



International Law and Self Determination: A Case for Kashmir's Special Status

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Abstract

Kashmir has been under illegal Indian Occupation since the independence of the Indian sub-continent from the British Raj. The UN has been calling for a peaceful resolution of the Kashmir issue by the wishes of Kashmiris, but India has had evaded the peace process despite taking the matter to the UN itself. India has been violating international law and committing human rights abuses in the previously autonomous region of Indian Occupied Kashmir (IOK). On August 5, 2019, the Indian government revoked Article

370 along with Article 35A of the Constitution of India in a bid to bring comprehensive political and demographic changes to the region. Legal and governance-based logic floated by India cannot justify its act of unilateral revocation of the special status of Kashmir which is a disputed territory between India and Pakistan and cannot be decided without the mutual consent of all the claimants. Although India has been abusing human rights for decades, altering Kashmir demographically is the most tyrannical step taken by the Indian government as it is a step to depriving the Kashmiris of their right to land and self-determination. This paper builds on the illegality of debate in international law concerning India's revocation of Kashmir's special status.

Keywords: Kashmir, Article 370, India, Pakistan, International Law, Human Rights Violations

Introduction

Kashmir is a beautiful valley with plenty of resources like minerals, water¹, timber, and land in the cradle of the Himalayas. In 1947, when the British rule ended in South Asia, the Indian subcontinent was divided into two independent states: Pakistan and India. Like other princely states, Kashmir had to join either India or Pakistan as it did not have an army or paramilitary of its own; however, Kashmir wanted to remain independent.² The majority of the population in Kashmir was Muslim, so people wanted to go towards Pakistan; but its ruler Maharaja Hari Singh was a Hindu who annexed Kashmir with India. Pakistan termed this accession illegal and against the wishes of the masses. After this decision, Kashmir became a bone of contention between Pakistan and India as both

1. Shawn Snow, "Analysis: Why Kashmir Matters," *The Diplomat*, September 19, 2016, <https://thediplomat.com/2016/09/analysis-why-kashmir-matters/>.

2. Pranav Asoori, "A Look into the Conflict Between India and Pakistan over Kashmir," *E-International Relations*, October 7, 2020, <https://www.e-ir.info/2020/10/07/a-look-into-the-conflict-between-india-and-pakistan-over-kashmir>.

claim it to be their integral part. Both states have fought traditional and proxy wars over Kashmir.³

After the first Kashmir war in 1947-48, the princely state was further divided into Azad Jammu & Kashmir (AJK) and Jammu & Kashmir (J&K). This Kashmir's fate-changing war handed over the AJK administration to Pakistan, and on the other hand, India gained control of J&K. India later on assigned J&K a special status under Article 370 of its constitution.

Article 370 allowed J&K to have its flag, independence, and constitution to run its affairs except for communication, defense, and foreign policy, in which the law of the central government of India would be applicable. However, on August 5, 2019, the Bhartiya Janata Party (BJP) revoked article 370 and deprived the Kashmiris of their rights to self-determination and distinct identity. This revocation, on one side, invited the criticism on BJP and its leader Narendra Modi from all over the country and international community as well; but, on the other hand, it increased the support of Hindu-extremists to BJP –augmenting the vote bank for the party. The New Delhi government justified their constitutional amendment by considering it as a gesture of goodwill by BJP towards Kashmiris and linked it with Kashmir's progress.

This act of the ruling party violated domestic and international laws. Common Kashmiris and their leaders analyzed the consequences of abrogation of article 370. Protests were staged to regain self-determination from the Indian government, which is their fundamental right under international law. To curb the agitation and bring the situation under control, India used force and put the valley under lockdown. The curfew was imposed in the valley, and Kashmiri leaders were kept in house imprisonment, and everything was now in control of the Indian central government.

3. Abdul Majid et al., “Kashmir: Major Source of Conflict between Pakistan and India,” *South Asian Studies*, no.2, (2019):11.

During this entire situation, India violated many fundamental human rights. In addition, natives of the valley did not have freedom of speech, movement, and communication, and they were restricted to their homes. Along with many international treaties, India is also in violation of bilateral treaties between Pakistan and India over Kashmir.

Article 370 of the Indian Constitution: From Historical Background to Contemporary Scenario

Article 370 of the Indian constitution was enforced in 1949 to confer J&K with a special semi-autonomous status. The semi-autonomous status meant it has its constitution, separate flag, and freedom to make law. On the other hand, the central government of India retained the authority on defense, communications, and foreign affairs.⁴ According to the law, J&K can decide who could buy land and are permanent residents. The Indian government cannot implement any law in the autonomous region without the approval of the state legislative body; however, the legislative body was dissolved by India in 1957.⁵ Article 370 along with 35A of the Indian constitution also explains that the Indian legislative body cannot amend this law. In addition, this article also deals with property ownership, and according to it, non-natives of J&K cannot own land in the state.

Article 35A of the Indian constitution, which was enforced in 1954, further strengthens the provision of article 370 related to property. According to this article, the matter of permanent residence in J&K and privileges such as the acquisition of property, government jobs, and educational scholarships will be decided by the state

4. Geeta Panday, "Article 370: What happened with Kashmir and why it matters," *BBC*, August 6, 2019, <https://www.bbc.com/news/world-asia-india-49234708>.

5. A. G. Noorani, *Article 370: A Constitutional History of Jammu and Kashmir* (London: Oxford University Scholarship Press, 2011), 11.

legislature.⁶ It further elaborates that any alien cannot become a citizen of the state and thus cannot have a share in government welfare schemes.

Politics of Altering Kashmir's Special Status

The political reason behind changing the status of Kashmir is to change its demography by relocating the Hindu population there and granting them citizenship: to change J&K from a Muslim majority to a minority; to maintain Indian sovereignty over Kashmir; and, through a referendum to manipulate Kashmir's decision in her favour. By doing this, India is violating its law of land law and also international law. For example, according to the 49th article of the 4th Geneva Convention, the occupier cannot alternate demography of occupied territory to claim its sovereignty over it.⁷ If India aims to annex J&K through a referendum, such kind of referendum will be null and void according to United Nations (UN) resolutions; because, in the case of France and Comorian island, France occupied the island and held a referendum which went in its favor.⁸ Later, through its resolution, the United Nations General assembly (UNGA) declared that the referendum was null and void.

Although India ratified many international treaties of political, civil, social, and economic rights, but still violates these rights in J&K in breach of international law.⁹ For example, Indian forces had used

6. Krishnadas Rajagopal, "What is Article 35A," *The Hindu*, August 26, 2017, <https://www.thehindu.com/news/national/what-is-article-35a/article19567213.ece>.

7. Micheal Siegrist, *The Functional Beginning of Belligerent Occupation* (Geneva: Graduate Institute Publications, 2011).

8. Flora Lewis, "Comoro Island Choose Freedom from France by Large Vote," *The New York Times*, December 24, 1974, <https://www.nytimes.com/1974/12/24/archives/comoro-islands-choose-freedom-from-france-by-a-large-vote-special.html>.

9. Hasnaat Malik Waqas, "Changing IOK Status will Violate International Law: Experts," *The Express Tribune*, August 3, 2019, <https://tribune.com.pk/story/2027543/changing-iok-status-will-violate-international-law-experts>.

pellet guns to curb civilians who raised voices to protect their right to self-determination: these metal pellets cause severe injuries and lead to death. In addition, men, women, and even children are mentally and physically tortured by occupier forces. To press the natives, the Indian government had cut down communication and food supply to the valley. Such acts of India violate international treaties ratified by it in 1979, such as the International Covenant on Civil and Political Rights and International Covenant on Economic Social and Cultural Rights (ICESCR).

Legal Justifications for Revocation

After the revocation of Article 370, different views have been circulating in the region and the world. This incident has divided politicians, analysts, and scholars among the opponents and supporters of this decision. After the abrogation of article 370, Kashmiri politicians and citizens criticized it and recorded their protest against this illegal act. To calm down the natives of the valley, the Indian premier addressed the Kashmiris and gave justified the revocation by labeling Article 370 as a source of corruption and terrorism.¹⁰ He further defended this act by promising a bright future for Kashmiris through transparent elections and selecting youth as representatives of the state. But lockdown in Kashmir made Modi's claims vague and false. Due to this deadlock, Kashmiris, instead of having representation in legislation, even lost their fundamental rights and freedoms, and Kashmir became the world's largest human jail.¹¹

10. Alex Ward, "Narendra Modi tells India that "a New Era Has Begun" after Kashmir Power Grab", *Vox*, August 9, 2019, <https://www.vox.com/world/2019/8/9/20798273/kashmir-narendra-modi-india-speech>.

11. Yusuf Hatip, "Jammu and Kashmir World's Largest Open Jail," *Asia-Pacific*, August 03, 2019, <https://www.aa.com.tr/en/asia-pacific/jammu-and-kashmir-worlds-largest-open-jail/1572239>.

In addition, not only did the politicians appreciate this act of BJP, but also the so-called law experts supported this on different platforms. According to Subhash Kashyap, a constitutional lawyer, this order was by the constitution of India, and there is no fault in it. Meanwhile, according to the Indian law of the land, this amendment is permanent, and it cannot be changed without the consent of the J&K legislature.¹²

According to the domestic opponents of the abrogation of article 370, the Indian interpretation of “Government of State” actually means the centrally appointed governor of the state. Since governors are New Delhi's representatives in the state governments who are appointed by the central government, it is used against the political sovereignty of Kashmir.

There is also a question about the legitimacy of such actions when a state's government is dissolved. The President's rule is a temporary solution until the elected government takes over, so it is unfair to decide an alteration of the region when the state government has been dissolved. There are also questions about article 367(4)(d), in which state constituent assembly is made equal to state legislative assembly.¹³

After the revocation of Article 370, the valley's situation got worse; but, Indian government officials projected it as a roadmap of the progress of J&K. For Instance, during an interview with CNBC TV, the Indian foreign minister Subrahmanyam Jaishankar stated that this 70-year-old provision (Article 370) was temporary and new order is not a heavy hand on occupier state. This will lead them to

12. K. Deepalakshmi, “Fact Sheet: What Is True and What isn't on J&K, Article 370,” *The Hindu*, August 6, 2019, <https://www.thehindu.com/news/national/fact-check-what-is-true-and-what-isnt-on-jk-article-370/article28835918.ece>.

13. Laya Maheshwari, “How the Indian Government Changed the Legal Status of Jammu and Kashmir,” *Lawfare Institute*, August 12, 2019, <https://www.lawfareblog.com/how-indian-government-changed-legal-status-jammu-and-kashmir>.

progress and development. The Indian home minister Amit Shah justified the scrapping of article 370 by the parliament as it was a gateway to terrorism, and through this revocation Indian government has shut the doors for terrorism in India.¹⁴ But in the prevailing situation after the constitutional amendment, the social environment became more intense due to protests by the Muslim community responded with violence of Indian security forces on agitators. This step of the Indian government affected the peace of Kashmir, brought about protests by the opposition party. Kashmiri students in Indian universities and other citizens started agitating, and it aggravated the law-and-order situation in major urban areas.¹⁵

Revocation of Article 370 and Customary International Law

According to the international law expert Ahmar Bilal Soofi, the abrogation of article 370 by India violates the Fourth Geneva Convention. Former Pakistan's ambassador to France, Ghalib Iqbal said, "If Indian held Kashmir is divided into two states, India will be in clear violation of the UN resolutions. Legally a disputed territory could not be divided into sub territories. As per law, it would not change the legal status of the disputed land."¹⁶

By abrogating articles 370 and 35A, India through a shrewd policy is trying to change the demography of the J&K and using force against inhabitants, which could result in the forced migration of the indigenous people, so these actions qualify as crimes against humanity when they are part of a widespread or systematic campaign of persecution. The establishment of the International

14. Zulfikar Majid, "After Delimitation, J&K Statehood will be Restored, says Amit Shah," *Deccan Herald*, October 23, 2021, <https://www.deccanherald.com/national/national-politics/after-delimitation-jk-statehood-will-be-restored-says-amit-shah-1043480.html>.

15. Raja Muzaffar Bhat, "Two Years Without Article 370 Has Done Little to Benefit the People of J&K," *This Wire*, August 5, 2021, <https://thewire.in/rights/article-30-kashmir-august-5-jammu-and-kashmir-two-years>.

16. Waqas, "Changing IOK".

Criminal Tribunal for Rwanda (ICTR) is the best example. The ICTR was established in 1994 by the UNSC in its resolution 955 to judge the responsibility of the Rwandese Patriotic Army (RPA) for the genocide of the almost 200,000 Rwandans and other violations of international law.¹⁷

The permanent alteration of the demography of J&K, which could result in ethnic cleansing, would be a severe disruption of international law and the International Convention of the Elimination of All Forms of Racial Discrimination (ICERD). This UN treaty that India ratified without any objection in 1968. Such violations are confirmed by the ICERD Committee in its 1995 decision on Bosnia-Herzegovina.

India is adopting the Israeli style of settlement to change the demography in J&K by establishing Sainik colonies to permanently settle Indian soldiers and replacing indigenous Kashmiris to change their culture and identity.¹⁸ Israel is settling its civilians in occupied Palestine and displacing the locals and using the Palestine land and natural resources for different purposes like military and security of its population.¹⁹ The usage of private property is unlawful according to the Hague Regulations and Fourth Geneva Convention. So, India and Israel are using the same method to tighten their illegal control over the occupied territory of Kashmir and Palestine, respectively.

17. Stefaan Vandeginste, "The International Criminal Tribunal for Rwanda: Justice and Reconciliation," *Humanitarian Practice Network*, May 1, 1998, <https://odihpn.org/magazine/the-international-criminal-tribunal-for-rwanda-justice-and-reconciliation/>.

18. Sikandar Shah, "A New Strategy," *Dawn*, April 20, 2019, <https://www.dawn.com/news/1477304>.

19. Ayesha Kuwari, "Israel Violation of International Law in the Occupied Palestine Territory," *Human Rights Pulse*, May 31, 2021, <https://www.humanrightspulse.com/mastercontentblog/israels-violations-of-international-law-in-the-occupied-palestinian-territories>.

Indian Violations of Treaties and Agreements

Since its inception, Pakistan and India have been at war with each other over the Kashmir issue. Pakistan and India both want to make Kashmir their integral part. The first war in 1947-1948 between these neighbors was also over the Kashmir issue. This inter-state conflict intensified when natives of tribal areas of North-West Frontier Pakistan (NWFP), now Khyber Pakhtunkhwa (KP), invaded the valley. Afterward, armies of both states were involved in a full-fledged war. Soon, after the intervention of the UN, this conventional war came to an end on the condition that a referendum will be held in Kashmir, but even after seven decades, this referendum is still to be held. This is a violation of UNSC Resolution 47. Through the assistance of the UN, the first agreement known as the "Karachi Agreement" was signed between these two rival states in 1949, and a cease-fire line was drawn between them.

After 16 years, both states again fought the war of 1965 for the following reasons: the Indian forces' penetration of Pakistani land and the second reason claimed by the Indian government that Pakistan is supporting militant groups to gain the rest of India Held Kashmir (IHK). However, due to the UN intervention, both states agreed to the ceasefire. The Soviet Union played the role of mediator, and relations between the two states got normalized by signing the Tashkent Agreement in 1966. According to this agreement, both neighbors will not interfere in each other's matters and will maintain good mutual diplomatic relations. Although the reason for this agreement was conflict over Kashmir, no clause dealt with the Kashmir fate in this treaty. And in this way, the Kashmir issue remains a bone of contention between these two states.

These ideological rivals again confronted each other in 1971, when India violated the Tashkent Declaration, interfered in East Pakistan, and supported the Mukti Bahni Movement, which the natives of East Pakistan carried to separate themselves from West Pakistan. India

captured around 92000 Pakistani soldiers. Pakistan and India again signed a peace treaty in 1972 to put an end to conflict and confrontation that have hitherto marred their relations and to move towards normalization of their relations. In this Shimla Agreement both parties agreed to make settlements regarding the prisoners of war and J&K.²⁰ In the agreement, both decided that "pending the final settlement of any of the problem between the two countries, neither shall unilaterally alter the situation and both shall prevent the organization, assistance or encouragement of any of acts determined to the maintenance of peace and harmonious relations". India half fulfilled its promise by sending back Pakistani soldiers to their motherland but did not take any step to resolve this issue.

- The abrogation of articles 370 and 35A is a violation of the Shimla Agreement by India.
- India is changing the demography of J&K, which is a severe violation of international humanitarian law. According to Article 49 of the Geneva Convention IV (1949), "the occupying power shall not deport or transfer parts of its civilian population into the territory it occupies." The same principle is reaffirmed in 1977's Additional Protocol I to Geneva Convention, reflecting customary international law, which terms Indian actions are a breach in the protocol.
- Under article 20(c)(i) of the International Law Commission Draft Code of Crimes against Peace and Security of Mankind, such force transfers of people are war crimes. However, under article 8(2)(b)(viii) of the International Criminal Court (ICC) status (1988), such transfer directly or indirectly constitutes war crimes in international armed conflicts.

20. Ahmar Bilal Soofi et al., "The Status of Jammu & Kashmir Under International Law," *Research Society of International Law*, August 15, 2019, <https://rsilpak.org/wp-content/uploads/2019/08/Legal-Memo-Kashmir.pdf>.

Lack of Enforcement of the UN Resolutions on Kashmir

The causes of the lack of enforcement of the UN resolutions on Kashmir can be identified as follows:

Indian Rigidity

The UN has passed several resolutions for the resolution of the Kashmir issue; but, India did not act upon those resolutions and did not accept the recommendations; although India itself brought the matter before the UN on December 30, 1947. On April 12, 1950, when the UN mediator Owen Dixon had asked both the states to withdraw their forces from Kashmir; Pakistan accepted, but India rejected the proposal. The UN commission suggested arranging a plebiscite in Kashmir, but India has not acted upon this suggestion until now. Initially, the main problem between India and Pakistan was the withdrawal of troops, but now India is illegally resettling non-Kashmiris to change the region's demography so that if the UN puts pressure on India for a plebiscite, it can get its desired results.

The UN mediator Owen Dixon proposed the plebiscite to be held all over Kashmir, but India rejected to entertain this proposal on its side of Kashmir and, in response, the same was the case with Pakistan. Mentioning the pre-conditions and unwillingness of the Indian government as a big hurdle, the envoy predicted at that time that there no longer existed any possibility of bringing the parties to any resolution of the dispute. The plebiscite covering the whole of Kashmir was not possible as Kashmir Commission and the UN mediator could not secure an agreement between parties.

On February 21, 1951, UK delegates proposed the UN representative for India and Kashmir. The representative would affect demilitarization in consultation with India and Pakistan based on Dixon's proposal and then a plebiscite will be conducted with the

consent of both the parties involved, but this was again not acceptable to India.

The UNSC appointed a UN representative for India and Pakistan, Dr. Frank P. Graham on March 30, 1951. He made a couple of visits to India and Pakistan and then submitted his report that Pakistan wanted 4000 men on the ceasefire line. In contrast, India wanted 16000 men, which created hindrances for the resolution of the Kashmir issue.

Role of Major Powers

The UN couldn't find a way out of the Kashmir crisis because of the mutual rivalry between the US and Russia and the vested interests of some other big powers. In 1958, USA and USSR were indulged in a Cold War and both were searching for allies or proxies in different regions; so, mostly they vetoed the UN resolutions about Kashmir in favor of their allies. Mostly the Soviet Union vetoed the resolution in support of India. The UN could be effective in the resolution of the issue if both powers had provided their full support for it. Kashmir issue could be solved if the US, Russia, the UK, and China did not act at cross-purpose and set aside their vested interests to help the UN find the solution of an issue that could be a threat to international peace and security.

Lack of Force

The United Nations did not have the power to force parties to accept the solution and that is why the Kashmir issue is still unresolved. India believed that the UNSC did not consider or give credence to the legality of Kashmir's accession to India, even if it was only a provisional arrangement until normalcy was achieved. On the other hand, Pakistan wanted to emphasize the second element of recommendation –plebiscite.

Conclusion

The BJP's vote bank contains rigid and extremist Hindus mostly. To accumulate maximum support from the dominating segment of the Indian society, the BJP needed to offer them something extraordinary to tap their ideology and influence them. Along with many other offerings, the BJP had committed its supporters to the annexation of Kashmir by amending the Indian constitution. By doing so, the Indian government has not considered the internationally recognized norms and traditions. It has taken a step to enforce its core foreign policy tenet: 'maintaining the territorial integrity of India'. While doing so, it has not taken the wishes of Kashmiris into account –the first and foremost aspect of all the UN resolutions on Kashmir. Historically, the role played by the global powers remained a hurdle rather than a contributory factor to the resolution of the Kashmir issue. India, being in the Russian camp during the Cold War and even after the end of it, successfully blocked every binding resolution over Kashmir in the UNSC. Russia, (the USSR during the cold war) has always supported the Indian stance against Pakistan. Today there is seen a thaw in Russia-Pakistan relations. But now India has got the US on its side by sharing a common goal of the containment of China. The nature of the UN's non-binding resolutions did not bring forth any peaceful solution to the Kashmir issue. Altering Kashmir's autonomous status is a serious crime under international customary law. Although India is mistaken for abrogating Kashmir's special status, Pakistan must follow a lenient way to influence it to restore the special status until the issue is completely resolved. Sooner or later, India has to revoke its step of abrogating Articles 370 and 35A which is becoming a source of agitation against the BJP government and harnessing disrespect for India internationally.

Key Findings and Way Forward for Pakistan

- Pakistan's diplomatic efforts have been slowed down as many other contemporary issues arose for the government; however, Pakistan has been raising the issue on every international forum. International pressure could not be built as desired due to Indian economic power and political clout globally.
- International law is not binding on any state; so, winning a case internationally helps pressure certain stakeholders. Right now, the west and even many Muslim countries are not in a position of supporting the Pakistani stance against India. An alternative approach must be followed.
- The UAE-Israel normalcy of relations is based upon the former's attempt to prevent the latter from the annexation of more areas of disputed lands of Palestine. It might not be the sole reason behind their normalizing relations. India and Pakistan could follow suit in the hope that if their relations are normal to some extent, it will help Kashmir.
- Building trust between India and Pakistan is very necessary to resolve the Kashmir issue. This matter cannot be resolved through military action and options for diplomatic cooperation must remain open. Trust-building takes time and continuity of such policies in successive governments is required.
- Afghanistan has recently been a ground for India to counter Pakistan strategically. The two nations must not use a third-party state for their bilateral rivalry. It will further complicate the situation. Peace in Afghanistan is currently a prerequisite for peace between India and Pakistan.

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- Bilateral and multilateral forums can be used for the resolution of the issue. The two states must resolve the issue politically and diplomatically.
 - SCO is a forum that can rightly be used. SCO was originated for resolving bilateral border disputes. Pakistan must push SCO to help it in resolving the issue as per the wishes of the people of Kashmir.

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