

UN MEDIATION ON KASHMIR DISPUTE: PAST AND FUTURE

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ABSTRACT: *India and Pakistan's dispute over the legal status of Kashmir is a longstanding conflict between the two countries which threatens the security of the entire region. This article provides critical analysis on the genesis of this conflict. The article is divided into sections for understanding the Pakistan India antagonism. These sections are, the partition of subcontinent, accession of Kashmir to India, UN interventions/mediations into this territorial dispute, and the Simla agreement. The article employs a qualitative research approach, therefore relying primarily on the analysis of published and written materials such as books, academic journals, magazines and newspapers. This article argues that although The Security Council attempted to use its mediatory influence at the early stages of the conflict but could not bring about a permanent resolution. After that a long period the bilateral negotiations have bore no results instead this protracted the conflict and has contributed to the deepening of mistrust between these two neighboring nuclear countries. The primary findings based on legal opinions of some experts suggest that the after the consistent failures of bilateral mediations between India and Pakistan for more than thirty years, the Security Council should reinsert itself as a mediator by understanding this failure and by reengaging India, which has become resistant in all these years to international mediation in Kashmir.*

KEYWORDS: Kashmir Dispute, UN mediation, Simla agreement, UN Resolutions.

INTRODUCTION

South Asia – home to one fifth of total human race – needs peace and stability. The long standing issue of Kashmir had virtually halted the passage of peace in the region. Forty four percent (44%) of the poor live in this part of the world, prosperity is whose fundamental right. It has been estimated that around \$300 billion / year are spent by South Asian nations and China on military expenditure. The peaceful referendum held September 18, 2014 in Scotland was a great inspiration to Kashmiris that a long-overdue referendum promised to them 67 years ago may be materialized now. This article is a humble try to provide critical analysis of the genesis of Kashmir Issue. Its historical perspective starting with Pak-India antagonism the formation of Jammu and Kashmir State, the partition of 1948, accession of Kashmir to India, UN intervention into this dispute and Simla Agreement. Main focus of the write-up would be deliberation upon validity of UN Resolutions on Kashmir and compatibility of Simla Agreement and UN charter. It argues that although the UN Security Council attempted to proactively use its mediatory and recommendatory influence at early stages of the dispute but could not bring about permanent solution. On the other hand an adventure of bilateral mutual solution in the form of “Simla Agreement” also could not bear any results or headway. Resultantly the conflict has been protracted and mistrust between two nuclear neighbouring

states deepened. Fundamental question would be that has the time come now for any breakthrough that we should divert again towards “any other peaceful means” as per very extract of Simla Agreement and what other than the alive resolutions in UN Security Council can this “other peaceful means” be? This may be reopened on the pretext of already tabled and deliberated resolutions of UNSC or knocking the doors of UNSC with a renewed resolution by any country, any party. The study will end up with some new vistas of breakthrough.

History of Kashmir Dispute / Back ground

The state of J&K is located at the heart of Asia with historical, geographical & technical Links to both south & central Asia. It shares its borders with three nuclear powers India, Pakistan and China with the most sustained level of violence internationally being described as crises-prone nuclear flashpoint. It spreads over 86000 sq.m (larger in area than 103 sovereign states) while its population is about 17 million (which is larger than that 125 UN members states). Nearly 80 per cent of the population is Muslim. The State of Jammu and Kashmir has historically remained more or less independent other than short periods. The British ruled Kashmir from mid-19th to mid-20th century. Until 1846, Kashmir was part of the Sikh empire. In the year 1846, the British defeated the Sikhs and sold Kashmir to Gulab Singh of Jammu for Rs. 7.5 million under the Treaty of Amritsar. Gulab Singh, the Maharaja, signed a separate treaty with the British which gave him the status of an independent princely ruler of Kashmir. A Dogra Dynasty established by Maharaja Gulab Singh produced three more Rulers, who ruled in succession over Kashmir were Rambir Singh (1857-1885), Partab Singh (1885-1925) and Hari Singh (1925-1949). (Rai, 2004)

To understand the basic nature of the dispute a peep through history window is needed. It was started from 1947 when Great Britain has departed from subcontinent According to the partition plan subcontinent of (Indian Independence Act 1947, Article-7) the rulers of princely states were given the choice to freely accede to either India or Pakistan, or to remain independent. They were, however, advised to make their decisions of acceding to any state taking into consideration the geographical, ethnic and religious issues. So legally the states became independent on the eve of 14th Aug, 1947 but secretary of state for India Lord Listovel spoke in the House of Lords that “we don’t of course propose to recognize any states as separate internal state” (Hussain, 2004) Viceroy Lord Mountbatten clarified the criteria for deciding the annexing of states that “Normally geographical situation and communal interests and so forth will be the factors to consider by 15ht Aug”. (Hussain, 2004) All states on the basis of above criteria acceded to either India or Pakistan but Junagarah, Hyderabad and Kashmir remained indecisive. Two states Junahgarh, Hyderabad with Hindu majority but Muslim rulers wanted to accede to Pakistan or remain independent respectively but Indian troops forcibly entered in the states and got hold of both on the pretext of Hindu majority. In case of Kashmir geographical contiguity, historical bondage, Muslim majority were all the considerations of laid down criteria (of Lord Mountbatten) were in favor of annexure of Kashmir with Pakistan, but neither India nor Hindu Maharaja of Kashmir wanted this annexure. History tells that during May to Aug 1947, President Indian congress (Acharaya Kirapalni) Maharaja Fareed kot, kapur, Patiala, rulers of Punjab, Lord Mountbatten and even Gandhi himself went to Kashmir and advised coerced and even forced Maharaja to Join India.(Iamb, 1992)

In the meantime other tactics were used to create space for unrest, maharaja’s brutalities along with pouring in of Rashtrya Swayam Sewak Singh (RSS) and Sikh gangs in Jammu, ignited the Muslim revolt as they rebelled in Dogra army. This indigenous uprising invited emotions of tribal brethren in North Areas of Pakistan and Kashmir. On 22, 23 Oct, 1947 tribal groups

joined rebel armies and seized Srinagar power house on 24th Oct. (Khan, 2010) So Maharaja instead of pacifying his subjects or by going along the wishes of majority population decided to fly from Kashmir and has asked for Indian army help.

Accession to India

On the evening of Oct 24, the Govt of India received an appeal for help from Maharaja. Subsequently Indian Defence Committee met on 25th Oct. Menon flew to Srinagar to meet Maharaja and assess the situation on 26th. Maharaja and Menon left Srinagar on the same day. Menon reported back to Defence Committee and again flew to Jammu to get letter from Maharaja along with accession instrument. (Ganguli, 1997) Indian Govt Didn't wait for formal approval of Instruments of accession and sent their army to Kashmir on 27th Oct at 9 am while on same day Lord Mountbatten wrote to Maharaja about acceptance of accession request. In his reply dated 27 Oct 1947, Lord Mountbatten said "in the special circumstances mentioned by Your Highness, my Government has decided to accept the accession of Kashmir State to the Dominion of India. Consistently with their policy that, in the case of any State where the issue of the accession has been the subject of dispute, the question of accession should be decided in accordance with the wishes of the people of the State, it is my Government's wish that as soon as law and order have been restored in Kashmir and her soil cleared of the invader, the question of the State's accession should be settled by a reference to the people"(Khan, 1985)

The legality of the Instrument of Accession is considered controversial on more than one grounds firstly it may be questioned on grounds that it was obtained under coercion. As William Slomanson contends that according to The International Court of Justice there "can be little doubt, as is implied in the Charter of the United Nations and recognized in Article 52 of the Vienna Convention on the Law of Treaties, that under contemporary international law an agreement concluded under the threat or use of force is void." (Slomanson, 2000) And India forced the accession as a condition for providing military interventions in Kashmir. 2ndly above stated evidence suggest that Indian troops were pouring into Srinigar on 27 October 1947, on the same day Viceroy was writing a letter to Maharaja asking about his decision about accession, on the same day Maharaja was signing the accession letter therefore it is evident Accession letter's signing and dispatching was a dubious issue and Indian army was Dispatched even before the Maharaja had signed the treaty. (Hussain, 1998) This fact would suggest that the treaty was signed under duress and without fulfilling legal formalities, so much so that it is also doubtful as to whether the treaty was ever signed. Because it was never presented to Pakistan (the main claimant in the case) nor it was registered to the United Nations secretariat by India for which International law bounds it says that that every treaty entered into by a member of the must be registered with the Secretariat of the United Nations (Slomanson, 2000) the most glaring doubt about the treaty's validity is that in 1995 Indian authorities reported that the original copy of the treaty was either stolen or lost (Internet, 2015)

The letters exchanged between Maharaja and Viceroy and the pronouncements made than would suggest that the accession was provisional and conditional.

The later statements from Indian side were in the same tone, texture and tenor. Nehru's letters of 28th Oct, 31st Oct 1947 to PM Pakistan and broadcasts of 2nd Nov and 21st Nov 1947. Mr. N. Gopaldaswani Indian delegate's addresses at UN, on 15th Jan 1948, 6th Feb 1948 etc. all assertions and reiteration of Indian pledge for people's will and plebiscite in Kashmir. (Evans, 2001)

Chronology and Analysis of Kashmir Dispute at UN

On 1st Jan, 1948 Indian Govt itself took the Kashmir Dispute case to the forum of United Nation. Although it was complaint against Pakistan but was based on Article 35 of chapter VI of UN Charter which relates to “Pacific settlement of Disputes” and (not chapter vii, which deals the cases of aggression) thus invoking the Security Council’s dispute resolution capacity. (Ganguli, 1997) **On 17th Jan, 1948** after listening through deliberation and counter arguments from Indian & Pakistan delegates a resolution was passed with direction to both of Governments to refraining from aggressive situation. **On 20th Jan,1948** United Nations passed Resolutions 38 and 39 and for the first time issued statements about Kashmir dispute. Pursuant to Article 34 of the United Nations a three members Commission for India and Pakistan (UNCIP) was established.(Ganguli, 1994) The functions defined for the UNCIP were; i)To investigate the facts that gave rise to the Kashmir dispute; ii)To exercise any mediatory influence likely to smooth away difficulties; iii)To carry out directions given by the Security Council. And iv) To report on the progress of executing the advice and directions of the Security Council.

Next resolution (Resolution No.47) came on **21st April 1948** with elaborate directions. This resolution clearly depicted the future line of action for UN role in Kashmir dispute. The resolution called for; i) Pakistan try to ensure the with-drawl of tribesmen ii) India to curtail its forces to the minimum for maintenance of law & order; iii) UN secretary General to appoint a Plebiscite Administrator who was to act as an officer of the state of Jammu & Kashmir.This resolution still remains the Security Council’s outlined structure for a peaceful settlement of dispute. Although both India and Pakistan had some reservations about this resolutions, but both agreed to accept Resolution 47 and the good offices of the UNCIP to their states. (Dawson, 1994)

Resolution of 13th Aug 1948 and 5th Jan 1949

On the basis of negotiations conducted during 1st Jan 1948 till Aug 1948 with the leaders of both countries and on the spot study of the situation the commission adopted two important resolutions on 13th Aug 1948 and 5th Jan 1949. Both resolutions together spell out the terms and conditions for the settlement of Kashmir dispute. The UNCIP resolution of 13th Aug reiterated the recommendations of Resolution 47 .It was a three part proposal document:- **Part I** was Cease fire order would imply; a) A cease fire order to apply to the all forces under their control in state of J&K on earliest practicable and mutually agreed dates., b) To refrain from taking measures that augments the military potential of any force.

Part II A Truce Agreement in which detailed modalities of the truce were chalked out . it consisted of these principles ; a) Government of Pakistan would withdraw its troops from the state., b) Government of Pakistan would use its best endeavor to secure the withdrawal of tribesmen and Pakistan nationals from the state., c) Pending a final solution the territory evacuated by the Pakistan troops will be administered by the local authorities under the surveillance of commission., d) India would withdraw the bulk of its troops from the state after Pakistan's withdrawal., e) India would maintain within the line existing at that moment of the cease-fire line the minimum strength of its forces., f) Government of India would ensure measures to safeguard peace and human and political rights of the people of Jammu and Kashmir.

Pertinent to mention here that statement by the Chairman Commission on 31st Aug 1948, stressed that “even after the withdrawal of the Pakistan Army, the Azad forces still muster 35 battalions of armed people who would not be asked to disarm or withdraw”. (Khan, 2006) Same stance was adopted by the commission, while replying certain queries by Pakistani and Indian govts, regarding Azad forces withdrawal.

Part III Both the governments reaffirm their wish that the future status of the Jammu and Kashmir shall be determined in accordance with the will of the people and to that end, upon acceptance of the truce agreement both governments agree to enter into consultations with the commission to determine fair and equitable conditions whereby such free expression will be assured.

The effects of this resolution were far reaching and it resulted in; because of it Ceasefire agreement of 1st Jan,1949 was imposed and the Appointment of first Plebiscite Administrator was also undertaken after this resolution.

A Resolution was adopted on **5th Jan 1949**, after both India and Pakistan accepted the basic principals stated above. The salient features of this resolution were again a reiteration that Free and fair Plebiscite was declared as only solution to the question of accession of the state of Jammu and Kashmir. **On 30th March,1950** Another U.N Resolution (Resolution 91) was passed which reaffirmed the desire for free and impartial plebiscite observing that as both the countries have accepted earlier resolutions. **On 4th Jan,1951** in London when Common wealth P.M Conference was held Kashmir was part of informal discussion. There three options of forces for plebiscite were presented; i) Common wealth force, ii) Joint Indo Pakistan force, iii) UN Forces. **On 30th April, 1951** another U.N Resolution/decision about the Kashmir issue was passed which asked state’s assembly to refrain from taking any decisions regarding Kashmir against the will of the people.

Mr. Graham was appointed new UN Representative in April 1951 from 30th April 1951 to March 1958. He presented six reports, but all rejected by India and accepted by Pakistan.

Resolution 98 was passed on 23 December 1952 which urged both the governments to enter into negotiations for the purpose of reaching agreement on the size of forces of both to remain on either side of ceasefire line after demilitarization. There was a significant event influenced sponsored by the Indian Government during all these passage of UN Resolutions that on **6th Feb,1954** Kashmir Assembly ratified the accession of Kashmir to India. While in 1957 UN remained proactive regarding the Kashmir dispute so adopted three resolutions in the same year i.e. on 24th Jan, 14th Feb and 2nd Dec. UN representatives religiously crafted different reports on varied stances and arguments of both countries and one thing remained common around which visits arguments and reports revolve is affirmation of right of self determination of Kashmiris to decide their own future. **24th Jan 1962** Kennedy proposed President World Bank for mediation (for being successful in Indus Water Treaty 1960) again India rejected the offer and Pak accepted it too.

In all there are almost 23 exclusive UN Resolution dealing with Kashmir disputes. By 1965, as the Cold War was at its peak and UN was very busy elsewhere and also because of its repeated failure to demilitarize Kashmir, the Security Council seemed disengaged from its mediatory role which it had played from the beginning of the dispute, After 1965, India and Pakistan have dealt with the conflict mostly bilaterally. The foregoing account of the Kashmir question between India and Pakistan brings out four substantive themes, namely, the question of

accession; the question of aggression; the question of self-determination; and finally, the question of UN resolutions.

Simla Agreement

Keeping these themes in background a little deliberation on Simla Agreement and its effect on UN resolution may lead to crystallize the concluding thoughts. The Simla Agreement of 2 July 1972 consists of a set of guiding principles, mutually agreed by India and Pakistan, which both sides would adhere to while managing relations with each other the relevant clauses of the Simla agreement of 2 July 1972 are being reproduced below: (Internet , 2014)

Clause 1 “The Government of India and the Government of Pakistan are resolved that the two countries put an end to the conflict and confrontation that have hitherto marred their relations and work for the promotion of a friendly and harmonious relationship”...In order to achieve this objective, the Government of India and the Govt of Pakistan have agreed, a) That the principles and purposes of the Charter of the United Nations shall govern the relations between the countries., b) That the two countries are resolved to settle their differences, through bilateral negotiations or by any other peaceful means mutually agreed Upon between them.

Clause 4.2 In Jammu and Kashmir, the line of control resulting from the cease-fire of December 17, 1971 shall be respected by both sides without prejudice to the recognized position of either side.”

Pakistan position on Simla agreement clauses relating to Kashmir is very clear, that Pakistan claims that a) The Simla Agreement of 2 July 1972, to which Pakistan also continues to adhere, did not alter the status of Jammu and Kashmir as a disputed territory, b) Para 6 of the Agreement lists “a final settlement of Jammu and Kashmir" as one of the outstanding questions awaiting a settlement., c) In Para 4 (ii) talks of a "Line of Control" as distinguished from an international border, it also explicitly protects "the recognized position of either side." The recognized position of Pakistan is very clear and recognized by the United Nations from the beginning., d) Article 1(iv) most explicitly refers to the Kashmir issue when it talks of "the basic issues and causes of conflict which have bedeviled the relations between the two countries for the last 25 years".(Mustafa 1972)

After the Simla agreement the stance of India has changed altogether, India contends that after Simla agreement UN resolutions passed in the matter have become redundant & irrelevant. And the same is the status of the UNMOGIP which was constituted under it and that differences between the two countries have to be resolved through bilateral negotiations only. A detailed exploration of Simla agreement in proper perspective and context reveals that first of all both the countries want their relationship continued to be governed by UN charter (Clause 1.1). While Article 103 of the UN charter contends that “in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”. Therefore Simla agreement did not alter the status of Jammu and Kashmir as decided by UN that is a disputed territory, fate of which is to be decided by the plebiscite in the area.

Analysis

After this quick overview of different UN resolutions and certain clauses of Simla Agreement Regarding Kashmir Issue the core questions that arise are ;As per UN Charter, if any

resolution (in the UN Agenda) stays in hibernation for a long time (e.g. 30 to 40 years) it can be considered out of agenda after lapse of some specific time? Or If not what is the formal procedure of getting that dormant resolution out of UN agenda? To reach a logical conclusion about above question an answer was sought from literature survey, historical evidences and leadership statements, for legal aspects expert opinions were obtained through structured interview of eminent legal experts of Kashmir and Pakistan. Based on all above inputs it was concluded that it is imperative that UN Charter, provide no limitation to any resolution or direction or advice of UNSC. Time limit is immaterial in this context. And JK issue is still on the agenda of UN. It is repeated every year. JK issue was raised in UNSC under Article 35 of UN Charter. Pakistan, in its reply to Indian allegations, made counter allegations against India, again, under Article 35. JK issue remains unsettled and past conditions constituting danger to peace in the region continue to exist, as such article 37 of UN charter provides remedy to the current position of the issue.

Another question which arise is In which category does the “Kashmir Resolution” fall now? Or Was “Kashmir Resolution” obligatory for the parties / stakeholders? The status of the resolutions is advisory and directory, not (mandatory). Part A of resolution 47 of April 21, 1948 have been implemented. Part B still awaits its settlement. Part B is still inforce in letter and spirit. Keeping in view prevailing conditions of harassment, Human rights violations, repression and intimidation in Indian controlled JK, Pakistan must initiate new move in UNSC or international court of justice to seek redress to right of self determination, acknowledged by UNSC.

An other aspect which was explored through this study was If as per passed resolution No 47 dated 21st April 1948 both parties could not act accordingly (i.e. movement of forces) does it mean that the Resolution has lost its credibility? And After “Simla Agreement” has UN Resolution on the same “Kashmir Issue” lost its validity or does the International Commitment over-rule the bilateral commitment? Content of Simla Agreement is subject to the provisions of article 103. Both countries have adhered to Simla Agreement by this time, but without visible desired success. Infact India has failed to discharge its obligation to resolve the issue through bilateral dialogue. Pakistan is no more obliged to wait further.

As per Sec. 1.1 of Simla Agreement both Govts (India and Pakistan) agreed that “the principles and purposes of the charter of UN shall govern the relations between the countries”. While according to Article 103 of UN charter “in the event of conflict between the obligations of the Members of the UN under the present charter and their obligation under any other international agreement, their obligation under present charter shall prevail” therefore it is deducted that Pakistan is free to invoke article 37 of UN charter, with emphasis on Indian failure and its adverse attitude to defeat the spirit of both the Simla Agreement as well as, UNSC Resolutions.

Para 6, 4 (II) 1 (IV) do not change the status of JK, and particularly acknowledge right of self determination. Nevertheless, conversion of cease Fire Line as LOC and its effect from December 17, 1971, is a deviation from Truce Agreement of January 1st, 1949. India, invariably misinterpreted Simla Agreement as final settlement of JK issue, and mislead the international community. Some of the legal experts even opined that All above setting aside can Pakistan, go to UN afresh with some modified options ending up on demand for plebiscite / right of people of Jammu and Kashmir?

CONCLUSION

Britain's strategy of "divide and rule" went horribly awry in the context of the partition of Indian subcontinent in 1947. In its haste to exit its subcontinent dominion, the British crown left a 'gaping wound' between the two newly established nations whose bloody creation was a classic manifestation of British colonial tactics. (Kapoor, Narang, 2006) The resolution of dispute like Kashmir is never easy – until and unless its very nature can't be identified and recognized. It started as a territorial dispute but always pledged to be resolved with reference to the will of people. A human aspirations is the key in the conflict. It is pragmatic to take, see and handle the issue on humanitarian grounds.

Thirty two years have been passed since Simla agreement but India & Pakistan have failed to settle the dispute over Kashmir. The opportunity of /or the first obligation of settling the dispute bilaterally vanishes. The same Simla agreement also proposes the next option of settling the dispute through "other peaceful means" .This situation envisages a role for third party mediation. Since India from the beginning opposed a third party mediation by any party like World Bank, USA or European Union, the only option left is the settlement of dispute through mediation by UN.

As final settlement of Jammu & Kashmir has made no headway bilaterally over the years "other peaceful means" may be adopted only in the form of UN mediation. The doors of the UN could be knocked By Pakistan keeping in hand article 37 of UN charter, which states "should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council" make the organization realize its long standing pledge to the people of Kashmir or the Kashmiris themselves should impress upon the UNO that they have been subjugated for almost two centuries (since 1846) and need to be heard at world stage. A referendum may be demanded.

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