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**SHRI DHARMASTHALA MANJUNATHESHWARA
LAW COLLEGE & CENTRE FOR
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ENFORCING RESOLUTION 47 TO SETTLE THE KASHMIR DISPUTE - A REVIEW

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Abstract

The article aims to analyse the dispute from the perspective of international law and more particularly assess the key recommendation of Resolution 47 passed by the UN Security Council in 1948, which calls for a plebiscite to be held in the Jammu and Kashmir region. The article argues that Resolution 47 is not only an ineffective method of settling the dispute but also an impracticable one due to the circumstances prevailing in the region.

Introduction

The dispute over Kashmir between India and Pakistan has been called the 'greatest and gravest single issue in international affairs.'³ The Kashmir dispute has characterised the relations between India and Pakistan ever since partition in 1947. The dispute has now become an issue of national prestige for both States than a territorial one. It has led to continuing tensions between the two States, resulting in countless deaths, strained bilateral relations, religious tensions, unrest in Kashmir, militancy, and human rights violations. While Islamabad criticises India of mishandling the entire situation and committing human rights violations, New Delhi blames Pakistan for sponsoring and aiding militants who have indulged in terrorism. Both India and Pakistan today, are States with nuclear capabilities and occupy prominent positions in South Asia. The unresolved Kashmir dispute thus poses a threat not only to the people of both nations but also to the whole of the South Asian region,⁴ which is home to a fifth of the world's population. The dispute cannot go on forever, but the longer it lasts, the more volatile the region becomes.

Although there have been several calls for the resolution of the dispute through international law,⁵ very little has been done about it by the international community.

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³ Philip Noel-Baker, the British delegate to the Security Council, 17 April 1948.
⁴ AZ Hilali, *Kashmir: Emerging Nuclear Threat in South Asia* 9(16) Perspectives 34-56 (2001).
⁵ Qaiser Javed Mian, *Resolving Kashmir Dispute Under International Law* 44(3) PAK L. J. 289 (2004);



This article aims to analyse the dispute from the perspective of international law and more particularly assess the key recommendation of Resolution 47 passed by the UN Security Council in 1948, which calls for a plebiscite to be held in the Jammu and Kashmir region.⁶ The article argues that Resolution 47 is not only an ineffective method of settling the dispute but also an impracticable one due to the circumstances prevailing in the region. While chapter I has provided the introduction to the article, chapter II and its sub-chapters discuss the reasons why Resolution 47 is impossible to enforce in the present scenario. Chapter III will deal with the final inference and conclusion of the article.

Enforcing UNSC Resolution 47

Resolution 47 aims at settlement of the Kashmir dispute through peaceful means including the organising of a plebiscite, which would recognise the right to self-determination of the Kashmiri people. The first clause concerned the restoration of peace and order. Under this clause, Pakistan is required to withdraw its tribesmen and troops from the north-western part of the State of Jammu and Kashmir.⁷ Following the withdrawal by Pakistan, India is directed to reduce its troops to the minimum strength required for the maintenance of peace and order.⁸ The second clause states that a Plebiscite Administrator appointed by the Government of Jammu and Kashmir in consultation with the U.N. Secretary General shall conduct a plebiscite in the State of Jammu and Kashmir.⁹ A Commission was also appointed by the U.N. Security Council to certify that the plebiscite, once conducted, was indeed free and impartial.¹⁰ The third clause provided for the representation of both India's and Pakistan's interests in the Commission which would oversee the plebiscite and the relations between India and Pakistan in the meantime. However, a major drawback of this Resolution by the Security Council was that it was not made under Chapter VII of the UN Charter, thereby making it a recommendation or declaration rather than a binding decision. Pakistan, along with several other States, continue to demand at various international forums that an independent plebiscite be held in Kashmir.¹¹

⁵ Cont. Islamic Human Rights Commission, 'Kashmir and Self-Determination: International Law as a Way Forward' (IHRC Website, 17 July 2007) available at <<http://ihrc.org.uk>>; Raja Muhammad Khan, Kashmir Dispute: A Legal Perspective 7(4) NDU JOURNAL (2015).

⁶ UNSC Resolution 47 (S/726), 21 Apr. 1948 available at: <[http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/47\(1948\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/47(1948))>

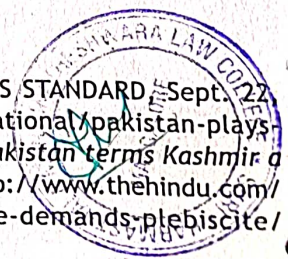
⁷ Ibid Clause A (1).

⁸ Ibid. Clause A(2)(b).

⁹ Ibid. Clause B(10)(c).

¹⁰ Ibid Clause B (15).

¹¹ IANS, *Pakistan plays Kashmir card at UN, demands plebiscite*, BUSINESS STANDARD, Sept. 2016 available at <http://www.business-standard.com/article/international/pakistan-plays-kashmir-card-at-un-deman-dsplebiscite-116092200144_1.html>; PTI, *Pakistan terms Kashmir a 'Legal Issue', Demands Plebiscite*, THE HINDU Oct. 2, 2014 available at <<http://www.thehindu.com/news/international/south-asia/pakistan-terms-kashmir-a-legal-issue-demands-plebiscite/article6468376.ece#>>



The idea of enforcing the resolution seems logical and reasonable. However, implementing Resolution 47 is not only a complicated task but is practically impossible. Apart from the fact that the Resolution is not legally binding on both States, there are other issues that need to be taken into consideration. The following analysis provides legal and factual reasons to suggest that the recommendation by the Security Council can never be implemented in the State of Jammu and Kashmir.

A. Pakistan's Continued Occupation of Jammu and Kashmir

The Resolution passed by the Security Council sought to demilitarise the region and create suitable conditions for a free and fair plebiscite that would determine the intentions of the people. It must be noted that the resolution was passed with respect to the State of Jammu and Kashmir as a whole, which includes the regions presently under the occupation of India as well as Pakistan. In other words, the resolution states that a plebiscite must be held in both India-administered Kashmir as well as Pakistan-administered Kashmir together. However, the first clause of the Resolution directs Pakistan to withdraw its troops and people from the State of Jammu and Kashmir as follows:

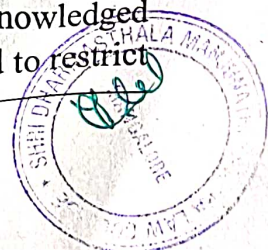
*The Government of Pakistan should undertake to use its best endeavours to secure the withdrawal from the State of Jammu and Kashmir of Tribesmen and Pakistani nationals not normally resident therein who have entered the State for the purpose of fighting.*¹²

The onus was primarily on Pakistan to withdraw its people from the disputed territory. Such withdrawal, followed by India's withdrawal of its troops, would have paved the way to hold a fair and impartial plebiscite for the indigenous people of Jammu and Kashmir. However, Pakistan cited shortcomings in the Resolution and refused to withdraw its nationals from the region. As a result, the region of Gilgit-Baltistan, which was an inherent part of the State of Jammu and Kashmir before partition, remained under the occupation and administrative control of the Government of Pakistan. Today, three generations of Pakistani nationals have made Gilgit-Baltistan their home, all of whom are entirely dependent on the State of Pakistan for governance. The occupation of Gilgit-Baltistan by Pakistani nationals has caused an irreversible change in the demographics of the region. The Resolution originally envisioned the recognition of the rights of the native Kashmiris to self-determination. However, it is not possible now to distinguish the native people from the Pakistani nationals, and hence, even if a plebiscite is held, the actual purpose of the resolution cannot be achieved.

B. The Simla Agreement

The Simla Agreement was a ceasefire treaty that established the Line of Control (LoC) between India and Pakistan.¹³ Under the Agreement, both States acknowledged the occupation of Jammu and Kashmir by each other. Both States agreed to restrict

¹² UN Security Council Resolution (n4) A (1)(a).



themselves to their respective sides of the LoC and observe the LoC as the de facto border. The Simla Agreement makes no mention of the U.N. Resolution but states that both India and Pakistan would endeavour to resolve the dispute through bilateral negotiations. An analysis of the Simla Agreement reveals how it was detrimental to the implementation of Resolution 47. Clause 1 of the Agreement is particularly relevant to this part of the thesis, which states 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...*¹⁴

The Simla Agreement is a treaty between India and Pakistan, which is governed by the Vienna Convention on the Law of Treaties¹⁵ and is binding upon both nations. The question that arises here is, whether the provisions of the Simla Agreement override the obligations under Resolution 47 passed by the Security Council. If it does, then, is the significance of the resolution nullified?

Article 103 of the U.N. Charter provides that the obligations of States under the Charter would prevail over obligations under other international agreements or instruments.¹⁶ Resolution 47 was passed by the Security Council, and therefore, lies within the scope of Article 103. However, in order for Article 103 to be applicable, the States need to have obligations under the Charter. Resolutions passed under Chapter VI are advisory and directory, but not mandatory. The provisions of the Resolution are not binding on India and Pakistan and hence do not create specific juridical obligations. In other words, there is no legal obligation under Resolution 47 to conduct a plebiscite. The only obligation that States have under Chapter VI is to make efforts to resolve the dispute through peaceful means.¹⁷ On the other hand, the Simla Agreement is a binding instrument that creates clear legal obligations on both India and Pakistan. The Agreement does not involve any clause regarding a plebiscite or mediation by the U.N. and puts the onus on India and Pakistan to resolve the dispute in a peaceful manner through bilateral negotiations.

Therefore, the Simla Agreement excludes any outside mediation on the Kashmir dispute and relies on mutual negotiations between the two countries. Although the obligations under the Charter legally override other international obligations, the nature of the Charter obligation itself is in question whereas the obligations under the treaty are clear and binding. As such, the robust and explicit Simla Agreement would prevail over the controversial and ambiguous resolution. The U.S.A. and other

¹³ Agreement between the Government of India and the Government of the Islamic Republic of Pakistan on Bilateral Relations (henceforth referred to as the Simla Agreement) (India-Pakistan) adopted 2 July 1972 [1972] INTSer 16.

¹⁴ Ibid. Clause 1(ii).

¹⁵ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations Treaty Series, vol. 1155, p. 331.

¹⁶ Article 103, United Nations, *Charter of the United Nations*, 24 Oct. 1945, 1 UNTS XVI.

¹⁷ Ibid. Article 33(1).



western countries also support India's interpretation of the provisions of the Simla Agreement.¹⁸

A subsequent resolution passed by the Security Council also supports reconciliation of the dispute through bilateral negotiations between India and Pakistan. Resolution 1172, passed in 1998, encourages the two States to find "mutually acceptable solutions" that address the dispute over Kashmir.¹⁹ Although Resolution 1172 does not specifically repudiate Resolution 47, it omits the original obligation on India and Pakistan to conduct a plebiscite and urges the two States "to resume dialogue" on all outstanding issues.²⁰

C. China's Occupation of Jammu and Kashmir

China has always been a keen observer of the Indo-Pak relations. Being a neighboring State to both India and Pakistan and sharing borders with the Jammu and Kashmir region, China plays a minor yet important role in the Kashmir dispute. China was at the forefront during the drafting of Resolution 47 and was one among the members of the U.N. who voted in favour of the Resolution.²¹ However, China's role in the dispute has changed drastically in the past 55 years. The Sino-Indian War of 1962 ended in a devastating defeat for the Indian side and as a result, a substantial portion of Jammu and Kashmir namely Aksai-Chin came under the direct control of China. It now occupies 14,500 square miles or about 20 percent of the disputed territory.²²

As previously stated, Resolution 47 is applicable to the whole of the State of Jammu and Kashmir. In 1948, when the resolution was passed, Aksai-Chin was an integral part of the State of Jammu and Kashmir. However, this territory is now under the occupation of China. Although the population of this region is meagre, it is still a subject of the resolution passed by the Security Council. If a plebiscite were to be conducted in accordance with the resolution, the population of Aksai-Chin would also be legally entitled to participate in the same. However, this would require China to renounce its claims over Aksai-Chin and allow the U.N. to take charge. China, which claims territorial sovereignty over Aksai-Chin, is unlikely to allow a plebiscite to be held in the region. India, which strongly challenges the imposition of Resolution 47, would cite this complication, leaving the resolution inapplicable.

¹⁸ Vaughan Lowe & others, *The United Nations Security Council and War: The Evaluation of Thought and Practice Since 1945* 340 (2008); Peter R Lavoy, *Asymmetric Warfare in South Asia: The Causes and Consequences of the Kargil Conflict* 47 (2009); Howard B. Schaffar, *The Limits of Influence: America's Role in Kashmir* 122-123 (2009); Dennis Kux, *India and the United States; Estranged Democracies, 1941-1991* 434 (1992).

¹⁹ UN Security Council, *Security Council Resolution 1172* (1998) [On International Peace and Security], 6 June 1998, S/RES/1172 (1998) 2.

²⁰ Ibid.

²¹ Srinath Raghavan, *War and Peace in Modern India* 130-131 (2010).

²² Lawrence Smallman, *Chinese-controlled Kashmir*, ALJAZEERA, Apr. 21, 2003 available at <http://www.aljazeera.com>.



China's involvement in the Kashmir dispute is not limited only to Aksai-Chin. In 1963, under the Sino-Pak Border Agreement, Pakistan settled its border disputes with China by ceding the Shaksgam area to China.²³ The Shaksgam area, which lies within Gilgit-Baltistan and once part of the princely State of Jammu and Kashmir, is a fragment of the disputed territory between India and Pakistan. Pakistan's cession of the area to China goes against its own policy on the status of Jammu and Kashmir. Officially, the Government of Pakistan regards Gilgit-Baltistan as part of the disputed territory with India. It has rejected demands for its complete integration with the State of Pakistan. This is because such a move would be detrimental to its demands for the settlement of the Kashmir dispute according to the U.N. Resolution.²⁴ However, by entering into the Border Agreement with China, Pakistan acknowledged its territorial sovereignty over the region. The Sino-Pak Border Agreement has caused a material change in the geography of the State of Jammu and Kashmir. India was quick in condemning the pact between Pakistan and China²⁵ and currently maintains that the Agreement is illegal. Pakistan's actions have hurt its own interests, worsened its ties with India and also affected the interests of the people of the region by further complicating the applicability of Resolution 47.

The China-Pak relations have grown stronger after the 2015 agreement between the two States to develop the China-Pakistan Economic Corridor (CPEC).²⁶ The CPEC, worth \$62 billion,²⁷ is a network of infrastructure projects including roadways, railways and waterways, which China would construct in Pakistan for its economic use. As part of the project, China intends to develop the infrastructure within Pakistan-administered Kashmir as well.²⁸ India has strongly opposed the CPEC as a violation of its territorial sovereignty.²⁹ With China's growing presence in the disputed territory, a plebiscite at such a time would adversely affect China's interests, due to the risk of the people deciding to accede to India. China, although not a direct party to the dispute, would prefer the continuance of the status-quo and would be unsupportive towards the idea of conducting a plebiscite in the region.

²³ Agreement between the Government of the People's Republic of China and the Government of Pakistan on the Boundary between China's Sinkiang and the Contiguous Areas, the Defence of which is under the Actual Control of Pakistan, available at <http://repository.un.org/bitstream/handle/11176/81199/S_5263-EN.pdf?sequence=1&isAllowed=y>

²⁴ Victoria Schofield, *Kashmir in Conflict* 180-181 (2003).

²⁵ Letter from the Delegation of India to the President of the Security Council dated 18 Mar. 1963 S/5263.

²⁶ Government of Pakistan, *Introduction to the CPEC*, CHINA PAKISTAN ECONOMIC CORRIDOR (2015) available at <<http://cpec.gov.pk>>

²⁷ CNN, *Pakistan lands \$46 Billion investment from China* CNN Apr. 20, 2015 available at <<http://money.cnn.com/2015/04/20/news/economy/pakistan-china-aid-infrastructure/>>

²⁸ Government of Pakistan, *Introduction to the CPEC*, CHINA PAKISTAN ECONOMIC CORRIDOR, (2015) available at <<http://cpec.gov.pk/project-details/71>>

²⁹ Web Desk, *China-Pakistan Economic Corridor 'unacceptable', Modi tells China*, THE EXPRESS TRIBUNE, June 1, 2015 available at <[https://tribune.com.pk/story/895611/china-pakistan-economic-corridor-unacceptab le-modi-tells-china/](https://tribune.com.pk/story/895611/china-pakistan-economic-corridor-unacceptab-le-modi-tells-china/)>



China's involvement in the Kashmir dispute is minimal. However, the change that is caused because of its involvement is substantial and irreversible. Although China has urged both parties to negotiate, it will not be possible without its cooperation. The legal complexities caused due to China's presence within the disputed territory constitutes a strong reason for the inapplicability of Resolution 47.

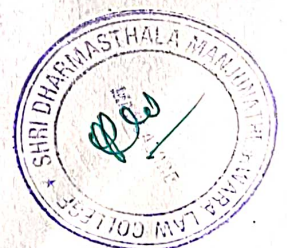
Conclusion

In conclusion, this article has addressed the infamous question of applicability of Resolution 47 to resolve the dispute between India and Pakistan. The provisions of the resolution are discussed in detail to obtain an understanding of the intentions of the Security Council in passing the same. The article further moves towards the assessment of the resolution and its applicability in the current scenario of the dispute more than 70 years after the resolution was passed.

The UN resolution is a document that has waned in its significance due to the changed circumstances in Jammu and Kashmir over the past seven decades. The article clearly lays down and analyses the reasons for non-applicability of the resolution. The continued occupation of territories within Jammu and Kashmir by Pakistan and China along with the provisions of the Simla Agreement contribute to the complications of enforcing any means of settlement through international law, let alone Resolution 47.

The path ahead for the Kashmir dispute looks uncertain at the moment. While India seeks to rely on bilateral negotiations as per the Simla Agreement and continues to accuse Pakistan of illegally occupying Gilgit-Baltistan, Pakistan has turned to the international community for assistance in the resolution of the dispute. However, what is certain, is that Resolution 47, cited by Pakistan along with several other States and organisations as an ideal solution to the dispute, does not present a means to settle the dispute due to the impracticability in its enforcement and inability to produce a fair and legitimate result.

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