharaja showed his desire for making standstill agreements with Pakistan and India. Pakistan agreed for such an arrangement on August 15, while India was engaged in negotiations with Kashmir but never signed such agreement with Kashmir. Having such agreement with Pakistan and ongoing negotiations with India is indicative of the fact that neither of the states challenged Kashmir's sovereignty, nor did they assert control over Kashmir.

On 30 June 1947, the Radcliffe Commission was established for the division of India. Gurdaspur, a Muslim population territory, was given to India. This decision of Radcliffe was political rather than based on legal, moral, and standards of justice which enabled India to have land access to Kashmir. The delay of India to enter into a standstill agreement with Kashmir was due to its wait for the Radcliffe Commission's decision regarding Gurdaspur.<sup>13</sup> Land access to Kashmir through Muslim majority Gurdaspur was the outcome of Nehru's political manoeuvring, which ensured the Indian Army's entrance to Kashmir, followed by forced accession of Kashmir to India.

Due to the irregularities in Radcliffe Awards, Mass-Hindu-Muslim migration and consequent violence started throughout Pakistan and India as well as in Kashmir, resulting in mass killings, to which Kashmiris was no exception. On October 22, 1947, Pashtun tribesmen from the then North-West Frontier Province of Pakistan entered into Kashmir in some 200-300 trucks, on the pretext of helping Kashmiris brothers, according to them. Following this attack, Maharaja

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<sup>12</sup> Vengalil Krishnan Krishna Menon, a politician and a diplomat, was Nehru's personal diplomat and he led India's foreign policy/relations. Mr. Krishna Menon was sent to British Prime Minister, Clement Attlee, to brief and persuade him that in parliamentary debates, the right of the princely states should not be highlighted and the probability of states freedom to remain independent should not be explicitly accepted. Moreover, in a telegram sent to Listowel on July 12, 1947, Lord Mountbatten wrote: "Any attempt to clarify the status of non-aligned princely states in Parliament, I think, would be premature and would affect the ongoing negotiations here." The outcome could be negative.

<sup>13</sup> This can be confirmed from one of Menon's statements, which is as follows "we want time for understanding the effects of standstill agreement due to the decision of the Radcliffe Commission. Now India has a connection with Kashmir."



fled to Jammu and requested Delhi for military help. India refused to help without accession of Kashmir to India. According to Indian claims, on 26 October Maharaja wrote a letter to Mountbatten proposing Kashmir's accession to India. According to Menon, Maharaja made a request of Kashmir accession to India in Jammu, on the same day Menon acquired Maharaja's signature on Instrument of Accession (IOA) and assured Maharaja of military assistance. On 27 October 1947, Mountbatten accepted the request with the condition that a plebiscite would take place to know the will of the Kashmiri people.<sup>14</sup>

*International Agreement:*

Thus, Maharaja's letter of 26 October and Mountbatten letter of 27 October 1947 to Maharaja are part of this accession, first proposed and signed by Maharaja and accepted by Mountbatten. According to India, these two letters together form an international agreement. With the Indian Army entering Kashmir and evacuating tribal fighters from Kashmir, the first war between Pakistan and India broke out. Ironically, armies of both sides were led by British officers. At the end of the war, India occupied Jammu, Ladakh and some parts of Srinagar, whereas Pakistan occupied the western part of Kashmir. The Pakistani side Kashmir was named as Azad Kashmir with Muzaffarabad its capital.

*Legality of accession:*

Contrary to the common narration, it is claimed that the Maharaja's signatures on IOA were acquired after the arrival of the Indian military in Kashmir. When the Maharaja was signing the accession deed, the Indian armies were already in Kashmir<sup>15</sup>. These are questions of facts, and questions of law depend

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<sup>14</sup> According to Mountbatten who was the then Governor General of India: (India) decided to accept the accession of Kashmir State to the Dominion of India. In consistence with their policy that in the case of any State where the issue of accession has been the subject of dispute, the question of accession should be decided in accordance with the wishes of the people of the State, it is my Government's wish that, as soon as law and order have been restored in Kashmir and its soil cleared of the invaders, the question of the State's accession should be settled by a reference to the people.

<sup>15</sup> LAMB, Alastair. *Incomplete Partition: The Genesis of the Kashmir Dispute, 1947-1948*. Oxford: Oxford University Press, 2002. ISBN: 0907129080. Alastair writes, "India had made all the preparations even before Kashmir's invasion. General Dugley Ressel himself monitored the preparation and planning with aid and support from Mountbatten." Entrance of the Indian army to Kashmir was portrayed as protection of democracy and making conditions suitable for conducting plebiscite.

on the questions of facts.<sup>16</sup> Any agreement acquired through force, coercion, fraud and intimidation is void within the Vienna Convention on the Law of Treaties.<sup>17</sup>

Sir Gerald Fitzmaurice, the then legal adviser in the British Foreign Office, in 1949 at the request of the Commonwealth Relations Office issued his revised legal view of Indian Independence Act 1947 and on Kashmir's accession to India. Based on the new evidence, he concluded that Kashmir's accession to India was in fact absolutely illegitimate. The following are the three important aspects of this dispute to be considered:

- Maharaja did not made the decision of accession with his own free will;
- Maharaja was not in control of Kashmir territory at the time of making the decision of accession thus he was lacking the capability to ensure accession;
- Accession proposal from Maharaja was accepted conditionally by Mountbatten and the conditions were never honoured.<sup>18</sup>

From international law perspective, the state of Jammu and Kashmir was an independent sovereign state between August 15, 1947, and October 26, 1947. Where it has all the prerequisites of statehood under international law. Such as population, well defined territory, a government, and the capacity to enter into relationships with other states.<sup>19</sup> From the perspective of Montevideo Convention on the Rights and Duties of States 1933, Kashmir had the status of a state in legal as well as political sense and therefore its territorial integrity, sovereignty, and independence was supposed to be respected. The accession was a matter of one independent state dealing with another independent state.<sup>20</sup> Ideally, the accession of Kashmir should have been beyond the will of Maharaja and should have been mainly based on the free will of Kashmiris.

Despite serious questions on the legality of IOA, a free and fair plebiscite was the central conditionality of the IOA to which Nehru agreed and he reiterated

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<sup>16</sup> HUSSAIN, Ijaz. Kashmir Dispute: An International Law Perspective. *The Journal of Asian Studies*. 1999. vol. 58. n° 3. pp. 866-868. ISBN 13: 9789698329037

<sup>17</sup> Articles 49-53, United Nations, Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol. 1155, p. 331, 23 May 1969, <https://www.refworld.org/legal/agreements/un/1969/en/73676> [accessed 26 March 2024].

<sup>18</sup> The then British Attorney General, Sir Hartley Shaw Cross, in his letter to Fitzmaurice on June 20, 1949, agreed with three main legal points of Maharaja's accession to India.

<sup>19</sup> Convention on Rights and Duties of States adopted by the Seventh International Conference of American States. Signed at Montevideo, December 26<sup>th</sup>, 1933. Article 1.

<sup>20</sup> CATALA, Amandine. Secession and Annexation: The Case of Crimea. *German Law Journal*. 2015. Vol. 16, n° 3, pp. 581.

this commitment time and again. The legal implications of the statements given by Nehru can be understood from the Eastern Greenland Case where the Permanent Court of International Justice held that: “A [verbal] reply...given by the Minister for Foreign Affairs on behalf of his Government...in regard to a question falling within his province, is binding upon the country to which the Minister belongs.”<sup>21</sup>

Following the first Indo-Pak war of 1947, the Kashmir issue was taken to the United Nations Security Council. Resolutions were adopted providing for the need of conducting a plebiscite to decide upon Kashmir’s future. The Resolutions explicitly provided that the so-called government of Kashmir is not entitled to make any decision on the behalf of Kashmiris. A free and fair plebiscite within the auspices of the UN was the only solution.<sup>22</sup> India agreed for the same and a plebiscite administrator was agreed to be nominated. However, India backtracked from its obligation and commitment, which led to multiple wars between India and Pakistan such as the Indo-Pak wars of 1956, 1971, and that of 1999.<sup>23</sup>

## II. Indian measures and the attempts of changing the demography

The occupied territory must be administered in accordance with the spirit of benefitting the population of that occupied territory. From the perspective of the law of occupation, the occupying force does not acquire sovereignty. IOA clearly mentions that Kashmir will be fully sovereign, and India will have the mandate to regulate its external affairs, defence, and communications. However, more in similarity with the Eastern Greenland case, in quest for ascertaining “effective control” over Kashmir, India disregarded the United Nations Security Council Resolutions (UNSCRs) as well as its own constitutional arrangement.<sup>24</sup> From 1950, India started making Kashmir a constitutional part of India. Five important steps were taken. First, through the first constitutional assembly, appointment of the Kashmiri government. Second, inserting article 370 within the Indian constitution in 1950. Third, the so-called Government of Jammu and Kashmir was established in 1951. The first elections were followed by accession and through

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<sup>21</sup> Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5).

<sup>22</sup> Security Council Resolution 91 (1951) [S/2017/Rev.I].

<sup>23</sup> BEHERA, Navnita Chadha. *State, Identity and Violence: Jammu, Kashmir and Ladakh*. New Delhi: Manohar Publishers & Distributors, 2000. ISBN-13: 978-8173043604.

<sup>24</sup> “Effective control” per PCIJ jurisprudence in its 1933 Eastern Greenland decision, ICGJ 303 (PCIJ 1933).

this so-called assembly, Kashmir entered into the Delhi Agreement with India in 1952.<sup>25</sup> Fourth, a constitution was adopted for Kashmir's in 1957. Fifth, in 1975 Indira Sheikh Abdullah Agreement was concluded between Kashmir and India. Part I of the Indian constitution provides for inclusion of Kashmir and part B of its first schedule deals with princely states. Finally, India abrogated the special constitutional status given to Kashmir in 2019.

Alongside the abrogation of article 370 and the Constitution (application to Jammu and Kashmir) Order 2019, Domicile laws were redefined through “*Jammu and Kashmir Reorganisation Order 2019*.” The Jammu Kashmir Reorganisation Order 2020 changed the definition of domicile in Kashmir and now any Indian citizen can acquire domicile of Kashmir and buy property in Kashmir. The jobs in Kashmir will not be exclusively for Kashmiris, non-Kashmiris can also acquire jobs in Kashmir. Until August 2020, some 1.25 million domicile certificates were issued to non-Kashmiris and another 0.45 million applications were in process.<sup>26</sup> This is claimed to be more like Israeli approaches in Palestine in order to turn Muslim majority into a minority, an attempt to change the demography of Kashmir which will also affect future referendums, if any. This not only violates the Security Council Resolutions, but also the IOA.

### **III. Prolonged illegal occupation or the right to self-determination?**

Whether the issue of Kashmir is a prolonged illegal occupation or the violation of the right to self-determination and which one should be emphasised upon? The issue of Kashmir is primarily that of prolonged illegal occupation. The stance of occupation is based on the fact that no consent was acquired from Kashmiris and Maharaja was forced for accession. Though the right to self-determination is the cry of the day (سكه رايح الوقت) and is an important part of this conflict, prolonged illegal occupation is the main and central point of this matter and it can not be ignored or taken lightly.

The Kellogg-Briand Pact 1928, also known as the Pact of Paris provides that occupation is illegal and sooner or later the occupying forces will have to

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<sup>25</sup> All the other political parties were ignored. When there was no further need for Sheikh Muhammad Abdullah, he was put into prison.

<sup>26</sup> HOFFMAN, Bruce. & DUSCHINSKI, Haley. Between Freedom and Justice: Popular Protest and Jurisdictional Contestation of Militarized Governance in Indian-Controlled Kashmir. *Social & Legal Studies*. 2020. vol. 29, n° 5, pp. 650-678.

leave the occupied territories, even if there is no resistance.<sup>27</sup> Similarly, from International Humanitarian Law (IHL) and international law of occupation, wherever there is illegal occupation, the state of war is present, which is an International Armed Conflict by the virtue of Common Article 2 of Geneva Conventions, no matter how low or no resistance exists.

#### **IV. UNSC Mandate of Maintaining International Peace and Security**

Do international Organisations have any role and obligation to strive for the solution of this dispute? The UNSC has a primary obligation under the UN Charter to maintain international peace and security, which includes mediating conflicts and supporting peaceful resolutions. With respect to Kashmir, question about UNSC role and potential was first raised by US Secretary of State for Southeast Asia in following words: “*how much scope will the UN Security Council have to question the legality of Kashmir’s accession to India?*” According to Sir Gerald Fitzmaurice, “*I think it would be correct for the Security Council to decide that the circumstances under which Kashmir was annexed by India were a matter of law, order, and security.*”<sup>28</sup>

Kashmir issue was taken into United Nations Security Council on January 1, 1948. So far, the United Nations Security Council has passed 20 resolutions, notable among which are Resolution 39,<sup>29</sup> 47,<sup>30</sup> 80, 91, 96, 98, 122,<sup>31</sup> 209,<sup>32</sup> 210, 211, 214,<sup>33</sup> 307,<sup>34</sup> and 370. Resolution 47 is the central piece that provides for a mechanism on how to resolve the issue of Kashmir. Within this Resolution, the solution proposed was plebiscite, the tribesmen were supposed to be evacuated

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<sup>27</sup> The General Treaty for Renunciation of War as an Instrument of National Policy 27 August 1928 (Kellogg-Briand Pact). The Pact in its article 1, condemned ‘recourse to war for the solution of international controversies’ and stipulated its renunciation ‘as an instrument of national policy’ by the major powers of the world.

<sup>28</sup> *The Revised Legal View on Indian Independence Act 1947* by Sir Gerald Fitzmaurice of 25 February 1948 upon the request of the Commonwealth Relations Office. According to him, the threat is, and still is, the root cause, and that peace and security cannot be restored unless this matter is revisited.

<sup>29</sup> Establishing the United Nations Commission for India and Pakistan (UNCIP) to investigate and mediate the conflict.

<sup>30</sup> Recommending a ceasefire, withdrawal of Pakistani and Indian forces, and a plebiscite to determine the future of Jammu and Kashmir.

<sup>31</sup> Reiterating the call for a plebiscite and maintaining the presence of UN observers to monitor the ceasefire.

<sup>32</sup> Calling for an immediate ceasefire.

<sup>33</sup> Reiterating the demand for a ceasefire and urging both parties to resume negotiations.

<sup>34</sup> Calling for a ceasefire and withdrawal of forces.

and both Pakistan and India were asked to remove their military from Kashmir. A UN administrator Admiral Chester Nimitz was appointed for managing the plebiscite. Similarly, the UNSC appointed an Arbitrator within its Resolution 91.

The UNSC's engagement with the Kashmir conflict has been marked by initial activism followed by inaction. Despite early resolutions calling for a plebiscite in Kashmir, the UNSC failed to enforce these resolutions, leaving the conflict unresolved. Following the Simla Agreement in 1972, which stipulated that India and Pakistan would resolve their differences bilaterally, the UNSC's active engagement with the Kashmir issue waned. This reduced international pressure to resolve the conflict.

Today, Kashmir is the oldest unresolved dispute on the United Nations Security Council agenda with complete failure of Security Council to resolve this vital dispute. Being unable to resolve one of the very first disputes brought before it, Security Council's role is undermined in achieving its mandate of maintaining international peace and security. This is largely due to the geopolitical interests of permanent UNSC members (P5) have often influenced the Council's actions (or inactions) on Kashmir. For instance, strategic alliances and economic interests have led to muted responses to escalations in the region. The potential use of veto power by P5 members, particularly those allied with either India or Pakistan, has prevented strong UNSC resolutions or actions from being taken.<sup>35</sup>

Kashmir is the instance of erosion of trust in international institutions. It weakens global governance mechanisms designed to maintain peace and security. Resort to unilateral actions and bypassing the UNSC became more common. Such as despite having number of UNSC's Resolutions, India has unilaterally annexed Kashmir. This leads to fragmented and inconsistent responses to global security challenges.

Following Kashmir annexation, in August 2020, India called for the removal of the Jammu and Kashmir Issue from the UN Security Council Agenda on the basis of "outdated agenda item of the India-Pakistan question". Here India ignores the rule that an agenda item can only be removed when the dispute or

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<sup>35</sup> CARTY, Anthony. & LONE, Fouzia Nazir. Some New Haven International Law Reflections on China, India and Their Various Territorial Disputes. *Asia Pacific Law Review*, 2011, vol. 19, n° 1, pp. 93-112. China is also a party to this territorial conflict. During Sino-Indian wars in 1962 and 2020, China has annexed Aksai Chin. India claims that Aksai Chin is part of Eastern Ladakh, which embroils China to this dispute as well.

the conflict has been resolved or through the consensus of all the 15 members of the Security Council. In similar situations International Court of Justice (ICJ) in the above mentioned case held that: “The mere denial of the existence of a dispute [by a state] does not prove its nonexistence...there has thus arisen a situation in which the two sides hold clearly opposite views...confronted with such a situation, the Court must conclude that international disputes have arisen”.<sup>36</sup>

## V. UN Sustainable Development Goals Agenda 2030

“*There can be no sustainable development without peace and no peace without sustainable development.*”<sup>37</sup> The United Nations Sustainable Development Goals 2030 requires determined measures and responses to the challenges to maintenance of international peace and security. Global peace and security can be ensured through effective, accountable, and inclusive institutions.<sup>38</sup> The achievement and progress on the sustainable development goals is challenging in regions of armed conflict. The following SDGs of UN Sustainable Development Goals Agenda 2030 are linked and affected by Kashmir dispute:

Considering peace as a crosscutting priority, the SDG 16 (*Peace, Justice, and Strong Institutions*) provides that the UN and the international community shall “*promote peaceful and inclusive societies for sustainable development, provide access to justice for all, and build effective, accountable, and inclusive institutions at all levels.*”<sup>39</sup> Kashmir conflict undermines efforts to achieve peaceful and inclusive society. In Kashmir, violence disrupts governance, erodes the rule of law, and hampers access to justice. Persistent conflicts weaken national

<sup>36</sup> Advisory Opinion Concerning the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania; First Phase, ICJ, 30 March 1950, <https://www.refworld.org/jurisprudence/caselaw/icj/1950/en/16773> [accessed 12 March 2024].

<sup>37</sup> Transforming our world: the 2030 Agenda for Sustainable Development. Available at: <https://sdgs.un.org/2030agenda>.

<sup>38</sup> D. M. Malone, *On SDG 16: Peace, justice and strong institutions*, “Our World”, (2018), <https://ourworld.unu.edu/en/sdg-16-peace-justiceand-strong-institutions>. One aspect of the SDG 16 that relates to peace and security tends to focus on measures related to humanitarian operations, ceasefires, peacekeepers and disarmament adopted with UN auspice alongside economic and social development.

<sup>39</sup> However, large parts of the contemporary human world are witnessing a sharp rise in armed conflicts leading to extreme poverty, hunger and underdevelopment within those regions including Kashmir. Over the last 15 years, the world has become less peaceful, with the overall 0.42 percent and average country score deteriorating by 5 per cent in 2023. In the last fifteen years, this is the thirteenth deterioration in global peacefulness and security. This is because the UN has though highest targets, yet low or no means of implementation and achieving those objectives. This in turn makes the pursuit of maintaining peace and security more of an idealistic hope.

institutions, making it difficult to implement effective policies and deliver public services. This stymies progress towards building strong institutions.<sup>40</sup>

Similarly, this dispute disrupts healthcare services, leading to poor health outcomes (*SDG 3: Good Health and Well-being*). The destruction of hospitals and clinics, along with the displacement of healthcare professionals, severely impacts public health. Prolonged exposure to violence and insecurity contributes to widespread mental health issues, which are often overlooked in Kashmir. Moreover, Kashmir has high gender-based violence, including sexual violence used as a weapon of war which is in negation to SDG 5, that deals with Gender Equality.

There also exist several shortcomings and lacunas within the Sustainable Development Goals Agenda 2030. The Security Council failed in achieving a peaceful settlement for Kashmir and other similar disputes due to the level of priority given to this obligation of the Security Council. Despite its imminence, the “*global peace and justice*” been placed as SDG number sixteen rather than at top. International peace and security is a meta-principal and cornerstone to all the other SDGs. Be that eradication of poverty, non-discrimination, economic development, decent work, quality education and so on.

Secondly, from the perspective of the Kashmir dispute, if the main architects of the UN Sustainable Development Goals (also the permanent members of UN Security Council, China, France, Russia, United Kingdom, and United States) are the top arms suppliers to India. India stands as the world's third biggest country with military expenditures of 40 billion USD since 2008. There are 700000 Indian army, which absolutely facilitates Kashmir's qualification as world's highest militarised zone with highest number of military personnel per civilian capita. With such attitude, it cannot be expected that there will be no arms race between Pakistan and India and that peace and security can be achieved. This consequently undermines the achievement of the UN SDGs 2030.

It may also be stimulating and relevant to further analyse that due to the failure of Security Council to ensure peace and security, how this challenge contribute to limit to India's trade and economic manoeuvre in the region, which is one of world largest economy, and how it has benefited China to pursue more

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<sup>40</sup> Schools are often targets of violence, and educational infrastructure is destroyed. This deprives children of their right to education and limits opportunities for future generations.



robustly its Silk Road Initiative that recoils from Karachi, Pakistan. Overall, how it contributes to Chinese dominance and its consequent worldview of international legal order.

## **VI. Palestine and Kashmir, misunderstood as the same disputes**

Generally, the issue of Kashmir and Palestine is misunderstood as the same. In the Palestine dispute, the UN has given the partition plan dividing the territories between Arabs and Israel. This provides the foundation for the state of Israel's existence and legitimacy.<sup>41</sup> However, there is no foundation and legitimacy for Indian occupation of Kashmir. Kashmir is a case of prolonged occupation. Jammu and Kashmir, which was a state, occupied by another state and this occupation is in continuity. Palestine has been occupied since 1967, while Kashmir has been occupied since 1947, yet Palestine is always given as a textbook example while Kashmir being ignored. The Palestine issue is not as big as the Kashmir issue. There are four reasons and grounds for this claim:

- i. How much territory is involved in both the disputes? In Kashmir, the amount of territory involved is many times bigger than that of Palestine.
- ii. How much of the population is affected by this dispute?
- iii. Magnitude of brutality and intensiveness in Kashmir and Palestine. In Kashmir there are around 900000 Indian paramilitary forces making Kashmir world highest militarised territory. This number is even more than double of the whole of Israeli military forces.
- iv. This is the world's only dispute where three of the neighbours possess nuclear arms capability.

## **VII. Suggestions and recommendations**

As stated above, Kashmir is an issue of occupation, violation of the right to self-determination, misappropriation of demography of an occupied territory, as well as the issue of threat to international peace and security that undermines the regional as well as the international development. Against this backdrop, the primary question that needs to be answered is who will be the representative of Kashmir dispute?

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<sup>41</sup> *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004, available at: <https://www.refworld.org/cases,ICJ,414ad9a719.html> [accessed 1 February 2024].

*The role of Azad Kashmir - Government in exile:* France was occupied during World War II. A government in exile for France was established and supported by allied powers. It was accepted as a base camp for French independence. This could be the status of the Azad Jammu and Kashmir government (a government in exile). Azad Kashmir is the original representative of this dispute. Azad Jammu and Kashmir should be brought to the driving seat of this dispute.

*Obligations of the International Community - the principle of estoppel:* The Kashmiris have a legitimate right to freedom from occupation and to a free and fair plebiscite. The international community in the form of international bodies as well as individual states has the responsibility to persuade India to end the occupation of Kashmir and to abstain from reverting on its legally binding obligations. The lack of enforcement on the part of the international legal system does not exonerate the Security Council's and international community from its primary responsibility of ensuring the protection of basic human rights, prohibition of occupation, the right to self-determination and the prohibition of demographic changes.

Being members of the United Nations, the International Community has the obligation to ensure that India follows the obligations stemming from relevant Security Council resolutions. The principle of estoppel can be invoked against the unilateral change of situation that is of international interests.<sup>42</sup> For example, the backtrack of India from holding plebiscite in line with its obligations under Security Council Resolution 91 and unilaterally changing the legal status and demography of Kashmir should bind it to this position.

The statement of Nehro is binding on India as in Eastern Greenland and Nuclear Test cases it was made clear that “*state officials, through their statements, can bind their country to a unilateral declaration.*” In case there is a deviation from such commitment made by state officials, through the principle of estoppel, the international community has the obligation to compel the violating state not to act unilaterally and arbitrarily changing the demography of occupied

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<sup>42</sup> VOYIAKIS, Emmanuel. Estoppel. *Oxford Bibliographies*, Oxford 2019.

territories.<sup>43</sup> Apart From Security Council, within the UN General Assembly the uniting for peace procedure can be initiated and adopted as well. This procedure was used during the instances when Russia vetoed Security Council resolutions regarding North Korea, Suez Canal, and Soviet invasion of Afghanistan.

Also, International Criminal Court (ICC) can be approached because this is not only the matter of human rights, rather this is also the case of war crimes, crimes against humanity and the crimes of misappropriating the demography of Kashmir. The only possible option with respect to Kashmir case, can be initiation of proceedings by the prosecutor of ICC.<sup>44</sup> This will be only possible when sufficient petitions are submitted with conclusive evidences of the atrocities committed that could motivate prosecutor of the ICC to initiate the proceedings.

In addition, the other venue can be the International Court of Justice. In going to the International Court of Justice, Britain can also be made party to the case. As the court held in the Chagos Archipelago case that since failure of Britain to perform its obligation of providing and ensuring the right to self-determination to the common masses was the violation of the UN charter's principles of right to self-determinations. The process of decolonization was therefore not completed and Britain was under obligations to perform its obligations of ensuring the right to self-determination of all the parts of Asia, including Kashmir. Moreover, the role of the Organization of Islamic Cooperation (OIC) can also be useful. This dispute can be effectively highlighted at the OIC as the 57 member states of the OIC are the part of UN as well.

### **VIII. Conclusion**

Kashmir in other words is initially and fundamentally the story of prolonged occupation of majority Muslim population by Hindu Maharaja, then by Hindu dominant India, followed by questionable accession with the commitment of plebiscite, and then reversion from that commitment, to the adoption of measures contrary to the prohibition of demographic changes of occupied territories. It is

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<sup>43</sup> Nuclear Tests Case (Australia v. France), -, International Court of Justice (ICJ), 20 December 1974, <https://www.refworld.org/jurisprudence/caselaw/icj/1974/en/19101> [accessed 12 March 2024].

<sup>44</sup> Within ICC a case can be brought through following three legally possible ways:

- By the state parties, (Pakistan and India are not parties);
- Referral by UN Security Council, or
- Initiated by ICC prosecutor.

also the story of failure of the Security Council to resolve this vital dispute, turning it to the oldest unresolved dispute on the United Nations Security Council agenda. This dispute has the potential of undermining regional and international security, and consequently it can mutilate the UN Sustainable Development Goals Agenda 2030, as there can be no sustainable development without peace and no peace without sustainable development.

There exist several shortcomings and lacunas within the Sustainable Development Goals (SDG) Agenda 2030. The Security Council failed in achieving a peaceful settlement for Kashmir and other similar disputes due to the level of priority given to the maintenance of international peace and security obligations of the Security Council. Within SDGs – 2030, despite its imminence, the “*global peace and justice*” has been placed as SDG number sixteen rather than as a top priority. Secondly, from the perspective of the Kashmir dispute, if the main architects of the UN Sustainable Development Goals (also the permanent members of UN Security Council, China, France, Russia, United Kingdom, and United States) are the top arms suppliers to India. India stands as the world's third biggest country with military expenditures of 40 billion USD since 2008. There are 700000 Indian army which absolutely facilitates Kashmir's qualification as world's highest militarised zone with highest number of military personnel per civilian capita.

International peace and security are the cornerstones to all the other SDGs. Be that eradication of poverty, non-discrimination, economic development, decent work, quality education and so on. There is the need for global peace and justice should be prioritized in all instances and the gap between aspirations and practical measures needs to be reduced.

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