KASHMIR DISPUTE: A LEGAL PERSPECTIVE

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Abstract

Despite the passage of almost seven decades, people of the former Princely State of Jammu and Kashmir are waiting for their right of self-determination, promised by United Nations. Whereas, there are over twenty five UN resolutions, calling for the solution of the dispute, India is reluctant to grant Kashmiris as their right of self determination. By denying the implementation of UN resolutions, and occupying the state through the deployment of over 700,000 troops, India is clearly violating international law and UN resolutions. Though the legal status of the instrument of accession has been questioned by neutral writers and experts of international law, the instrument to safeguard the Kashmiris’ right to decide their future as per their wishes in its various articles. Over last twenty-five years, Indian security forces deployed in Indian Held Kashmir (IHK) have committed massive human rights violations. In fact, the dispute about the State of Jammu and Kashmir is an issue of right of self-determination for the Kashmiri people. The paper therefore, puts into debate, the legal perspective of Kashmir dispute in the light of guarantees, provided by international law, provisions of human rights, related agreements and conventions.

Keywords: Kashmir, UN Resolution, India, International Law

Introduction

Human security is the most significant agenda of state security. The elements of human security constitute security of individuals, communities and societies. The basic right to live, survive, cherish and prosper in life is for every human being and is explicitly guaranteed in the international law. This is regardless of cast, creed, faith and geographical identity of the
person or community in question. The provision of human rights and security are categorically stated both in international law and in the International Covenant on Civil and Political Rights (ICCPR).

In the theoretical perspective, the right to self-determination or Self-Determination Theory (SDT) is an individual’s and community’s right to freely decide their political, social, cultural and economic status. According to International Law, the right to self determination is fundamental human right. The principle of self determination is significant part of the Charter of UNO. According to the norms of international law, and principles of international Court of justice, the right to self determination is held by the people fundamentally and not by the government. Self-Determination Theory (SDT) was developed by Edward L.Deci and Richard M. Ryan. Its main focus is on supporting natural intrinsic tendencies, human motivation and personality in an effective and healthy ways. As a meta-theory for framing motivational studies, the SDT “focus on how social and cultural factors facilitate or undermine people’s sense of volition and initiative, in addition to their well-being and the quality of their performance”3. It also deals with “individual’s experience of autonomy, competence, and relatedness.”4

Despite global prohibition on torture even during the times of national emergency, deaths through torture of Kashmiri people have been a common phenomenon in Indian held Kashmir (IHK) by Indian security forces. Factual reports of killing innocents, torture, hostage taking, and rape have been prominent among a wider variety of human abuses in IHK since 1990.

Kashmir is a case study for the self-determination; Kashmir has all the elements that a nation state should fulfil.

- It has a territory larger than many nation states from Africa to Europe and Asia.
- It is rich in natural resources.
- It is home to more than 13.65 million people.5
It has a history of independence or self-governance.
It owns a distinct culture, languages and deity.

India, the largest democracy in the world, continues to occupy 66% area of Kashmir in an undemocratic manner. Free elections are not a norm in Kashmir. Wherever a voice for human rights was raised it was curbed by arrest, torture, killing, or other such means. The main agenda here therefore, is to correlate Kashmir’s right to self determination with violation of basic human rights. Because now there are political tactics being used to alter the demographic landscape of Kashmir: over half a million non-Kashmiris have been settled in Indian held Kashmir.

The basic provision of international law is that; “individuals should not be arbitrarily deprived of their lives, and homicide should be deterred, prevented and punished.” These rights are further secured and protected by the ‘Universal Declaration of Human Rights-1948’. The declaration emphasizes on ‘innate freedom and equality, puts a ban on discrimination and states that, “Everyone has the right to life, liberty and security of person.” Unfortunately, with all these safeguards and guarantees for the human beings, through various agreements, declarations and covenants, the people of IHK are being humiliated, discriminated, tortured and killed as if there is no law meant for their protection and safeguard.

The Instrument of Accession; Myth or Reality

While tracing history of the state, one may find many discriminations and ruthless handling of Kashmiri masses at the hands of the Indian occupation forces. The current phase of sufferings of the Kashmiri people started with decolonization of Subcontinent in 1947. Decolonization of India was a difficult decision for the British Government; however, two factors obligated the latter to eventually vacate this strategically significant part of Asia. The first factor was the local protests against the protracted British rule that had transformed this particular colony into a nuisance for the
crown. Sustenance of the colonies due to the fiscal retardation of the crown was imminent. Therefore, the British Government was compelled to announce the decolonization and the partition plan of India on June 3, 1947. This was followed by passing the Indian Independence Act by British Parliament on July 17, 1947. Article 1 of the Independence Act, paved the way for the decolonization of India and its partition into the two states, India and Pakistan. In its Article 7, the Independence Act declared the suzerainty of ‘His Majesty’ over the Indian states. According to this Article, suzerainty of His Majesty over the Princely States lapsed on August 15, 1947, sequel to which all treaties and agreements, which were enforced until the date of passing of this Act, between rulers of these state, and His Majesty also lapsed.

There were over five hundred sixty-five Princely states in British India at the time of its partition. According to Article 7 of the Indian Independence Act, all agreements between British Government with Princely states or their rulers lapsed on 15th of August 1947. The State of Jammu and Kashmir had ‘class A’ status, enjoying special autonomy and was sold to Gulab Singh by East India Company in 1846 through Kashmir Sale Deed (KDS). The provision of this article slabs Maharaja Sir Harisingh to be the legal ruler of the state after August 15, 1947. If he was not the legal ruler of the state, how could he sign the instrument of accession (if at all it was signed) with India? It is to be kept in mind that, this title to the state was granted to him by the British Government (East India Company) under the Treaty of Amritsar popularly known as the ‘Kashmir Sale Deed’ signed on 16 March 1846 and lapsed on 15th August 1947.

Apart from above mentioned facts, Lord Mountbatten, the Last Viceroy of India, during his special meeting with Chamber of Princes in New Delhi on July 25, 1947, said that all Princely States were practically free to join any one of the dominions; India or Pakistan. Nevertheless, he clarified that, two pre-conditions have to be kept in consideration while acceding to any dominion. These pre-requisites include; the geographical contiguity of the Princely states and wishes of the
Owing to overwhelming Muslim population, both the factors in the former Princely State of Jammu and Kashmir were favouring its accession to Pakistan.

This aspect was violated by Lord Mountbatten himself, the subsequent Indian rulers and Maharaja Harisingh. This was indeed, the first violation of Indian Independence Act, the very basis of partition of India. This is why it is said that, Kashmir is unfinished agenda of Indian partition. Otherwise, the State of Jammu and Kashmir is not just a piece of land, the fate of which could be sealed or signed away through any Instrument of Accession, which has no legal value, even if it was ever signed before Indian invasion into the state. What could have been the deciding factor was the free will of people of the state, the right of self determination.

Musings of the various scholars of the International Relations include the question of whether the Instrument of Accession was really signed by the Maharaja or not? From the perspective of international law, any treaty or an agreement once enter into force by a UN member, needs to be registered with the United Nations Secretariat. There exists no evidence, which proves that, Instrument of Accession was ever presented in the UNO or shared with Government of Pakistan. Furthermore, in 1995, India announced that, original copy of the Instrument of Accession had either been stolen or lost.

**Aftermath of Indian Invasion**

Once the popular Kashmiri demand; accession with Pakistan was not met by Maharaja Harisingh, the people of the state revolted against Dogra rule and later established Azad Jammu and Kashmir Government on October 24, 1947. Even today, this day is being regularly celebrated in Azad Kashmir each year as the day of independence and state’s accession to Pakistan. The Kashmiri revolt propelled the Maharaja to ask for Indian military assistance, by making a formal request through Mr. R.L. Batra, the deputy Prime Minister of Maharaja. The Indian Government however, conditioned the military assistance with state’s accession to
India, which Maharaja Harisingh was never. Nevertheless, on October 27, 1947, Indian Army landed at Srinagar Airport, which India claimed was done after formal signing of Instrument of Accession with Maharaja Harisingh. The illustrious British writers like Alastair Lamb and Victoria Schofield contested in their writings about the signing of any Instrument of Accession between Maharaja Harisingh and India before October 27, 1947. V.P. Menon, Indian civil servant (states secretary), however, stated otherwise and said that, signing on accession treaty was done on 26 October 1947. V.P Menon’s statement was contradicted by then Kashmiri Prime Minister, Mr Mahajan, who accompanied V.P. Menon from Delhi to Jammu and vice versa.

Legal frameworks may support one cause on mere technicality but the primary issue of importance is that of human dignity which trumps all laws of man. This is supported in words of Jawaharlal Nehru that, “I say with all respect to our Constitution that it just does not matter what your Constitution says; if the people of Kashmir do not want it, it will not go there. Because what is the alternative? The alternative is compulsion and coercion...” Then again if legality is scrutinized closely, there are many safeguards in the instrument of accession, which guarantee the sovereignty of the state’s future. Clause 7 of the instrument says, “Nothing in this instrument shall be deemed to commit me in any way to acceptance of any future constitution of India ...” Clause 8 of the Instrument further elaborates; “Nothing in this Instrument affects the continuation of my sovereignty in and over this state......”

Even if the instrument of accession is accepted as a legal document, signed by the Maharaja and Indian government it clearly states that, “after the restoration of law and order in the State of Jammu and Kashmir and the expulsion of the raiders, its future will be decided in accordance with the wishes of the people of the State.” UNO followed suit in all twenty-four resolutions, it passed from time to time. Apart from this, Indian leadership had made a number of commitments with Kashmiri people, Government of Pakistan
and to the world community that after the restoration of peace in the state, its future would be decided as per the wishes of the people of Jammu and Kashmir through a UN mandated plebiscite, the fulfillment of which is still awaited.

Mr. Alexander Simon, the British High Commissioner to India revealed in a top-secret letter addressed to the British Government that, despite having no formal accession treaty till-date (27 October, 1947), ten Indian aircrafts loaded with arms and troops were dispatched to Kashmir from New Delhi on the morning of 27 October 1947. There is yet another significant factor, had there been any accession treaty, between Indian government and Maharaja, why could it not be published in the Indian White Paper of 1948? Despite all these facts, the legal query still unanswered is that, why the IHK was given a special status through Article 370 of the Indian Constitution, which is not the case with any integral Indian state.

Another perception prevails that, after the invasion of the state by the Indian forces, Maharaja Harisingh may have been forced to sign the instrument of accession. Supposedly, if this is deemed true, the Instrument of Accession stands tainted. It is a dubious legality that can be challenged on grounds that it was obtained under intimidation and duress. The International Court of Justice has highlighted that, “under international law an agreement concluded under the threat or use of power is rendered null and void.” The UN Charter also has the same interpretation and it is recognized in the Article 52 of the Vienna Convention on the Law of Treaties.

**The UN Interpretation of Kashmir; Integral Part of India or Otherwise**

Once differences arose between the Indian Premier Nehru and Sheikh Abdullah over the future status of the state in 1951, India imprisoned Sheikh Abdullah and through bogus Legislative elections, got the accession resolution approved in favour of Indian union in 1952. This was done despite clear directive of UN Resolution dated March 30, 1951. The
resolution affirmed that the convening of a Constituent Assembly as recommended by the General Council of the "All Jammu and Kashmir National Conference and any action that Assembly might attempt to determine the future shape and affiliation of the entire state or any part thereof would not constitute a disposition of the state in accordance with the above principle.” 21 After this, India stepped back from conducting of the plebiscite and later started calling the state its integral part.

Subsequently on January 24, 1957, UNSC passed another resolution and reminded both the governments and authorities on both parts of Jammu and Kashmir that, the principle embodied in its previous resolutions that, the final disposition of the State of Jammu and Kashmir will be made in accordance to the will of the people expressed through the democratic method of a free and impartial plebiscite conducted under the patronage of the United Nations. Both resolutions clearly state that, “any action which the Kashmir Constituent Assembly may have taken or might attempt to take to determine the future shape of state or any of its part would not constitute the disposition of the state and that election of the State’s Constituent Assembly cannot be a substitute for plebiscite.” 22 From the legal perspective as per UN resolutions, IHK Legislative Assembly had no authority to declare Kashmir as an integral part of India.

The UN has passed a number of resolutions regarding the Kashmir dispute, but the fact that these resolutions were passed under Chapter-VI of its Charter hence cannot be enforced and the resolutions have the status of being non-binding. This indeed is one of the biggest obstacles to the resolution of the Kashmir dispute. Had these resolutions been passed under Chapter VII, which deals with binding UN resolutions, the fate of the disputed territory could have been decided much earlier. In addition, the resolutions passed by the UNCIP were also non-binding as, it was an agency of good offices and had no power to impose the decisions. It would be erroneous to establish that since these resolutions were not legally binding on India and Pakistan, that they had not been
implemented as such in real sense. In fact, they imposed a moral responsibility on India and Pakistan to ascertain the will of the Kashmiri people by holding a plebiscite in Jammu and Kashmir.

**Right of Self-Determination: A Comparative Study**

The right of self determination embodies the basic right of the people for making decision for their destiny. It is the core principle of international law and fully protected in the charter of United Nations and International Covenant on Civil and Political Rights for all people.\(^{23}\) The concept of self determination is as old as the Greek city state(s) remained significant during French and American revolutions, refined by Woodrow Wilson in his fourteen points, thus incorporated into the League of Nations and got centrality in the Charter of United Nations. Post World War-II, the principle of right of self determination becomes the leading cause of the European decolonization of Asia and Africa.\(^{24}\) Pakistan and India were among the initial states which got independence in August 1947. In the case of Palestine, the right of self determination accorded to Palestinians by UN in its resolutions 181 and 194 was denied by Israel.\(^{25}\) United States, Britain and France remained in direct support to the Israel in its expansion and violation of UN resolutions. The UN Partition Plan gave 53% land to Israel and 47% to Palestinians, but today, Israel is occupying over 80% of the total landmass, restricting Palestinians in two narrow areas of Gaza and West Bank. In the case of Palestine, there has been a clear violation of this UN mandated right of self determination.\(^{26}\)

In the case of East Timor; it was the province of Indonesia, not a non self governing territory.\(^{27}\) East Timor indeed was a province of Indonesia, as the people of this province through exercise of their right of self determination voted in favour of the Indonesia when “People's Assembly" formally requested integration with Indonesia following its decolonization from Portugal in 1975.\(^{28}\) However, there has been claim that, Indonesia occupied it through the use of force in 1976 and People’s Assembly ratified it without having a popular support
from the masses. In any case the people ultimately decided to be independent from Indonesia, thus without having many UN resolutions, East Timor got independence status in 2002, under the notion of the right of self determination. East Timor had the support of US, and European Union. There were allegations against Indonesia that, while administratively controlling East Timor, it had violated the human rights by, “political, social, and cultural repression; and by entering into treaties on behalf of the East Timorese for self-serving economic reasons.” India too, has violated the human rights in IHK and still doing that. In case of Palestine, Israeli repression over the Palestinian people is a routine matter. Despite presence of dozens of UN resolutions, this dedicated active support of US and EU is not available in the case of Kashmir and Palestine issues, thus remained unresolved.

In February 2008, once Kosovo Parliament declared that, Kosovo will be independent and sovereign state, there were mixed responses from major power houses. The US and Western countries favoured the declaration, but Russia along with some other countries declared the declarations as against the International law. Later on, most of the countries have recognized the Kosovo’s independence. According to Johan Ryan, “The UN charter gives people the right to self-determination and by virtue of that right they are free to determine their political status. Quebec in Canada has exercised that right, and there should be no reason why Crimea could not do the same.” International Court of Justice too, has given its verdict about the legality of Kosovo’s right of self determination and independence.

In case of Crimean accession with Russia, there arose another legal lacuna, whether it could accede with Russia. There are two arguments about this accession. First; the entire process of accession was forced upon by Russia, thus lack transparency and obligations of international law were not met. Second argument was that, Crimea was originally part of Russia, annexed with Ukraine in 1954 once the latter was part of former Soviet Union. It was meant to maintain a strong grip over the states annexed but, was not a part of Russia.
Similarly, demographic changes were made in Central Asian region. Now, once Ukraine was parting ways with Russia (by joining NATO), the Russian origin population of Crimea decided to join back their parent country. They adopted the legal procedure of referendum by the people and through Crimean Parliament. Like Crimea, Indian held Kashmir enjoys a special autonomous status under Article 370 of Indian Constitution. This article is the only link between IHK and India. Then, there are dozens of resolutions for the determination of right of self-determination by people of Kashmir to decide their future status as per their wishes. There were no human rights violations in Crimea by Ukraine, even then, the Crimean decided to leave the latter. But in the case of IHK, India has perpetrated unprecedented human rights violations and is under Indian occupation too, therefore, must get their right of self determination as their basic right.

**Constraints with Bilateralism**

Following the Simla Agreement of 1972, India prefers resolution of issues through a bilateral approach. Whereas in this accord both the countries agreed to “settle their differences by peaceful means through bilateral negotiations”, there was no mention of by passing or leaving aside the UN resolutions on Kashmir issue. Rather, clause I of Article 1 of the agreement clearly states that, “the principles and purposes of the Charter of the United Nations shall govern the relations between the two countries.” In a way, UN role was reiterated in the Simla Agreement. Then, Kashmir is not a bilateral issue rather it has four parties; Kashmiri being the first party to the dispute, besides, India, Pakistan and United Nations. Even China should be party to the dispute, having a part of Kashmir (Aksai Chin) under its control.

Then, over the years, the bilateral approach has not worked, primarily, owing to a non-cooperative Indian attitude. The agreement whilst considering the bilateralism sacred does not thwart any third party mediation or facilitation. It says, “That the two countries are resolved to settle their differences
by peaceful means through bilateral negotiations or by any other peaceful means mutually agreed upon between them.”

The hardened Indian stance, sticking to bilateralism speaks of its delaying tactics and lack of determination for the resolution of core disputes like Kashmir.

In the recent history, there have been pressures from United States and some European countries over India and Pakistan for the resolution of Kashmir dispute, particularly during the period of escalation and mobilization of forces. Unfortunately, the United Nations resolutions on Kashmir are under Chapter-VI of its Charter, hence cannot be enforced. This fact was even highlighted by former UN Secretary General, Kofi Annan in March 2001, during his visit to Pakistan. Replying to a question he said that the UN resolutions on Kashmir did not come under Chapter Seven of the UN charter, therefore are not self-enforcing. In the case of East Timor and Iraq (1991), UN resolutions were under Chapter 7, thus enforceable. The resolutions on Kashmir need cooperation of both the parties for implementation. For the US, EU and other major powers, consent of both India and Pakistan is needed to play the role of mediator or facilitator.

Nonetheless, owing to its strategic partnership with India, U.S seems less interested to play a dominant role for the resolution of Kashmir issue except rhetorically. Therefore, US stance with respect to Kashmir is essentially one of neutrality based on maintaining cordial relations with India without foregoing a relationship with Pakistan.

New Debate; Abrogation of Article 370 and Integration of Kashmir into India

A debate is underway in India, whether or not to abrogate Article 370 of Indian Constitution, which gives Indian held Kashmir, a special status. For the Indian leaders, especially BJP, as an election promise, Article 370 is an irritant and they are making grounds for doing away with it. Nevertheless, for the people of IHK, Indian occupation, its brutalities and daily crackdowns and human rights violations are the real
problems. For them, even Article 370 is a symbol of foreign occupation, though under the prevailing circumstances, Kashmiri from IHK will like to guard it, until they attain their right of self-determination. Contrary to the Indian efforts of abrogating article 370, the people of occupied Kashmir would like India to stop human rights violations through its security forces in the first instance. Subsequently, they would like the implementation of UN resolutions (right of self-determination), through UN sponsored plebiscite. Since India has an inflexible approach towards both, therefore, there is a dire need that the international community and United Nations play their role to beseech India. However, whether it is Indian occupation or continuation of the Article 370, it is the Indian rule over occupied Jammu and Kashmir in particular, which Kashmiri people have been fighting against ever since 1947.

Today, Article 370 is the only linkage between India and IHK, and even this article does not give India legitimacy over the state of Jammu and Kashmir. Drafted in part XXI of the Indian Constitution, this article relates to, “Temporary, Transitional and Special Provisions. Except for Defence, Foreign Affairs, Communications and ancillary matters (matters specified in the Instrument of Accession) the Indian Parliament needs the State Government’s concurrence for applying all other laws.”

Indeed, the Kashmiri people in IHK live under different laws, including those related to citizenship, ownership of property, and fundamental rights, as compared to the integral Indian states. Except for four areas mentioned above, Indian parliament has no legal authority to make laws for the state. Article 5 of IHK Constitution provides full protection to the state’s legislature. At the time of drafting and incorporation of this Article into Indian Constitution, the then Indian Law Minister B.R. Ambedkar had opposed it. He even ridiculed Sheik Abdullah by saying, “You wish India should protect your borders, she should build roads in your area, she should supply you food grains, and Kashmir should get equal status as India. But Government of India should have only limited
powers and Indian people should have no rights in Kashmir. To give consent to this proposal, would be a treacherous thing against the interests of India and I, as the Law Minister of India, will never do it.”

For the people of IHK, Article 370 is nothing except a continuation of Indian rule.

**Indian Strategy for 2014-Election in IHK**

Now, through the abrogation of this Article, Bhartia Janta Party (BJP) led Indian Government intends complete integration of the state of Jammu and Kashmir with Indian Union. In order to do that, BJP has worked out a strategy to manipulate the State’s Election-2014 in IHK, the way Nehru did in 1952, after imprisoning Sheikh Abdullah. The strategy included that, through a well-orchestrated plan, Modi Government should get maximum Legislative Assembly seats (at least 44 plus) mainly from Jammu and Ladakh provinces. This would have given Indian Government sufficient maneuvering space to bring demographic changes in the state through Legislative Assembly resolutions. Once there would be majority seats of BJP and its alliance in assembly, India can get the results of its own choice, against the wishes of masses and through such a manipulated and engineered IHK Assembly, will get a vote of state’s permanent accession with Indian Union by doing away with the Article 370.

To its bad luck, the BJP could bag twenty-five seats, otherwise a great success and formed Government with People’s Democratic Party (PDP). In fact, India has record of changing the demographic character of Kashmir. Following the mass Muslim migration from Jammu Province from 1947 to 1971, India inhabited Hindu population from elsewhere into the state, thus, converting the Muslim majority into minority. In 2008, while in the midst of completing its long term surreptitious agenda in Valley, India had to confront yet another indigenous Kashmiri upsurge. This was sequel to allotment of 800 kanals of forestland to Shri Amarnat Shirine Board in complete violation of State’s law on allotment of property. This was yet another attempt to inhabit the Hindu population for bringing demographic changes in the Valley,
which has 95 percent Muslim population. The Kashmiri protest against this allotment was responded by killing dozens of the innocent protestors and imposing economic strangulation by blocking Jammu-Srinagar Highway by Indian security forces and BJP workers. The economic blockade of Valley, caused wastage of hundreds of thousands tons of perishable items, as these items could not be taken to the Indian markets. This resulted into loss of millions of dollars to local Kashmiri business community and farmers.

**Post Election-2014; an Alternative Indian Strategy for IHK**

Failing to form a Government of its own, the BJP has decided to undo the very unified character of the IHK. The broad contour of the plan is to eliminate the very identity of Kashmiris- the Kashmiriyat, though indirectly, India is working on it since 1950s as. In Jammu region, despite mass Muslim migration, Hindu majority was restricted to three districts (Jammu, Udhampur and Kathua) only. Other three districts; (Poonch, Doda and Rajouri) had Muslim majority. India Curved out additional four districts (Riasi, Ramban, Samba and Kishtwar), all having Hindu majority. Overall, India (BJP) is trying to prove that, Jammu is a Hindu majority province and its people are inclined towards India. For the Ladakh Region, India plans differently. Practically, this area is controlled directly by the New Delhi and masses are persuaded to ask for their separate identity; the Buddhist or regional identity- away from Kashmiriyat. A rift is created between Valley people and people of the Leh and Kargil-Dras. Within Ladakh, there is a huge gap between Buddhists and Muslims of Kargil-Dras.

In Valley, India is planning separate union territory for the Hindu Pandits, where they could feel more secure and their culture is protected. Two movements of Kashmir Pandits are active for their separate homeland. One; Punun Kashmir and the other is Bantustan. Since Pundits are pro India, thus, through Punun Kashmir Pandits demand establishment of their own secure regions or homeland in the Valley of Kashmir
comprising regions of the Valley to the East and North of river Jhelum. According to Bantustan; three identified ‘settlements’ will be carved out of existing populated areas of Kashmir Valley for the Hindu Pandits. For this purpose, there would be allotment of 17,000 kanals of land for Bantustans. This would mean displacing the already traumatized Muslim populace of Valley for having new secured autonomous regions for Hindu Pandits. According to a Congress MP, Mani Shankar Aiyar—Congress, “The worst of a coalition of opposites, such as we have in Jammu and Kashmir, is that to keep the alliance going, the partners indulge in what can only be described as competitive communalism”\textsuperscript{38} Indeed, the Crux of New Indian Strategy for IHK is, doing away with the Kashmiri identity—Kashmiriyat, dividing the people on communal and ethnic lines, subsequent demise of right of self-determination and finally, the state’s merger into Indian Union or annexation of its parts with other Indian states, after abrogation of Article 370.

The Perspective of International Law

Whereas International human rights law prohibits the arbitrary deprivation of life under any circumstances, Article 6 of International Covenant on Civil and Political Rights (ICCPR), prohibits derogation from the right to life, even during occasions of emergency. Its Articles 4 and 7, explicitly ban torture, even in times of national emergency or when the security of the state is threatened.\textsuperscript{39} Indian Army and paramilitary forces operating in the held Kashmir, have deliberately and methodically violated the fundamental human rights and international norms on human rights law, to which Indian Government is responsible, being signatory of these laws.

A world with human beings and without rules is a jungle devoid of consideration morality. Thus, it would be futile to look at the Kashmir issue without taking all the legal aspects under close scrutiny. The international humanitarian law, applicable to the right of self-determination in conflict zone of IHK is found in Article 3 Common to the four Geneva
Conventions of August 12, 1949, known as the ‘Common Article 3’ which provides international law and standards governing the conduct of parties in an internal armed conflict, including government forces and insurgents.\(^\text{40}\) It states that: “Persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.”\(^\text{41}\)

Unfortunately, in IHK, the human rights violations like; torture, hostage taking and rape have been used as weapon.\(^\text{42}\) The Common Article 3 forbids all of these human abuses. India however, blatantly violated this international humanitarian law and its security forces killed innocent Kashmiri people, molested women folk and tortured thousands just on the basis of suspicions under the inhuman repressive laws like Armed Forces Special Power Act, Public Safety Act and similar other provisions. It is worth mentioning that, two more international human rights treaties deals with right of self-determination of Kashmiri masses. These include; the International Covenant on Civil and Political Rights (\(\text{x}\)), and the International Covenant on Social, Economic and Cultural Rights (\(\text{xi}\)). Common article 1, paragraph 1 of these Covenants provides that;

“All people have the rights of self-determination, by virtue of that right they freely determine their political states and freely determine their economic, social and cultural development.”\(^\text{43}\)

The Discriminatory Indian Laws

Indian Government is continuing its repression on Kashmiri masses through a number of discriminatory laws, imposed in the state, since 1990. Among these laws, Armed Forces Special Power Act (AFSPA) empowers the security forces “to shoot at sight or arrest people without a warrant.”\(^\text{44}\)
Few years back, Omar Abdullah, the former IHK Chief Minister tried his best to revoke this law from the occupied state. Unfortunately, he could do very little, despite his meeting with then Indian Army Chief, General VK Singh, Defense and Home ministers. Indian Army and former Indian Defense Minister, AK Antony, strongly resisted the move and were able to convince the Chief Minister of IHK for not pursuing the issue any further.45

**Challenging the United Nations**

After 1948 Kashmir War, UN established a United Nations Military Observer Group in India and Pakistan (UNMOGIP), for monitoring the ceasefire between Pakistani and Indian forces deployed along Line of Control (LoC). In early 1950s, Sir Owen Dixon, the United Nations Representatives to UNCIP, reported to the Security Council that;

“In the end, I became persuaded that India’s agreement would never be obtained to demilitarization in any such form, or to provisions governing the period of plebiscite, conducted in conditions sufficiently guarding against intimidation, and other form of abuse by which the freedom and fairness of the plebiscite might be endangered.”46

However, after Simla Agreement-1972, India gradually stopped UN military observers to visit areas which are deeply embedded in abject poverty and beaten down by violence. So much so, during LoC ceasefire violations, in January 2013, once Pakistan demanded neutral investigation through UN military observers, India rejected the proposal.47 India even denied legal status and the very validity of UNMOGIP. In a way, India negated UN mandate and its resolutions. It was distressing once the Permanent Indian Representative to the UN, Mr Hardeep Singh Puri said that, “UNMOGIP's role had been ‘overtaken’ by the 1972 Simla Agreement.”48 Nevertheless, later on, Mr Martin Nesirky, the spokesperson of the UN Secretary General, clarified that, “UNMOGIP can only be terminated by a decision of the Security Council”49 not by the yearning of India. In July 2014, Indian Government
ordered the UNMOGIP to vacate a Government building, which was in their use since long, a step towards their ultimate expulsion from India subsequently. Surprisingly, there has been muted response from the UN on this legated role of UN by India.

It is misfortune of the people of Kashmir that, civilized international community and United Nations have done very less to give them their right of self-determination. With the massive human rights violations by Indian security forces after the re-emergence of Kashmiri struggle in 1990 and its two phased revival in 2008 and 2010, United Nations could have taken measures to break the impasse. With the global silence over the human rights violations in Kashmir and UN ineptness, India continued reign of terror on Kashmiri people, torturing and killing those who demanded their freedom and incarcerating the popular leaders in order to silence the opposition. In order to do so, India continued enhancing its security forces in IHK. Through discriminatory laws, Indian security forces have the freedom to detain and torture the civilians, gang rape the womenfolk, torch the villages and desecrate the places of worship and holy shrines. While this has been happening, United Nations and human rights organizations could not prevailed over India to stop violation of human rights.

The Way Forward

Indeed, Kashmir belongs to the Kashmiris, therefore, India must stop harping on about its misleading slogan of calling it as its integral part. It is not integral Indian state, rather, an occupied state. There is a need that major powers and UN should seriously revisit their role over the future status of Kashmir and give Kashmiri people their right, as granted in UN Charter and its resolutions. The international community and major powers have to re-awaken their conscious and role. India should stop violations of human rights and respect UN Charter and its resolutions on the settlement of the dispute. Among the contemporary global disputes, Kashmir is the longest unresolved dispute on the agenda of the United
Nations Security Council. Today, South Asia is one of the most unstable regions in the world. In all the prospects, the road to peace and stability in South Asia lies in the final settlement of the Kashmir dispute. The dispute has been a ban for peace in the region. This fact was even highlighted UN Secretary General, Mr. Ban Ki Moon on February 4, 2009, once he visited Pakistan. He said that, Kashmir is the main cause of instability in South Asia and accentuated the concerned parties to resolve it through negotiations. He had shown similar sentiments earlier in November 2008. Earlier, the former US President Mr. Bill Clinton once declared Kashmir dispute as, “the most dangerous place on earth”.

Sequel to revival of political struggle of Kashmiri masses in 2010, the former Indian ambassador and lawmaker, Mr Kuldip Nayar reminded India that, despite heavy military deployment of Indian Army in the Occupied Kashmir, India could neither restore peace nor resolve the dispute to the satisfaction of the masses. According to this scholar, “Every now and then there is an incident in the valley to register the people’s discontent.”

Taking cover of its secularism, democracy and a international lobbying, India has created an impression on the international community that, it has successfully neutralized the Kashmiris demand for their right of self-determination in its illegally occupied portion of the state of Jammu and Kashmir. Nevertheless, this notion is far from the factual position in the occupied part of Kashmir. Indeed, the situation in Kashmir has not improved; rather, Indian occupation forces are committing massive human rights violations there with a renewed vigour.

Following some of the extreme steps, taken by BJP Government under Prime Minister Narindra Modi over the future of Kashmir, it seems less likely that, Kashmiri will get their right of self determination. Modi’s Government is trying to divide Kashmir and Kashmiris on religious, ethnic and territorial basis. This all is being done to do away with the
identity of Kashmir and Kashmiryat. These aggressive designs of BJP have created a frustration in all parts of Kashmir.

There is an immediate need that, Indian leadership should realize its global and regional obligations and adopt a realistic approach for the realistic solution Kashmir, as per the wishes of its subjects. The world community has a moral role to persuade India for the implementation of UN resolutions on Kashmir. If at all India is serious for a peace in South Asia, it would have to come to the negotiating table to resolve the main dispute. The sporadic incidents like the Mumbai attacks and change of governments in either country should not become a hurdle in the finalization of the agreements between two countries and implementation of international commitments, particularly, UN resolutions. After all wars and conflicts have never solved the disputes, rather issues are always settled at the negotiated tables.

The UN efforts at resolving the status of East Timor needs to be considered in this regard. In East Timor, the Security Council under chapter VII of the UN charter authorized an International Force for East Timor to determine the freely expressed will of the people. All the international human rights bodies unequivocally agree both that human rights are systematically denied in Kashmir and that Kashmiri people should be given the opportunity to exercise their right of self-determination. The conflicts in East Timor and Kosovo are comparable to Kashmir in this respect, and the legal framework applied in each case may provide similarly applicable solutions for Kashmir.

Kashmir is a tragedy, no doubt about it, for Pakistan and India and more so for the people of Kashmir. Learning something from their costly experience, both the countries are now trying to tread upon a different path, shifting from paranoia and reflexive hostility to a more rational way of looking at each other. To their mutual benefit, one might add, for a never-ending hostility never served anyone’s interests. Let us by all means, stir the still waters of Kashmir through diplomacy and negotiations and in accordance with the wishes
of the Kashmiri people. For an objective and result orientated progress, Kashmiri leadership from both sides of the Line of Control should be made a party to negotiations process between India and Pakistan.

In the wake of Indian latest move, strong resistance has to be put up strong resistance against its strategy of dividing Kashmiri people and destroying the Kashmiri identity (Kashmiryat) at all costs. In this regards, Kashmiri masses and leadership need to play important role through; awareness campaigns-academia-seminars and media including social media. There have to be diplomatic efforts by all diplomatic missions of Pakistan lobbying for convincing the global community, international organizations and United Nations against this overt Indian strategy. Bringing a political resolve and commitment away from rhetoric by all mainstream political parties and Government of Pakistan on Kashmir dispute is also needed. The Government of Pakistan should clarify with India about five aspects: status of Kashmir as an entity –its unresolved nature-will of Kashmiris, Human rights violations and UN resolutions over Jammu and Kashmir dispute. All is possible only once there is a dedicated support from international community, dedicated leadership support from Pakistan, a unified and committed Kashmiri leadership on both sides of divide, away from personal or party agendas with an unflinching resolve about the future of Kashmir.

**Conclusion**

The methods and techniques to address different conflicts depend on their nature, sources of origin and their surrounding environment. In case of Kashmir, if direct negotiations are not possible, or not result oriented, as seen from the past experience, there is no harm in getting support from the UN or any major power as a facilitator. Otherwise, this dispute is neither bilateral nor bound to be resolved bilaterally. The facilitating party can promote communication among the parties, negotiate various options for solutions and
finally convince the stakeholders for the acceptance of most appropriate solution as a way forward.

It is unambiguously stated in the Universal Declaration of Human Rights that, “Whereas it is essential if a man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, the human rights should be protected by the rule of law.”\textsuperscript{54} Besides, Article 1 of the declaration declares that, “All human beings are born free and equal in dignity and rights. They are awarded reasons and conscience and should act towards one another in a spirit of brotherhood.”\textsuperscript{55} Besides, the international law states that, all people have right to self-determination and their human rights should be protected. This shows that international law is a guarantor of peace, human rights and democracy. The people of Kashmiri deserve their basic right and security to their lives in the light of international law as well as universal declaration of human rights. All tomorrows will depend on peace in this region, all progress shall be subject to a rightful fulfilment of needs of the youth in Kashmir and all prosperity of South Asia will stem from this periphery, if resolved. Let hope stay adrift and aloft. After all it is hope that keeps the world going.

\textbf{Notes}


The population has grown much more than this, but exact data is not available.


9 V. P. Menon, Transfer of power in India, Chennai Orient Longman, 1957


11 Ibid.

12 Ibid.


14 Ibid.


17 Ibid.


20 Ibid


23 Legal Information Institute, Self determination (international law), Cornell University Law SchoolSearch Cornell, Available on; https://www.law.cornell.edu/wex/self_determination_international_law.

26 Ibid.
28 Ibid.
33 UN Resolution On Kashmir Irrelevant - Kofi Anan (accessed September 1, 2014) at www.thekashmir.wordpress.com
34 Ibid.
37 Sanjana Pandit, “5 things you need to know about #Article 370”, dna (accessed September 1, 2014) at www.dnaindia.com
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41 “Treaties and States Parties to Such Treaties,” International Committee of Red Cross, (accessed September 1, 2014) at www.icrc.org


54 Ibid.

55 Ibid.