KASHMIR AND SELF DETERMINATION: NO CLEAR ANSWERS

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INTRODUCTION:

The importance of universal realization of the rights of the people to self determination[1], as opposite to the major concept in political theory[2], has acquired a new significance under International Law[3]. The specific meaning of self-determination[4] of people has a history owing to World War I and beyond[5].

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[1] See generally, R S Saini, *Is the Right of Self Determination Relevant to Jammu and Kashmir*, 38 (02) INDIAN JOURNAL OF INTERNATIONAL LAW, 157, 157-159 (1998).

[2] Self-determination began life as a political, rather than a legal, principle. Even as a political principle, it was not absolute: most sovereign states consist of more than one ethnic group, and if every such group were entitled to secede at will, very few states would be able to maintain their territorial integrity. It has been clear from the outset that such a state of affairs is unacceptable to the community of states as whole, and this has strongly influenced the development of the international rules on the subject. M H Mendelson, *Self Determination in Jammu and Kashmir*, 36(01) INDIAN JOURNAL OF INTERNATIONAL LAW, 1, 2 (1996).

[3] The existence of the people's right of self-determination in international law cannot be denied. It is reflected in the Charter of the United Nations, recognized in the common articles one of the International Covenants, accepted in opinions of the International Court of Justice and reflected in the theory and practice of international law. *Id*, at 3.

[4] … the problem of the self-determination of people does not receive prominent or direct treatment. The primary concern is to emphasize the importance, and indeed priority, of the state to the international legal order. Antnony Carty, PHILOSOPHY OF INTERNATIONAL LAW, 95 (2007). See also, Antonio Cassese, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL, 14, 15 (1996). Lenin was first to insist, to the international community, that the right of Self-determination be established as a general criterion for the liberties of the peoples. To be sure before him Self-determination had been championed at the political level by a number of conventions originating from various Leftist parties and in 1913 Stalin had written a detailed pamphlet on the matter-a pamphlet, it should be stressed, ignored by 'socialist' scholars and to which, instead, a learned commentator rightly drew attention some years ago. Nevertheless the first forceful proponent of the concept at the international level was Lenin.
As the American historian Arno Mayer has pointed out, Lenin fully developed his ideas on the subject between 1915 and July 1916 while he was writing his book On Imperialism. The principle of Self-determination was, in the words of Mayer, 'the political extension of Lenin's primarily economic analysis of imperialism'. It was to led to the liberation of oppressed peoples which was, in turn, to contribute to the success of socialist resolutions.

[5] From the outset of the Allies' war against Austria-Hungary, Germany, Bulgaria, and the Ottoman Empire, Self-determination maintained a high profile. Indeed, Allies claimed that the primary purpose of war effort was the

In international law a change in ownership of a particular territory involves a change in sovereignty which may be liked or disliked by the inhabitants. This changeover in the nationality has in many cases become a root cause for political instability and dispute over the legitimacy of the territories. This was frequently seen during World Wars and beyond. It was for this reason that about the end of the World War II, some specific powerful States proclaimed Self-determination as one of the objectives to be attained[6] like through Atlantic Charter[7]. This was however limited to Internal Self-determination [8] only. The principle of External Self-determination became a part of the international law with the adoption of the United Nations Charter 1945. This principle of Self-determination was later emphasized in the Colonial Declaration of 1960[9], the International Covenant on Civil and Political Rights, 1966, the International Covenant on Economic, Social and Cultural Rights 1966, and the Declaration on the Principles of International Law 1970 besides in a number of Declarations and Resolutions passed by the General Assembly[10]. The International Commission in 1988 expressed that the right of Self-determination was of universal application[11]. The right to self-determination has

realization of the principle of nationality and of the right of the peoples to decide their own destiny. Antonio, *supra* note 4, at 23, 24.

[6] During Second World War, as early as 1941, the US and UK proclaimed Self-determination as one of the objectives to be attained and put into practice at the end of the conflict. The Atlantic Charter drafted by President F D Roosevelt and Winston Churchill and made public on 14 August 1941, proclaimed Self-determination as a general standard of governing territorial changes, as well as principle concerning the full choice of the rulers in every sovereign State (Internal Self-determination). *Id*, at 37.

[7] The Atlantic Charter, one of the important documents jointly signed and issued by the American President, Franklin D. Roosevelt and the British Prime Minister, Winston S. Churchill on 14 August 1941, laid down fundamental principles for post-war reconstruction. This eight-point statement, besides other things, assured the self-determination of the peoples. In this regard, the Charter declared the opposition to the territorial changes contrary to the wishes of the people immediately concerned… and supports of the right of the people to choose their own form of government. Saini, *supra* note1, at 160.

[8] Internal Self-determination means the right of the people to choose its own form of government and its own policies.

[9] On, 14 December 1960, the General Assembly by a vote of 89 to 0 with 9 abstentions, adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples. The Declaration acknowledged that "all peoples have the right to self-determination" and immediate steps should be taken to transfer all powers of peoples of the colonies, non-self-governing or trust territories without any condition or reservations. Saini, *supra* note 1, at 163.

[10] For details refer to, Showkat Hussain, *Uti Possidetis Juris and its Application in Context of Present Day Problems*, VXI, KASHMIR UNIVERSITY LAW REVIEW, 164, 173 (2008).

[11] … the principle of Self-determination applies beyond the colonial context within the territorial framework of independent States. Malcolm N Shaw, INTERNATIONAL LAW, 271 (Ed., 6th 2008).

been, since Kashmir acceded to India in 1947, much contested at state, national and international forum. It is, therefore, inevitable that the legal aspect of self determination shall be analyzed and its applicability, if any, to the State of Jammu and Kashmir[12] in the light of International[13] and municipal[14] law.

JAMMU AND KASHMIR AND RIGHT TO SELF DETERMINATION:

A state is a political community established by a sovereign, a sovereign political entity in public international law, government governing its people[15]. A state comes into existence either by breaking off from an existing state or otherwise. When one state takes place for another and undertakes a permanent exercise of its sovereign territorial rights or powers, there is said to be a succession of state[16].

In August 1947, an original Member of the United Nations divided into two States, India and Pakistan and the Princely States which were freed from the suzerainty of the British rule, were given choice to accede to either of the dominions[17]. From the viewpoint of international law[18],

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[12] See contra: Mendelson, *supra* note 2, at 1, the author concludes, on the Report of a Mission prepared by International Commission of Jurists, that the inhabitants of Jammu and Kashmir are entitled to the right of self determination, including the right to independence from India are in fact incorrect as both matter of fact and law. See also Saini, *supra* note 1.

[13] The International Commission of Jurists has declared that the people of the State of Jammu and Kashmir acquired a right of self-determination at the time of the partition of India. The right has neither been exercised nor abandoned and therefore remains capable of exercise.
It is also pertinent to mention that the United Nation Security Council while admitting India's complaint refused to acknowledge Kashmir as its legitimate part. It recognized people of Kashmir as the principle party to the dispute who should be given a chance to decide their future through exercise of Right of Self-Determination.

[14] The view taken by some legal experts in the light of Article 253 read with Article 246 and the Union List Items 10, 12, 13 and 14 is that the accession of Jammu and Kashmir to India was provisional and by implications provide even for her succession from the Union. See generally A G Noorani, ARTICLE 370: A CONSTITUTIONAL HISTORY OF JAMMU AND KASHMIR, 324, 325 (2011).

[15] A State proper…is in existence when the people are settled in a country under its own sovereign Government. L Oppenheim, INTERNATIONAL LAW: A TREATIES, Vol. I, 118 (H Lauterpacht ed., 8th edn., 1970).

[16] Amos S Hershen, *The Succession of States*, 5(2), THE AMERICAN JOURNAL OF INTERNATIONAL LAW, 285, 285 (1911).

[17] See generally T. T. Poulose, STATE SUCCESSION IN INTERNATIONAL LAW: STUDY OF INDIA, PAKISTAN, CEYLON AND BURMA, 6 (1974)

[18] The legal position expressed by the Assistant Secretary-General for Legal Affairs, on the question of the effect of the succession on membership and representation of India in the United Nations, on 8 August 1947.

the situation was one in which a part of an existing State broke off and became a new State. On this analysis, there was no change in the international status of India; it continued as a State with all the treaty rights and obligations, and consequently, with all the rights and obligations of membership in the United Nations. The territory which broke off, Pakistan, was to be a new State; it had not have the treaty rights and obligations of the old State, and had not, of course, have membership in the United Nations[19].

The Princely State, Jammu and Kashmir, in 1947 became independent sovereign State with the passing of the Indian Independence Act 1947 in the meaning of the international law[20]. Besides creating two independent States of India and Pakistan, the Act of 1947 added a new political dimension by authorizing the Rulers of the Princely States[21] to either accede to India or the newly created State of Pakistan[22]. Though the Act of 1947 provided three choices to the Maharaja, however to decide upon it was not an easy task. The Maharaja of Jammu and Kashmir however did not acceded by 15 August 1947[23] and initially remained silent[24] on the question of accession[25] in the hope of establishing a sovereign Kashmir[26].

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[19] In international law, the situation is analogous to the separation of the Irish Free State from Great Britain and of Belgium from the Netherlands. In these cases, the portion which separated was considered a new State; the remaining portion continued as an existing State with all the rights and duties which it had before.

[20] Section 7 (1) (c) of the Indian Independence Act, 1947

[21] Contra: …the accession was legally invalid…the Maharaja by 26/27 October 1947 was no longer competent to sign the Instrument of Accession because he had to all intends and purposes been overthrown by his own subjects. Alastair Lamb, KASHMIR: A DISPUTED LEGACY 1846-1990, 150 (1993). See also Abdul Majid Zargar, *The Accession Debate: Facts we Need to Know*, THE GREATER KASHMIR, 17 (Srinagar edn., Oct. 12, 2010). Morally and ethically, this document [the Instrument of Accession], surreptitiously entered and accepted within period of less than 72 hours, by a person who did not posses any representative character and whose only claim to rule us was that his forefathers had paid a sum of 75 lac rupees (Nanakshahis) as purchase condition, alone cannot seal the fate of a nation to a particular destiny

[22] Section 2(4) of the Indian Independence Act, 1947.

[23] When Maharaja of Jammu and Kashmir, Sir Hari Singh, failed to accede to either India or Pakistan by 15 August 1947 he became the Ruler of what was for all practical purposes an independent sovereign polity. Alastair Lamb, INCOMPLETE PARTITION: THE GENESIS OF THE KASHMIR DISPUTE1947-1948, 139 (1997).

[24] In fairness to Maharaja Hari Singh, it must be said that, situated was he was, it was not easy for him to come to a decision. If he acceded to Pakistan, the non-Muslims of Jammu and Ladakh…would definitely have resented such action. On the other hand, accession to India would have provoked adverse reactions in Gilgit and certain areas contiguous to Pakistan… Maharaja was in a Micawberish frame of mind, hoping for the best while continuing to do nothing. V. P. Menon, INTEGRATION OF THE INDIAN STATES, 394, 395 (1995).

[25] There were in fact no more than three States the question of whose accession was to cause trouble. But the problems connected with these three-Junagadh, Hyderabad and Kashmir-were, in ascending order of gravity, to

The delay, however, led to the political and sovereign uncertainty in the State[27]. To seek time over the question of Accession, the Maharaja sought to secure a Standstill Agreement[28] with India and Pakistan[29]. The decision was communicated to both the States by Janak Singh, the new Prime Minister of the States, on August 12, 1947[30] after the dismissal of Pandit Kak. The proposal was telegrammed to both the States. The agreement was entered between the government of Jammu and Kashmir and Pakistan, while no agreement was reached between India and Jammu and Kashmir.

On the other hand, the events on the transfer of power took an ugly shape not only in India but in the State of Jammu and Kashmir also. In January 1947 communal madness broke in Punjab between Muslims and non- Muslims which led to the partition of Punjab into a Muslim and non-Muslim majority provinces. It was for this reason that the State of Jammu and Kashmir could not be blamed for fearing that it might go the same way[31]. The Standstill Agreement that had been entered between the State of Jammu and Kashmir and Pakistan started to breakdown during the late September, when the essential supplies sent to Jammu and Kashmir from Pakistan began to be interrupted. This was followed by tribal attacks. The uncertainty caused by the tribal attack

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embitter relations between India and Pakistan to such an extent as to arouse doubt whether the whole business of the State's future had not been handled with too much haste and too little attention to diversity of circumstances. E W R Lumby, THE TRANSFER OF POWER IN INDIA: 1945-7, 237 (N/A).

[26] See W N Brown, THE UNITED STATES AND INDIA AND PAKISTAN, 162 (1953). He (Hari Singh) disliked the idea of becoming part of India… or Pakistan… He thought of independence.

[27] On 15 August 1947, with the Maharaja's failure to decide to accede to either India or Pakistan, the problem of the future of the State of Jammu and Kashmir became greatly more complicated. Lamb, *supra* note 21, at 121.

[28] To enter into a Standstill Agreement, the reasons were both political and legal. The political because of the prevailing situation in the State and legal for evading any external aggression on the sovereignty of the state.
See also Hayes Louis D, IMPACT OF U. S. POLICY ON THE KASHMIR CONFLICT, 11 (1971).

[29] Two identical telegrams were sent to both India and Pakistan on 12 August 1947:

> Jammu and Kashmir would welcome Standstill Agreement with India/Pakistan on all matters on which there exist at the present moment with outgoing British India Government. It is suggested that existing arrangements should continue pending settlement of details and formal execution of fresh orders.

For details refer to P N Lankahpal, ESSENTIAL DOCUMENTS AND NOTES ON KASHMIR DISPUTE (1958).

[30] On 12 august 1947 the new Prime Minister of Jammu and Kashmir, Janak Singh, proposed by a telegram a Standstill Agreement with both India and Pakistan. Lamb, *supra* note 21, at 121, 122.

[31] …what undoubtedly made him decide not to accede to Pakistan, but to remain independent for as long as possible, and to accede to India as the second best alternative, was the fate of the Hindus and Sikhs next door in the frontier region. Prem Shankar Jha, THE ORIGINS OF A DISPUTE: KASHMIR 1947, 59 (2003).

finally led the Maharaja to seek help from the government of India[32]. Accordingly, on the 25th and 26th of October was called the Defence Committee's meeting to discuss the issue[33]. Lord Mountbatten who presided the Defence Committee's meeting recommended for the Accession first[34] and plebiscite to be held after the law and order would be resorted in the valley. The suggestions were readily accepted in the meeting[35].

Attached to the letter, composed by Maharaja Hari Singh reiterating his request for military assistance to the Governor-General of India, was the Instrument of Accession. It was declared in the Instrument of Accession that accession to the Dominion of India shall be limited to the Defence, Communication and External Affairs only. The question of Plebiscite, which had been extremely contested by Mountbatten, found no place either in the Instrument of Accession or in the Maharaja's letter[36]. Mountbatten, however, when formally accepted the Instrument of Accession did accorded, as was decided in the Defence Committee's meeting, that once law and order would be restored, the State's future should be settled by a reference to the people.

This reply of the Governor- General on 27th October, when accepting the Accession of Kashmir, asserting that as soon as the law and order had been restored in the valley, the state's accession should be settled by a "reference to the people[37]" has figured the most controversial feature[38] of

[32] The ruler, as a last resort, appealed for help to the government of India on the evening of 24 October 1947. The government of India decided not to send Indian troops inside Kashmir, unless it acceded to India. H. G. Gururaja Rao, LEGAL ASPECTS OF THE KASHMIR PROBLEM, 64 (2nd edn., 2002).

[33] See Alastair Lamb, BIRTH OF TRAGEDY: KASHMIR 1947, 84 (1994).

[34] Menon, *supra* note 24, at 399.

[35] See Alan Campbell-Johnson, MISSION WITH MOUNTBATTEN, 224-226(1951). See also Victoria Schofield, KASHMIR IN CONFLICT: INDIA PAKISTAN AND THE UNENDING WAR 52, 53 (2004). See also Prem, *supra* note 29, at 84. See also Menon, *supra* note 24, at 400.

[36] These conflicting version of the history does not fail to create the impression that the Instrument of Accession might actually had been drafted by Menon and Company earlier to 26th October and consequently did not contained any clause to the effect of "*a reference to the people*". Mountbatten's letter of acceptance lends support to this argument, where he was determined for the inclusion of the Clause to the same effect. This might had been done keeping Junagadh into consideration. For subsequent enquiry see Lamb, *supra* note 23, at 165 66.

[37] …the Government of India unilaterally announced that the people of Kashmir must decide their own fate after the tribal raiders had been driven out and law and order had been restored to normal. Menon, *supra* note 24, at 413. See also Oppenheim, *supra* note 15, at 551. As the object of cession is sovereignty over the ceded territory, all such individuals domiciled thereon as are subjects of the ceding State becomes *ipso facto* by cession subjects of the acquiring State. The hardship involved in the fact that in all cases of cession the inhabitants of the territory who remain lose their old citizenship and are handed over to a new sovereign whether they like it or not, has created a movement in favour of the claim that no cession shall be valid until the inhabitants have by a Plebiscite given their consent to the cession.

Kashmir dispute[39]. It has also led to the two versions of accession debate. Firstly accession of Kashmir was conditional[40] and secondly it was unconditional. A. S. Anand maintains that it was only a political commitment[41], a declaration without any legal effect[42].

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[38] The proposal of a plebiscite "after the actual fact" is an odd one for a realist to make, and one must therefore ask whether Mountbatten was not at this point more interested in the principle of accession than in the final determination of the will of the Kashmir people by a plebiscite. Josef Korbel, DANGER IN KASHMIR, 82 (2008).

[39] What is significant about the expression reference to the people and its possible interpretations has been discussed, at length, by Alistair Lamb. See Lamb, *supra* note 21, at 137-140.

[40] Vast expanded interpretation and the complexities' of the treaty combined with reply of the Governor-General has involved not only merely study of law in action but also corresponding implications, in so far they have become, if at all, constitutional restraints an powers exercisable by India.

[41] See contra: In Qatar *v* Bahrain (1994), the ICJ had to decide on the legal character of two instruments upon which Bahrain filed a case against Qatar: first, a double Exchange of Letters concluded in December 1987 between Qatar and Saudi Arabia, on the one hand, and between Bahrain and Saudi Arabia, on the other hand; and second, a set of minutes signed by the Foreign Ministers of Qatar and Bahrain in December1990, on the occasion of the meeting of the Co-operation Council of Arab States of the Gulf.
The Court observed that international agreements might assume a number of forms and have many denominations. It adopted the same approach as it had in the *Aegean Sea* case, finding it necessary to analyze the actual terms and particular circumstances in which the alleged agreement was drawn up.
Taking all the facts of the case into consideration, the Court decided that the double Exchange of Letters and the 1990 Minutes were international agreements creating rights and obligations for the parties. The Court decided that by the terms of those agreements the parties had undertaken to submit to the Court the whole dispute between them, as provided for by the text proposed by Bahrain to Qatar on 26 October 1990 and accepted by Qatar in December 1990, and referred to in the 1990 Minutes as the "Bahrain formula".
In paragraph 25 of its judgment, the Court laid down the elements of an international undertaking that constitutes a treaty. It said:
… Accordingly, and contrary to the contentions of Bahrain, the Minutes are not a simple record of a meeting, similar to those drawn up within the Tripartite Committee; they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement.
As has been observed, the word "thus" in that paragraph is of great importance, because it is the link between "commitments to which the Parties have consented", on the one hand, and the creation of "rights and obligations in international law" on the other. The Court's ruling may be interpreted as indicating that the consent to commitments is of fundamental importance for the creation of a treaty under international law.
The *Eastern Greenland* case. On 14 July 1919 the Danish Minister accredited in Norway said, in a conversation with Mr. Ihlen, the Norwegian Minister of Foreign Affairs that Denmark would not object to any claim to Spitsbergen which Norway might submit at the Peace Conference, if Norway would not oppose the Danish claim at the same conference to the whole of Greenland. In another conversation on 22 July 1919, Mr. Ihlen stated that: "... the plans of the Royal [Danish] Government respecting Danish sovereignty over the whole of Greenland ... would meet with no difficulties on the part of Norway". These were words recorded by Mr. Ihlen in the form of minutes, and submitted to his Government. One of the questions before the Court was the legal character of the Ihlen Declaration: was it simply a unilateral declaration, or a hybrid instrument combining the features of an agreement with those of a unilateral declaration? The Court's judgment did not fully address any of these questions. It focused rather on the binding nature of an international obligation, regardless of its source. The Court said:
[t]he Court considers it beyond all disputes that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.

To the controversies' was added a new possibility of alternative interpretation to the word "Plebiscite". Did it mean a decision by direct adult franchise or indirect that is duly elected representatives[43] of the people[44]. In broader context it warrants an enquiry of the question that

For a detailed inquiry refer to, M. Fitzmauric, *The Identification and Character of Treaties and Treaty Obligations*, 73 BYIL, 1, 12-16 (2000).
It is suggested that the decisions of the ICJ (above) would serve to lucid the grey twilight zone between binding and non-binding agreements. However, because of the political intrusion, the task is not snug.

[42] Lord Mountbatten in expressing the wish was probably expressing a pious hope-a declaration without legal effect… The declaration was probably intended to show to the people of the State that the Government of India desired to democratize the State. Such an expression of policy or opinion cannot be regarded as a condition attached to acceptance of Kashmir's accession. It cannot be regarded as a 'proposal' within the meaning of Indian Contract Act. A. S. Anand, THE CONSTITUTION OF JAMMU AND KASHMIR: ITS DEVELOPMENT AND COMMENTS, 67, 68 (5th edn. 2006).
The assertions made by Anand are incorrect as a matter of both logic and of law, for the reasons as:
Firstly, the Governor-General was the only authority to accept the accession of Kashmir and his reply amounted, speaking legally, letter of "Acceptance". It is a well settled law of international law that any statement by head of the State, or any person, authorized, is the act of the 'State'.
Secondly, the "reference to the people" had already been accepted in the final session of the Defence Committee, when accepting accession and what Mountbatten expressed later.
Thirdly, if the assertions made by the Governor-General had no legal effect, it inevitably demands an enquiry of the questions that why Lord Mountbatten, when he visited Lahore on 1st November 1947 to meet Jinnah and Liaquat Ali Khan, suggested for inviting the UNO to send observers to ensure that the necessary atmosphere was created for free and impartial Plebiscite. This gives rise to larger questions, that what about the Statement given by Nehru in a broadcast, "we have decided that the fate of Kashmir will be decided by the people…". Nehru in a telegram to the Prime Minister of Pakistan, on 4 November 1947, draws attention to his broadcast. N. Gopalaswami Ayyangar while explaining on the issue of Kashmir, when asked by Maulana Hasrat Mohani, in the Constituent Assembly stated that "… the government of India has committed themselves to the people of Kashmir in certain respects. They have committed themselves to a position that an opportunity would be given to the people of the State to decide for themselves whether they will remain with the Republic or wish to go out of it…".
Fourthly, even if such "opinion" or "policy" would be a "proposal", it would not have been governed by the Indian Contract Act. The Indian Contract Act had no application to it, as it was an agreement entered between two independent and sovereign States governed by the principles of international law.
Fifthly, when Governor-General accepted the Accession, it became binding only following the signing by the Maharaja.

[43] See contra Sheikh, *supra* note 10, at 172. After a short span of cooperating with the UN, India conducted "elections" in which 72 out of 75 members were elected "unopposed" to the Constituent Assembly of the State. These "elections" were portrayed as a substitute for right of self-determination though their credibility was seriously questioned by several experts. The United Nations through several resolutions rejected Indian contention and made it clear that creation of the Constituent Assembly in Indian administrated part of Kashmir or conducting of elections will not be deemed to be exercise of right of self-determination in accordance with the United Nations Resolutions… and any action that Assembly may have taken or might attempt to take to…would not constitute a disposition of the state with the above (right to self determination as contemplated under the United Nations Resolutions) principle.

[44] It could be a plebiscite even if the duly elected representatives of the people, according to the election law of the state, supported the Maharaja's act of accession… I have always had a feeling that when our prime minster Greed to a plebiscite, he had this kind of plebiscite in view, and if this is correct, his promise stands fully discharged because Sheikh Abdullah's Government, elected on adult franchise, ratified the Maharaja's act. Mehr Chand Mahajan, LOOKING BACK 282 (1963).

whether there is a right of succession with respect to a part of State which had once taken part in accession process[45]. This gives rise to a larger question that who has the deciding power or in other words what constitutes a "people" entitled to the right[46]?

The question that exists in the case of State of Jammu and Kashmir dispute is whether right to self determination obliged India to permit and facilitate the inhabitants of Kashmir to opt for independence[47] or in other words, whether it was a mere moral obligation and did not constituted a legally binding obligation on India. And the crucial element in distinguishing between formal and informal instruments is the element of "intention" that is to say whether parties to a treaty intended to be bound by it or not[48]. It is pertinent to mention that the rules regarding state practice, evidence of State practice can be found in Government press releases, declarations, statements and other papers on foreign ministry websites and websites of organizations of Governments[49], are not only binding but impose obligation *erga omnes*[50] which have also

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The analogy given by Mahajan is not free from doubts. It is pertinent to mention that Sheikh Abdullah was appointed only as Emergency Head and National Conference had not taken part in the January 1947 elections in the State. The elections only took place after the accession was executed. This, however, gives rise to a larger question that whether such exercise of power justified the head count, interest count, time count and ethical count of the power spectrum. For a detailed study on power spectrums and their relation with the governmental process, refer to Julius Stone, SOCIAL DIMENSIONS OF LAW AND JUSTICE, (1999), see also Karl Loewenstein, POLITICAL POWER AND THE GOVERNMENTAL PROCESS, (1965).

[45] See generally Antuony Carty, PHILOSOPHY OF INTERNATIONAL LAW (2007).

[46] See generally Vaughan Lowe, INTERNATIONAL LAW (2007).

[47] The promises were not only made to the people of the valley but communicated through diplomatic channels to the State of Pakistan and at United Nation. The question that whether such unilateral declarations have any legal implications has been discussed by Sheikh Showket. Sheikh, supra note, 10, at 164. See also Starke, INTERNATIONAL LAW, 401 (1994). An oral declaration in the nature of the promise made by Minister of Foreign affairs of one country to Minister of Foreign affairs of other country in a matter within his competence and authority may be as binding as a formal written treaty. See also generally A G Noorani, ARTICLE 370: A CONSTITUTIONAL HISTORY OF JAMMU AND KASHMIR, 321 (2011).

[48] The intention of the parties…express or implied…is the law. See H Lauterpacht, *Restrictive Interpretation and the Principles of Effectiveness of Treaties*, 26 BYIL, 73 (1949). See also OPPENHEIM'S INTERNATIONAL LAW VOL. 2, 1202 (Sir R Jennings, and Sir A Watts eds., 1996), …it is suggested that the decisive factor is still whether instrument is intended to create international legal rights and obligations between the parties… See also Lord McNair, the law of the treaties, 366 (1961). See also C Lipson, *why are some international agreements informal*? INTERNATIONAL ORGANIZATION, 495-538 (1991).

[49] Malcolm N Shaw, INTERNATIONAL LAW,116, 117 (5th ed., 2005).

[50] See ICJ, CASE CONCERNING THE BARCELONA TRACTION, LIGHT AND POWER COMPANY LIMITED (Second Phase), Reports 1970, p.32, paras 33-4. Even a unilateral statement could have the force of *erga omnes*. See NUCLEAR TESTS CASE (Australia vs. France), 1974, ICJ, 253,269.

acquired the status of *jus cogens*[51] and their very compelling nature[52] has turned them in to a peremptory norm.[53]

On the other hand when India in January 1948 moved a complaint to the Security Council, against Pakistan, under Article 35 and 36 of the United Nations Charter, the Kashmir dispute was considered by the Council in the light of the fact that the State of Jammu and Kashmir belonged to neither successor of the British India Empire and that its future is to be decided by a free and impartial plebiscite to be held under the auspices of the United Nations. Since United Nations first Resolution in January 1948, and after, on the Kashmir dispute this had been the principle, holding for plebiscite, to which both the countries had given their commitment, when accepting the Resolutions. It is also pertinent to mention that the Security Council in 1997, passed a Resolution on Jammu and Kashmir declaring that no internal electoral process in India held part of State of Jammu and Kashmir, legally and validly, be a substitute for a plebiscite, which was to be held under the auspices of the United Nations in accordance with the Security Council Resolutions of 1947 and 1948. Nonetheless the plebiscite, of which the Security Council was talking and India and Pakistan had given their commitment, was to he held for the whole of the State of Jammu and Kashmir that is to say Indian and Pakistan administrated Kashmir. This plebiscite was "also" subsequent to the withdrawal of tribal's, Pakistani national and regular army from Pakistan occupied Kashmir and withdrawal of Indian forces to a defined quantum from Indian administrated side. The process had never taken place. This rendered plebiscite unreal and illusionary.

Since the Kashmir collide was moved to the Security Council in 1947, a series of Resolutions had been adopted. This has however given rise to certain questions apart from the fact that the Resolutions have done nothing except for "urging", "reaffirming", "expecting" and "resolving".

[51] See Vienna Convention on the Law of Treaties, Art. 53. U.N. Doc. A/Conf. 39/27 (1969).

[52] See Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 513 (5th edn., 1998). He observes that, the major distinguishing feature of such rules [of jus cogens] is their relative indelibility. They are rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect.

[53] A peremptory norm is defined as a "norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." See Alexander Orakhelashvili, PEREMPTORY NORMS IN INTERNATIONAL LAW 8 (Vaughan Lowe ed., 2006).

They have not gone beyond that. First: What is the effect of the Security Council's Resolution[54]? Was the commitment for holding plebiscite an international obligation or engagement[55]? Does the commitment of India to hold plebiscite in the State to determine the future, fall within India's domestic jurisdiction[56]? And most importantly, did Security Council, on the request of either India or Pakistan, had jurisdiction to open accession question[57]? Was India's move in accepting India-Pakistan matrix on accession issue, legally and morally correct[58]?

[54] Whether Security Council's Resolutions are binding is open to debate in international law. It is pertinent to mention that any reference made to the Council under Chapter V and VI of the United Nations Charter are not self enforceable. This gives rise to two questions. First: where a Resolution has been accepted, what would be the legal implications of such undertaking? Second: why did not India, knowing Pakistan was aggressor, referred its case under chapter VII of the United Nations Charter or under Article 96 of the Charter?

[55] Whether the UNCIP resolutions constituted an international "engagement" or an "international" obligation is again a matter of international law.

[56] It is evident that as long as the government of India had not expressed any such "wish" before the UN Security Council or to a foreign state, the question of assuming an international obligation or engagement did not arise, and the matter did indeed fall within its "domestic jurisdiction" of India. But, the moment that New Delhi expressed the "wish" before the United Nations (as well as at bilateral and multilateral conventions and fora on numerous occasions), that the question of accession be determined by a plebiscite, and that such a "wish" was recognized and accepted by the United Nations and other states (including Pakistan), New Delhi entered into at least an international engagement to hold the plebiscite, thereby taking the matter outside its "domestic jurisdiction"… The point is that New Delhi, by its own admission, had accepted at least an international engagement, albeit a conditional, contingent and non-enforceable one. That is sufficient to take the Kashmir issue out of the domestic jurisdiction of India and make it an international matter. More importantly, it permitted the international community to at least argue that India is under an international obligation to hold a plebiscite to determine the accession of the princely Indian state. The determination of whether or not India is under an international obligation to do so is itself a matter of international law. Aman Hingorani, INTERNATIONAL RELATIONS AND SECURITY NETWORK: THE KASHMIR ISSUE DIFFERING PERCEPTIONS, 11 (2007).

[57] According to Anand (*supra* note 47, at 74) and Mahajan (*supra* note 49, at 278, 280) the question of accession of the State of Jammu and Kashmir was outside the writ jurisdiction of India, Pakistan and the Security Council. The analogy given by them is partially correct.
Firstly: It is the State of Jammu and Kashmir which had and have right to approach appropriate international community to open the accession debate, on the failure of India to meet the obligations contemplated in the Instrument of Accession (recovery of territories) and would by implication provide a right to the State of Jammu and Kashmir to approach the Security Council on the ground of "material breach" in the treaty obligations.
According to the rules of International Law neither a Constitutional mandate nor the enactment of a statute provides an excuse for a treaty violation. Art. 27, Vienna Convention on the Law of Treaties, 1155 UNTS 331 Adopted on May 23, 1969.
Second: it was also, and is; open to India to approach appropriate international community, in case it finds the State of Jammu and Kashmir not adhering with the provisions of the Instrument of Accession, to open the accession question.
Thirdly: The court of highest judicature in India has no jurisdiction to decide over accession dispute, so calling upon an international community would be an appropriate move.

[58] Firstly, the accession matrix was a matter between the State of Jammu and Kashmir and India. When Kashmir acceded to India in 1947, India became responsible for the State. Consequently it required India to evacuate all invaders from the State. Accession was provisionally accepted (See Government of India's White Paper on Jammu and Kashmir at page 3 and letter written by the Maharaja Hari Singh to Sader Patel on 31 January 1948.) He wrote

CONCLUSION:

True the principle of Self-determination has been emphasized as a part of the international law, there is however two versions on the context and the jurist and legal experts have sharply divided their opinions based on both political and legal theories[59]. There are no clear answers to these questions and the lack of certainty, the political implications of the principle are so great that all definitions are controversial, on such fundamental aspect of the principle render it more mysterious[60].The consequences for the right of Self-determination are devastating. It would be difficult to reach a solution of such problem as in the case of the State of Jammu and Kashmir, for certainly these are all politically charged questions. True the analogy between the fundamental rights of the States under international law is predominantly conceived by States vis-à-vis other States. This, however, is to beg without warrant scholarly question in international law that in the above proposed analogy would not the de-facto claims of human beings necessarily correspond to lie behind the fundamental rights of States as formulated in international law[61]. Arguments of learned length and arcane erudition have been urged about it[62]

"…if the Union cannot recover back our territory and is going eventually to agree to the decision of the Security Council which would result in handing us over to Pakistan, then there is no point in sticking to the accession of the State to the Indian Union". Thus any commitment by India, whereby it agreed upon the India-Pakistan matrix on the issue was a breach of an international obligation took under the Instrument of Accession. Second: The Instrument of Accession reflected the principles on which the relationship between the power holder (India as in this case) and the power addressee (State of Jammu and Kashmir as in this case) were based. It, Instrument of Accession, became the legally permitted matrix for the exercise of powers validly and access to power. It was not so much words or rules but a behavior pattern and influenced the shape of action in a peculiar manner designed in the document. The Instrument of Accession, not only as a physical or moral law but strictly legal, imposed itself as an observed fact on India, requiring them to do nothing to infringe legal independence, and to do necessary to ensure it. India was under an obligation to protect the people and land of the State and could not enter into any bilateral agreement on the issue with any foreign State. It was a legal as well as moral wrong committed by India.

[59] As pleaded by many that right of Self-determination is an inalienable human right. The effective exercise of a right to self-determination is prerequisite for the genuine existence of the human rights and freedoms, ensures human dignity. On the other hand it is contested to be contradictory to the principle of territorial integrity. Read in context of Article 2 (7) of the United Nations Charter. See generally Malcolm *supra* note 11, at 522.

[60] It has not been appreciated that, despite the domination, in international legal opinion, jurisprudence, and other of state sovereignty against the principle self-determination, the two approaches are in international practice left as irreconcilable and unresolved. Antnony, *supra* note 4, at 91.

[61] The plea for the more concern of the effect of this analogy is raised in the light of the fact that the de-facto claims of human beings have, often, resulted in some beautiful legislations. Magna Carta, American Declaration of Independence, and French Revolution are few to mention. Thus a State, it is contended, should not escape such responsibility.

[62] Was the conditionality binding on India, speaking constitutionally?

and the researcher could not escape the imponderable end of this riddles wrapped in mysteries inside enigmas. With raising many questions and answering some, only deepens the mystery about it.