
Baibhaw Gahlaut

National Law Institute University, Bhopal, India

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Baibhaw Gahlaut*

National Law Institute University, Bhopal, India

Jammu and Kashmir is one of the most beautiful places on earth and has often been described by poets and travellers as paradise on earth. However, following the partition of India in 1947, the region has become a site of conflict between India and Pakistan and is now a potential nuclear flashpoint in Asia. Thus, in this article, the author examines the genesis of the Kashmir dispute and tries to ascertain the legality of the accession of Jammu and Kashmir to India. As, despite numerous attempts at mediation, the UN Security Council has failed to bring about a permanent resolution of the dispute, the author highlights the possible reasons for this failure and puts forward a potential solution to the dispute which would be acceptable to all parties.

1. Introduction

The dispute between India and Pakistan over Jammu and Kashmir has served as a major obstacle in the relationship between the two countries, and to peace in southern Asia. Both countries to the dispute make claims to Kashmir and have fought three wars over the territory. The dispute over Kashmir has dragged on for more than 60 years, since the independence of India and Pakistan from British Rule, and its resolution has become a major challenge for the international community.

*Email: bgahlaut@gmail.com


4It was feared even at the time of independence that ‘the problem would drag on for several years before a definitive solution is reached’. See PB Potter, ‘The Principle Legal and Political Problems Involved in Kashmir Case’ (1950) 44 AJIL p 361.
The resolution of this dispute has become even more important in light of the fact that both India and Pakistan have successfully acquired nuclear weapons. Yet, in the opinion of the present author, a purely legalistic approach to the problem would not bring a viable solution. Thus, it is necessary to look into the facts that gave rise to the dispute in the first place so as to provide a workable solution acceptable to India, Pakistan and the people of Kashmir.

In the present article, Section 2 examines the origin of the conflict and the accession of Kashmir to India. However, as Pakistan does not recognise the accession of Kashmir to India, Section 3 analyses the legality of the accession. Further, Section 4 brings out the role played by the UN Security Council in the resolution of the Kashmir dispute, and highlights the factors that led to failure of the Security Council to provide a permanent solution to the dispute. Finally, Section 5 puts forward a possible solution that could be acceptable to all parties to the dispute, while Section 6 provides a conclusion to the article.

2. Origins of the Kashmir dispute

In order to understand the Kashmir crisis accurately, it is essential to go back to the history of the state. In the opinion of the present author, the genesis of the Kashmir crisis cannot be traced to any single event in its history. Since we are also concerned with ascertaining the legality of the accession of Kashmir to India, we can trace the roots of the dispute to the demise of the British Empire in South Asia and the partition of British India in 1947. However, chief among all the reasons is the failure of the British to provide a mechanism for the integration of princely states into India or Pakistan.

The Partition Plan of 3 June 1947 provided that on the withdrawal of the British, the suzerainty of His Majesty over the Indian states would lapse and all

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6. The British Empire in India consisted of nine provinces known as British India and 584 princely states. See DD Basu, Introduction to the Constitution of India (Prentice-Hall, New Delhi 1982) p 43.


8. The Indian sub-continent was partitioned by the Partition Plan of 3 June 1947 to form two independent dominions out of British India on the principle that Muslim majority areas would form part of the dominion of Pakistan and Hindu majority areas would form the dominion of India. See CM Ali, The Emergence of Pakistan (Research Society of Pakistan, Lahore 1985) pp 149–160.

9. The relationship of princely states with the British was governed by the doctrine of paramountcy. Under the doctrine of paramountcy, the princely states were dependent on the British Crown for their external relations and defence, but they possessed some sort of internal sovereignty. See P Diwan, ‘Kashmir and the Indian Union: The Legal Position’ (1953) 2 ICLQ 333–58, 336. For example, in the case of the state of Kashmir, the British government took responsibility for protecting the territories of Maharaja Gulab Singh from external enemies, as evident from art 9 of the Treaty of Amritsar 1846. See the text of the Treaty of Amritsar as provided in AS Anand, The Constitution of J & K: Its Development and Comments (Universal Law Publishing, Delhi 1998) app II.

powers would return back to the princely states.\textsuperscript{11} Thus, the princely states had the option of acceding either to India or Pakistan, or becoming independent nations.\textsuperscript{12} However, the option of independence was strongly opposed by India,\textsuperscript{13} and was even discouraged by the British.\textsuperscript{14} The last Viceroy of India, Lord Mountbatten, in his address to the Chamber of Princes on 25 July 1947, advised the princely states to accede to either of the two dominions, keeping in mind the geographical compulsions.\textsuperscript{15}

Kashmir was geographically close to both the dominions of India and Pakistan\textsuperscript{16} and the heterogeneous population of the state made it difficult for Maharaja Hari Singh of Kashmir to choose between the two.\textsuperscript{17} In fact, the Maharaja preferred the independence option for his state\textsuperscript{18} and did not want to join either of the two dominions.\textsuperscript{19} Thus, he offered to sign standstill agreements with both dominions for maintenance of the status quo in respect of essential services pending a final decision regarding the future of the state.\textsuperscript{20} The government of Pakistan entered into a standstill agreement with the Maharaja and took the responsibility of administering communication and rail and road services in Kashmir,\textsuperscript{21} but the government of India did not enter into any such standstill agreement.

\textsuperscript{14}See above n 2, pp 7–8. Lord Mountbatten suggested to Maharaja Hari Singh of Kashmir that independence was not a feasible option and that the princely state would not be recognised as a dominion by the British Government. See VP Menon, \textit{The Story of the Integration of the Indian States} (Longmans, Green & Co, London 1956) p 394.
\textsuperscript{15}See Keesing’s Contemporary Archives, 9–16 August 1947, p 8765. A state could accede to either of the two dominions of India or Pakistan by executing an instrument of accession signed by the ruler and accepted by the Governor General of the dominion concerned. AS Anand, \textit{The Constitution of J & K: Its Development and Comments} (Universal Law Publishing, Delhi 1998) p 67. More than 500 accessions were accepted by the dominions of Indian and Pakistan, even before partition was effected by the rulers by execution of the instrument of accession. See RGC Thomas, \textit{Perspectives on Kashmir: The Roots of Conflict in South Asia} (Westview Press, Boulder 1992) p 82.
\textsuperscript{16}Above n 7, p 9.
\textsuperscript{18}Above n 2, p 36.
\textsuperscript{19}The primary reason for this dislike of India was fear of democratisation of states due to close links between the National Conference of Kashmir and the National Congress of India. Moreover, he disliked the option of accession to Pakistan because of its Muslim majority. WN Brown, \textit{The United States and India and Pakistan} (Harvard University Press, Cambridge 1953) p 162.
India invited the Maharaja or any other person authorised on his behalf to Delhi to negotiate a standstill agreement between the Kashmir government and the dominion of India. But before the conclusion of any such agreement, an invasion of Kashmir by Pathan tribesmen commenced, with the support of the government of Pakistan. Finding that he could no longer defend his state with his own resources, the Maharaja requested armed assistance from the dominion of India. However, such assistance was refused by the government of India on the grounds that Kashmir was a neutral state and accession to India was a prerequisite for military intervention by India. Thus, the Maharaja of Kashmir executed the instrument of accession and informed the government of India of his intention of setting up an interim government under Sheikh Abdullah, leader of the National Conference party in Kashmir. A simultaneous appeal for accession was also made by Sheikh Abdullah. Lord Mountbatten, as Governor General of India, accepted the accession of Kashmir to the dominion of India, and in a personal letter to the Maharaja informed him of the Indian government’s wish to settle the question of the state’s accession with reference to the people as soon as law and order had been restored and the soil of Kashmir cleared of invaders.


23 Above n 21, pp 89–90.


30 See the text of the letter by Lord Mountbatten to the Maharaja of Kashmir. Above n 12, pp 47–8.
However, the land of Kashmir could not be cleared of the invaders, and thus the matter of accession could not be referred to the people of Kashmir.

3. Legality of the accession

In order to ascertain the legality of the accession, a few questions need to be answered. First, we need to determine who had the authority to decide over the future of princely states. Second, we need to ascertain if accession was dependent on considerations such as geographical factors; and lastly, we need to ascertain the impact of the personal letter of Lord Mountbatten to the Maharaja of Kashmir.

In relation to princely states, it was provided by the Cabinet Mission that the British Crown could not retain the paramountcy over the princely states, and thus the rights surrendered by the princely states to the paramount power would return to the states. Thus, in order to determine who had the authority to decide on the accession of Kashmir, we need to find out whether the rights surrendered to the paramount power would revert back to the ruler or to the people of the princely states.

The combined reading of section 8(2) of the Indian Independence Act 1947 and section 6 of the Government of India Act 1935 causes this author to argue that the power to accede to either of the two dominions by signing the instrument of accession was given to the rulers of the princely states, and thus the rights surrendered to the paramount power would revert back to the rulers of the princely states. In addition, as the very existence of the dominions of India and Pakistan came about by virtue of the Indian Independence Act 1947, neither of the two dominions could challenge the legitimacy of the right of the ruler to decide upon accession as provided by the Act. It has been established even by the courts that in a monarchical form of government, it is the sovereign who is recognised and not the state or subjects of the sovereign.


33It provided that the dominions of India and Pakistan would continue to be governed by the Government of India Act 1935 with such modification as the Governor General of the dominion would by order specify. See The Indian Independence Act 1947 (10 & 11 Geo 6 c 30) s 8(2) <http://www.legislation.gov.uk/ukpga/Geo6/10-11/30>.

34It provided that an Indian state shall be deemed to have acceded to the dominion of India if the Governor General of the dominion signified his acceptance of the Instrument of accession executed by the ruler. See the Government of India Act 1935 (26 Geo 5 & 1 Edw 8 c 2) s 6 <http://lawmin.nic.in/legislative/textofcentralacts/GOI%20act%201935.pdf> accessed 1 February 2013.

35USA vs Wagner (1867) LR 2 c App 582.
sovereignty of the Maharaja of Kashmir over the territory was accepted by the government of Pakistan when it entered into the standstill agreement with the Maharaja on 15 August 1947 and took responsibility for administering communications and rail and road services in Kashmir.\(^\text{36}\)

Therefore, the Maharaja of Kashmir had sovereignty over the state and had complete authority to decide upon the accession of that state.

Lord Mountbatten, in his address to the Chamber of Princes on 25 July 1947, advised the princely states to accede to either of the two dominions, keeping in mind the geographical compulsions.\(^\text{37}\) However, legally the decision to accede to either of the two dominions of India or Pakistan was independent of any such consideration and was an exclusive right of the rulers of the princely states.\(^\text{38}\)

The government of Pakistan endorsed the above view by accepting the accession of the princely state of Junagadh to the dominion of Pakistan.\(^\text{39}\)

Yet it is the opinion of the present author that even a consideration of geographical, communal and other factors would justify the accession of Kashmir to the dominion of India. The state of Kashmir was geographically close to both the dominions of India and Pakistan.\(^\text{40}\) In relation to the communal factor, India is a secular state and does not ascribe to the ‘two-nation theory’.\(^\text{41}\) Meanwhile the people of Kashmir identified themselves more strongly by the common bond of Kashmiriyat\(^\text{42}\) than by religion and likewise did not ascribe to the two-nation theory.\(^\text{43}\) Thus, the presence of a Muslim majority in Kashmir was never a hurdle in the accession of Kashmir to India. Also, in relation to the wishes of the people, it can be argued that the Maharaja’s request for accession to India was similarly endorsed by Sheikh Abdullah, the leader of the National Conference.


\(^{37}\)See Keesing’s Contemporary Archives, 9–16 August 1947, p 8765.


\(^{39}\)The dominion of Pakistan accepted the accession of Junagadh, which was predominantly Hindu but ruled by a Muslim Nawab, thus establishing that the ruler can make such a choice independent of geographical, communal and other considerations. See S Gupta, Kashmir, a Study in India-Pakistan Relations (Asia Publication House, Bombay 1966) pp 79–84.


\(^{41}\)Above n 7, p 8.


while even the people of Kashmir wanted to accede to India.\textsuperscript{44} Thus, even a consideration of the above factors would have led the Maharaja to decide upon accession to India.

At this juncture, we need to ascertain whether the letter from Lord Mountbatten to the Maharaja of Kashmir\textsuperscript{45} made the accession provisional and incomplete. The present author argues that the accession of Kashmir to the dominion of India became legally complete once the Governor General of the dominion of India accepted the instrument of accession executed by Maharaja Hari Singh of Kashmir.\textsuperscript{46} The government of India never intended to make provisional accession and it always maintained that the accession of Kashmir to India was complete in law and in fact.\textsuperscript{47} What was offered in Lord Mountbatten’s letter was a just a proposal, which was not accepted by the Maharaja of Kashmir by any letter secondary to the instrument of accession, and thus these proposals did not become legally binding upon India.\textsuperscript{48} In fact, what India declared was political policy and moral commitment of the government at that time and thus cannot be considered as part of the law.\textsuperscript{49} Moreover, the Indian Independence Act 1947 did not provide for conditional accession, and thus the unilateral declaration by Lord Mountbatten cannot affect the validity of the accession carried out in conformity with the Act.\textsuperscript{50}

Even though the conditions prerequisite for the fulfilment of this unilateral, political and non-binding promise were not met,\textsuperscript{51} in order to show its


\textsuperscript{45}Lord Mountbatten, in his letter to the Maharaja, informed him of the wish of the government of India to settle the question of the state’s accession with reference to the people as soon as law and order had been restored and the soil of Kashmir cleared of the invaders. See the text of the letter of Lord Mountbatten to the Maharaja of Kashmir. Above n 12, pp 47–8.

\textsuperscript{46}Accession of more than 500 princely states to India and Pakistan was completed by the signature of an instrument of accession by the ruler and its acceptance by the respective governors general. See DR Sardesai, ‘The origins of Kashmir’s International and Legal Status’ in RGC Thomas (ed), \textit{Perspectives on Kashmir: The Roots of Conflict in South Asia} (Westview Press, Boulder 1992) p 84.

\textsuperscript{47}See the speech of Jawaharlal Nehru in the House of the People: ‘Let me be quite clear … What I said was that accession was complete in law and in fact in Oct 1947 …’ quoted by Paras Diwan. See P Diwan, ‘Kashmir and the Indian Union: The Legal Position’ (1953) 2 ICLQ pp 333–58, 341–42.


\textsuperscript{50}See MC Mahajan, \textit{Accession of Kashmir to India: The Inside Story} (Institute of Public Administration, Sholapur 1950) pp 19–21.

\textsuperscript{51}Kashmir could not be cleared of invaders. See n 32.
commitment to democratise the state, India tried to ascertain the wishes of the people\textsuperscript{52} by way of the Constituent Assembly,\textsuperscript{53} which ratified\textsuperscript{54} the accession of Kashmir to India on 15 February 1954.\textsuperscript{55}

Thus, the legality of the accession of Kashmir to the dominion of India cannot be questioned and the accession is complete in law and in fact.\textsuperscript{56}

4. Role of the Security Council

When the Indian Army discovered that the raiders had active assistance from the Pakistan authorities, India warned Pakistan that it would attack their bases in Pakistan so as to cut off supplies to the raiders.\textsuperscript{57} However, Lord Mountbatten advised Indian President Jawaharlal Nehru to avoid widening the conflict and to seek the intervention of the United Nations on the issue of aggression.\textsuperscript{58} India brought the situation\textsuperscript{59} before the Security Council under Article 35\textsuperscript{60} of the

\textsuperscript{52}The doctrine of self-determination by people had not developed into a norm of international law at that time and thus this doctrine did not apply to Kashmir as binding law even by virtue of international law. See B Farrell, ‘The Role of International Law in the Kashmir Conflict’ (2002–2003) 21 PSILR p 310.

\textsuperscript{53}The Constituent Assembly came into existence via the Proclamation of Yuvraj of Kashmir of 30 April 1951. See the text of the proclamation in a speech by VK Krishna Menon on Kashmir at the United Nations Security Council’s 762nd meeting on 23 January 1957, para 132.


\textsuperscript{56}Mr Warren Austin, the representative of the United Nations, asserted that ‘The external sovereignty of Jammu and Kashmir is no longer under the Maharaja. With the accession of Kashmir to India, this sovereignty went over to India and is exercised by India.’ See speech of Warren Austin during 240th meeting of Security Council on 4 February 1948 quoted by Sandeep Gopalan. S Gopalan, ‘India-Pakistan Relations: Legalization and Agreement Design’ (2007) 40 VJTL pp 687–726, 697.


United Nations Charter, requesting the Security Council to call upon Pakistan to put an end to its provision of assistance to the invaders. Initially, Pakistan denied giving assistance to the invaders and made counter charges against India to the point of challenging even the validity of the accession of Kashmir to India. Pursuant to the request made by Pakistan, the Security Council established the United Nations Commission on India and Pakistan (UNCIP) to investigate pursuant to article 34 of the UN Charter and to exercise mediatory influence to smooth away difficulties and carry out the directions of the Security Council. The Security Council also passed another resolution on 21 April 1948 advising both Indian troops and Pakistani tribesmen to withdraw, and providing for the setting up of an interim government representing political parties in Kashmir so that a fair plebiscite could be arranged by UNCIP and peace and order restored in the area. Although both parties objected to certain aspects of the plan for a plebiscite, the Security Council directed the commission to proceed without delay to the areas of dispute to accomplish its duties under the resolution of 21 April 1948.

On arrival in Pakistan on 7 July 1948, UNCIP discovered a material change in the situation brought about by the presence of three brigades of the Pakistan army. On 13 August 1948, UNCIP adopted a resolution in three parts calling for a ceasefire, a truce and finally a plebiscite. Part I of the resolution called for a ceasefire order, while Part II required Pakistan to withdraw its troops and secure the withdrawal of tribesmen, leaving the territory to be administered by local authorities. Then upon withdrawal of Pakistan forces and tribesmen, India was

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62See the text of the complaint submitted by the Representative of India in a letter to the President of the Security Council dated 1 January 1948. UN Doc S/628, at 1, 1 January 1948.
63See letter from Chaudhry Muhammad Zafarullah Khan, Minister of Foreign Affairs of Pakistan, to Rrygve Lie, UN Secretary General, UN Doc S/646, at 12, 15 January 1948.
64UN Doc S/646, 15 January 1948.
67Pakistan objected that an impartial plebiscite was impossible under the National Conference and India objected to the withdrawal of its troops from Kashmir. See G Shahidul Alam, ‘Peacekeeping Without Conflict Resolution: The Kashmir Dispute’ (1982) 61 Fletcher Forum 61–89, pp 64–65.
71Id, Part I.
72Id, Part II, para A.
to withdraw the bulk of its forces, but was allowed to maintain minimum forces necessary to assist local authorities in maintaining law and order. Finally Part III of the resolution reaffirmed the wish of the governments of India and Pakistan to determine the future status of Kashmir in accordance with the will of the people.

It can be inferred from the above resolution that by allowing India to maintain minimum forces necessary to assist local authorities in the observance of law and order, UNCIP indirectly recognised the legality of the accession of Kashmir to India. Although UNCIP succeeded in getting a ceasefire agreement signed by India and Pakistan on 27 July 1949, it could not get the parties to agree on the demilitarisation of Kashmir. The commission was replaced by individual UN representatives who tried to negotiate the demilitarisation of Kashmir but were unsuccessful. As a result, due to the failure of the United Nations to arrange for a truce between India and Pakistan, a plebiscite could not happen in Kashmir.

Frustrated over its failure to instigate the people of the Kashmir valley to rise in rebellion against India on the pretext of turmoil precipitated by the Hazratbal incident and the internment of Sheikh Abdullah, Pakistan commenced aggressive activities along the ceasefire line in Kashmir under the illusion that it was militarily superior to India, while Indian armed forces were demoralised after Pakistan’s successful military encounter with India over the Rann of Kutch.

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73 Id, Part II, para B.
74 Id, Part III.
78 It was clarified by UNCIP that a plebiscite would happen only after the requirements of Part I and Part II are fulfilled. See Official Records of the Security Council, Fourth Year, Supplement for January 1949, UN Doc S/1196, para 2.
79 The Hazratbal incident arose out of the theft of the holy relic, said to be the Prophet’s hair, from the Hazratbal shrine in Srinagar in December 1963. As word of the incident spread, massive anti-India agitation started, led by an action committee under the leadership of Maulana Masood Syed Masoodi. C Jaffrelot, Pakistan: Nationalism Without a Nation? (Manohar, New Delhi 2002) p 184.
80 The Rann of Kutch is a barren strip of uninhabitable land at the seaward end of the boundary between West Pakistan and India, where an area of about 9065 km² has been the object of a dispute between India and Pakistan. The dispute ended after a special tribunal, headed by Gunnar La Gergun of Sweden, granted 777 km² of the territory to Pakistan, while the rest was determined to belong to India. S Sundararajan, Kashmir Crisis: Unholy Anglo-Pak Nexus (Kalpaz Publications, Delhi 2010) pp 319–28.
These aggressive activities in turn culminated in full-scale war between India and Pakistan in 1965. In order to prevent a widening of the dispute, the Security Council soon intervened and passed Resolution 210 calling upon both countries to issue orders for a ceasefire and restoration of the status quo. It is to be noted here that instead of engaging itself directly into the dispute, the Security Council requested India and Pakistan to engage in negotiation, mediation and other peaceful means provided by article 33 of the UN Charter to settle the dispute. Thus, the parties accepted the Soviet Union as a mediator and negotiated the Tashkent Declaration. The Tashkent Declaration secured the withdrawal of the armed forces of both countries to pre-war positions, reaffirmed observance of the existing ceasefire line and committed the parties to discourage harmful propaganda.

We can infer two major things from the above events. First, the declaration treated the international border and ceasefire line at par and thus provided for the de facto partition of Kashmir, giving legal recognition to the ceasefire line. Second, by not renewing its call for a plebiscite in both resolutions and not engaging directly in negotiating a ceasefire between the parties, the Security Council allowed the parties to move towards a bilateral resolution of the Kashmir dispute and end the role of the international community.

Both India and Pakistan went on to engage in another war in 1971, which came to an end through the signing of the Simla Agreement. The significance of the Simla Agreement was signed by Zulfiqar Ali Bhutto and Indira Gandhi on 2 July 1972. See Simla Agreement on Bilateral Relation, India-Pak, 2 July 1972, 858 UNTS. 71 (1972).
of the Simla Agreement lies in the fact that it provided for the countries to settle their differences by peaceful means through bilateral negotiation or by other peaceful means agreed upon between the parties, \(^{92}\) and also provided for replacement of the ceasefire line by the Line of Control. \(^{93}\) Thus, the failure of the United Nations in bringing about a permanent resolution of the Kashmir dispute caused India and Pakistan to shift to a bilateral resolution of the dispute and end the role of the United Nations and other external bodies. Although Pakistan still wants to engage the international community in solving the Kashmir dispute, India argues that the dispute is to be solved bilaterally and continues to resist any kind of international mediation. \(^{94}\)

In the opinion of the present author, four reasons explain the failure of the Security Council to resolve the Kashmir problem. First, the Security Council saw the problem as a political dispute and failed to expressly mention the legality of the instrument of accession in its resolutions. \(^{95}\) Thus, dealing with the dispute as a purely political issue proved too weak to compel India and Pakistan to come to a binding and final resolution of the dispute. \(^{96}\) Second, the Security Council failed to declare the entrance of Pakistan troops into Kashmir as being an act of aggression \(^{97}\) and only recommended the withdrawal of the troops from Kashmir, declaring it to be a ‘material change’ \(^{98}\) from the situation originally presented to the Security Council. Third, the Security Council failed to realise that the wish of the government of India to settle the question of the state’s accession by reference to the people (as soon as law and order had been restored and the soil of Kashmir cleared of the invaders) \(^{99}\) was a unilateral offer made by the

\(^{92}\) Id, art II (ii).
\(^{93}\) Id, art IV (ii).

\(^{95}\) See UN Security Council, Resolution 47 (1948) of 21 April 1948, 21 April 1948, S/RES/47 (1948). However, UNCIP recognised the legality of the accession when it refused to take up the Pakistan government’s complaint against the decision of the Indian Constituent Assembly to give four seats to representatives from Kashmir on purely legal grounds. See United Nations, Kashmir Papers: Reports of the United Nations Commission for India and Pakistan (June 1948 to December 1949) (Ministry of External Affairs, Government of India, New Delhi 1950) p 194. Also, UNCIP indirectly accepted the legality of Kashmir’s accession to India by allowing India to maintain minimum forces necessary to assist local authorities maintaining law and order. See Resolution Adopted by United Nations Commissions for India and Pakistan, 13 August 1948, UN Doc S/995, Part II, Para B, 9 November 1948.

\(^{96}\) See above n 2, pp 53–55.

\(^{97}\) The government of India, in its original complaint to the Security Council, requested the Security Council to call upon Pakistan to end the act of aggression. See the text of complaint submitted by the Representative of India in the letter to the President of the Security Council, dated 1 January 1948. UN Doc S/628, at 1, 1 January 1948.

\(^{98}\) See Resolution adopted by United Nations Commissions for India and Pakistan, 13 August 1948, UN Doc S/1100, para 75, 9 November 1948. Part II.

\(^{99}\) See the letter of the Maharaja of Kashmir to the Governor General of India and attached Instrument of accession. Above n 12, pp 47–8.
government of India to the people of Kashmir, and that Pakistan had no *locus standi* in the matter.\(^{100}\) Fourth, the Security Council failed to issue binding resolutions to solve the dispute due to the competing interests of four of the five permanent members of the Security Council.\(^{101}\)

### 5. Proposed solution

Although the Simla Agreement recognised the need for a final settlement of the Kashmir dispute,\(^ {102}\) the parties have failed to reach such a settlement – even 40 years after the signing of the agreement. In the meantime, both India and Pakistan have successfully acquired nuclear weapons\(^ {103}\) and have even fought another war over Kashmir.\(^ {104}\) It is even possible that Pakistan could be ready to make its first use of nuclear weapons against India in case of war.\(^ {105}\) Thus, considering the potential impact of the Kashmir conflict on world peace and the apparent failure of bilateralism under the Simla Agreement, the present author proposes a solution that could be acceptable to all the parties to the dispute.

In the author’s opinion, the most appropriate solution to the Kashmir problem is the conversion of the existing Line of Control between India and Pakistan into a new official border. It was highlighted by the Kashmir Study Group in its report submitted in 1997 that the Line of Control is acceptable to most of the elites of India and Pakistan as a permanent international border,\(^ {106}\) and was indeed acceptable to Zulfikar Ali Bhutto, the then Prime Minister of Pakistan in 1972.\(^ {107}\)

However, the above solution fails to recognise that no lasting solution to the dispute will be secured unless the people of Kashmir agree and recognise it in principle. Thus a strict partition of Kashmir would violate the basic principle that

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\(^{100}\)Moreover, Kashmir never belonged to Pakistan; it never acceded to Pakistan and was in no way historically connected with present Pakistan. See VK Krishna Menon, Marathon Speech on Kashmir at United Nations Security Council’s 762nd meeting on 23 January 1957, para 185 <http://www.un.int/india/ind31.pdf> accessed 1 February 2013.

\(^{101}\)The USA’s interest in Pakistan and India’s relationship with the Soviet Union ensured a veto for any decision of the Security Council prejudicial to the interests of either India or Pakistan. See B Farrell, ‘The Role of International Law in the Kashmir Conflict’ (2002–2003) 21 PSILR pp 311–12.

\(^{102}\)See The Simla Agreement. 858 UNTS 71 (1972), art I (ii), p 73.


\(^{104}\)India and Pakistan fought the Kargil War in 1999. See VP Malik, *Kargil from Surprise to Victory* (Harper Collins Publishers, New Delhi, India 2006).

\(^{105}\)Former Pakistan President Pervez Musharraf has said that the option to use nuclear weapons can be considered if Pakistan is threatened with extinction. See HD Sokolski, *Pakistan’s Nuclear Future Worries Beyond War* (Strategic Studies Institute, US Army War College, Carlisle Barracks, PA 2008) p 135.


\(^{107}\)Zulfikar Ali Bhutto told Indira Gandhi at the Simla Summit in 1972 that ‘the Line of Control will become the border, that over the years, he should be able to convince his people what is India’s is India’s and what is ours is ours’. See V Schofield, *Kashmir in the Crossfire* (IB Tauris, London 1996) p 214.
Kashmir is an indivisible entity.\textsuperscript{108} In order to take care of the concerns of the people of Kashmir, the author suggests to treat the proposed international border along the Line of Control as a ‘soft border’ for the purposes of people living on both sides.

Additionally, the author proposes the setting up of a joint commission comprising representatives of India and of Pakistan, and representatives of the government of Kashmir under control of India and the government of Kashmir under control of Pakistan to monitor the proposed international border, and to look into other issues of mutual concern for the people of Kashmir living on either side of the Line of Control. This commission would primarily look into issues such as trade, tourism, water, etc. However, the respective armies of India and Pakistan would continue to guard the part of Kashmir on their side of the proposed international border, while the people of Kashmir would have a relatively easy passage to the whole of Kashmir irrespective of which army is defending the territory. It is to be noted that under the proposed plan, the people of Kashmir on either side of the Line of Control would not be allowed to settle in parts of Kashmir on the other side of the proposed international border.

Also, in relation to representation in international forums, both India and Pakistan would continue to represent the people of Kashmir on their side of the proposed international border in various international and regional forums. The people of Kashmir, meanwhile, would be given full autonomy in running their internal affairs and would be allowed to participate in the federal election in the country on whose side of the proposed international border they would fall.

The idea of allowing free movement to people of Kashmir has been proposed by the former President of Pakistan, Pervez Musharraf,\textsuperscript{109} and was accepted by India. Indian President Man Mohan Singh suggested that ‘people on both sides of the Line of Control should be able to move freely and trade with one another’, and even argued that the setting up of a co-operative consultative mechanism in Kashmir would help solve the social and economic problems of the region.\textsuperscript{110}

Thus, the proposed solution could be acceptable to India, Pakistan and the people of Kashmir as it would leave the present political and economic arrangement undisturbed and would help bring peace in the region without detachment of any territory from either India or Pakistan.

6. Conclusion

The present article has examined the genesis of the Kashmir conflict and its entrenchment over the years. Clearly the origin of the dispute lies in the failure of the British to provide a mechanism for the integration of the princely states into India and Pakistan after the demise of the British Empire in India. Maharaja Hari Singh of Kashmir preferred the independence option for his state, but was


forced to execute the instrument of accession, joining India in order to save his state from invasion by Pathan tribesmen who invaded Kashmir with the support of Pakistan.

The author concludes that the power to accede to either of the two dominions by signing the instrument of accession was given to the ruler of the princely state. Legally, the decision to accede to the dominion of India or Pakistan was independent of any considerations and was an exclusive right of the rulers of the princely states. Moreover, even when giving consideration to factors such as geography, communal factors and the wishes of the people of Kashmir, the accession of Kashmir to the dominion of India is justified.

The accession of Kashmir was made legally complete once the Governor General of India accepted the instrument of accession executed by the Maharaja Hari Singh of Kashmir, while a separate personal letter from Lord Mountbatten would not affect the legality of the accession. Moreover, the promise made by Lord Mountbatten was unilateral, political and non-binding and was made in order to show India’s commitment to democratise the state. India even tried to ascertain the wishes of the people by way of the Constituent Assembly, which ratified the accession of Kashmir to India.

In order to avoid a full-scale war with Pakistan, India took the matter to the Security Council, but the Security Council failed to bring about a permanent resolution to the dispute – mainly because it failed to expressly mention the legality of the instrument of accession in its resolution and failed to recognise that Pakistan had no *locus standi* in the matter. Thus, the failure of the Security Council in bringing about a permanent resolution to the Kashmir dispute made India and Pakistan shift towards a bilateral resolution of the dispute and end the role of the United Nations and other outside bodies.

As a solution to the dispute, the present author proposes to treat the existing Line of Control as the international border, which should be considered as a soft border only for people living in Kashmir. Moreover, a joint commission comprising representatives of India, Pakistan, the government of Kashmir under control of India and the government of Kashmir under control of Pakistan could be set up to monitor the proposed international border, and to look into other issues such as water, tourism, etc. which affect the whole of Kashmir’s population.

The proposed solution would be acceptable to all the parties, including the people of Kashmir, as it would leave the present political and economic arrangement undisturbed and would help bring peace in the region without detachment of any territory from either India or Pakistan.

Notes on contributor

Baibhaw Gahlaut is affiliated to the National Law Institute University, Bhopal. In furtherance of his interest in the area of climate change, he has attended two Model United Nation Conferences on climate change and has won ‘Special Mention’ at Cop 16 organised at IIT Kanpur. He has an article titled ‘Climate Change: Emerging Social and Legal Issues’ published in the International Journal of Public Law and Policy and an article titled ‘Land Acquisition and Resettlement and Rehabilitation Bill, 2011 – A Bane or Boon?’ published in the Statute Law Review.