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# THE INDIAN DETERMINATION OF JAMMU AND KASHMIR: A CRITICAL APPRAISAL OF HISTORY, SOVEREIGNTY, AND JUS GENITIUM

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*Jammu and Kashmir is the northernmost region of the Indian subcontinent. For more than eight decades, it held a special status under the domestic jurisdiction of India. This status empowered it to have its constitution and to modify the applicability of any laws passed by the center—India. This special status owed much to both the municipal laws of India and customary International Law. However, On August 5, 2019, when the Republic of India revoked this status, Pakistan and its allies alleged that India had violated International Law. This article argues and demonstrates that the Republic of India has not violated International Law but respected it by accessing the regions through formal means. To demonstrate this theory, this article will first analyze the sovereign evolution that Jammu and Kashmir have undergone historically. Then, the role of the UN, and the bilateral affairs of India and Pakistan in the context of Jammu and Kashmir are emphasized. The principle of jus gentium qua self-determination will be applied to discuss the changed trilateral relationships between Jammu, Kashmir, and India. Finally, the article concludes by demonstrating that the revocation of the special status and formal accession made by India is a concern of India's internal affairs alone, contrary to what has been alleged by Pakistan and its allies.*

## Introduction

*Small indeed the country may seem by the side of the great plains that extend in the south, and confined the history of which it was the scene. And yet, just as the natural attractions of the valley have won it fame beyond the frontiers of India, thus too the interest attaching to its history far exceeds*

*the narrow geographical limits.*<sup>1</sup>

Jammu and Kashmir is a mountain region at the crossroads of India, Pakistan, China, and Afghanistan. On a cartographic plane, it appears remote and landlocked, extending for no more than ninety miles, isolated by successive ranges of the Himalayan Mountains high above the plains of the sub-continent.<sup>2</sup> The Mughals who conquered the region in 1586 called the region *Jannat*—<sup>3</sup> paradise, praising its snow-capped mountains, sunny gardens, and romantic households. However, for more than seven decades since, the valley has become a paradise lost—its people's lives, entrenched in the bitter sovereignty dispute between India and Pakistan, its land—a witness to the constant bloodshed.

The question of sovereignty holds a special position in the history of Jammu and Kashmir. Since, 1947, the region has been under the Republic of India. The relationship between both the [States]<sup>4</sup> of Jammu and Kashmir and India has been guided by the terms of accession that the monarch of Jammu and Kashmir signed with India. This treaty of accession gave the state of Jammu and Kashmir a pseudo-autonomy over its internal affairs while ceding powers of defense, communication, and external affairs to India. However, over time, the relationship of both states became bonded inextricably; therefore, the slow withering of the treaty became inevitable. On 5 August 2019, the Government of India issued a presidential order under Article 370 of the Indian constitution, and annulled the 72 years long recognition of the autonomy of the State of Jammu and Kashmir<sup>5</sup> The same day the Republic of India passed a Bill bifurcating and reducing Jammu and Kashmir into two separate Union Territories.<sup>6</sup> According to the Republic of India, these incidents were matters of its domestic concerns alone. The bifurcation and reduction of

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1 \* BA.LLB (Hons.) student at the National University of Advanced Legal Studies, India. The author wishes to thank Ananth Krishna S, Rahul Nair, Giri Aravind, and Aswin C. Panicker for their valuable feedbacks and suggestions. Kalhana, *Kalhana's Rajatarangini: A Chronicle of The Kings of Kashmir*, trans. M. A Stein (1900), xxiv.

2 Victoria Schofield, *Kashmir in Conflict: India, Pakistan and the Unending War* (London: Bloomsbury Academic, 2002), 1.

3 Sunil Sharma, "Kashmir and the Mughal Fad of Persian Pastoral Poetry," in *Borders: Itineraries on The Edges of Iran*, eds. Stefano Pello (USA: Boston University, 2016), 183-202.

4 Though, with the formal accession, Jammu and Kashmir became a part of India, it still had some autonomy over the region—giving way to a pseudo-statehood—distinguishing it from rest of the India; Navnita Chadha Behera, *Demystifying Kashmir* (Washington: Brookings Institution Press, 2006), 104-145.

5 "Instrument of Accession of Jammu and Kashmir," *Jammu and Kashmir Law*, accessed March 4, 2020, [http://jklaw.nic.in/instrument\\_of\\_accession\\_of\\_jammu\\_and\\_kashmir\\_state.pdf](http://jklaw.nic.in/instrument_of_accession_of_jammu_and_kashmir_state.pdf); "The Constitution (Application to Jammu and Kashmir) Order, 2019," *E- Gazette*, accessed March 4, 2020, <http://egazette.nic.in/WriteReadData/2019/210049.pdf>.

6 "The Jammu and Kashmir Reorganization Bill, 2019," *PRS India*, accessed March 5, 2020, <https://www.prsindia.org/billtrack/jammu-and-kashmir-reorganisation-bill-2019>.

Jammu and Kashmir created a huge outcry among Pakistan and its allies. They questioned the validity of India's actions, condemning and demanding an immediate withdrawal of political moves made by India in Jammu and Kashmir.<sup>7</sup> There is no doubt that the sudden change in the pseudo-autonomy of a region that was long under international observations would call forth much attention. However, to allege that the government of India has annexed the region of Jammu and Kashmir would be an erroneous conception of the special status that was enjoyed by the region under both International Law and India's constitutional framework.

This article will assert that the autonomy enjoyed by the region of Jammu and Kashmir was a provisional measure forged temporarily for the attainment of the longer objective—Formal Accession with India. To understand this, the article will analyze the historical aspects of Jammu and Kashmir, and the evolution of its sovereignty that has undergone a radical change over time. It will discuss UN interventions and the subsequent impasse situation that existed between India and Pakistan for the claim over Jammu and Kashmir, and the slow erosion of Article 370 of India's constitution that granted the pseudo-autonomy to Jammu and Kashmir. The incidents before and after abrogation and bifurcation will be examined to endeavor the justification of formal accession under International Law, and will vindicate all the allegations condemning the Republic of India. Finally, this article hopes to demonstrate that the Republic of India has not violated International Law, but has instead respected it by formally acknowledging the accession and thus, bringing an end to the long-standing international impasse.

### Historical Background of Jammu and Kashmir

Sovereignty is a political concept that refers to dominant power or supreme authority. Historically the [Regions]<sup>8</sup> of Jammu and Kashmir have witnessed a multitude of struggles between civilizations attempting to establish a sovereign regime—but none were strong enough to retain the mountain lands without fear of external intervention. The history of Jammu and Kashmir, for this article, has been divided into two stages: the Treaty of Amritsar, and the Instrument of Accession stage. Both

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7 "Pakistan condemns announcements on J-K, summons Indian envoy," *The Tribune*, January 24, 2020, <https://www.tribuneindia.com/news/archive/pakistan-strongly-condemns-india-s-announcements-on-j-k-813353>; "China condemns India's division of Jammu and Kashmir," *Tamil Guardian*, December 5, 2019, <https://www.tamilguardian.com/content/china-condemns-india-s-division-kashmir>.

8 Until 1846, both the regions of Jammu and Kashmir were ruled by two different sovereign powers—while the valleys of Kashmir were controlled by the Maharaja Ranjit Singh, the plains of Jammu was under the control of his rival Maharaja Gulab Singh. It was only in 1846, when the valley was bought by the Maharaja Gulab Singh that both the regions were merged.; "Treaty of Amritsar" (*hereinafter*, Amritsar Treaty), *Jammu and Kashmir Law*, accessed March 6, 2020, [http://jklaw.nic.in/treaty\\_of\\_amritsar.pdf](http://jklaw.nic.in/treaty_of_amritsar.pdf); Samir Ahmed Bhat, "State formation in colonial India", *International journal of scientific and research publication* 6, no. 2 (2016): 153-156.

these stages carry preeminent importance for its present status.

*Treaty of Amritsar*

Sovereignty has been defined as the political and legal basis for the international personality of a state.<sup>9</sup> It provides the state with supreme control over its internal and external affairs.<sup>10</sup> The region of Jammu and Kashmir has always been in a state of sovereign evolution. The twelfth century Poet Kalhana, in his epic work *Maharajatarangini* (Chronicle of Kings), describes how, since time immemorial, the valley's rulers came into contact and conflict with their neighbors. This holds for Kashmir's subsequent history. Kashmir's first period of "imperial" history begins in the third century BC with the rule of Asoka, whose empire extended from Bengal to the Deccan, Afghanistan to Punjab, and included Kashmir.<sup>11</sup> The second occupation of Kashmir happened in the first century AD, when the Kushans from the Chinese frontiers invaded the whole of North India.<sup>12</sup> In 1586, after a power struggle, Akbar conquered the valley.<sup>13</sup> The period thereafter is regarded as the modern history of Kashmir.<sup>14</sup> Later, with the Persian invasion of Delhi, the Mughal's hold on Kashmir slowly deteriorated.<sup>15</sup> In 1751, the Afghans, ruled by Ahmed Shah Durrani, absorbed Kashmir into their expanding empire.<sup>16</sup> However, the south of Kashmir was occupied by the Sikhs, and in 1819, they were also successful in taking final control of the whole of Kashmir.<sup>17</sup> The Sikhs acknowledged the Supremacy of the British Empire and in return, the British agreed for borders of the region to be drawn at River Sutlej.<sup>18</sup> However, after the death of Maharaja Ranjit Singh,—the then Sikh ruler of Kashmir— the British-Sikh relationship fell apart. In 1846, Sikhs engaged in a war with the British Empire on the banks of River Sutlej, leading to their subsequent defeat and rise of the British in the valley.<sup>19</sup> In the same year, the ruler of Jammu Maharaja Gulab Singh (a feudatory of Ranjit Singh) was welcomed by the British as

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9 Jana Maftei, "Sovereignty in International Law," *ACTA UNIVERSITATIS DANUBI-  
US. JURIDICA*, 11, (2015): 11.

10 Harvey Starr, *Anarchy, Order and Integration: How to Manage Interdependence*, (Michigan: University of Michigan Press, 1999), 76.

11 Schofield, *Kashmir in Conflict: India, Pakistan, and the unending war*, 1-8.

12 Ibid.

13 Sir Walter Roper Lawrence, *The Valley of Kashmir*, 181.

14 Schofield, *Kashmir in Conflict: India, Pakistan, and the unending war*, 1-6.

15 Ibid, 3-9.

16 Ibid, 4.

17 Parmu, *A History of Sikh Rule in Kashmir, 1819-1846* (University of Michigan Press, 2006), 36.

18 Schofield, *Kashmir in Conflict: India, Pakistan, and the unending war*, 3-9.

19 Amarpal S. Sidhu, *The First Anglo-Sikh War* (2013);

Robert A. Huttenback, "Kashmir as an imperial factor during the reign of Gulab Singh (1846-1857)," *Journal Of Asian History* 2 , no. 2 (1968): 77-108.

an ambassador for his neutral stand in the Anglo-Sikh war, and subsequently entered the Treaty of Amritsar with him. Under this treaty, Maharaja Gulab Singh bought the region of Kashmir for a sum of seventy-lacs of rupees, thereby establishing the princely state of Jammu and Kashmir under the suzerainty of the British Empire.<sup>20</sup> This could be the first time that the sovereignty of a state had been sold to any person. From then forward, Gulab Singh held the title of Maharaja of both Jammu and Kashmir.

### *Instrument of Accession*

*The destinies of our Indian empires are covered with thick darkness...It may be that the public mind of India may expand under our system till it has outgrown that system; that by good government we may educate our subjects into a capacity for better government...Whenever it comes, it will be the proudest day in English History.*<sup>21</sup>

British administration of India began as early as the nineteenth century with the English East India Company's assumption of governance under Charter Act 1833.<sup>22</sup> After the First War of Independence in 1858, governance was formally transferred from the English East India Company to the Crown — specifically, Queen Victoria—who was formally declared as the “Empress of India.”<sup>23</sup> The British ruled India as nine provinces of the British Empire. Under the doctrine of paramountcy, they were also responsible for the Defence and foreign relations of 584 princely states, including the princely state of Jammu and Kashmir.<sup>24</sup> British imperial policy towards the princely State of Jammu and Kashmir was guided primarily by fear of Russian advancement towards India through the Pamir mountains, as well as of events in the expansion of Turkestan, the eastern part of which was under the nominal rule of China.<sup>25</sup> The political awareness of Jammu and Kashmir owes much to the responsible government movement against the British in the opening decades of

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20 R. S. Gull, “The man who purchased Kashmir,” *Kashmir Life*. Accessed December 10, 2019, <https://kashmirlife.net/the-man-who-purchased-kashmir-issue-15-vol-07-81400/>.

21 Jane Samson, *The British Empire* (Oxford: Oxford University Press, 2001), 134.

22 M. B. Hooker, “The East India Company and the Crown 1773-1858,” *MALAYA LAW REVIEW* 11, no. 1 (1969): 31-37.

23 Miles Taylor, *Empress: Queen Victoria and India* (Connecticut: Yale University Press, 2018), 167-191.

24 Julian Arthur Beaufort Palmer, *Sovereignty and Paramountcy* (Michigan: University of Michigan Press, 2006), 28-57.

25 Schofield, *Kashmir in Conflict: India, Pakistan, and the unending war*, 10.

the twentieth century.<sup>26</sup> These movements provided the people of British India an opportunity to express how they should be governed. During World War I, most of the princely state of India had demonstrated their unpredicted allegiance towards the British Empire by providing utmost support to the Crown.<sup>27</sup> “They have shown that our quarrel is their quarrel...they were a profound surprise and disappointment to the enemy; and a cause of delight and pride to those who knew beforehand the Princes’ devotion to the Crown.”<sup>28</sup> In Kashmir— Maharaja Pratap Singh, the new ruler of Jammu and Kashmir, placed all his troops at the disposal of the British,<sup>29</sup> which fought forces in Africa, Egypt, Mesopotamia, and France. Following the death of Maharaja Pratap Singh, Maharaja Sir Hari Singh ascended to the throne and introduced various measures which caused further discontent over the already disaffected subjects of Jammu and Kashmir. Several campaigns were organized against him by both the Hindus and Muslims.

The Government of India Act 1935 marked the beginning of the next stage in deliberations over how India should be self-governed. By the end of World War II, it was evident that independence was near, as India witnessed a peak in Anti-British campaigns. However, the “form” of Independence was initially uncertain. The Indian National Congress led by Jawaharlal Nehru advocated a multi-ethnic-democratic form of government. Conversely, Mohammad Ali Jinnah was adamant that India should be divided into two nations: the Muslim majority Pakistan, and the Hindu majority of India. In the end, the communal divide and religious hatred nurtured by the British administration to maintain authority could not be overcome, and the one nation theory of unified India was abandoned, and instead, a two-nation theory was adopted. On August 15, 1947, India was partitioned into the dominion of India and dominion of Pakistan:

*This was a moment of both triumph and tragedy. Of triumph, because the freedom for which hundreds had toiled and died, was won. Of tragedy, because the dream of freedom for a united India vanished when on 3 June 1947, the prime minister of India announced his acceptance of [the] partition of India with “no joy in my heart.”*<sup>30</sup>

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26 These activities were headed mainly by the Indian National Congress, founded in 1885, and the Muslim League, which was established in 1906; Altaf Hussain Para, *The Making Of Modern Kashmir: Sheikh Abdullah And The Politics of The State* (London: Routledge, 2019); Tara Chand, *History of Freedom Movement In India* (2017).

27 Schofield, *Kashmir in Conflict: India, Pakistan and the unending war*, 15.

28 Ibid; Montagu and Chelmsford, *Report on Indian Constitutional Reform*, MSS Eur C 264/42, IOIC, 14122 (Apr. 1918).

29 Christopher Snedden, *Understanding Kashmir and Kashmiris* (London: Hurst Publication, 2015), 81.

30 Seervai, *Constitutional Law of India* (4<sup>th</sup> ed., 2015), 1.

The princely states, although impacted by a partition, were not incorporated into either dominion. The princely states had three options—to join one of the two new “dominions” of India and Pakistan, or to declare Independence<sup>31</sup> (though Lord Mountbatten, the last British administrator of India insisted that the third option was only nominal).<sup>32</sup> A large majority of Indian States were enveloped by the region of India, and so, geographically decided their fate. The Ruler of Jammu and Kashmir—Maharaja Hari Singh was a Hindu ruler, and opposed the idea of joining Pakistan, but was equally reluctant to the idea of joining India; the fear of losing power haunted him,<sup>33</sup> and so, he entered into a standstill agreement with Pakistan.<sup>34</sup> However, a Muslim revolt in the Poonch region and an invasion of Kashmir by Pathan tribesmen from Pakistan on October 22, 1947 forced Maharaja Hari Singh to turn towards India for help.<sup>35</sup> On October 26, Maharaja Hari Singh appealed to the Governor-General of India for military intervention, and, on the same day, executed an instrument of accession, thereby conceding the sovereignty of Jammu and Kashmir to the Indian dominion.<sup>36</sup> Accordingly, Indian troops were dispatched to Kashmir, which rolled-back the invaders from inside the valley to the borders.

### International Affairs

The issue of Kashmir was internationalized even before it was submitted under the UN—while accepting the instrument of accession from Maharaja Hari Singh. The Maharaja wrote that once the invading forces had been expelled and law and order restored, the accession should be ratified by “a reference to the people.”<sup>37</sup> Similarly, on November 2, 1947, Nehru, as the first Prime Minister of India, drew the attention of the world nations by declaring the Indian Government’s pledges to the People

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31 Sumantra Bose, *Contested Lands: Israel-Palestine, Kashmir, Bosnia, Cyprus, And Sri Lanka* (Boston: Harvard University Press, 2007), 166.

32 Ibid.

33 B. Farrell, “The Role of International Law in Kashmir,” *Penn State International Law Review* 21, no. 2 (2003): 297.

34 Ibid.

35 The invasion caused the death of more than 2000 Muslims. This incident further incited the anti-Maharaja elements in *Poonch* and *Mirpur*. On 24 October 1947, they formed the Provisional Azad Government, which came into to being right before accession; Snedden, “The forgotten Poonch uprising of 1947,” *India Seminar*, accessed January 10, 2020, [https://www.india-seminar.com/2013/643/643\\_christopher\\_snedden.htm](https://www.india-seminar.com/2013/643/643_christopher_snedden.htm).

36 With the execution of this document Maharaja Hari Singh submitted to the dominion of India, its sovereign powers of defense, foreign affairs, and communications; “Instrument of Accession of Jammu and Kashmir (*hereinafter*, Instrument of Accession),” *Jammu and Kashmir Law*, accessed March 6, 2020, [http://jklaw.nic.in/instrument\\_of\\_accession\\_of\\_jammu\\_and\\_kashmir\\_state.pdf](http://jklaw.nic.in/instrument_of_accession_of_jammu_and_kashmir_state.pdf); A. G. Noorani, *Article 370: A Constitutional History of Jammu and Kashmir* (Oxford: Oxford University Press, 2014), 19-50.

37 Adarsh Sein Anand, “Accession of Jammu and Kashmir,” *Journal Of The Indian Law Institute* 43, no. 4 (2001): 461.

of Kashmir and to the world that it would conduct a referendum under international auspices such as the UN.<sup>38</sup>

### *Role of the United Nations*

Although India was (and is) a member of international organizations such as the League of Nations and the United Nations, it was not regarded as a sovereign state under the General International Law while its internal and external relations were dependant on the British Government and Parliament.<sup>39</sup> Only with the coming into force of the Indian Independence Act, 1947 India could finally become a full-fledged member of the International Community. Within months of its membership to the UN, India brought the issue of Kashmir before UN Security Council and alleged that Pakistan had assisted in the invasion of Kashmir by providing military equipment, training, and supplies to the Pathan warriors.<sup>40</sup> Pakistan denied these allegations, and in turn, accused India of their involvement in the massacre of Muslims in Kashmir, aggression against Pakistan, and questioned the validity of the Maharaja's accession to India.<sup>41</sup> Pakistan further requested the Security Council to appoint a commission to secure a cease-fire and to ensure the withdrawal of outside forces, along with conducting a plebiscite for determining Kashmir's future. Thereafter, the Security Council (without addressing the initial issue of Kashmir) adopted a resolution establishing the United Nations Commission on India and Pakistan (UNCIP).<sup>42</sup> The purpose of the Commission was to make findings of fact according to Article 34 and to act as a mediating influence.<sup>43</sup> The UN also issued a resolution for the self-determination of Kashmir and to conduct a plebiscite.<sup>44</sup> The resolution put forward the retreat of both Pakistan and Indian troops from Kashmir. However, as both the parties feared that a retreat would lead to a strategic advantage to the other, troops from both States were stationed before the UNCIP even reached Kashmir, a

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38 Pranay Gupte, *Mother India: A Political Biography Of Indira Gandhi* (2009), 268; Andrew Whitehead, "Kashmir looks for local lessons in Scottish referendum," *BBC*, accessed February 20, 2020, <https://www.bbc.com/news/world-asia-29204977>; Gowhar Geelani, "When Nehru promised Kashmir freedom, why is India still in denial?," *The Express Tribune*, accessed February 24, 2020, <https://blogs.tribune.com.pk/story/41513/when-nehru-promised-kashmir-freedom-why-is-india-still-in-denial/>.

39 Lassa Oppenheim, *Oppenheim's International Law* (Sir Robert Jennings and Sir Arthur Watts Eds., 8<sup>th</sup> Ed., 2009): 209.

40 Letter from the Representative of India to the President of the Security Council (Jan 1, 1948), U.N. Doc. S/628 (1948). In its complaint, India indicated that it would resolve the accession issue once conditions in Kashmir allowed.

41 Letter from the Minister of Foreign Affairs of Pakistan to the Secretary General (Jan. 15, 1948), U.N. Doc. S/646/Corr. 1 (1948).

42 *Ibid.*

43 Article 34 authorizes Security Council to investigate a dispute that might endanger international peace; S.C. Res. 39, U.N. Doc. S/654 (1948).

44 S.C. Res. 47, U.N. SCOR, 3d Sess., 286th Mtg., U.N. Doc. S/726 (1948).



complete disregard for the proposed resolution.

After taking into view the prevailing conditions, the UNCIP proposed a significant resolution which provided for three essential steps in sequential order. First, they stipulated that Pakistan must withdraw all its forces and tribesmen from Jammu and Kashmir and assist in creating conditions for the people to express their choice without fear or intimidation of Pakistani presence in the region.<sup>45</sup> After this, only then would the Government of India conditionally take steps to gradually withdraw its forces (India would be allowed to retain adequate troops for law and order to meet against external threats).<sup>46</sup> Finally, after satisfying these two conditions, only then would the Government of India, with its machinery, then be responsible for conducting a fair and free plebiscite under UN supervision for the entire State of Jammu and Kashmir.<sup>47</sup> Pakistan rejected this resolution as it did not suit its interest in occupying Jammu and Kashmir by force and subterfuge.<sup>48</sup> Instead, Pakistan further engaged in stationing its troop illegally in areas it already occupied, augmented its strength by signing deals with China and bartered away portions of its occupation, consequently changing the demographic pattern in areas like Gilgit Baltistan and Pakistan-occupied-Kashmir.<sup>49</sup> In 1949 a cease-fire line was drawn,<sup>50</sup> and the commission eventually disbanded in favor of individual representatives.<sup>51</sup> Until today, a plebiscite has not been achieved even after the frequent renewal of UN security resolutions.<sup>52</sup>

### *Bilateralism*

The first India-Pakistan War occurred in the spring of 1948 following the incidents of tribal invasion that brought Jammu and Kashmir to India, and only ended at the agreement of a ceasefire in January 1949. After, almost the whole of Jammu and Kashmir (including Ladakh) was under India's control while Pakistan gained little from this illegal act of attempted annexation.<sup>53</sup> Again, in 1965, a second Indo-Pakistani war ignited, resulting from the infiltration of thousands of Pakistan-supported armed

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45 United Nations Commission on Indian and Pakistan, *Resolution for a Cease-Fire Order and Truce Agreement*, U.N. SCOR, 3d Sess., at 3, U.N. Doc. S/995 (1948).

46 Ibid.

47 Ibid.

48 "Pakistan had rejected the very security council resolution of 1948—the very resolution that it swears by now," *Financial Express*, Accessed March 5, 2020, <https://www.financialexpress.com/india-news/pakistan-had-rejected-the-u-n-security-council-resolution-of-1948-the-very-resolution-it-swears-by-now/362555/>

49 Ibid.

50 S.C. Res. 91, U.N. SCOR, 6th Sess., 539th Mtg., U.N. Doc S/2017/Rev.1 (1951).

51 S.C. Res. 80, U.N. SCOR, 5th Sess., 470th Mtg., U.N. Doc. S/1469 (1950).

52 Josef Korbel, "The Kashmir Dispute and the United Nations," *INT'L ORG.* 3, 282-83 (1949). Josef Korbel was one of the members to the commission.

53 Bose, *Contested Lands*, 168.

freedom fighters (known as *Mujahideen*) into the Indian-held Kashmir. This fighting lasted for 17 days and ended in a stalemate.<sup>54</sup> The Security Council's attempt at ending the 1965 war was mainly concentrated on maintaining the status quo and still, no call for a plebiscite was made even.<sup>55</sup> The first round of Kashmir negotiation was urged by the Soviet Union in 1965, where both India and Pakistan met at the Soviet city of Tashkent.<sup>56</sup> Despite this, the Tashkent agreement was only another attempt to revert to the status quo and though several proposals were made, Pakistan's interest remained solely on Kashmir, which India refused to discuss.<sup>57</sup> The Tashkent Agreement was successful in achieving constructive mediation but was ultimately a failure in settling the Kashmir dispute. A third war broke out between India and Pakistan in 1971, when India entered East Pakistan based on a humanitarian intervention,<sup>58</sup> and only ended when India unilaterally declared cease-fire, resulting in the birth of Bangladesh.<sup>59</sup> By this time India had already become a regional power and aimed to confine the discussion of Jammu and Kashmir bilaterally between itself and Pakistan. In 1972, both countries met in the resort town of Shimla with the prime ministers of both countries agreeing and signing the Shimla pact, which provided that:

*the two countries put an end to the conflict and confrontation that have hitherto marred their relations and work for... a friendly and harmonious relationship and... durable peace on the subcontinent... reconciliation [and] good neighbourliness.*<sup>60</sup>

They further agreed that:

*in Jammu and Kashmir, the Line of Control resulting from the cease-fire of 17 December 1971 shall be respected by both sides... Neither side shall seek to alter it unilaterally, irrespective of mutual differences and legal interpretations. Both sides... undertake to refrain from the threat or use of*

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54 Bose, *Contested Lands*, 174.

55 S.C. Res. 211, U.N. SCOR, 20th Sess., 1242nd Mtg., U.N. Doc. S/6694 (1965). Security Council requested that India and Pakistan should engage in negotiation and mediation in an attempt to settle the underlying dispute.

56 Sarbjit Johal, *Conflict and Integration in Indo-Pak Relations* (Michigan: University of Michigan Press, 2008), 126-128.

57 Verinder Grover and Ranjan Arora, *Partition of India, Indo-Pak Wars and Uno* (Verinder Arora and Ranjan Arora Eds., 1999), 450.

58 United Nations High Commission, *The State of World Refugees*, 2000 (Oxford: Oxford University Press, 2000), 68.

59 Richard Sisson and Leo Rose, *War And Secession: Pakistan, India, and The Creation Of Bangladesh* (1990), 234.

60 Shimla Agreement, <https://people.unica.it/annamariabaldussi/files/2015/04/Shimla-Agreement-July-2-1972.pdf>.

*force in violation of this Line.*<sup>61</sup>

The agreement ended by stating:

*both Governments agree [to]... meet again at a mutually convenient time in the future.... to discuss the modalities and arrangements for the establishment of durable peace and normalization of relations.*<sup>62</sup>

After this, the 1980s and 1990s were filled with various insurgency movements, anti-India protests, and conflicts between the Indian army and Islamic militants in Jammu and Kashmir that resulted from release of a great deal of Pakistan trained militants and weapon energy into India.<sup>63</sup> To end the long-standing scuffle and to develop better relations, in February 1999, India's Prime Minister Atal Bihari Vajpayee made a diplomatic visit to Pakistan on the first-ever bus service connecting Delhi to Lahore,<sup>64</sup> resulting in the sensational Lahore declaration. The Lahore declaration was a silver lining in the relationship between both countries,<sup>65</sup> and reiterated their determination to implement the Shimla agreement in "letter and spirit." The governments agreed to "intensify efforts to resolve all issues, including [...] Jammu and Kashmir" based on an "agreed bilateral agenda."<sup>66</sup> However, the emergence of this good relationship was not to be and ended abruptly when Pakistani military units infiltrated the Line of Control (LOC) in Kargil while the Lahore Declaration was being signed. As retaliation, in May 1999, India launched a massive land and air strike to evict the infiltrators,<sup>67</sup> with the hostilities only ending by President Clinton's persuasion of Nawaz Sharif—the Pakistani prime minister- to withdraw.<sup>68</sup>

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61 Shimla Agreement, <https://people.unica.it/annamariabaldussi/files/2015/04/Simla-Agreement-July-2-1972.pdf>.

62 Ibid.

63 Joy Aoun et al., "Religious Movements, Militancy, and Conflict in South Asia cases from India, Pakistan, and Afghanistan," *Center for Strategic and International Studies*, accessed February 1, 2020, [https://csis-website-prod.s3.amazonaws.com/s3fs-public/legacy\\_files/files/publication/120713\\_Aoun\\_ReligiousMilitancy\\_Web.pdf](https://csis-website-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/120713_Aoun_ReligiousMilitancy_Web.pdf)

64 Bose, *Contested Lands*, 187.

65 Since, then both countries were vested in testing nuclear weapons throughout 1990s. Their relations had been characterized by antagonism and recrimination because of the armed conflict in Indian controlled Kashmir, with India blaming Pakistan for abetting the insurgents and Pakistan accusing India of heavy-handed repression; Imtiaz Rafi Butt, "The silver lining for Pakistan," *The Nation*, accessed February 27, 2020, <https://nation.com.pk/23-Mar-2018/the-silver-lining-for-pakistan>.

66 "Lahore Declaration February 1999," *Ministry of External Affairs*, accessed February 16, 2020, <https://mea.gov.in/in-focus-article.htm?18997/Lahore+Declaration+February+1999>.

67 Srinath Raghavan, "J and K autonomy and after," *Seminar* 45 (2020): 725.

68 Crisis in Pakistan, *Gov Info*, accessed March 30.,2020, <https://www.govinfo.gov/content/pkg/CHRG-106shrg61870/html/CHRG-106shrg61870.htm>.

The relationship further deteriorated as a result of the 2001 attacks of the Indian government by Islamic militant organizations such as Lakshae-Taiba and Jaishe Mohammed, who are allegedly based out of Pakistan. These incidents brought both countries to the brink of nuclear war. Adding to it, the 2008 Mumbai attacks, the 2016 Pathankot attack, and the 2019 Pulwama attack heightened the nationalist rhetoric on both sides, resulting in the collapse of the India-Pakistan bilateral relationship with little chance (if ever) of recovering.

### **An Internal Matter?**

As claimed by India, the issue of Jammu and Kashmir has always been a matter of its domestic concern. However, this was not always the case. While it is true that the region of Jammu and Kashmir has become a part of India, this owes much to the slow erosion of Article 370, and the incidents prior and after the presidential rule in the territory. To discuss, the following section will be divided into two: (1) The erosion of Article 370, and (2) The division of the region into The Union Territory of Jammu and Kashmir, and The Union Territory of Ladakh. It will deal with the dawdling merger of the region with India and discuss the present status of the territory.

#### *Erosion of Article 370*

Between May 1947 and August 15, 1947, almost all the princely states signed the instrument of accession with either India or Pakistan (whether by pressure or for diplomacy). Kashmir was not much different. However, when Maharaja Hari Singh conceded the sovereignty of Jammu and Kashmir to India, the terms of the treaty provided the concession only with regards to foreign affairs, defense, currency, and communication. In March 1948, Maharaja appointed an interim government in the State with Sheikh Abdullah as prime minister,<sup>69</sup> and tasked to frame a constitution for the State. At the same time, the government of India was preparing its constitution.<sup>70</sup> As part of this process, the princely states were invited to send their representatives to India's constituent assembly, and Sheikh Abdullah and his colleagues joined the Indian constituent assembly as members in May 1949. Over the next five months, they negotiated Kashmir's future relationship with India. Accordingly, a conclusion was reached to only incorporate the provisions in the Constitution of Kashmir that adhered to the original instruments of accession. It was also decided that Kashmir's constituting assembly when formed, would decide all other matters.<sup>71</sup>

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69 Khandelwal, *Pledge for an Integrated India*, 252.

70 Bose, *Contested Lands*, 187.

71 Rahul Tripathi, "Instrument of accession: from 1947 till date," *Economic Times*. Accessed January 20, 2020, <https://economictimes.indiatimes.com/news/politics-and-nation/instrument-of-accession-from-1947-till-date/articleshow/70546147.cms?from=mdr>.

Based on the meetings convened, when India's Constitution was adopted in 1949, Kashmir was given a special status under Article 370 of India. Article 370 stipulates that other articles that give power to the central government would be applied to Jammu and Kashmir, only with the concurrence of the State's constituent assembly. Article 370 was a temporary provision in the sense that its applicability was intended to last only until the formulation and adoption of Jammu and Kashmir's constitution. However, in 1956, the constituent assembly of Jammu and Kashmir dissolved itself without making further recommendations on either the adoption or abrogation of Article 370, thereby leaving an indelible imprint on the Indian constitution. Article 370 records a "solemn compact"<sup>72</sup> protecting the rights of the 1947 instrument of accession. Article 370 provided the state of Jammu and Kashmir with the autonomy of governance inside its region. However, some laws in Jammu and Kashmir could be considered as misogynistic and violative under *jus cogens*. An example of such a law is that a Kashmiri woman loses her rights to property in Kashmir when she marries an outsider.<sup>73</sup> Thus, in respecting Jammu and Kashmir's sovereignty under Article 370, India was to overlook the gross violations of gender equality and human rights. In light of this, the gradual erosion of Article 370, was inevitable both for the sake of respecting human rights, and to extend the principles of gender equality that was part and parcel of the Indian Constitution.<sup>74</sup>

When Article 370 was originally made, only two articles of the Indian constitution applied to the state of Jammu and Kashmir. All the other provisions of the Indian Constitution were applied, with modifications and exceptions stipulated by the President of India.<sup>75</sup> The first of such order was the presidential order of 1950, officially known as The Constitution (Application to Jammu and Kashmir) Order, 1950. It specified the subjects and articles of the Indian constitution which

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72 A. G. Noorani, *Article 370: A Constitutional History of Jammu and Kashmir*, 1.

73 Jill Cottrell, "Kashmir: The vanishing autonomy", in *Practicing Self Governments: A Comparative Study Of Autonomous Regions*, edited by Ghai and Woodman (Cambridge: Cambridge University Press, 2013), 163-199; ("The landmark Declaration, adopted by the General Assembly on 10 December 1948, reaffirms that "All human beings are born free and equal in dignity and rights" and that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, ... birth or other status.") "Gender equality," *United Nations*, <https://www.un.org/en/sections/issues-depth/gender-equality/>.

74 Article 370 was an elixir for the Jammu and Kashmir Constitution; it gave the legislature an apparent power to modify application of any laws passed by the Centre. Thus, it was both in good faith and for the welfare of the under privileged there, the abrasion was inevitable.; "Full text of document on govt's rationale behind removal of special status to JandK," *The Hindu*, accessed February 28, 2020, <https://www.thehindu.com/news/national/full-text-of-document-on-govts-rationale-behind-removal-of-special-status-to-jk/article28821368.ece>.

75 Bodh Raj Sharma, "The Special Position of Jammu and Kashmir in the Indian Constitution," *The Indian Journal Of Political Science* 19, no. 3 (1958): 284.

was consistent with the Instrument of Accession.<sup>76</sup> The second order was passed in 1952 that amended Article 370 by replacing the phrase “Maharaja of Jammu and Kashmir” to the “Legislative Assembly of the State as the *Sadr-i-Riyasat*.”<sup>77</sup> This was a symbolic step in the history of Jammu and Kashmir as it led to the further abolition of the monarchy in the state. In 1954, the third presidential order came into force. It was a comprehensive agreement seeking to implement the 1952 Delhi agreement.<sup>78</sup> Accordingly, fundamental rights under the Indian Constitution were extended to Jammu and Kashmir with some modifications and reservations. Simultaneously, Article 35A was also added to the constitution. This was added per the presidential order of 1954 and empowered the state government to legislate on privileges of permanent residents concerning aspects of immovable property, settlement in the state, and employment.<sup>79</sup>

In addition to these original orders, 47 other presidential orders were made between 1956 and 1994, making various other provisions in the Constitution of India that became applicable to Jammu and Kashmir. These orders were issued with concurrence with the government of the Jammu and Kashmir and not that of the dissolved constituent assembly. This practice of applying for the presidential order in concurrence with the state government became a customary practice as it was deemed that no other body in the state was competent to give assent.<sup>80</sup> It is noteworthy, that among these 47 orders made, some of the presidential orders were issued while the state was under the President’s rule and without the concurrence of a state government.<sup>81</sup> These incidents of the application of presidential orders in the state of Jammu and Kashmir evidenced that Article 370 was already in the process of erosion and was made more obvious when in 1963, Nehru said in a parliamentary debate, that:

*Kashmir’s autonomy has been eroded... and many new things have been in the last few years... which has made the relation of Kashmir with union of India very close... So, we feel that this process of erosion of Article 370 [that] is going on... we should allow it to go on.*<sup>82</sup>

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76 “Constitution Application Orders,” *Jammu and Kashmir Law*, accessed March 15, 2020, <http://jklaw.nic.in/jk1950order.pdf>

77 “Constitution (Application to Jammu and Kashmir) Order 1950,” *Jammu and Kashmir Law*, accessed March 16, 2020, <http://jklaw.nic.in/jk1950order.pdf>.

78 Arguably, it went further than the Delhi Agreement in some respects. Ghai and Woodman, *Practicing self government*, 171–172.

79 Mohan Krishen Teng, *State Government and Politics, Jammu and Kashmir* (Michigan: University of Michigan, 2007), 68-119.

80 A. G. Noorani, *Article 370: A Constitutional History of Jammu and Kashmir*, 9-11.

81 Ghai and Woodman, *Practicing self governments*, 173–175.

82 Lok Sabha debates, vol XII, 27 NOV 1963, cols. 1231-32

*The Union Territory of Jammu and Kashmir and the Union Territory of Ladakh*

On 5 August 2019, the Home Minister Amit Shah of India, announced in the upper house of the Parliament of India that the President of India had issued the Constitution (Application to Jammu and Kashmir) Order, 2019 (C.O. 272), and thereby, the Constitution (Application to Jammu and Kashmir) Order, 1954 stands overridden. It was a historical move from India's part, allowing the Constitution of India to be made applicable to the whole of Jammu and Kashmir without any restrictions. This order was made by the President of India with the "concurrence of the government of the state," and the "governor appointed by the Union government."<sup>83</sup> The presidential order, 2019 also added clause 4 to the four sub-clauses of Article 367 of the Indian constitution, thereby adding the interpretation of state government to include the governor.<sup>84</sup> This was in adherence to the prevailing state practices, since some of the presidential orders issued after 1954 when the state was under presidential rule was made applicable through the concurrence of the governor of the state and not the state government.<sup>85</sup> After the passing of the presidential order, 2019 before the Rajyasabha, the government, through a resolution passed, issued a constitutional order which replaced the original text of Article 370 with a new text that allowed the amendment of the Article.<sup>86</sup> On the same day, a bill was introduced in the parliament, the Jammu Kashmir Reorganization Bill, 2019. The bill intends to convert the State of Jammu and Kashmir into two separate territories, namely, Union Territory of Jammu and Kashmir, and the Union Territory of Ladakh.<sup>87</sup> The Bill was passed by both houses of the parliament and the Union Territory of Jammu and Kashmir, and the Union Territory of Ladakh came into being on October 31, 2019, thereafter known as the National Unity Day of India.<sup>88</sup>

**International Law in Jammu and Kashmir**

The issues concerning a change in the status of Jammu and Kashmir cannot be satisfactorily addressed unless the impact of international law is also analyzed and explained in its most methodical form. This section will demonstrate that in the

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83 K. Venkataramanan, "How the status of Jammu and Kashmir is being changed," *The Hindu*, accessed February 27, 2020; Pranab Dhal Samanta, "Article 35A ceases to exist," *The Economic Times*. Accessed March 30, 2020.

84 "The Constitution (Application to Jammu and Kashmir) Order, 2019," *E-gazette*, accessed March 27, 2020, <http://egazette.nic.in/WriteReadData/2019/210049.pdf>.

85 Ghai and Woodman, *Practicing self governments*, 173–175.

86 The government brings Resolution to Repeal Article 370 of the constitution, <https://pib.gov.in/newsite/PrintRelease.aspx?relid=192487>

87 A State is a constituent division that has separate government. Whereas a Union territories are small administrative units governed directly by the Centre.

88 "The Jammu and Kashmir Reorganization Act, 2019," *E-gazette*, accessed March 10, 2020, <http://egazette.nic.in/WriteReadData/2019/210407.pdf>.

changed circumstances, the international institutions which were once revered to be the chief interests in determining the status of Jammu and Kashmir are no longer relevant. It will further establish that even if conceded to the principle of international law, the law of the comity of nations that envisages mutual respect and acceptance for other countries' laws and political system is not against, but in favor of India's accession of Jammu and Kashmir.

### *Self-Determination*

Self-determination is an important principle under contemporary international law.<sup>89</sup> The principle in its most lucid sense recognizes the right of people to determine one's political future.<sup>90</sup> As a most promising doctrine with broad application, it has always played an integral role in determining the status of Jammu and Kashmir in the international sphere.<sup>91</sup> The most common criticism raised against India when the accession was announced was also based on this principle.<sup>92</sup> The most common criticism raised against India when the accession was announced was also based on this principle.<sup>93</sup> However, the principle of self-determination is not an absolute principle and critiques of India have fail to account the relevance of self-determination in Jammu and Kashmir within the context of its changed circumstances.<sup>94</sup> Self-determination presents limitations,<sup>95</sup> and the validity of the claim to self-determination must be evaluated by addressing the following concerns. The first concern is whether the region is a non-self-governing one. A region that is geographically separate from the administering state, and colonies of colonial governments are considered as non-self-governing regions.<sup>96</sup> The relationship between India and the state of Jammu

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89 Oppenheim, *International Law*, 445.

90 Castellino, *International Law and Self-Determination*, 110-19.

91 Farell, "Kashmir," 314.

92 "European Parliamentary members condemn India for denying Kashmiris right to self-determination," *The International News*, accessed February 27, 2020, <https://www.thenews.com.pk/latest/528380-european-parliament-condemns-india-for-denying-kashmiris-right-to-self-determination.>; Mona Bhan et al., "The International community must intervene on Kashmir," *Open Democracy*, accessed February 11, 2020, <https://www.opendemocracy.net/en/international-community-must-intervene-kashmir/>.

93 "European Parliamentary members condemn India for denying Kashmiris right to self-determination," *The International News*, accessed February 27, 2020, <https://www.thenews.com.pk/latest/528380-european-parliament-condemns-india-for-denying-kashmiris-right-to-self-determination.>; Mona Bhan et al., "The International community must intervene on Kashmir," *Open Democracy*, accessed February 11, 2020, <https://www.opendemocracy.net/en/international-community-must-intervene-kashmir/>.

94 Lauterpacht Research Centre For International Law, *International Law Reports*, 115, 150 (E. Lauterpacht Et al. eds., Cambridge Univ. Press, 1999).

95 *Ibid.*

96 Josef Brink, *Non-Self Governing Territory*, 316-321; David Raic, *Statehood and The Law of Self-Determination*, (Kluwer Law, International 2002), 206.



and Kashmir is not that of the colony and the colonial government. The Constitution of India grants power to the Jammu and Kashmiri election commission to oversee the establishment of electoral roles as well as to conduct elections to both legislative council and legislative assembly.<sup>97</sup> Before bifurcation, there were 87 assembly constituencies and six parliamentary constituencies in Jammu and Kashmir,<sup>98</sup> and Jammu and Kashmir has a history of sending elected members to the lower house of Parliament since 1967.<sup>99</sup> The only time elections were not held was in 1990 due to security concerns.<sup>100</sup>

The principle of self-determination is linked to the notion of representative government and declares that states who comply with the principle must have a government representing the whole population of their region without distinction between race, creed or color.<sup>101</sup> Self-determination takes place whenever the people of a given territory can freely elect the government of their choice.<sup>102</sup> The people of Jammu and Kashmir have been exercising this right from 1956 onwards by electorally selecting their representatives in the state government and from 1956 in the Parliament. India is a union of states that grants the Parliament — the collective of representatives from all of the states (of which even the state of Jammu and Kashmir is an active member) — the power to make crucial decisions for the whole of India. This includes the power to either unite, divide, diminish, and alter any of the states under it for administrative convenience. Thus, to argue that the division of Jammu and Kashmir into two union territories would harm their historic rights of self-governance would hold no water since there have been no separate states of Jammu and Kashmir, to begin with. By actively engaging in the political administration of India, Jammu and Kashmir have already acceded to the Union, though, it was once limited by growing concerns about its autonomy. However, as it currently stands, Jammu and Kashmir have no separate existence from India. Therefore, the division of Jammu and Kashmir into two union territories is a domestic political move by the Indian government without any actual implications for the international community.

The second concern is whether the groups claiming self-determination form “people” under international law. The term “people” has been defined by different

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97 “Parliamentary Constituencies,” Chief Electoral Officer, [http://ceojammukashmir.nic.in/Parliamentary\\_Constituencies.htm](http://ceojammukashmir.nic.in/Parliamentary_Constituencies.htm).

98 Rahul Kanwal, “Its delimitation next in Jammu and Kashmir says BJP,” *India Today*, accessed February 27, 2020, <https://www.indiatoday.in/india/story/it-s-delimitation-next-in-jammu-and-kashmir-says-bjp-1577994-2019-08-06>.

99 Mayil Vaganam, “A survey of elections in Kashmir,” *Institute Of Peace And Conflict Studies*, accessed February 27, 2020, [http://www.ipcs.org/comm\\_select.php?articleNo=717](http://www.ipcs.org/comm_select.php?articleNo=717).

100 Ibid.; Edgar Thorpe And Showick Thorpe, *General Studies Paper 1* (2020), 2-3; Ibp Usa, *India Country Study Guide Volume 1 Strategic Information and Developments*, 217.

101 Thomas D. Musgrave, *Self Determination And National Minorities* (Oxford: Oxford Univ. Press, 2000), 98.

102 Borris Meissner, *The Right of Self Determination After Helsinki And Its Significance For Baltic Nations* (1981), 382.

scholars in various ways. In the post-war period, among many third world countries, decolonization was considered to be the only aspect of self-determination, and hence, within this context, the term “people” is confined to the population living in a non-self-governing region.<sup>103</sup> A much broader definition of “people” is contained in the representative government theory of self-determination. As Rosalyn Higgins notes, self-determination refers to “the right of [a] majority within a generally accepted political unit to exercise power. In other words, it is necessary to start with stable boundaries and to permit political change within them.”<sup>104</sup> Another accepted form of defining “people” is along the ethnic lines, since, there is an accepted practice by the UN General Assembly to divide territories when ethnic differences portend future instability.<sup>105</sup> Even if conceded to any of these definitions, a general device to distinguish people of Jammu and Kashmir from the rest of India is not possible, with a population of 44 percent Hindus, 68.31 percent Muslims, 0.28 percent Christians, 0.09 percent Buddhists, and 0.02 percent Jains. If people are equated with the State, it would mean that through the instrument of accession and the general elections conducted that the state has conceded to the region of India. The people of Jammu and Kashmir already exercise their right to vote by participation in general elections and hence, the representative definition also does not help demarcate the “people” separately. Finally, the people of Jammu and Kashmir are not inherently different from the people of India, nor do they constitute a trait or characteristic confined only to Jammu and Kashmir. The sovereignty of the region has always been in constant evolution from as early as the first century AD. Thus, the unitary concept of “self-determination” is inadequate, for Jammu and Kashmir especially.<sup>106</sup> The third concern is whether the region is integral to the state concerned. The principle of self-determination should not be equated with the right to secede.<sup>107</sup> Secession is against the principle of territorial integrity of a nation, and to concede to any fractions of a population the right of withdrawing from a community to which they belong would be to destroy the order and stability within states and would introduce anarchy in international life. It would be to uphold a theory incompatible with the very idea of the state as a territorial and political entity.<sup>108</sup> The Union of India, as well as the Preamble and Section 3 of the erstwhile constitution of Jammu and Kashmir, defines Jammu

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103 Rigo Sureda, *Evolution of Right of Self Determination*, 215.

104 Musgrave, *Self-determination*, 152.

105 *Resolution adopted on the report of the ad hoc committee on the Palestinian question*, [https://undocs.org/A/RES/181\(II\)](https://undocs.org/A/RES/181(II)).

106 Ved P. Nanda, *Self-determination and secession under International Law*, *Denver Journal of International Law* 29, no. 4 (2001): 305-326.

107 The Aaland Islands, Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs (1921) *League Doc. B7. 21/68/106*, 27.

108 *Ibid.*

and Kashmir as an integral part of India.<sup>109</sup> Since 1964, the region of Jammu and Kashmir, and India has become indissolubly bound to each other. To concede to any claim for secession from India would be against India's much-established territorial integrity that lies in the unity of its states. In his famous speech made in 1994, the then Prime Minister P. V. Narasimha Rao stated that Kashmir will always remain an integral part of India.<sup>110</sup> A similar comment was also made by Pandit Nehru as well. Another factor to be considered while analyzing the deeply entrenched territorial bond between India and Kashmir is who seeks for a separate state of Kashmir. The claim for a separate Kashmir is made by the prohibited separatist groups such as the Plebiscite and *Mujahadeen*—both with a proven history of backdoor support and training from inter-services intelligence of Pakistan.<sup>111</sup> The positive international law does not recognize the right of national groups. This is true in the case of Jammu and Kashmir as well. Giving heed to such claims made by such organizations would defeat the purpose of international law.

The final concern is whether the region is “geographically and economically” bound to the State concerned. The “fabled state” of Kashmir lies in mountain ranges separating the overpopulated plains of India from the endless steppes and deserts of Central Asia.<sup>112</sup> It shares boundaries with the Indian states of Himachal Pradesh, and Chandigarh in the south. Though this region has been described as one of the world's primary strategic pivots, the nexus of continents, empires, and civilizations,<sup>113</sup> due to its sprawled demarcations, it faces an imminent threat from the states of Pakistan, China, and Afghanistan (though is not economically bound to any of these states).<sup>114</sup> But, India's interest in the region dates back to the 1947 Instrument of Accession, and beyond- driven by both strong cultural and security bonds. Economically, Jammu and Kashmir are the largest recipient of grants from the central government, totaling

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109 Kash. Const. preamble; “J and K shall be an integral part of India,” *Minister of External Affairs*, accessed March 20, 2020, [https://www.mea.gov.in/articles-in-indian-media.htm?dtl/15748/JK+is+and+shall+be+an+integral+part+of+India.](https://www.mea.gov.in/articles-in-indian-media.htm?dtl/15748/JK+is+and+shall+be+an+integral+part+of+India.;); “Kashmir is an integral part of India say Deoband clerics,” *Economic Times*. Accessed January 27, 2020, <https://economictimes.indiatimes.com/news/politics-and-nation/kashmir-an-integral-part-of-india-say-deoband-clerics/articleshow/6729157.cms?from=mdr>.

110 John Thor Dahlburg, “India, Pakistan exchanges Harsh words on Kashmir,” *Los Angeles Times*. Accessed February 27, 2020, <https://www.latimes.com/archives/la-xpm-1994-08-16-mn-27741-story.html>.

111 Arthur S. Banks et al., *Political Handbook of The World 1998* (2016): 707.; “Order.” Ministry of Home Affairs, (Apr. 8, 2002), [https://mha.gov.in/sites/default/files/BanJudgment\\_09042002.pdf](https://mha.gov.in/sites/default/files/BanJudgment_09042002.pdf).

112 Eric S. Margolis, *War at The Top of The World: The Struggle Of Afghanistan, Kashmir And Tibet* (2002): 53.

113 Ibid.

114 The part of Kashmir illegally occupied by China is called Aksai Chin, and that illegally occupied by Pakistan is Azad Kashmir.; Robert G. Wirsing, *Boundary and Territory Briefing* (Clive Schofield Ed., 1998), 1-18.

an amount of US\$812 million per year.<sup>115</sup> In an attempt to improve the infrastructure of the region, the Indian government has commenced work on the Kashmir Railway project at a cost of more than US\$2.5 billion as early as in 2002.<sup>116</sup> The Associated Chambers of Commerce and Industry of India (ASSOCHAM) is also working with the union and the state government of the Jammu and Kashmir region to set up industrial parks and special economic zones to attract investments.<sup>117</sup> Another major source of income of the region is from Hindu pilgrims who visit the *Vaishno Devi* and *Amar Nath* Temple of Jammu and Kashmir annually.<sup>118</sup> The region of Jammu and Kashmir is both economically and geographically bound to India, and it is not economically or geographically viable for the region of Jammu and Kashmir to secede from India.<sup>119</sup> Even if a small nationality did initially secede, it would in all probability be drawn back into the larger state and eventually rejoin it.<sup>120</sup> Economic viability and military defense are major considerations for a State's survival.<sup>121</sup> With a major threat to territorial security from both Pakistan and China, the concept of self-determination would only act as a source of political instability and domestic disorder.

### *Shimla Agreement and Bus Diplomacy*

With the formal accession of Jammu and Kashmir to India, the requirement of bilateral negotiations between India and Pakistan as a means to resolve territorial disputes has become obsolete. The matter of Jammu and Kashmir has become India's domestic concern alone.<sup>122</sup> This means that the Shimla agreement and bus diplomacy ("Lahore Declaration") will not be a factor in future negotiations between India and Pakistan on Jammu and Kashmir. The assessment augurs well in the historical regard since the agreement by both countries to veto the status quo has done more harm than good. The Shimla agreement intended for a workable resolution to eliminate interference through an agreed plan of action. But, such a mechanism to resolve disputes as agreed by the parties was not followed in its absolute sense. Pakistan has at multiple times violated the Shimla agreement. On

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115 "Economy," Jammu and Kashmir Government, <https://jk.gov.in/jammukashmir/?q=economy>

116 Ibid

117 Ibid.

118 Ibid.

119 Jones Et. Al., "Economic Development as a Tool to Reduce Secessionism in Jammu and Kashmir," *University of Wisconsin*, <https://minds.wisconsin.edu/bitstream/handle/1793/43875/southasia.pdf?sequence=1&disAllowed=y>

120 Buccheit Lee C., *Secession*, 54.

121 Musgrave, *Self determination*, 27.

122 "India's Proposition on J and K hasn't changed: MEA reacts to UN Chief's remarks in Pakistan," *India Today*,. Accessed February 27, 2020, <https://www.indiatoday.in/india/story/india-s-position-jammu-kashmir-has-not-changed-mea-reacts-un-chief-remarks-pakistan-1647115-2020-02-17>

February 1999, when the Lahore Declaration was being signed with a reiteration of “the determination of both countries to implement the Shimla Agreement in letter and spirit,” Pakistani military units had already infiltrated the LOC in Kargil which led to the fierce fight that claimed the lives of 519 Indian personnel.<sup>123</sup> Moreover, this was not the only occasion when Pakistan had violated the treaty. The multiple violations of ceasefire agreements have constituted the withering of the treaty from its absolute form. Therefore, an argument that India has violated the Shimla agreement will not suffice since the terms of the agreement have already been violated by the other party, invalidating the whole of the agreement, or giving India a higher position to suspend its operation at its will.<sup>124</sup>

### *The validity of UN Resolutions on Kashmir*

The United Nations has, at multiple times, unsuccessfully attempted to resolve the Kashmir dispute. The major reason for its failure to mediate during the 20<sup>th</sup> century is attributed both to cold war politics and their inability to take binding action. However, this nowhere means that the UN has the right to intervene in Kashmir matter anymore. Article 2 (7) of the UN charter provides that the United Nations should not intervene in matters which are exclusive to the domestic jurisdiction of a state. The UN has issued numerous resolutions on Kashmir through both the General Assembly and through the Security Council from 1948 onwards. These resolutions emphasize a need for a plebiscite and focus on the self-determination of the people of Kashmir. Historically, none of these resolutions have attained any progress in reconciling the dispute between states in the region of Kashmir. As Professor Sumantra Bose points out “[the] UN long ago became irrelevant to the resolution of Kashmir,”<sup>125</sup> and United Nations resolution which cannot progress into law becomes materially non-binding.<sup>126</sup> This applies to resolutions made for Jammu and Kashmir as well. The material changes that have happened to Kashmir ever since the signing of the Shimla agreement and the years forward have materially altered the nature of Kashmir into a state under the Union of India. A similar position was also taken by Kofi Annan, the UN Secretary General on a visit to the subcontinent in 2000. According to him, the old Security Council resolutions that call for a plebiscite were unenforceable and essentially defunct, since India has squarely opposed the plebiscite for the past 50 years, and the Pakistani conception of the plebiscite limits the choice to the two

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123 Kanti. P. Bajaipai et al., *Kargil and after Challenges: Challenges for Indian Policy* (2001), 53.

124 Oppenheim, *International Law*, 205.

125 Bose, *Contested Lands*, 200.

126 Bruce Cronin and Ian Hurdin, *UN Security Council And Politics of International Authority* (2008), 50-71.; *Towards the UN Reform: New Threats, New Responses*, (The Warsaw Report of The Regional Conference In Support Of The High Level Panel On Threats, Challenges And Change Appointed By UN Secretary General, Warsaw, 24-25 May 2004), 80-93.

options of the late 1940s and early 1950s. Such an exercise would *a priori* exclude the first preference—independence—of millions on both sides of the LOC. In reality, Pakistan has used the plebiscite demand simply as a strategic weapon against India in the propaganda war over Kashmir. In 2004, Musharaff also publicly acknowledged that it is pointless to “flog the dead horse of the plebiscite” and that an alternative path to settling Kashmir must be found.<sup>127</sup>

## Conclusion

For more than eight decades, the region of Jammu and Kashmir has enjoyed a special status under the domestic jurisdiction of India. This status owed much to both the municipal law, and the international law. However, by revoking Article 370 of the Indian Constitution, the government of India has formally accessed the territory of Jammu and Kashmir. Therefore, from henceforward, any question on the determination of Jammu and Kashmir should be guided by the municipal law of India. The allegations made by both Pakistan and its allies that the Republic of India has violated international law, is no longer sound. On the contrary, the Republic of India has both respected and adhered to the principles of international law. The root of plebiscite and self-determination, howsoever, alluring they may appear have become both an obsolete and a dangerous formula for addressing the issues of Kashmir. Any more applications or claims made of this nature on Jammu and Kashmir would be tantamount to an uncalled intervention into the territorial integrity of the state. The sovereignty of Jammu and Kashmir has always been in a form of evolution from the fifth century AD to the formal accession made by the union of India on 5 August, 1952. This paper has established that India’s formal accession of Kashmir complied with international law and that the UN resolutions of Kashmir for self-determination and plebiscite are no longer valid in light of the material change of circumstances. The formal accession of Jammu and Kashmir demonstrates a transition from bitter acrimony to a delicate domestic compromise. Nonetheless, its effective victory relies on the acceptance from the part of the world’s nations to respect its domestic act. Until then, peace and harmony will only be a mere sham in the covet of international law.