



Tensions Continuing to Flare between Pakistan and India over Kashmir—How International Law and the United States Have Tried and Failed, and What Options are Available to Resolve This Dispute

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Introduction

All roads inevitably lead back to colonialism. The enduring conflict between India and Pakistan over Kashmir is no different. In this report, I will first provide a brief history of the conflict between India and Pakistan in Kashmir. Next, I will discuss why the International Court of Justice (“ICJ”) and the international legal community will likely not be able to resolve the dispute between India and Pakistan since India is unlikely to give consent to the ICJ and Pakistan will likely be unable to invoke the ICJ’s jurisdiction. Finally, I will recommend that the U.S. serve as a mediator between India and Pakistan in Kashmir and assist Kashmiris in finally attaining peace given India’s recent efforts to deny Kashmiris their rights.

The Formation of India and Pakistan

Prior to 1947, the British ruled much of the Indian subcontinent, first through the British East India Company and later directly through the British crown.¹ With India's independence from Britain looming, a "two-nation" theory became a solution to the issue of Hindus and Muslims requiring separate nations since one unified country would mean Hindus having a significant majority over Muslims.² Thus, on August 14, 1947, Pakistan was created, and India gained its independence the following day on August 15, 1947.³

Under the Indian Independence Act⁴, princely states within colonial India, not directly governed by Britain, "could decide to join either new nation or remain independent."⁵ While most states aligned themselves with "one nation or the other," Maharaja Hari Singh, the Hindu ruler of Jammu and Kashmir, desired independence for his state.⁶ However, after pro-Pakistani rebels took over most of western Kashmir, Singh signed the Instrument of Accession in October 1947, aligning with India and thereby gaining India's military assistance in preventing more rebel invasions from Pakistan.⁷ Kashmir later received "special status" under the Indian constitution, which guaranteed "Kashmir would have independence over everything but communications, foreign affairs, and defense."⁸

As fighting continued between India and Pakistan, a United Nations intervention in 1949 resulted in a cease-fire line ("LOC"), dividing the region.⁹ The cease-fire line has been monitored by the U.N. Military Observer Group on India and Pakistan ("UNMOGIP"), with the northern and western areas of Kashmir under Pakistan's control and the Kashmir Valley, Jammu, and Ladakh under India's control.¹⁰ Over the years, India has rejected U.N. resolutions recommending a direct vote to determine the status of Kashmir, claiming that there is no need for one given that Kashmiris have voted in India's national elections.¹¹ Notably, India has also suppressed insurgency efforts by Kashmiri separatists and killed a number of civilians leading

the U.N. High Commissioner for Human Rights to decry India's use of "arbitrary detention [in] target[ing] protesters, political dissidents, and other civil society actors."¹²

India's Revocation of Kashmir's Special Status and How International Law Has Failed and Continues to Fail in Resolving India and Pakistan's Conflict

After many wars and endless conflict in the region for three decades, in an unprecedented move, India revoked Kashmir's constitutionally guaranteed special status, rescinding Article 370 of its constitution and essentially turning the 60% Muslim Kashmir into an Indian union territory.¹³ Against this backdrop, Pakistan's government decried India's move as "illegal" and Kashmiris claimed that India violated the Instrument of Accession.¹⁴

Despite India's assertion that Kashmir is officially part of India, the U.N. continues to consider Kashmir a "disputed area."¹⁵ This means that the conflict wages on in Kashmir despite international rules and regulations that are supposed to solve territorial disputes.¹⁶ Pakistan has called on the ICJ, "a U.N. tribunal that rules on contested borders and war crimes," to litigate India's revocation of Article 370, claiming that India committed a treaty violation.¹⁷

However, the ICJ will first need to determine whether it even has the jurisdiction to hear the case between India and Pakistan. This can be done in one of two ways: either the ICJ gains jurisdiction under Article 36(2) of the Statute, where both states approach the court with their dispute; or there is a violation of a treaty in accordance with Article 36(1) of the Statute, requiring the ICJ to intervene and settle the dispute.¹⁸ Since India is unlikely to agree to the first option of "compulsory jurisdiction" under Article 36(2), Pakistan must likely assert that India committed a bilateral or multilateral treaty violation in order to initiate proceedings against India at the ICJ.¹⁹ However, "there is no multilateral or bilateral agreement in place in relation to issues pertaining to Kashmir, wherein jurisdiction has been conferred on the ICJ."²⁰ Thus,

Pakistan very likely cannot invoke jurisdiction of the ICJ in the matter of India's revocation of special status for Kashmir, leaving consent from both states as the only way for ICJ to litigate this issue.²¹

Given India's unapologetically nationalist leadership and unwillingness to consent to jurisdiction over what it considers an "internal matter," the path to ending the conflict in Kashmir must involve the U.N. and the United States.²² However, the U.N. has failed to mend relations between India and Pakistan over the years.²³ Peacekeeping missions in both countries and plans to demilitarize Kashmir have been rejected by one or both states, leading to even more fighting.²⁴ Post-revocation of Article 370, the U.N. Secretary-General has expressed concerns about the human rights situation in the region, making clear that the U.N.'s position on Kashmir is that it is "governed by the Charter . . . and applicable Security Council resolutions."²⁵

However, despite growing concerns about the human rights situation and India's role in depriving Kashmiris' of their rights, the U.N. remains unable to "restore dialogue" between India and Pakistan.²⁶ In fact, without any "standing body of international law enforcement officers," treaties and ICJ decisions are unenforceable unless a party participates in a resolution process with the U.N. Security Council.²⁷ Even then, "such resolution processes are highly political and any permanent Security council member can veto them," meaning that India, which has been highly resistant to mediation in Kashmir because of its general suspicions of foreign powers, believes in its "self-image as a regional leader in no need of assistance."²⁸ Furthermore, India has also dealt with the conflict under the assumption that "mediation tends to empower the weaker and revisionist party (in this case, Pakistan)."²⁹

Conclusion

In 1991, “India and Pakistan battled along the Line of Control in the Kargil district of Kashmir, leading the United States to intervene diplomatically, siding with India.”³⁰ However, experts note that the United States has strong interests in resolving the India-Pakistan conflict in Kashmir, so much so that it has an “opening for effective third party intervention” in the matter.³¹ Although United States’ interest in creating a coalition between the two states certainly may reveal its own bias, this bias, according to some scholars, can actually “facilitate the conduct of mediation.”³²

Here, the United States might be spectacularly and unusually primed to assume the role of mediator since both Pakistan and India, respectively, “will believe that the [United States], by virtue of good relations with the adversary, can extract concessions from that adversary, precisely because said adversary allows the [United States] to exercise leverage over it.”³³ Thus, the very act of the United States getting involved and being open about its biases, especially its interests in security, including military and non-proliferation issues, economic relations, and stopping the rise of militant religious movements and terrorism in the region,³⁴ places it in a unique position to use its own leverage and lead conflict resolution between India and Pakistan.

Although an offer to facilitate peace talks by the Trump administration failed to take hold in 2019,³⁵ the Biden administration now has a moral obligation³⁶ to bring issues facing Kashmiris to the forefront and resolve the conflict between India and Pakistan once and for all.³⁷ However, this might be an uphill battle, given that the latest data from India shows terrorist incidents in Jammu and Kashmir have fallen by 59%.³⁸

With the crisis in Kashmir continuing to escalate, steps must be taken to end tensions between India and Pakistan and finally solve the human rights abuses being waged against

innocent Kashmiris abuses at the hands of Prime Minister Modi and his Hindu Nationalist Bharatiya Janata Party.

Without international legal intervention and mediation efforts by the United States, India will continue thwarting “its own democratic ideals,” opting instead to bully “disaffected, scared, and leaderless Kashmiris” and continue its conflict with Pakistan in Kashmir for years to come.³⁹

¹ Erin Blakemore, *The Kashmir Conflict: How Did it Start?*, NATIONAL GEOGRAPHIC (Mar. 2, 2019), <https://www.nationalgeographic.com/culture/article/kashmir-conflict-how-did-it-start> [<https://perma.cc/ZL4H-2SQT>].

² Brian Farrell, *The Role of International Law in the Kashmir Conflict*, 21 Penn St. Int'l L. Rev. 293, 295 (2003).

³ Blakemore, *supra* note 1.

⁴ Indian Independence Act, 1947, 10 & 11 Geo. 6, c. 30, § 1.

⁵ *See id.*

⁶ *See id.*

⁷ *See id.*; *see also* *Kashmir: Why India and Pakistan Fight Over It*, BBC (Aug. 8, 2019), <https://www.bbc.com/news/10537286> [<https://perma.cc/HP6S-HMUQ>].

⁸ Blakemore, *supra* note 1.

⁹ BBC, *supra* note 7.

¹⁰ *Behind the Kashmir Conflict*, HUMAN RIGHTS WATCH, <https://www.hrw.org/reports/1999/kashmir/back.htm> [<https://perma.cc/GF8C-D7W7>] (last visited Jan. 26, 2022).

¹¹ *See id.*

¹² Scott Neuman & Lauren Frayer, *In Unprecedented Move, India Revokes Kashmir's Special Status, Sparks Fears Of Unrest*, NPR (Aug. 5, 2019), <https://www.npr.org/2019/08/05/748170695/in-unprecedented-move-india-revokes-kashmir-special-status-sparks-fears-of-unre> [<https://perma.cc/J9L4-8YUW>]; *see* Briefing Note, Update of the Situation of Human Rights in Indian-Administered Kashmir and Pakistan-Administered Kashmir from May 2018 to April 2019 (July 8, 2019), https://www.ohchr.org/Documents/Countries/IN/KashmirUpdateReport_8July2019.pdf [hereinafter UNHCR Human Rights Update].

¹³ *See* Neuman & Frayer, *supra* note 12; *see also* BBC, *supra* note 7.

¹⁴ Bulbul Ahmed, *India and Pakistan Fought 3 Wars Over Kashmir – Here's Why International Law and US Help Can't Solve This Territorial Dispute*, CONVERSATION (Aug. 24, 2021), <https://theconversation.com/india-and-pakistan-fought-3-wars-over-kashmir-heres-why-international-law-and-us-help-cant-solve-this-territorial-dispute-164672> [<https://perma.cc/HKV2-52LP>].

¹⁵ *See id.*

¹⁶ *See id.*

¹⁷ Priya Pillai, *Pakistan v. India at the International Court of Justice, on Kashmir?*, OPINIOJURIS (Aug. 25, 2019), <http://opiniojuris.org/2019/08/25/pakistan-v-india-at-the-international-court-of-justice-on-kashmir/> [<https://perma.cc/M3JS-Y2UH>].

¹⁸ *See id.*

¹⁹ Jay Manoj Sanklecha, *Why Pakistan Will Not Succeed in Taking India to ICJ on Kashmir*, WIRE (Aug. 23, 2019), <https://thewire.in/rights/why-pakistan-will-not-succeed-in-taking-india-to-icj-on-kashmir> [<https://perma.cc/KL8H-W2HF>].

²⁰ *See id.*

²¹ *See id.*

²² *See id.*

²³ *See* Ahmed, *supra* note 14.

²⁴ *See id.*

²⁵ K. Alan Kronstadt, Cong. Rsch. Serv., R45877, *Kashmir: Background, Recent Developments, and U.S. Policy* 19 (Jan. 13, 2020) [hereinafter CRS Report].

²⁶ *See* Ahmed, *supra* note 14.

²⁷ *See id.*

²⁸ CRS Report, *supra* note 24, at 8

²⁹ *See id.*

³⁰ *See Ahmed, supra* note 14.

³¹ Anthony Wanis St. John, *Third Party Mediation over Kashmir: A Modest Proposal*, 4 INT'L PEACEKEEPING 1, 26 (1997), <https://www.american.edu/sis/faculty/upload/wanis-third-party-mediation-over-kashmir.pdf>.

³² *See id.* at 23.

³³ *See id.*

³⁴ *See id.* at 18.

³⁵ Sumit Ganguly, *The United States Can't Solve the Kashmir Dispute*, FOREIGN AFFS. (July 30, 2019), <https://www.foreignaffairs.com/articles/india/2019-07-30/united-states-cant-solve-kashmir-dispute> [<https://perma.cc/AK5Z-86R9>].

³⁶ Yelena Biberman, *Eight reasons why the United States should promote Kashmir peace talks now*, ATL. COUNCIL (Feb. 17, 2021), <https://www.atlanticcouncil.org/blogs/southasiasource/eight-reasons-why-the-united-states-should-promote-kashmir-peace-talks-now/> [<https://perma.cc/V6GB-5SK5>]. The United States has a moral obligation to facilitate a peace deal between Pakistan and India in Kashmir if it is serious about its commitment to “democracy and human rights” and if it wants to “send a message to India and the rest of the world confronting the rise of authoritarianism.” *See id.*

³⁷ Anchal Vohra, *Modi Took Complete Control of Kashmir Two Years Ago—and Got Away With It*, FOREIGN POL'Y (Aug. 3, 2021), <https://foreignpolicy.com/2021/08/03/modi-took-control-of-kashmir-2-years-ago-and-got-away-with-it/> [<https://perma.cc/Q2B2-MQQP>].

³⁸ *See id.*

³⁹ *See id.*