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The Longstanding *Kashmir Issue*: Where Does International Law Stand?

Elisa Tino

EDITORIALE SCIENTIFICA
Napoli

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Abbreviations

AFDI	Annuaire Français de Droit International
AICHR	ASEAN Intergovernmental Commission on Human Rights
AJIL	American Journal of International Law
Arizona JICL	Arizona Journal of International & Comparative Law
As. Aff.	Asian Affairs
ASEAN	Association of Southeast Asian Nations
Berkeley JIL	Berkeley Journal of International Law
BJWA	Brown Journal of World Affairs
Brooklyn JIL	Brooklyn Journal of International Law
Buffalo HRLR	Buffalo Human Rights Law Review
BYIL	British Yearbook of International Law
Cambridge JICL	Cambridge Journal of International and Comparative Law
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CI	La Comunità Internazionale
CIRAC	Comité International pour le Respect et l'Application de la Charte Africaine des Droits de l'Homme et des Peuples
CJTL	Columbia Journal of Transnational Law
CMW	Convention on the Protection of the Rights of all Migrant Workers
CPPCG	Convention on the Prevention and Punishment of the Crime of Genocide
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSA	Contemporary South Asia
CUJSAS	Columbia Undergraduate Journal of South Asian Studies

Denning L. J.	Denning Law Journal
DPCE	Diritto Pubblico Comparato ed Europeo
DUDI	Diritti Umani e Diritto Internazionale
E&PW	Economic and Political Weekly
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
EU	European Union
Glob. Leg. St. Rev.	Global Legal Studies Review
Goettingen JIL	Goettingen Journal of International Law
Harvard ILJ	Harvard International Law Journal
HONAI: Int'l J. Ed. Soc. Pol & Cult. St.	HONAI: International Journal for Educational, Social, Political & Cultural Studies
HRC	Human Rights Committee
HRLR	Human Rights Law Review
HRQ	Human Rights Quarterly
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLR	International Community Law Review
ICLQ	International and Comparative Law Quarterly
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance
IICLR	Indiana International and Comparative Law Review

ILC	International Law Commission
ILSA J. Int'l & Comp. L.	ILSA Journal of International and Comparative Law
Int'l St.	International Studies
IRRC	International Review of Red Cross
ISQ	International Studies Quarterly
Israel LR	Israel Law Review
IPHRC	OIC Independent Permanent Human Rights Commission
JAAS	Journal of Asian and African Studies
JCSL	Journal of Conflict and Security Law
J. Eur. St	Journal of Eurasian Studies
LAC	Line of Actual Control
LoC	Line of Control
Loyola Univ. Chic. Int'l L. Rev.	Loyola University Chicago International Law Review
Minnesota JIL	Minnesota Journal of International Law
Muslim WJHR	Muslim World Journal of Human Rights
MPEPIL	Max Planck Encyclopedia of Public International Law
Notre Dame LR	Notre Dame Law Review
OHCHR	Office of the United Nations High Commissioner for Human Rights
OJLS	Oxford Journal of Legal Studies
OIC	Organization of Islamic Cooperation
OIC-IPHRC Journal	Journal of the OIC Independent Permanent Human Rights Commission

Orient Res. J. Soc. Sc.	Orient Research Journal of Social Sciences
Pac. Focus	Pacific Focus
Pac. Rev.	Pacific Review
Pak. Hor.	Pakistan Horizon
Pak. JIA	Pakistan Journal of International Affairs
PCA	Permanent Court of Arbitration
Pol. Sc. Q.	Political Science Quarterly
QIL	Questions of International Law
PJH	Perennial Journal of History
RBDI	Revue Belge de Droit International
RdC	Recueil des Cours de l'Académie de La Haye
RDI	Rivista di Diritto Internazionale
Res. Soc. Int'l L.	Research Society of International Law
Rev. Est. Jur.	Revista de Estudios Jurídicos
RGDIP	Revue Générale de Droit International Public
RHDI	Revue Héllenique de Droit International
RIS	Review of International Studies
Riv. Int'l Dir. U.	Rivista Internazionale dei Diritti dell'Uomo
RQDI	Revue Québécoise de Droit International
SAARC	South Asian Association for Regional Cooperation
SCO	Shanghai Cooperation Organization
SEER	The Slavonic and East European Review
St. Int. Eur.	Studi sull'Integrazione Europea
Strat. St.	Strategic Studies

UN	United Nations
UNCIP	United Nations Commission for India and Pakistan
UNESCO	United Nations Educational Scientific and Cultural Organization
OHCHR	Office of the United Nations High Commissioner for Human Rights
The Law & Prac. Int'l Courts & Trib.	The Law & Practice of International Courts and Tribunals
Trans. L. & Comp. Prob.	Transnational Law & Comparative Problems
Trento St. L. Rev.	Trento Student Law Review
UCLA J. Int'l L. & For. Aff.	UCLA Journal of International Law and Foreign Affairs
UNHRC	United Nations Human Rights Council
Univ. Miami ICLR	University of Miami International and Comparative Law Review
UNMOGIP	United Nations Military Observer Group in India and Pakistan
UPR	Universal Periodic Review
VCLT	Vienna Convention on the Law of Treaties
Virginia JIL	Virginia Journal of International Law
VRÜ	Verfassung und Recht in Übersee
ZaöRV	Zeischrift für ausländisches öffentliches Recht und Völkereecht

INTRODUCTION

TABLE OF CONTENT: 1. The origins of the *Kashmir issue*: a historical *excursus*. – 2. The UN involvement in the *Kashmir issue* and its inability to solve it. – 3. The position of the international Community and international organizations on the *Kashmir issue*. - 4. The current *status* of the territory of the former Princely State of Jammu and Kashmir. – 4.1. India-Administered Kashmir. – 4.2. Pakistan-Administered Kashmir. – 4.3. China-Administered Kashmir. – 5. The current terms of the *Kashmir issue*. - 6. The research objective and methodological approach

1. The expression *Kashmir issue* refers to the dispute dating back to the second half of 1940s and concerning the sovereignty over the entire area that used to be the Princely State of Jammu and Kashmir under the British Indian Empire.

As is known, the East India Company was involved in trade with the Asian Continent since the 17th century and managed the Indian territory on behalf of the United Kingdom until the mid-19th century, when a bloody uprising led the British Government to reorganize its presence in the area. Thus, the East India Company was liquidated, and the entire Indian region was transferred under the control of the British Crown. In particular, the region was articulated into areas directly administered by the United Kingdom, which were collectively called *British India*, and areas ruled by indigenous rulers but under British *paramountcy*[1], called *Princely States* (see *Appendix 1*). British India was characterized by a sort of federal structure; it consisted of eight Provinces (Burma, Bengal, Madras, Bombay, United Provinces, Central Provinces and Berar, Punjab and Assam) administered either by a British Governor or Lieutenant-Governor. The territories currently belonging to the Indian Union and to the Islamic Republic of Pakistan respectively formed the Punjab Province[2]. The Princely States were almost six hundred; among them there was the *Princely State of Jammu and Kashmir*. It came into existence in 1846 following the conclusion of the Treaty of Amritsar

[1] The concept of «paramountcy» and its legal framing from the international law perspective will be discussed later. See Chapter I, para. 2.1.

[2] In particular, under the British colonization, the Punjab Province encompassed the present Indian States and Union Territories of Punjab, Haryana, Himachal Pradesh, Chandigarh, and Delhi, and the Pakistani region of Punjab, and Islamabad Capital Territory.

formalizing the arrangements of the Treaty of Lahore[3]. The latter, which put an end to the First Anglo-Sikh War, required the Sikhs to cede «(...) to the Honorable Company [East India Company] the territories situated between the rivers Beas and Indus, including the provinces of Cashmere and Hazara» (Article IV). The Treaty of Lahore paved the way for the conclusion of the Treaty of Amritsar between the British East Indian Company and Gulab Singh, the *Maharaja* of Jammu[4]. The Treaty at issue provided the cession of the territories mentioned in Article IV of the Treaty of Lahore and corresponding to the so-called *Valley of Kashmir* to the Maharaja of Jammu in exchange of a sum (Article 3). In other words, it stipulated the creation of a new entity, namely the *Princely State of Jammu and Kashmir*, comprising the territory of Jammu, the Himalayan Kingdom of Kashmir and the frontier areas of Ladakh, Gilgit and Baltistan (see *Appendix 2*) over which the Maharaja Gulab Singh gained full sovereign powers. In turn, the Maharaja recognized the British *paramountcy*[5], that is, he accepted that the foreign policy and defense of his new Princely State was managed by the British Crown[6], while

[3] See Treaty of Lahore, 9 March 1846; Treaty of Amritsar, 16 March 1846. About the Treaty of Amritsar and its validity, in literature see M. A. KHAJA, *Treaty of Amritsar in Retrospect,* in *Proceedings of the Indian History Congress,* 2016, 338-347.

[4] *Maharaja* was the title used to designate the Ruler of Princely States. It is worth noting that the modern Jammu region was divided into twenty-two principalities; Jammu was among them. During the 1700s its Ruler tried to bring all principalities under his control through the conquests. Then, in 1816 the new political entity of Jammu was annexed to Lahore Darbar and its administration was assigned to the son of the Maharaja of Lahore, belonging to Singh family. In 1819 the Himalayan Kingdom of Kashmir was conquered and annexed to Lahore Darbar too. The outbreak of the First Anglo-Punjab war following the British attack on Punjab brought about a significant change in the geo-political scenario of the region. For a brief illustration of the events leading up to the conclusion of the Treaty of Lahore and the creation of the Princely State of Jammu and Kashmir see A. M. PIR, A. R. SHIEKH, *Formation of the Princely State of Jammu and Kashmir*, in *Jurnal Kajian Sejarah & Pendidikan Sejarah,* September 2013, 139-150.

[5] According to Article 10 of the Treaty of Amritsar, in token of the British supremacy, the Maharajah Gulab Singh should have presented annually to the British Government one horse, twelve shawl goats of approved breed (six male and six female) and three pairs of Cashmere shawls.

[6] Pursuant to Article 9 of the Treaty of Amritsar, the British Crown committed to actively protect the territorial integrity of the Princely State of Jammu and Kashmir from external enemies. Moreover, as regards external relations, the Maharaja should have referred to the arbitration of the British Government any dispute or question that might arise between himself and the Government of Lahore or any other neighboring State and would have complied with its decision (Article 5). Any change of the frontiers of the State would have required the consent of the British Government (Article 4).

he saved autonomous decision-making powers over internal matters[7].

At the end of the Second World War, the continuous and increasingly harsh protests of the Indian nationalist movement against the British Government forced the latter to promise independence. Thus, in July 1947 the British Parliament passed the Indian Independent Act[8] stipulating that, as of 15 August of that year, two independent States would have arisen in the Indian territories under the direct rule of the British Crown, named India and Pakistan respectively (Section 1). It is worth noting that the definition of their boundaries was not based on the *uti possidetis iuris* principle[9]. As is known, it provides that emerging States presumptively inherit their pre-independence administrative boundaries. For British India, its application would have meant that international frontiers would have to be drawn using the boundaries of the *Province,* the primary unit in the federal structure of British India. However, committing to the boundaries of the Province of Punjab would have required rejecting its partition, which did not suit the interests of the British Government. As a result, the international border between India and Pakistan was drawn, in defiance of *uti possidetis* principle, on the boundaries of administrative sub-units within the Province of Punjab.

[7] It is worth noting that over the years British *paramountcy* extended. The Princely State of Jammu and Kashmir concluded some administrative arrangements whereby it entrusted the British Crown with the management of certain services (e.g. communications and transit infrastructures).

[8] See British Parliament, *Indian Independence Act 1947*, Chapter 30 10 and 11 Geo 6, 18 July 1947.

[9] About the principle of *uti possidetis iuris* in international law, with particular regard to its relationship with self-determination of peoples in literature see, *ex multis*, J-M. SOREL, R. MEHDI, *L'uti possidetis entre la consécration juridique et la pratique,* in *AFDI*, 1994, 11-40; C. ANTONOPOULOS, *The Principle of Uti Possidetis Iuris in Contemporary International Law,* in *RHDI*, 1996, 29-88; G. NESI, *L'uti possidetis iuris nel diritto internazionale,* Padova, 1996; O. CORTEN, *Droit des peuples à disposer d'eux-même et uti possidetis,* in *RBDI*, 1998, 161-189; G. ABI-SAAB, *Le principe de l'uti possidetis. Son rôle et ses limites dans le contentieux territorial international,* in M. G. KOHEN (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law,* Leiden, 2007, 657-671; A. PETERS, *The Principle of Uti Possidetis Iuris. How Relevant is it for Issues of Secession,* in C. WALTER ET AL. (eds), *Self-Determination and Secession in International Law*, Oxford, 2014, 95-137; G. NESI, *Uti Possidetis Doctrine*, in *MPEPIL,* February 2018; G. NESI, *A Few Reflections about uti possidetis iuris and Self-Determination about the Twentieth and Twenty-First Centuries*, in *The International Legal Order in the XXIst Century: Essays in Honour of Professor Marcelo Gustavo Kohen,* Leiden-Boston, 2023, 197-209.

As regards the Princely States, the Indian Independence Act gave them the freedom to choose whether to remain independent or to opt for accession to one of two newly formed States (Section 2(4)). The Hindu Maharaja of the Princely State of Jammu and Kashmir, whose population was predominantly Muslim, did not make any decisions within the specified time limit. So, from August 15, 1947, his State became *de facto* independent[10]. Regarding the relations with the two newly formed States (India and Pakistan), the Maharaja decided to propose to both of them the conclusion of two separate but identical *Standstill Agreements.* The Maharaja's aim was to maintain the administrative *status quo* and to avoid chaos when British paramountcy would have lapsed. His proposal was accepted only by Pakistan.

In the aftermath of the end of British rule in Indian subcontinent, the internal political situation in the Princely State of Jammu and Kashmir was tense. There were rooted socio-economic tensions between the Muslim majority of the population, who were poor peasants, and the predominantly Hindu landowning class. Those tensions were exacerbated by discontent with the autocratic regime imposed by the Maharaja and his hesitation in deciding on accession to one of the two newly formed States. Thus, in October 1947 those tensions resulted in an uprising in the Western Poonch district. The uprising was then joined by some Pakistani tribes, who – together with local rebels – took control of that part of territory and proclaimed the independent State of *Azad Jammu and Kashmir*. Additionally, they threatened to take the Princely State Capital.

The Maharaja was incapable of putting down the revolt, so he turned to the Indian Government requesting the help of its military forces to restore control over his territory and offering in return the signing of the Instrument of accession of his Princely State to the Indian Union. It provided that the Maharaja preserved his own governing power over the territory of the Princely State on all matters (Article 8), except for defense, external affairs and communications which fell under Indian authority (Article 3). The Maharaja's request was granted; in his reply letter the General-Governor of India stated that he agreed to the sending of troops in the region and accepted the accession of the Princely State of Jammu and Kashmir. Upon learning

[10] For an in-depth analysis of the issue, see Chapter I, para. 2.2.

of the Indian troops' dispatch, Pakistan responded by invading the territory of the Princely State, thus starting the first Indo-Pakistani war.

Through the intervention of the UN Security Council[11], on January 1, 1949, a suspension of hostilities was achieved, and India and Pakistan signed an agreement establishing a ceasefire line[12]. However, the truce was only temporary, and hostilities resumed first in summer of 1965[13] and then in 1971 coinciding with the Bangladesh Liberation War[14]. Although it was short, the 1971 war enabled India to capture a larger quantity of territory than Pakistan. Thus, after the ceasefire on December 17, both sides attempted to take back lost territory. The territorial dispute ended temporarily with the signing of the so-called *Simla Agreement*[15]. The parties recognized the bilateral nature of the *Kashmir issue* (Article 1) and accepted the partition of the territory of the Princely State of Jammu and Kashmir along the ceasefire line defined in 1949, which was then called *Line of Control* (LoC) (Article 4(ii)). Since 1971, tensions did not escalate into open

[11] The involvement of the UN Security Council will be investigated in detail below (see *infra,* para. 2). In this regard, in literature see T. DAS, *The Kashmir Issue and the United Nations*, in *Pol. Sc. Q.,* 1950, 264-282; F. SHAKOOR, *UN and Kashmir*, in *Pak. Hor.,* 1998, 53-69; B. R. FARRELL, *The Security Council and Kashmir,* in *Trans. L. & Cont. Prob.,* 2013, 343-368; T. KHURSHID, *United Nations Security Council Resolutions: Status of the People of Jammu and Kashmir,* in *Strat. St.,* 2016, 100-122; S. P. WESTCOTT, *The Case of UN Involvement in Jammu and Kashmir*, in *E-International Relations*, 2020, 1-10.

[12] See Agreement between military representatives of India and Pakistan regarding the establishment of a cease-fire line in the State of Jammu and Kashmir, Karachi, 27 July 1949. The line fixed by the so-called *Karachi Agreement* did not legally constitute an international border, but it performed *de facto* this function.

[13] In summer 1965, armed infiltrators from Pakistan crossed the ceasefire line, and the number of skirmishes between Indian and Pakistani troops increased. The conflict fully erupted as Pakistan launched an attack across ceasefire line in Southwest Jammu and Kashmir and it continued until an UN-sponsored ceasefire took hold on September 23. For a detailed analysis of events see Z. HASAN*, The India-Pakistan War – A Summary Account*, in *Pak. Hor.,*1965, 344-356.

[14] The war began with Pakistan's Operation Chengiz Khan, consisting of preemptive aerial strikes on eight Indian air stations. The strikes led to India declaring war on Pakistan, marking its entry into the war for East Pakistan's independence, on the side of Bengali nationalist forces.

[15] See Agreement between the Government of India and the Government of the Islamic Republic of Pakistan on bilateral relations, Simla, 2 July 1972. About this agreement in literature see G. S. BHARGAVA, *The Simla Agreement. An Overview*, in *India Quarterly*, 1973, 26-31; M. A. RAHMAN ET AL., *Agreement on the Application of UN Resolutions on Jammu and Kashmir: A Critical Analysis under International Law*, in *PJH*, 2021, 285-302.

warfare anymore, except for the brief clashes that occurred in the Kargil region in 1999 and some periodic skirmishes on the LoC[16].

While India and Pakistan were clashing for control of the former Princely State of Jammu and Kashmir, there was (and still there is) another State making claims on that territory: it is China[17]. The latter does not acknowledge the McMahon Line as boundary with India in the Eastern Sector, since it considers it as a violation of the principle of historic rights[18]. Thus, since late-1950s China has advanced its own delineation of border with Indian territory, claiming control over Aksai Chin which corresponded to large area of the Northeastern part of the Princely State. It is a southwestward extension of the Plateau of Tibet which is devoid of human settlement because of its geographical connotation. Nevertheless, the Beijing Government claimed its control for strategic reasons, as it constituted a *bridge* between the Chinese region of Xinjiang and Tibet. The unsuccessful outcome of the talks initiated in 1960 led to the outbreak of a brief but intense conflict between China and India in October 1962. It was virtually over when China unilaterally proclaimed a ceasefire and withdrew from some of the territory it had occupied. India endorsed the ceasefire. As a result of the conflict, China took control of western Aksai Chin, and it has

[16] The Kargil war (May to July 1999) was provoked by the infiltration of Pakistani regular troops into India-Administered Kashmir across the LoC. In 2024 there has been an uptick in attacks along the LoC, with the most recent militant–military engagements leading to the death of an Indian officer. See https://eastasiaforum.org/2024/09/20/kashmir-to-remain-a-thorn-in-the-side-of-india-pakistan-relations/

[17] It is interesting to note that, although China occupies approximately 42,735 sq kms of the territory of the former Princely State of Jammu and Kashmir, it hardly figures in any reference to the *Kashmir issue* at the UN. About the political implications of China's involvement in the *Kashmir issue* see, among others, S. YASMEEN, *The China Factor in the Kashmir issue*, in R. G. C. THOMAS (ed.), *Perspectives on Kashmir: the roots of conflict in South Asia*, New York- Abingdon, 2019, 319-340.

[18] The McMahon Line was the result of the Simla Convention agreed by Great Britain, China and Tibet in 1914. It provided that Tibet would be divided into Outer Tibet and Inner Tibet. Outer Tibet would remain in the hands of the Tibetan Government under Chinese suzerainty, but China would not interfere in its administration, while Inner Tibet would be under the jurisdiction of the Chinese government. The Convention with its annexes also defined the boundary between Tibet and that between Tibet and British India (the so-called *McMahon Line*). A draft convention was initialed by all three countries on 27 April 1914, but China immediately repudiated it. A slightly revised text was signed again on 3 July 1914, but only by Britain and Tibet. The Chinese plenipotentiary declined to sign it, because it claimed that the territorial division was based on incorrect assessments and without taking account of the delimitation drawn in 1899 (the so-called Macartney-Mc Donald Line) which attributed half of the territory to China. The British and Tibetan plenipotentiaries then signed a bilateral declaration stating that the Simla Convention would be binding on themselves, and that China would be denied any privileges under the Convention until it signed it.

maintained sovereignty over the region ever since. The boundary between the two States was set by the so-called *Line of Actual Control* (LAC); it is a demarcation line instrumental to avoid confrontation between military forces of the two sides[19], which functions as a *de facto* border[20]. Then, in 1963 Pakistan and China concluded an agreement delimiting their boundaries[21]. Pakistan agreed to cede to China the Shaksgam Valley, a territory it gained control of in the first Indo-Pakistan war. In return, it obtained military and nuclear technology from China.

2. The UN, which counts among its objectives the maintenance of international peace and security, could not remain unrelated to the *Kashmir issue*. On January 1, 1948, India filed a complaint in the UN Security Council under Chapter VI of the UN Charter, alleging that Pakistani invasion of the Princely State of Jammu and Kashmir was an act of aggression against its territory likely to endanger the maintenance of international peace and security. Therefore, in self-defense India might be compelled to enter Pakistan territory in order to take military action against the invaders. On the other hand, Pakistan rejected Indian claims, outlining its own position.

Much to India's surprise, the Security Council did not *order* Pakistan to withdraw. On the other hand, under Chapter VI of the UN Charter, it could not have done so; at most it could have *suggested* it to Pakistan. Rather, the Security Council established the UN Commission for India and Pakistan (UNCIP) which was vested with the tasks to investigate the facts under Article 34 of the UN Charter,

[19] Significantly, Article 1 of the Agreement on the Maintenance of Peace and Tranquility along the Line of Actual Control in the India-China Border Area (Beijing, 7 September 1993) requires both sides to strictly observe the LAC only for the purpose of avoiding unnecessary military confrontations «pending an ultimate solution to the boundary question». Then, following Article 6 states that the «Agreement does not prejudice» the respective «positions on the border question».

[20] Despite several formal agreements and protocols intended to amicably address the India–China border dispute, the two countries have not been able to resolve the conflict, whether legally or diplomatically. The skirmishes that took place between 2020 and 2022 confirm this. See https://www.gisreportsonline.com/r/china-india-border-2/

[21] See Agreement between the Government of the People's Republic of China and the Government of Pakistan on the boundary between China's Sinkiang and the contiguous areas, the defense of which is under actual control of Pakistan, Peking, 2 March 1963 (hereafter, 1963 boundaries Agreement).

and to act as mediator[22]. Then, in the face of persistent hostilities, it passed a more detailed resolution providing guidelines for solving the conflict[23]. In essence, the Security Council called upon Pakistan to secure the withdrawal of its proxies, followed by a withdrawal of Indian troops. The UN would then establish a temporary Plebiscite Administration in the Princely State of Jammu and Kashmir with the mandate to organize and manage a fair and impartial plebiscite concerning accession to India or Pakistan. The proposed solutions were not followed up and hostilities continued until the UNCIP succeeded in mediating between the two disputants[24]. Thus, on January 1, 1949, a ceasefire was achieved and, under the auspices of the UNCIP's Truce Sub-Committee India and Pakistan signed an agreement establishing a ceasefire line (the aforementioned *Karachi Agreement*). In order to monitor its compliance a Military Observer Group was deployed by the UN[25]. However, the cessation of hostilities was not accompanied by a settlement of the dispute. In this regard, the 1949 final report of the UNCIP is emblematic. It recognized the UNCIP's failure in mediating between India and Pakistan and in convincing them to demilitarize the territory of the Princely State of Jammu and Kashmir and suggested that the Security Council assigned the role of mediator to a single person who could «more effectively conduct the negotiations which, to be successful,

[22] See UN Security Council, *Resolution No.* 39 (1948). *Establishing a Commission on the India-Pakistan Question,* UN Doc. S/RES/39(1948) of 20 January 1948.

[23] UN Security Council, *Resolution No.* 47 (1948). *On Restoration of Peace and Order and the Plebiscite in the State of Jammu and Kashmir*, UN Doc. S/RES/47(1948) of 21 April 1948.

[24] After negotiations with the two sides, the UNCIP passed a three-part Resolution of 13 August 1948 and subsequently added a 'supplement'. The three parts dealt with ceasefire, terms for truce, and procedures for negotiation regarding the plebiscite. In particular, it provided that Pakistan withdrew its troops, as well as its tribesmen and nationals not normally resident therein from territory of the Princely State of Jammu and Kashmir. On the other side, once the Pakistani withdrawal was over, India had to withdraw the bulk of its forces from the Princely State in stages to be agreed upon with the UNCIP. In compliance with these conditions, the UN Security Council foresaw a plebiscite to determine the future of the territory of the Princely State of Jammu and Kashmir. Both the countries accepted the resolution, and a ceasefire was achieved.

[25] On 24th of January 1949 a first group of UN military observers arrived in the territory of the Princely State of Jammu and Kashmir to supervise the ceasefire between India and Pakistan. Under the command of the Military Adviser appointed by the UN Secretary-General, those observers formed the nucleus of the United Nations Military Observer Group in India and Pakistan (UNMOGIP). Following renewed hostilities, UNMOGIP remained in the area to observe developments pertaining to the strict observance of the ceasefire and report thereon to the Secretary-General (see UN Security Council, *Resolution No.* 91 (1951), cit.). The monitoring Mission is still active.

must be carried out in active and constant consultation with the two parties» [26]. Hence, the Security Council appointed a series of individual representatives to ensure the ceasefire, to induce India and Pakistan to withdraw their troops and to pave the way for the plebiscite[27]. During their activity period, from 1950 to 1965, the Security Council addressed the *Kashmir issue* in several resolutions which reiterated the call for demilitarization of the territory of the Princely State of Jammu and Kashmir and for the plebiscite[28]. However, none of them were followed up. And, in fact, it was evident that the prospects for a successful plebiscite were few, if any, in the light of both the conduct of the two States and the UN approach. On the one hand, neither Pakistan nor, consequently, India have ever really shown any intention of withdrawing their troops and, rather, soon after the 1949 ceasefire they both realized a frequent and ruthless suppression of Kashmiri rights[29]. So, the preconditions for the plebiscite were never set in place. On the other hand, although the UN continued to formally insist on holding the plebiscite, such an *insistence in words* did not translate into conclusive deeds. Indeed, both the UNCIP and the individual mediators who were then appointed by the Security Council neglected to consult various political actors within the Princely State of Jammu and Kashmir and disregarded Kashmiri authorities. This approach seems to be symptomatic of the UN's intention merely to mediate between India and Pakistan, rather than really identifying the Kashmiris' preferences[30]. This consideration is confirmed by the approach further

[26] UNCIP, *Third Interim Report*, UN Doc. S/1430 of 5 December 1949, para. 285.

[27] For an overview of initiatives and proposals presented by various individual representatives see B. R. FARRELL, *op. cit.,* 350-355.

[28] See UN Security Council, *Resolution No.* 80 (1950). *The India-Pakistan Question*, UN Doc. S/RES/80(1950) of 14 March 1950; UN Security Council, *Resolution No.* 91 (1951). *The India-Pakistan Question,* UN Doc. S/RES/91(1951) of 30 March 1951; UN Security Council, *Resolution No.* 98 (1952). *The India-Pakistan Question*, UN Doc. S/RES/98(1952) of 23 December 1952; UN Security Council, *Resolution No.* 122 (1957). *The India-Pakistan Question*, UN Doc. S/RES/122(1957) of 24 January 1957; UN Security Council, *Resolution No.* 126 (1957). *The India-Pakistan Question,* UN Doc. S/RES/126(1957) of 2 December 1957. The proposal to hold a plebiscite that was supposed to decide the future *status* of the Princely State was also persistently supported by the UNCIP. See UNCIP, *Resolution* of 13 August 1948 with Supplement (Document *S/1100* of 9 November 1948, para. 75); UNCIP, *Resolution No. S/5/1196* of 10 January 1949, para. 15.

[29] About the human rights situation in India-Administered Kashmir and Pakistan-Administered Kashmir see Chapter III.

[30] In this sense see S. P. WESTCOTT, *op. cit.,* 5. It is worth noting that the term «Kashmiris» is used here to refer to the population settled on the entire territory of the Princely State of Jammu and Kashmir.

held by the Security Council. In resolutions adopted in 1965 and in 1971 after resumption of hostilities[31], any reference to the holding of the plebiscite was dropped and the Security Council merely called for a ceasefire and withdrawal to the original ceasefire line[32]. On the other hand, if the Council's intention had indeed been to identify the preferences of the Kashmiris, it would not have circumscribed their ability to choose their own political *status* solely to the alternative of accession to India or Pakistan. The possibility of establishing as an independent State would also have been contemplated[33].

Likewise, cessation of hostilities was the only priority for the General Assembly. In its resolution adopted in 1971 pursuant to Uniting for Peace procedure it merely called for a ceasefire and urged the Security Council to take appropriate action[34]. On closer inspection, another feature characterized the Security Council's approach to the *Kashmir issue*. Resolutions adopted in the 40-50s were formulated in the terms of recommendations calling on Pakistan and India to peacefully resolve their differences. While the Security Council offered its good offices in facilitating a solution, it did not seek to impose its will on the parties[35]. This can probably be explained by

[31] During the 1965 war, the Security Council relied largely on the Secretary-General as a factfinder and agent. He provided regular updates on the military situation in the territory of the Princely State of Jammu and Kashmir and implementation of the Security Council's withdrawal and cease-fire demands. See UN Secretary-General, *Report by the Secretary-General on the Current Situation in Kashmir,* UN Doc. S/6651 of 3 September 1965*; Report by the Secretary-General on Developments on the Situation in Kashmir,* UN Doc. S/6661 of 6 September 1965; *Report by the Secretary-General on the Military Situation in the Area of Conflict Between India and Pakistan,* UN Doc. S/6687 of 16 September 1965; *Report by the Secretary-General on His Efforts to Give Effect to Security Council Resolution 211 of 20 September 1965,* UN Doc. S/6699 of 21 September 1965; *Report of the Secretary-General on the Observance of the Cease-Fire Under Security Council Resolution 211 of 20 September 1965,* UN Doc. S/6710 of 25 September 1965.

[32] UN Security Council, *Resolution No.* 209 (1965), *The India-Pakistan Question,* UN Doc. S/RES/209(1965) of 4 September 1965; *Resolution No.* 210 (1965), *The India-Pakistan Question,* UN Doc. S/RES/210(1965) of 6 September 1965; *Resolution No.* 211 (1965), *The India-Pakistan Question,* UN Doc. S/RES/211(1965) of 20 September 1965; *Resolution No.* 214 (1965), *Demanding that parties observe the cease-fire and calls for prompt withdrawal of military personnel*, UN Doc. S/RES/214(1965) of 27 September 1965; *Resolution No.* 215 (1965), *Calling upon India and Pakistan to schedule troop withdrawal,* UN Doc. S/RES/215(1965) of 5 November 1965; *Resolution No.* 307(1971), *Demanding that a durable cease-fire be observed in the India-Pakistan question,* UN Doc. S/RES/307(1971) of 21 December 1971.

[33] In this regard see Chapter II, para. 3.1.

[34] UN General Assembly, *Resolution No*. 2793(XXVI), *Question considered by the Security Council at its 1606th, 1607th and 1608th meetings on 4, 5 and 6 December 1971,* UN Doc. A/RES/2793(XXVI) of 7 December 1971.

[35] See B. R. FARRELL, *op. cit.,* 357.

reason of the article of the UN Charter under which the Indian complaint and the Pakistani counter-complaint were lodged: it was Article 35. Conversely, a different language characterized the resolutions adopted in 1965 and in 1971. They did not suggest possible solutions or direct UN agents to facilitate negotiation between the parties anymore; but they called upon ceasefire. Although they contained no reference to their legal basis, in the light of their content, these resolutions were allegedly adopted pursuant to Article 40 of the UN Charter. That is, they were resolutions that, while still not imposing obligations on the two disputants, fell under the umbrella of Chapter VII of the UN Charter.

Furthermore, it cannot but be observed that although China is also a party to the dispute and has also resorted to the use of force to assert its position, its conduct and its claims never constituted an item of which not only (obviously) the Security Council, but also the General Assembly were sized. In general, the UN approach has not proven to be fully successful. On the one hand, it is undeniable that its intervention made it possible, in several circumstances, to achieve a ceasefire and (also thank to the deployment of UNMOGIP) to prevent the outbreak of a larger conflict. On the other hand, however, it is equally undeniable that the UN has not been able to resolve the *Kashmir issue;* rather, it even seems to have recently shown disinterest in it. It is a fact that, although in recent years there has been a new escalation of tension between both India and Pakistan and between India and China, the 1971 resolutions were the last actions taken by the General Assembly and the Security Council. The latter's meeting held in 2019, at the request of Pakistan due to certain domestic policy choices made by India, ended without the adoption of a resolution or the publication of press release[36].

3. Although the *Kashmir issue* has been internationalized since 1948 when it was first brought before the UN Security Council, it has not attracted great attention by international Community[37].

[36] That meeting was held behind closed doors under request of Pakistan, and with China's support, on 13 August 2019.

[37] About the position of the international Community on the *Kashmir issue* in literature, from a geo-political perspective, see O. I. CHEEMA, *Kashmir Dispute and International Community*, in *Strat. St.,* 1995/96, 57-79; H. SCHAFFER, *The International Community and Kashmir*, in *IDEALS*, 1997, 15-18; M. HUSSAIN, *The Kashmir Issue: Its International*

In the early years, some timid attempts to promote a settlement of the dispute outside the UN came only from some of major powers. In the 1960s, the United States and the United Kingdom conducted six rounds of talks to solve the *Kashmir issue* to little avail. For its part, in 1966 the Soviet Union engineered an agreement at Tashkent which ended the second Indo-Pakistan War. However, that agreement merely restored the *status quo ante bellum*, so it did not solve the dispute[38].

From the conclusion of the 1972 Simla Agreement establishing the parties' commitment to resolve the issue bilaterally to the end of 1980s the *Kashmir issue* fell into oblivion, while the two *superpowers* were busy preserving their spaces of influence[39]. Following the end of the Cold War, the United States took again the lead in international efforts to deal with the dispute, but neither it nor any other State did much more than urge the two claimants to reach a settlement bilaterally[40] .

The role played by international regional organizations in favoring a solution has been even less relevant. Indeed, the *Kashmir issue* has remained off the agenda of the two Asian organizations to which both India and Pakistan are parties, namely SAARC[41] and

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Dimension, in R. G. THOMAS (ed.), *Perspectives on Kashmir: The Roots of Conflict in South Asia*, New York-Abington, 2019, 341-349.

[38] See Tashkent Declaration, 10 January 1966. The Declaration was issued at the end of a conference between the Indian Head of Government and its Pakistani counterpart through the mediation of the Soviet Prime Minister and pressure from the United States and the UN.

[39] It is worth noting that the evolving Cold War with the Soviet Union in Iran, Turkey and West Asia forced the United States to review the significance of South Asia. While India was identified as neutral and increasingly friendly towards the Soviet Union, Pakistan became the focus of American partnership in the strategically vital Southwest Asia abutting the Gulf, Soviet Central Asia, China and India. Cultivating friendship with Pakistan implied protection of Anglo-American interests in the oil-rich Persian Gulf, the principal goal of British and American policy.

[40] In a geo-political perspective, in the post-Cold War era, the collapse of Communism changed the strategic dynamics of the US policy towards India and Pakistan; in particular, India became strategically important to balance out China's rising power in the Indo-Pacific region. See A. GUL, R. AHMAD, *Critical Analysis of the US Mediating Role in India-Pakistan Conflict*, in *Margalla Papers*, 2019, 119-126.

[41] SAARC is an economic and political regional organization comprising eight South Asian States (Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka). The Organization was established with the signing of the SAARC Charter in Dhaka on 8 December 1985. It aims to accelerate the process of economic and social development in its member States through increased intra-regional cooperation. About SAARC in literature among others see E. GONSALVES, N. JETLY, *The Dynamics of South Asia: Regional Cooperation and SAARC,* New Delhi, 1999; B. C. UPRETI, *SAARC: Dynamics of Regional Cooperation in South Asia,* New Delhi, 2000; L. SÁEZ, *The South Asian Association for Regional Cooperation (SAARC): An Emerging Collaboration Architecture,* London, 2011; R.

SCO[42]. Out of fear that political contrasts (such as the *Kashmir issue*) between two Member States could undermine interstate cooperation, at the time of the establishment of SAARC, its Member States decided that bilateral and contentious issues were excluded from its deliberations (Article X(2) SAARC Charter). Although the SCO Charter does not contain such a provision, the *Kashmir issue* has also been ignored by the Organization whose activities seem, however, to be conditioned by Indo-Pakistan rivalries. Such an approach to leave divisive issues or disputes involving two or more members out of the organization is fully consistent with the so-called *Asian way*, that is, a markedly voluntaristic view of interstate cooperation which is based on constant mutual benefit. Asian States do not consider regional organizations as means of overcoming common problems or rivalries, according to the European approach[43]. Rather, they consider them as means to realize carefully balanced reciprocal interests. This explains why Asian States tend to participate in forms of association whose activities are regarded as concretely useful, from time to time, and to keep issues of disagreement out of cooperation.

KUMAR, O. GOYAL (eds), *Thirty Years of SAARC: Society, Culture and Development*, New York, 2016; B. CHAKMA, *South Asian Regionalism: The Limits of Cooperation*, Bristol 2020.

[42] SCO is an intergovernmental organization which is endowed with political and economic competences. It was established by the so-called *Shanghai Declaration* (15 June, 2001) which was followed by the signing of the SCO Charter in St. Petersburg on 7 June 2002. It currently comprises 10 members (Russia, China, Kazakhstan, Uzbekistan, Tajikistan, Kirghizstan, Pakistan, India, Iran and Belarus). About SCO in literature see mainly M.-R. DJALILI, T. KELLNER, *L'Organisation de Coopération de Shanghai: nouveau Léviatan eurasiatique ou colosse aux pieds d'argile?*, in *Conflits, sécurité et coopération*: *Liber amicorum Victor-Yves Ghebali*, Bruxelles, 2007, 193-221; A. J. K. BAILES ET AL., *The Shanghai Cooperation Organization,* SIPRI, Stockholm, 2007; E. TINO, *Una nuova sfida nel regionalismo multipolare asiatico: la Shanghai Cooperation Organization*, in *CI*, 2009, 273-292; L. KUMAR, *Shanghai Co-operation Organisation: Eurasian Security through Cooperation*, Delhi, 2011; S. ARIS, *Eurasian Regionalism: the Shanghai Cooperation Organization*, Houndmills-New York, 2012; C. CARLETTI, *Opportunità di crescita delle partnership istituzionali dell'Unione europea fra Medio Oriente ed Asia: Il Consiglio di Cooperazione del Golfo e l'Organizzazione di Cooperazione di Shanghai*, in *St. Int. Eur.*, 2013, 353; R. ALIMOV, *The Shanghai Cooperation Organisation: Its role and place in the development of Eurasia*, in *J. Eur. St.*, 2018, 117-124. About the membership of India and Pakistan in SCO, see Z. S AHMED ET AL., *Conflict of Cooperation? India and Pakistan in Shanghai Cooperation Organization*, in *Pac. Focus,* 2019, 5-30.

[43] The experience of the European integration process is emblematic in this regard. Schuman's proposal to place Franco-German production of coal and steel under a common High Authority, thus establishing an organization open to the participation of other European countries (the European Community of Coal and Steel) answered the need to remove centuries-old rivalry between France and Germany which had provoked bloody wars. In Europe, the perception of common good on the part of the EEC Members overcame the long-ingrained history of bilateral and multilateral rivalries.

The only regional organization concerned with the *Kashmir issue* is the OIC, an intergovernmental organization gathering 57 States belonging to the Islamic World; Pakistan is among them. And, as it can be imagined, it was precisely the Government of Islamabad which placed the issue before the OIC. However, rather than promoting a compromise solution, the Organization merely (understandably) espoused the Pakistani cause and, since the 1990s, its intergovernmental bodies have been regularly adopting declarations and resolutions condemning *India's occupation* of the territory of the former Princely State of Jammu and Kashmir and supporting the Kashmiris' right to self-determination[44]. Then, to voice its position and to coordinate joint actions on the dispute, the OIC also established the Contact Group on Jammu and Kashmir which closely monitors and articulates concerns over the evolving developments in India-Administered Kashmir[45]. Furthermore, the political and social situation in that region has also interested the Independent Permanent Human Rights Commission (IPHRC) established within the OIC[46],

[44] See, particularly, OIC Council of Foreign Ministers, *Resolution No. 11/20-P on Jammu and Kashmir Dispute,* 8 August 1991; OIC Council of Foreign Ministers, *Resolution No. 9/21-P on Jammu and Kashmir Dispute*, 29 April 1993; OIC Council of Foreign Ministers, *Resolution No. 8/22-P on Jammu and Kashmir Dispute*, 12 December 1994; 7th Islamic Summit Conference, *Special Declaration on the Jammu and Kashmir,* 15 December 1994; OIC Council of Foreign Ministers, *Resolution No. 7/23-P on Jammu and Kashmir Dispute*, 12 December 1995; OIC Council of Foreign Ministers, *Resolution No. 8/24-P on Jammu and Kashmir Dispute*, 13 December 1996; OIC Council of Foreign Ministers, *Resolution No. 9/25-P on Jammu and Kashmir Dispute*, 17 March 1998; OIC Council of Foreign Ministers*, Resolution No. 9/26-P on Jammu and Kashmir Dispute*, 1 July 1999; OIC Council of Foreign Ministers, *Resolution No. 14/9-P(IS) on Jammu and Kashmir Dispu*te, and *Resolution No. 15/9-P (IS) on the escalation of the tensions in Jammu and Kashmir,* 13 November 2000; 10th Session of the Islamic Summit Conference, *Declaration on Jammu and Kashmir*, 17 October 2003; etc. Lastly see OIC Council of Foreign Ministers, *Resolution No.10/46-POL on the Jammu and Kashmir Dispute*, 2 March 2019; OIC Council of Foreign Ministers*, Resolution No. 10/47-POL on the Jammu and Kashmir Dispute,* 28 November 2020; OIC Council of Foreign Ministers, *Resolution No. 8/48-POL on the Jammu and Kashmir Dispute*, 23 March 2022; OIC Council of Foreign Ministers, *Resolution No. 8/49-POL on the Jammu and Kashmir Dispute*, 17 March 2023. About the OIC's position on the *Kashmir issue* in literature see Z. IMAM, *OIC and the Kashmir Issue,* in *Int'l St.,* 2002, 193-194.

[45] The OIC Contact Group on Jammu and Kashmir was established in 1994 as a platform comprising representatives of Azerbaijan, Niger, Pakistan, Saudi Arabia and Turkey. Lastly, the Contact Group met at the sidelines of the 79th session of the UN General Assembly. See Joint Communiqué of the Meeting of the OIC Contact Group of Jammu and Kashmir, 26 September 2024, https://mofa.gov.pk/press-releases/joint-communique-of-the-meeting-of-the-oic-contact-group-on-jammu-and-kashmir.

[46] The Independent Permanent Human Rights Commission (IPHRC) is an expert body with advisory capacity established by the OIC as one of the principal organs working independently in the area of human rights.

which is mainly concerned with the human rights aspects of the *Kashmir issue*[47].

Outside Asian continent, over the past two decades an interest in the issue has been shown by the European Union. In May 2007 an overwhelming majority in the European Parliament passed the «Report on Kashmir: Present Situation and Future Prospects»[48]. It raised particularly the issue of human rights violations in the territories originally belonging to the Princely State of Jammu and Kashmir and called on involved Governments to allow international human rights groups access to the region for investigations. Since then, the European Parliament has not lost sight of the issue it discussed, at the urging of some of its members, following India's decision to revoke the autonomy *status* originally granted to its Federated State of Jammu and Kashmir[49]. In general terms, the EU's position to date has been to encourage the parties to the dispute to find a lasting solution, by engaging in a positive dialogue, and by involving as far as possible the Kashmiris.

4. Currently, the LoC and the LAC divide the territory of the former Princely State of Jammu and Kashmir into three parts. The so-called «India-Administered Kashmir» consists of territories located in the South and East of the LoC. On the other side of the line, in the Northern and Western part there are the territories under the control of Pakistan. They are commonly known as «Pakistan-Administered Kashmir». Finally, the large area of the Northeastern part of the former Princely State of Jammu and Kashmir, including Aksai Chin and Shaksgam Valley, belong to the so-called «China-Administered Kashmir». Each of these territories has a different political *status* and is differently administered.

[47] See *OIC-IPHR, Report on Fact Finding Visit to the State of Azad Jammu and Kashmir to Assess Human Rights in the Indian Occupied Kashmir*, 27-29 March 2017; *OIC-IPHRC, Report on the 2nd Fact Finding Visit to State of Azad Jammu and Kashmir to Assess Human Rights Situation in the Indian Occupied Kashmir,* 4-8 August 2021.

[48] European Parliament, Resolution of 24 May 2007 *on Kashmir: present situation and future prospects,* (2005/2242(INI)).

[49] https://www.europarl.europa.eu/doceo/document/CRE-9-2019-09-17-ITM-018_EN.html

4.1. Pursuant to the Instrument of accession concluded in October 1947, Indian Government formally incorporated into the Indian Union the territories, originally belonging to the Princely State of Jammu and Kashmir, located in the South and East of the LoC. The terms of their accession to the Union were agreed by the Indian Prime Minister, Nehru, and his counterpart of the Princely State[50]. Their intense negotiations concluded in 1952 with the signing of the so-called *Delhi Agreement*[51] which *de facto* acknowledged what was agreed in the Instrument of accession. The content of the Delhi Agreement then flowed into the Indian Constitution. The territories of the former Princely State of Jammu and Kashmir located in the East and South of the LoC amounted to a Federated State, called «State of Jammu and Kashmir», which enjoyed a special *status* of autonomy within the Indian Union, as evinced by the fact that it was exempt from the complete applicability of the Indian Constitution: only Article 1, defining the Union[52], and Article 370 applied[53]. The

[50] For a detailed analysis of those negotiations, see A. G. NOORANI, *Article 370: A Constitutional History of Jammu and Kashmir,* Oxford, 2011, 50-172.

[51] See Delhi Agreement of 24 July 1952.

[52] Pursuant to Article 1 of the Indian Constitution, «[t]he territory of India shall comprise: (a) the territories of the States; (b) the Union territories specified in the First Schedule; and (c) such other territories as may be acquired». Currently, it counts 28 States where the Governor, as the representative of the President, is the head of Executive, and 8 Union Territories administered by the President through an Administrator appointed by him.

[53] Pursuant to Article 370 of the Indian Constitution, «a. the provisions of article 238[dealing with the application of provisions in Part VI concerning the administrative organization of Indian States] shall not apply in relation to the State of Jammu and Kashmir; b. the power of Parliament to make laws for the said State shall be limited to: (i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and (ii) such other matters in the said Lists, as, with the concurrence of the Government of the State, the President may by order specify; c. the provisions of article 1 and of this article shall apply in relation to that State; d. such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify:

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State:

Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

2 If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

Federated State of Jammu and Kashmir had its own Constitution (which entered into force in 1956), its own flag, as well as its own legislative, executive and judicial bodies which were entitled to exercise governing powers on all matters except for foreign policy, defense and communications. Thus, as agreed in the Instrument of accession and reiterated in the Delhi Agreement, the powers of the Indian Parliament over the State were limited to the aforementioned matters. Other constitutional powers of the Indian Government could be extended to the State of Jammu and Kashmir only with the concurrence of its Government and the approval by its Constituent Assembly[54]. Moreover, a recommendation by the latter was necessary to abrogate or amend Article 370 of the Indian Constitution. Finally, pursuant to Article 35A of the Indian Constitution, the Legislature of Jammu and Kashmir was entitled to provide special rights and privileges to permanent residents of the State[55]. They concerned the ability to purchase land and immovable property, to vote and contest elections, to seek government employment and to avail oneself of other State benefits, such as higher education and health care[56].

The special *status* of autonomy granted to the Federated State of Jammu and Kashmir by the Indian Constitution remained into force until summer 2019, when the New Delhi Government issued a Presidential Order repealing Article 370 of the Indian Constitution[57], thus making all its provisions of the Indian Constitution applicable to

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3. Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification».

[54] The Constituent Assembly of Jammu and Kashmir was convened on 31 October 1951 and was dissolved on 17 November 1956, when the Constitution was adopted. Its involvement in amending or repealing Article 370 of the Indian Constitution (as provided for by Article 370 itself) has been variously interpreted. In this regard, see T. AMICO DI MEANE, *Una fine annunciata? La revoca dell'autonomia del Kashmir nel fragile federalismo indiano*, in *DPCE*, 2020, 98-99. It is also worth noting that, according to the UN Security Council, the Constituent Assembly could not be regarded as representative of the will of Jammu and Kashmir's people. See UN Security Council, *Resolution No.* 91 (1951), cit.; *Resolution No.* 122 (1957), cit.

[55] Article 35A was added through a Presidential Order under Article 370 of Indian Constitution. See the Constitution (Application to Jammu and Kashmir) Order, 1954.

[56] Non-permanent residents of the Federated State of Jammu and Kashmir, even if Indian citizens, were not entitled to these privileges.

[57] The Constitution (Application to Jammu and Kashmir) Order, 2019, C.O. 272 of 5 August 2019. This order was based on the resolution passed in both houses of Indian Parliament with two-thirds majority.

Jammu and Kashmir[58]. The Presidential Order was then followed by the enactment of the *Jammu and Kashmir Reorganization Act* which abolished the Federated State of Jammu and Kashmir and ordered the creation of two Union Territories in its place[59], namely Jammu and Kashmir, and Ladakh. These are, in effect, mere administrative units without legislative power and governed by bodies appointed by the President of the Union (Article 239 of the Constitution). Additionally, in 2020 the Indian Government passed the *Adaptation Order*, extending domiciliary *status* to Indian citizens who have resided or worked in the territory for a certain time period, including bureaucrats, children of bureaucrats, migrant laborers, and army officers[60]. In other words, Article 35A of the Indian Constitution was repealed too.

4.2. As mentioned above, the territories of the former Princely State of Jammu and Kashmir located in the North and West of the LoC are currently controlled by Pakistan. They are administered as two separate territories: Azad Jammu and Kashmir, on the one hand, and Gilgit-Baltistan, on the other hand. Unlike India, Pakistan has not formally annexed those territories to its own yet; accordingly, Article 257 of the Pakistani Constitution states that «when the people of the State of Jammu and Kashmir decide to accede to Pakistan, the relationship between Pakistan and that State shall be determined in accordance with the wishes of the people of that State». On the other hand, the territories of Azad Jammu and Kashmir and Gilgit-Baltistan are not even independent.

Azad Jammu and Kashmir is currently governed by the 1974 Azad Kashmir Provisional Constitution, as amended lastly in 2018[61]. It allows for self-government providing that Azad Jammu and Kashmir has its own President, Prime Minister and State Council, as well as its own elected legislative assembly. The latter's powers are however limited: pursuant to the Azad Kashmir Provisional

[58] In this sense see Declaration under Article 370(3) of the Constitution, C.O. 273 of 6 August 2019.

[59] The Jammu and Kashmir Reorganization Act, 2019 No. 34 of 2019 of 9 August 2019.

[60] See Jammu and Kashmir Reorganization (Adaptation of State Laws) Order, 2020, of 1 April 2020.

[61] See Azad Jammu and Kashmir Interim Constitution (Thirteenth Amendment) Act, 2018. About current socio-political situation in Azad Jammu and Kashmir see E. MAHMUD, *Azad Jammu and Kashmir's Quest for Empowerment*, in S. HUSSAIN (ed.), *Society and Politics of Jammu and Kashmir,* London, 2020, 79-97.

Constitution (Article 31), the Legislative Assembly cannot enact laws regarding defense, security, currency, external affairs, foreign trade, since these matters are vested in Pakistani authorities. Moreover, the Provisional Constitution formally provides the State Council, comprising the Prime Minister of Pakistan and other members nominated by him/her. Before the 2018 amendment it was vested with all the legislative powers on the subjects mentioned in the Council's legislative list including executive authority under those laws. It was both a legislative body and a proxy of the Federal Government of Pakistan and the State judiciary could not review its decisions. The 2018 amendments to the Azad Kashmir Provisional Constitution introduced significant changes which has *de facto* limited self-governing powers of local authorities. The State Council was divested of all legislative and executive powers, but its members and employees saved intact for a consultative role in respect to the matters and subjects mentioned in Article 31(3) and in respect of the responsibilities of the Government of Pakistan under UNCIP Resolutions. However, in practice, no such consultative process has taken place until now. The 2018 amendment did indeed expand the powers of the Legislative Assembly, which is now also empowered to legislate on other subjects (listed in Part B of the council legislative list) and to amend the Provisional Constitution, but the consent of the Government of Pakistan is required[62]. As it is evident, in Azad Jammu and Kashmir local institutions have little authority in practice, because the power ultimately rests with the central Government of Islamabad.

The situation in Gilgit-Baltistan is not different. It was directly ruled by the central Government of Islamabad for almost 60 years. Then, in September 2009 it obtained partial autonomy which, in reality, is only nominal. The Gilgit-Baltistan Empowerment and Self-Governance Order provided for a more powerful legislative assembly, which currently has the authority to choose the Chief Minister, and introduced legislation on 61 subjects[63]. Matters which do not fall under the Legislative Assembly's competence are covered by the Gilgit-Baltistan Council, which consists of six members of the

[62] In particular, the Legislative Assembly cannot amend Article 31 (concerning its powers), Article 33 (concerning the amendment procedure itself) and Article 56 (devoted to responsibility of Pakistan) of the Azad Jammu and Kashmir Provisional Constitution without prior approval of the Government of Pakistan.

[63] See Government of Pakistan – Ministry of Kashmir Affairs and Northern Areas, *Order to provide greater political empowerment and better governance to the people of Gilgit-Baltistan*, Islamabad, 9 September 2009, https://www.satp.org/Docs/Document/845.pdf

Legislative Assembly and nine Pakistani Parliament members, and it is headed by the Pakistani Prime Minister and vice-chaired by the federally appointed Governor. As it is evident, it is controlled by Pakistan. Additionally, a majority of high-level positions in the local administration are reserved for Pakistani bureaucrats, limiting local involvement in decision-making. No significant changes were introduced by the 2018 Gilgit-Baltistan Order. Evidence of this is the fact that the latter was not formulated with the consultation of locals from the region[64].

In general terms, the political systems of these two territories are different from those of the rest of Pakistan and they both have no representation in the national Parliament.

4.3. The so-called China-Administered Kashmir includes the territory of Aksai Chin, namely the large area of the Northeastern part of the former Princely State of Jammu and Kashmir. Specifically, it was historically part of *Ladakh.* It is an arid territory over which China exercises full sovereignty. Proofs of this come from the official *standard map*, recently released by Chinese authorities, which continues to show the Aksai Chin region as being within its borders (see *Appendix 4*).

From administrative point of view, Aksai Chin is part of Hotan County within the autonomous region of Xinjiang. An autonomous region is a provincial level administrative division. In particular, it is the highest level of minority autonomous entity in China, which has a comparably higher population of a particular minority ethnic group[65]. So, being an autonomous region, the administrative structure of Xinjiang reflects the policies of recognition of ethnic minorities and self-administration, it has its own local Government, and more legislative rights, such as the right to formulate self-government regulations and other separate regulations.

The aforementioned Xinjiang autonomous region also includes the territory of Shaksgam Valley, also known as Trans-Karakorum Tract. It was historically part of Hunza-Gilgit region of the former

[64] See Government of Pakistan – Ministry of Kashmir Affairs and Northern Areas, *Order to provide for political empowerment and good governance in Gilgit-Baltistan*, Islamabad, 3 May 2018. For further considerations about current political situation in Gilgit-Baltistan see M. HUSSAIN, *Gilgit-Baltistan and the Ongoing Politics of Ambiguity,* in S. HUSSAIN (ed.), *Society and Politics of Jammu and Kashmir,* London, 2020, 99-116.

[65] Pursuant to Article 30 of the Chinese Constitution, «[a]ll autonomous regions, autonomous prefectures and autonomous counties are ethnic autonomous areas».

Princely State of Jammu and Kashmir. Since 1949 this territory fell under physical control of Pakistan being included in the so-called Pakistan-Administered Kashmir. As a result of the conclusion of the 1963 Sino-Pakistan boundaries Agreement, the Shaksgam Valley was then ceded by Pakistan to China which has since exercised full sovereign powers over it. In particular, under Chinese law, it is part of its Taxkorgan and Yecheng counties in the foregoing Xinjiang Region. It is one of the most inhospitable areas of the world, with some of the highest mountains. However, it has a strategic significance for China; due to its geographical location the Shaksgam Valley allows China to link Gilgit with Hotan, which is an important military headquarter situated at the cross-section of the Tibet-Xinjiang Highway and Hotan-Golmud Highway[66]. Thus, over the years it has built roads, as well as military posts in Shaksgam Valley.

5. Though nearly 80 years have passed since it arose and despite the UN intervention and the feeble attempts of the international Community, the *Kashmir issue* continues to be unresolved. The words expressed by the Pakistani Prime Minister during the 78th session of the UN General Assembly are emblematic in this respect. He stated that «Kashmir is the key to peace between India and Pakistan»[67] and observed that «[t]he Jammu and Kashmir dispute is one of the oldest issues on the agenda of the Security Council»[68].

Since 1947 the Government of Pakistan, supported by Pakistani scholars and the entire Islamic World[69], has been contesting the accession of the Princely State of Jammu and Kashmir to the Indian Union on the grounds that it would have its legal basis on an agreement (i.e. the so-called Instrument of accession) that is invalid on several grounds[70]. So, according to Pakistan, India would be exercising governing powers over the territory of Jammu and Kashmir without a valid sovereign title; therefore, the territory in question would amount to an occupied territory and, consequently, the people

[66] The Hotan-Golmud Highway links Xinjiang to Qinghai province and central China.

[67] Statement by the Prime Minister of Pakistan, General Debate of the 78th Session of the UN General Assembly, 22 September 2023, para. 11.

[68] Statement by the Prime Minister of Pakistan, cit., para. 12.

[69] We refer to the positions expressed by the OIC. See *supra*, para. 3.

[70] These grounds will be investigated in Chapter II.

settled on it would be entitled to the right to self-determination[71]. Furthermore, over the years Pakistan has strongly criticized the way in which India has been exercising its sovereignty over that territory. In particular, it has accused India of perpetrating continuous and massive human rights violations against the Kashmiris, particularly after its decision to revoke the constitutionally guaranteed autonomy *status* of the Federated State of Jammu and Kashmir[72]. The Islamabad Government reacted by addressing some letters to the UN Secretary-General and the President of the UN Security Council, thus urging UN intervention[73].

India's decision to revoke the autonomy *status* from Jammu and Kashmir was not welcomed by China either. In particular, it

[71] Over the years Kashmiris' entitlement to self-determination has been strongly supported by Pakistani scholars. See mainly A. KHAN, *The Kashmir Dispute: A Plan for Regional Cooperation*, in *CJTL*, 1994, 495-550; K. BALAGOPAL, *Kashmir: Self-Determination, Communalism and Democratic Rights*, in *Economic and Political Weekly,* 1996, 2916-2921; L. MOHIUDDIN, *Human Rights Violations: A Case Study of Kashmir*, in *Pak. Hor.*, 1997, 75-97; F. N. LONE, *The Creation Story of Kashmiri People: the Right to Self-Determination*, in *Denning L. J.,* 2009, 1-25; SEHGAL, *Kashmir Conflict and Self-determination,* London, 2011; R. M. KHAN, *Kashmir Dispute: A Legal Perspective*, in *NDU Journal,* 2015, 135-159; H. KANJWAL, *Kashmir: A Case for Self-Determination*, in *BJWA,* 2019, 253-266; I. ABBASSI, *Legitimacy of Kashmir's Liberation Struggle: Right to Self-Determination Under International Law*, in *Strat. St.*, 2020, 58-73; I. CHAKRABARTY, *Self-Determination: What Lessons from Kashmir?,* in *IICLR*, 2021, 35-59; M. SAIFUDDIN, M. FATIMA, *Right to Self-Determination and Kashmiris: A Conceptual Understanding and Perspective*, in *Orient Res. J. Soc. Sc.,* 2021, 1-13; S. MALIK, N. AKHTAR, *Explaining Jammu and Kashmir Conflict under Indian Illegal Occupation: Past and Present,* in *Margalla Papers*, 2021, 23-35.

[72] In this regard in literature see H. KANJWAL, *op. cit*.; M. KHAN, S. KHAN, *Demographic Change in Kashmir: A Perspective of International Law,* in *Glob. Leg. St. Rev.*, 2019, 7-15; A. BILAL SOOFI ET AL., *The Status of Jammu and Kashmir under International Law*, in *Res. Soc. Int'l L.,* 2019 2-17; I. ABBASSI, *op. cit.;* M. AZAM, *Infringements of International Law and UN Charter in Indian Occupied Kashmir,* in *Margalla Papers*, 2020, 71-82; A. H. WANI, *Kashmir under Occupation and Crimes against Humanity,* in *Pak. Hor.*, 2020, 91-94; I. CHAKRABARTY, *op. cit.*; M. SAIFUDDIN, M. FATIMA, *op. cit.;* R. Q. IDREES ET AL., *The Indian Occupied Kashmir Dispute: A Legal Analysis in Purview of United Nations Resolutions,* in *Pak. JIA,* 2021, 105-123; S. MALIK, N. AKHTAR, *op. cit.*; S. K. MEHDI ET AL., *Analysis of Kashmir's Special Status Revocation under International Law*, in *Pak. JIA,* 2022, 461-472.

[73] See Chargé d'affaires a.i. of the Permanent Mission of Pakistan to the United Nations, *Letter addressed to the Secretary-General,* S/2019/623 of 1 August 2019; Permanent Representative of Pakistan to the United Nations, *Identical Letters addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council*, A/73/974–S/2019/635 of 6 August 2019; Permanent Representative of Pakistan to the United Nations, *Letter addressed to the President of the Security Council*, S/2019/654 of 13 August 2019; Permanent Representative of Pakistan to the United Nations, *Letter addressed to the President of the Security Council,* S/2019/944 of 21 December 2019; Permanent Representative of Pakistan to the United Nations, *Letter addressed to the President of the Security Council,* S/2020/771 of 3 August 2020.

considered the separation of Ladakh into a union territory as *unacceptable* and as a threat to its territorial sovereignty[74], since Ladakh is geographically contiguous to China-Administered Kashmir, and it historically included the territory of Aksai Chin which is currently under Chinese control. So, China supported Pakistan's request to the UN Security Council to consider the issue in 2019.

For its part, India has always rejected allegations. It claims that it legitimately exercises sovereignty over the territory of the former Federated State of Jammu and Kashmir by virtue of the Instrument of accession concluded in 1947[75]. Rather, it is Pakistan that is violating international law; it has been controlling part of the territory of the former Princely State since 1947, as a result of its military invasion[76]. So, on the assumption that the Princely State of Jammu and Kashmir became part of the Indian Union by virtue of the aforementioned Instrument of accession, India considers the *Kashmir issue* not as a *territorial dispute* between the two countries, but as a *situation* under international law which arose due to Pakistan's aggression in its territory[77]. Furthermore, Pakistani Government is accused of supporting the opposition and insurrection of Kashmiris against the Indian presence, as well as of training, arming and financing terrorist groups that spread terror in India-Administered Kashmir [78]. Additionally, India continues to claim the Aksai Chin region, which is under Chinese control[79], and replies to critics concerning the changed

[74] See Foreign Ministry Spokesperson Hua Chunying's Remarks on the Indian Government's Announcement of the Establishment of the Ladakh Union Territory Which Involves Chinese Territory of 6 August 2019, https://www.mfa.gov.cn/eng/xwfw_665399/s2510_665401/2535_665405/201908/t20190806_696969.html

[75] About the *Kashmir issue* from the Indian perspective, see S. GANGULY, K. BAJPAI, *India and the Crisis in Kashmir,* in *Asian Survey*, 1994, 401-416; H. KAUL, *Kashmir – A Problem?,* in *World Affairs,* 1995, 24-27; G. M. SHAH SHRI PRAKASH, *Towards Understanding the Kashmir Crisis*, New Delhi, 2002; V. BHAGWAT, *Kashmir–The Keystone of India's National Security*, in *World Affairs,* 2005, 64-72.

[76] Replying to charges expressed by Pakistani Prime Ministers at the 75th session of the UN General Assembly, the Indian delegate stated *inter alia* that «the only dispute left in Kashmir relates to that part of Kashmir that is still under the illegal occupation of Pakistan». See https://www.hindustantimes.com/india-news/un-general-assembly-india-dismisses-pakistan-pm-s-criticism-on-kashmir-issue/story-iHmPmEZ8AKaTSTh450OViP.html

[77] In this sense see Q. J. MIAN, *Resolving Kashmir Dispute under International Law*, 3, https://www.pja.gov.pk/system/files/Resolving_Kashmir_Dispute_Under_International_Law.pdf .

[78] In this sense see T.N.K., *Kashmir – What is at Stake There*?, in *World Affairs,* 1992, 62.

[79] The New Delhi Government claims Aksai Chin to be a part of the India-controlled Ladakh province.

status of Jammu and Kashmir by stating that it is a matter covered by the principle of non-interference in internal affairs.

6. As said, India, Pakistan and China continue to take diametrically opposed positions on the *Kashmir issue*. Hence, who is right? Where does the *reason*, at least the legal one, lie? Particularly where does international law stand? These questions acquire even more relevance if one considers that the *Kashmir issue* has been all but ignored. As already said, except for UN at universal level, and OIC and, in limited manner, EU at regional one, international organizations have not addressed the issue or expressed a position on it. Moreover, the *Kashmir issue* has been mostly overlooked by most international law scholars who did not have Indian, Pakistani, and Chinese nationality[80].

This manuscript aims to fit into this *vacuum* and to offer a legal investigation of the issue in order to verify which position is the correct one from the perspective of international law and to suggest possible solutions. The question is whether India, Pakistan and China are really legitimately exercising control over the territories originally belonging to the Princely State of Jammu and Kashmir, and whether the legal titles they claim are really valid. It is also a question of whether the principle of self-determination of peoples, which has been repeatedly invoked by Pakistan and the Islamic World, really applies to the issue and, therefore, whether the Kashmiris really hold such a right. Finally, it is a matter of ascertaining whether actions and measures implemented by India, Pakistan and China on the territories of the former Princely State of Jammu and Kashmir under their respective control resulted in human rights violations.

The specifics of the *Kashmir issue* raise a methodological problem. Given that the facts and the legal issues underlying them

[80] Among the few non-Indian, non-Pakistani and non-Chinese scholars who studied the *Kashmir issue*, see R. BASTIANELLI, *La questione del Kashmir ed i rapporti fra India e Pakistan*, in *Informazioni della Difesa*, 5/2020, 12-19; S. CORDERA, *La questione del Kashmir: origini e sviluppi recenti*, in *IndiaIndie,* 2011, https://www.iai.it/sites/default/files/indiaindie_04.pdf; T. AMICO DI MEANE, *op. cit.*; F. GORTAN, *L'occupazione del Kashmir*, in *IRIAS Review - Studi sulla pace e sui conflitti*, 2021, 4-29; G. HOWARD, *India's Removal of Kashmir's Special Protection Status: an Internationally Wrongful Act?*, in *Univ. Miami ICLR,* 2021, 493-517; A. KUSZEWSKA, *The India-Pakistan Conflict in Kashmir and Human Rights in the Context of Post-2019 Political Dynamics*, in *As. Aff.*, 2022, 198-217.

date back to the 1940s and that in the meantime the relevant rules of international law have evolved (e.g. peoples' right to self-determination, protection of human rights, etc.), the question arises of whether the *old* or the *current* law is to be applied. In other words, problems of temporal nature arise. In 1975 the *Institut de Droit International* adopted a resolution concerning the «Intertemporal Problem in Public International Law»[81]; its Article 1 stated that «[u]nless otherwise indicated, the temporal sphere of application of any norm of public international law shall be determined in accordance with the general principle of law by which any fact, action or situation must be assessed in the light of the rules that are contemporaneous with it». This Article incorporated the position expressed by Max Huber acting as arbitrator for the Permanent Court of Arbitration (PCA) in the 1928 famous *Island of Palmas Case.* He argued that «a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when the dispute in regard to it arises or falls to be settled»[82]. In other words, the legality or validity of an act is to be judged by the standards in force at the time the act occurs. This point was further confirmed by the ICJ[83] which did not fail to exclude the retroactive application of rules of international law[84].

This work aims to solve the aforementioned methodological problem by following such approach. This means that it will try to offer an unbiased reading of the *Kashmir issue* through the lens of intertemporal international law, that is, the *Kashmir issue* will be analyzed in the light of relevant rules of international law at the time events occurred. It is worth clarifying that such intertemporal approach will not be used in a narrow sense, that is, the evolution of applicable rules over the time will not be completely disregarded.

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[81] Institut de Droit International, *The Intertemporal Problem in Public International Law* (Eleventh Commission, Rapporteur: Mr. Max Sorensen), Session of Wiesbaden – 1975. About the intertemporal law in literature see particularly T. O. ELIAS, *The Doctrine of Intertemporal Law*, in *AJIL*, 1980, 285-307; M. KOTZUR, *Intertemporal Law*, in *MPEPIL* April 2008; S. WHEATLEY, *Revisiting the Doctrine of Intertemporal Law*, in *OJLS*, 2021, 484-509.

[82] See PCA, Award of 4 April 1928, *The Island of Palmas Case (United States of America v. The Netherlands*), para. 845.

[83] See ICJ, Advisory Opinion of 16 October 1975, *Western Sahara*, para. 79; ICJ, Advisory Opinion of 25 February 2019, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, para. 177.

[84] See ICJ, Judgement of 3 February 2012, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening),* paras 58 and 93.

Rather, in order to analyze the *Kashmir issue* and to assess the legitimacy of conducts carried out by India, Pakistan and China over the time a dynamic logic will be used. This means that the law applicable *at that time* will be determined in hindsight, namely from the privileged position of *now*. Admittedly, this is the same approach followed by the ICJ in its Chagos Arcipelago Opinion. Indeed, it concluded that the separation of the Chagos Archipelago was unlawful since it determined that at the time it occurred the rule of self-determination of peoples crystallized with the adoption of the 1960 *Declaration on the Granting of Independence to Colonial Countries and Peoples*[85]. And such determination resulted from the consideration of the 1970 *Declaration on Friendly Relations*[86]. In other words, in 2019 the ICJ judged the issue «with the benefit of hindsight, in the certain knowledge that the General Assembly had confirmed the existence of the self-determination norm in 1970, with the adoption of the Declaration on Friendly Relations»[87]; clearly, it would not have reached the same conclusion in the 1960s. So, the analysis of the *Kashmir issue* will be indeed carried out according to the intertemporal approach but, in line with the ICJ's dynamic logic, relying on legal instruments which postdate the period in question, when those instruments will be useful to confirm or interpret applicable pre-existing rules or principles.

[85] UN General Assembly, *Resolution* No. 1514 (XV). *Declaration on the Granting of Independence to Colonial Countries and Peoples,* UN Doc. A/RES/1514(XV) of 14 December 1960.

[86] UN General Assembly, *Resolution No.* 2625 (XXV). *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,* UN Doc. A/RES/2625(XXV) of 4 October 1970.

[87] S. WHEATLEY, *op. cit.,* 486.

CHAPTER I

THE LEGITIMACY OF CONTROL EXERCISED OVER THE TERRITORY OF THE PRINCELY STATE OF JAMMU AND KASHMIR

TABLE OF CONTENT: 1. The law of occupation under international law and the conditions for its applicability to the *Kashmir issue*. – 2. The requirements of statehood under international law. – 2.1. The international *status* of the Princely State of Jammu and Kashmir from 16 March 1846 to 14 August 1947. – 2.2. … and from 15 August 1947 to 27 October 1947. – 3. The *status* of India-Administered Kashmir under international law. – 3.1. The existence of consent by the territorial State. – 3.1.1. The legitimacy of consent by the territorial State. – 3.2. The existence of a sovereign title: the Instrument of accession. – 3.2.1. The validity of the Instrument of accession under international law. – 3.2.1.1. The capacity of the Princely State of Jammu and Kashmir to conclude the Instrument of accession. – 3.2.1.2. The legitimacy of the consent to conclude the Instrument of accession. – 3.3. The legal effects of the Instrument of accession on the statehood of the Princely State of Jammu and Kashmir. – 4. The *status* of Pakistan-Administered Kashmir under international law. – 4.1. The legal nature of Pakistan's occupation of Azad Jammu and Kashmir and of Gilgit-Baltistan. – 5. The *status* of China-Administered Kashmir under international law. – 5.1. China's occupation of Aksai Chin. – 5.1.1. The legal nature of China's occupation of Aksai Chin. – 5.2. Shaksgam Valley and the illegitimacy of China's legal title over it. – 6. Conclusions

1. India, Pakistan and China accuse each other of illegitimately exercising sovereignty over *their* respective territories that once formed part of the Princely State of Jammu and Kashmir. So that each qualifies the territory controlled by the other as *occupied territory*[88].

[88] Thus, for instance, in official statements of the Pakistani Government and in its letters to the UN, in Resolutions adopted by the OIC intergovernmental bodies, in the Reports of the OIC-IPHRC, as well as in papers and manuscripts of Pakistani scholars the territory of Jammu and Kashmir under Indian sovereignty is usually referred to as *Indian-Occupied Jammu and Kashmir*. In literature, see particularly F. N. LONE, *Historical Title, Self-Determination and the Kashmir Question*, Boston-Leiden, 2018, 242-243; BILAL SOOFI ET AL., *op. cit.;* M. AZAM, *op. cit.;* A. H. WANI, *op. cit.*; F. GORTAN, *op. cit.;* S. MALIK, N. AKHTAR, *op. cit.*; R. Q. IDREES ET AL., *op. cit.;* S. K. MEHDI ET AL., *op. cit.,* 468-469. Likewise, Indian authorities refer to *Pakistan-Occupied Kashmir* and to *China-Occupied Kashmir*. In literature see, among others, V. GUPTA, A. BANSAL, *Pakistan-Occupied Kashmir: an Untold Story*, Mumbai, 2007; R CHANDRASHEKHAR, *Pakistan-Occupied Kashmir*, New Delhi, 2017; P. SINGH, *Re-Positioning Pakistan-Occupied Kashmir on India's Policy Map,* IDSA Monograph Series No. 62, October 2017; S. K. SHARMA, *Pakistan Occupied Kashmir*, New Delhi, 2019; S. R. CHINOY, *The Forgotten Fact of "China-Occupied Kashmir",* MP-IDSA Special Feature, 13 November 2020, https://idsa.in/system/files/comments/sf-china-occupied-

As is known, under customary international law, as reflected in Article 42 of the 1907 Hague Regulations, a «[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised»[89]. Moreover, pursuant to Common Article 2(2) of the 1949 Geneva Conventions, a situation can be an occupation «even if the said occupation meets with no armed resistance». In other words, an *occupation* consists in a factual situation wherein a State acquires an unconsented-to effective control over a foreign territory over which it does not have sovereign title[90]. It is generally understood that such «effective control» presupposes three cumulative conditions: 1. the presence of foreign forces without the consent of the local Government; 2. their ability to exercise authority over the territory; 3. the incapability of local Government to exercise authority. It is worth noting that, being a factual situation, occupation is not in and of itself a violation of international law, even if it may arise as a consequence of unlawful resort to force. However, this does not mean that the occupying power can dispose of the territory under its control at will. Once the aforementioned factual criteria are met and an occupation is thus realized, the law of occupation applies[91]. The latter is premised on

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kashmir-srchinoy.pdf; A. K. GANGULY, *Kashmir "Face-Off" India's Quandary: Options for India*, New Delhi, 2021.

[89] About the *hostile occupation* in literature see, among others, F. CAPOTORTI, *L'occupazione nel diritto di guerra,* Napoli, 1949; A. MIGLIAZZA, *L'occupazione bellica*, Milano, 1949; G. VON GLAHN, *The Occupation of Enemy Territory,* Minneapolis, 1957; A. GERSON, *War, Conquered Territory and Military Occupation in Contemporary International Legal System*, in *Harvard ILJ,* 1977, 525 ff.; A. ROBERTS, *What is a Military Occupation?,* in *BYIL,* 1984, 256 ff.; E. BENVENISTI, *The International Law of Occupation,* Princeton, 1993; Y. ARAI, *The Law of Occupation. Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, The Hague, 2009; M. SIEGRIST, *The Functional Beginning of Belligerent Occupation,* Geneva, 2011; A. ANNONI, *L'occupazione ostile nel diritto internazionale contemporaneo,* Torino, 2012; N. RONZITTI, *Diritto internazionale dei conflitti armati,* Torino, VII ed., 2021, 140-146 and 281-287; S. SILINGARDI, *L'occupazione bellica nel diritto internazionale contemporaneo: brevi considerazioni a margine di una recente sentenza della Corte suprema di Israele*, in *RDI*, 2021, 817 ff.; E. LIEBLICH, E. BENVENISTI, *Occupation in International Law*, Oxford, 2022.

[90] About the requirement of «effective control» see ICJ, Judgment of 19 December 2005 (Merits), *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, para. 173; ICJ, Advisory Opinion of 19 July 2024, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, para. 90.

[91] The law of occupation consists in: Articles 42-56 of the 1907 Regulations concerning the Laws and Customs of War on Land annexed to the Hague Convention (IV) respecting the Laws and Customs of War on Land; the 1949 Fourth Geneva Convention relative to the

respect for the displaced sovereign and the maintenance of the *status quo*, as occupation is a temporary administration of the occupied territory, and it does not transfer title of sovereignty to the occupying power[92]. So, the law of occupation imposes several negative and positive obligations on the occupying power; a failure to comply with them constitute a violation of international law. In particular, the occupying power must primarily maintain the geo-political identity of the occupied population and, consequently, it cannot rule the occupied territories on a permanent or even an indefinite basis. In their administration, it only has to take the necessary steps to restore law and order and public life and maintain them as well as possible. In doing so, it has to abide by the laws in force when occupation occurred. Moreover, the occupying power is required to govern in the best interests of the people under occupation, subject only to the legitimate security requirements of the occupying military authority. Therefore, it has to administer public buildings and natural resources situated in the occupied territories in accordance with the rules of usufruct country[93]. Moreover, it is generally accepted that the occupying power must ensure the enforcement of human rights standards over the territorial community under its control[94].

On the premise that, as the Eritrea Ethiopia Claims Commission clarified[95], *occupation* could exist on a disputed territory, it is to be ascertain whether the territories of the former Princely State of Jammu and Kashmir are really *occupied* by India, Pakistan and/or China

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Protection of Civilian Persons in Time of War (particularly, Articles 27-33 and Article 47-78); Article 5 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict; and Article 9 of its 1999 Protocol. Most of these provisions, particularly the Hague Regulations, have long been regarded as part of customary international law. In this sense see ICJ, *Armed Activities on the Territory of the Congo,* cit., para. 172; ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory*, cit., para. 96.

[92] This point has been recently reiterated by the ICJ in *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory,* cit., para. 105.

[93] The occupying power is also under the obligation to take measures to preserve cultural property situated in occupied territories.

[94] In this sense see particularly ICJ, Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* para. 106; ICJ, *Armed Activities on the Territory of the Congo*, cit., paras. 215-221; ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory,* cit., para. 99. See also Committee on the Elimination of Racial Discrimination, *Consideration of Reports, Comments and Information Submitted by States Parties under Article 9 of the Convention (Continued),* CERD/C/SR.2788 of 10 December 2019, para. 7.

[95] Eritrea-Ethiopia Claims Commission, Partial Award - Central Front - Ethiopia's Claim 2 – of 28 April 2004, para. 29.

respectively under international law and, consequently, whether the latter are under the law of occupation. To this end, the question is whether in each of the three areas into which the Princely State of Jammu and Kashmir is currently divided the main elements of the occupation under international law (i.e., a territory, a hostile army, and an authority) subsist.

At first glance, these requirements could seem to be satisfied. Indeed, it is unquestionable that Indian, Pakistani and Chinese authorities exercise effective control over *their* part of the territory of the former Princely State of Jammu and Kashmir and that this power is enforced by the presence of a massive number of troops[96]. However, as mentioned above, in order for the territory of the Princely State to be said to be under occupation, it is necessary to ascertain whether the military forces present therein are *hostile*. That is, the question is whether their presence is legitimate under international law because, for example, it is justified by the consent of the territorial State or because the State exercising effective control through the military has a valid sovereign title. To answer these questions, it is however necessary to address some preliminary issues, first and foremost the legal *status* of the Princely State of Jammu and Kashmir under international law. Ascertaining its international subjectivity is in fact instrumental in assessing the validity, at the international level, of its acts, on which, in turn, the legal framing of some of the conducts engaged in by India, China, and Pakistan depends.

2. As is well known, pursuant to Article 1 of the Montevideo Convention, «[t]he State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States»[97]. However, international law scholars usually distinguish the element of «government» from those of

[96] According to the Prime Ministers of Pakistan «[s]ince 5 August 2019, India has deployed 900,000 troops in Illegally Occupied Jammu and Kashmir to impose the 'Final Solution' for Kashmir». See Statement by the Prime Minister of Pakistan, cit., para. 13. Since the early 2000s, China has also increased its military presence along the LAC and, according to journalistic sources, it has been actively bolstering the defense capabilities of the Pakistani army along LoC in Jammu and Kashmir over the past three years, which includes the construction of steelhead bunkers and the provision of Unmanned Aerial and Combat Aerial Vehicles.

[97] *Montevideo Convention on the Rights and Duties of States*, Montevideo, 26 December 1933, entered into force on 26 December 1934.

«territory» and «people», and they regard the former as the constitutive element of the «State», on which subjectivity depends, and the latter as mere material prerequisites which, though essential to its existence, remain external data with respect to the legal personality of the State[98]. Therefore, on the premise that «nelle relazioni internazionali gli Stati interagiscono in quanto governi e non popoli» and that – consequently – what matters for international law is the State-organization[99], relevant criteria for statehood traditionally involve incidents of the effective control by an authority over a territorial community (the so-called requirement of *effectiveness*), and the ability to exercise such control independently (the requirement of *independence*). The requirement of *effective control* is usually satisfied if there is an intentional display of power and authority over the territory, by the exercise of jurisdiction and State functions (i.e., legislative, executive and judicial functions)[100]. Then, such governing functions must be exercised in original title; the vesting of power may arise under the law in force in the territory (e.g. its own Constitution), or it may be established by a treaty. What is important is that the validity of governing functions is not based on another legal system[101]. In this sense it is usually dealt with *independence*. Where the entity lacks any of these two requirements, it cannot be qualified as a «State» under international law and, therefore, it cannot enjoy international subjectivity.

2.1. As mentioned above, the Princely State of Jammu and Kashmir came into existence in 1846 following the conclusion of the Treaty of Amritsar (see Introduction, para. 1). The Treaty stipulated the creation of a new *State* by providing for the cession and

[98] In this sense see particularly, R. QUADRI, *Diritto internazionale pubblico*, Napoli, V ed., 1968, 425.

[99] The expression «State-organization» refers to a restricted set of organs that directs the entity.

[100] The concept of «effective control» was developed in international case-law. See PCIJ, Judgment of 5 September 1933, *Legal Status of Eastern Greenland (Denmark v. Norway)*; ICJ, Judgment of 17 November 1953, *Minquiers and Ecrehos* (*France v. United Kingdom*); ICJ, Judgment of 22 December 1986, *Frontier Dispute* (*Burkina Faso v. Republic of Mali*).

[101] As pointed out by Anzilotti, «The idea of dependence (…) necessarily implies a relation between a superior State (suzerain, protector, etc.) and an inferior or subject State (vassal, protégé etc.); the relation between the State which can legally impose its will and the State which is legally compelled to submit to that will. Where there is no such relation of superiority and subordination, it is impossible to speak of dependence within the meaning of international law» (PCIJ, Advisory Opinion of 5 September 1931, Individual Opinion of M. Anzilotti, *Customs Régime between Germany and Austria (Protocol of March 19th, 1931)*, 58.

subsequent annexation of the territories between rivers Ravi and Indus (corresponding to the Kashmir Valley) to Jammu and the vesting of sovereign powers over it in the Maharaja of Jammu. It is to be noted that the Treaty of Amritsar did not mention anything about the internal administration of the nascent Princely State and, unlike similar agreements concluded between other Princely States and the British East Indian Company, it made no provision for the appointment of a British Resident, so the Maharaja was left with internal autonomy[102].

At the same time, however, the Treaty of Amritsar provided that the nascent Princely State of Jammu and Kashmir referred to the arbitration of the British Government any disputes or question that might arise between itself and any other neighboring State (Article V), and that its military forces joined the British troops (Article 6) which were responsible for protecting its territorial integrity[103]. Moreover, «[t]he limits of the territories of Maharaja Gulab Singh shall not be at any time changed without the concurrence of the British Government» (Article 4). In essence, the nascent Princely State accepted that the British Crown exercised control over its external affairs. Then, over the years, internal sovereignty of the Princely State was further eroded; through the conclusion of *ad hoc* arrangements, its Maharaja ceded to the British Crown controls also over trade, commerce and communication. In sum, the Princely State of Jammu and Kashmir was an autonomous State under paramountcy of the British rule.

In light of such a configuration, the question arises whether it fulfilled the criteria of statehood described in the previous paragraph and, therefore, whether it enjoyed international subjectivity.

Regarding the criterion of *effective control*, in my view, it seems that the Princely State satisfied it. Over the years the Maharaja adopted several normative acts concerning the internal functioning of the State (such as the criminal law system, the establishment of the High Court and the Legislative Assembly) or regulating specific aspects of civic life (e.g. land alienation, sales of goods, widow remarriage, citizenship, census, etc.)[104]. They all are evidence of his exercise of governing powers in concrete and stable terms.

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[102] Thus, the State was allowed to be governed by traditional institutions. In this regard, see A. KUMAR, *The Constitutional and Legal Routes*, in R. SAMADDAR (ed), *The Politics of Autonomy: Indian Experiences,* New Delhi, 2005, 93-113.

[103] Pursuant to Article 9 of the Treaty of Amritsar, the British Crown committed to actively protect the territorial integrity of the State of Jammu and Kashmir from external enemies.

[104] In this regard see F. N. LONE, *Historical title,* cit., 60-62.

As regards the requirement of *independence*, on the one hand, the Treaty of Amritsar constituted the legal title for the exercise of sovereignty by the Maharaja of Jammu over the entire territory of the nascent Princely State of Jammu and Kashmir and it was from it (and, subsequently, from the Constitution of Jammu and Kashmir proclaimed in 1939) that its organs derived their power. The sovereignty of the Princely State was thus not dependent on the legal order of another State, so that the requirement of independence would seem, *prima facie*, to be met. However, the exercise of this sovereignty was not full and met limits set by the Treaty itself; indeed, it also constituted, at the same time, the legal title for the British Crown to exercise control over the external affairs of the Princely State. And, obviously, the loss of control over foreign affairs involves a loss of independence to some extent. Albeit partial lack of independence seems to suggest that the Princely State of Jammu and Kashmir lacked the qualifications for statehood as defined under contemporary international law.

On the other hand, however, it should not be ignored that, although it was under the partial dependence of another subject of international law (i.e. the United Kingdom), the Princely State remained distinct from it, having defined its *status* in full autonomy by agreement. Likewise, it is to be borne in mind that, while, through the conclusion of the Treaty of Amritsar, the Princely State yielded certain sovereign powers by limiting its independence, the British Crown assumed the obligation to protect and guarantee its territorial integrity. Indeed, pursuant to Article 9 of the Treaty of Amritsar, the British Government pledges to provide assistance to the Princely State in order to protect its territories from external enemies. So, on closer inspection, it seems that the Treaty at issue established a *protectorate*[105]. Indeed, as noted in literature, «[t]he one defining characteristic of a treaty of protection is the transfer of the management of some or all of the international affairs to the protecting State. (…) As a general rule, a protected State will remain in command over its internal affairs – including the execution of international obligations internally – while delegating a certain degree

[105] In this sense see also F. N. LONE, *Historical title,* cit., 185. About the legal arrangement of the protectorate and its framework under international law see mainly G. VENTURINI, *Il protettorato internazionale,* Milano, 1939; AM KAMANDA, *A Study of the Legal Status of Protectorates in Public International Law*, Ambilly-Annemasse, 1961; M. TRILSCH, *Protectorates and Protected States*, in *MPEPIL,* February 2011.

of control over its external affairs»[106]. Despite the extensive delegation of powers over foreign affairs (and, sometimes, also over some internal affairs) to the protector, it is generally acknowledged that the legal arrangement of the *protectorate* presupposed the continued sovereignty of the *protégé*, that is, the protected State continued to enjoy the *status* of subject of international law to which special subjective legal situations and special obligations to the protecting State attached[107]. Such *status* was deemed not to be undermined either by the fact that the *protégé* lacked capacity to act internationally on its own behalf, or by the fact that the treaty of protectorate conferred upon the protecting State subjective legal situations that differed in content. The reason was simple: the *status* as a subject of international law resulted from the fact that the subjective legal situations in which the protectorate was embodied were situations of international law, created by an international agreement[108]. This doctrinal orientation was then confirmed by the jurisprudence of the ICJ; in the *United States Nationals in Morocco Case*[109], it argued that Morocco nevertheless retained substantial international personality although it had placed itself under the protection of France by virtue of the Treaty of Fez and so its conduct of international relations was forthwith delegated to France.

In the light of above reasoning and on the premise that the oft-mentioned Treaty of Amritsar established a protectorate, it must be concluded that Princely State of Jammu and Kashmir – which consequently amounted to a protected State – was a subject of international law.

2.2. The protectorate established by the Treaty of Amritsar ceased as a result of the entry into force of the 1947 Indian Independence Act.

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[106] M. TRILSCH, *op. cit*.

[107] In this sense see P. FIORE, *Diritto internazionale codificato e la sua sanzione giuridica*, Milano-Napoli-Palermo-Roma, V ed., 1915, 149-150; G. MORELLI, *Nozioni di diritto internazionale*, Padova, III ed., 1951, 185-186; G. BALLADORE PALLIERI, *Diritto internazionale pubblico*, Milano, VIII ed., 1962, 158. A partially different position is advocated by F. SALERNO, *Diritto internazionale. Principi e norme,* Milano, VI ed., 2021, 39-40. The author argues that the protected State merely enjoyed a limited condition of international subjectivity.

[108] G. MORELLI, *op. cit.,* 186.

[109] ICJ, Judgment of 27 August 1952, *Rights of Nationals of the United States of America in Morocco (France v. United States of America),* 185 and 188.

The latter provided that as from August 15, 1947 «the suzerainty of His Majesty over the Indian States lapses, and with it, all treaties and agreements in force at the date of passing of this Act (…) all functions exercisable by His Majesty at that date with respect to Indian States, all obligations of His Majesty existing at that date towards Indian States or the rulers thereof, and all authority powers, rights, or jurisdiction exercisable by His Majesty at that date in or in relation to Indian States by treaty, grant, usage, sufferance or otherwise» (Section 7(I)(b)). In other words, as from August 15, 1947, the Princely State of Jammu and Kashmir would reacquire full control over its external affairs and over any other internal matters delegated to the British Crown. In turn, this would clearly result in its regaining full independence; independence which it should have renounced if it had exercised the power recognized by the Indian Independence Act (Section 2(4)) and opted for annexation to India or to Pakistan.
As already said, the Maharaja made no choice by the deadline, so, as of August 15, 1947, the Princely State of Jammu and Kashmir became formally fully independent. This conclusion is further supported by the fact that from that date it was no longer the British Crown that acted internationally on behalf of the Princely State. It was indeed the Maharaja himself who concluded the Standstill Agreement with Pakistan to manage the external affairs of the Princely State[110]. Moreover, from that date the Maharaja continued to exercise sovereign powers over internal affairs as regulated by the 1939 Jammu and Kashmir Constitution[111]. So, the Princely State continued to meet the requirement of *effectiveness*. This, combined with the aforementioned regaining of full independence, leads to the argument that from August 15, 1947, to the conclusion of the Instrument of accession it possessed the qualifications for statehood as defined under international law.

3. The qualification of the Princely State of Jammu and Kashmir as a subject of international law as of August 15, 1947, contributes to arriving at a negative answer to the question of whether Indian troops

[110] About the *Standstill Agreement* and its validity see *infra*, para 3.2.1.1.

[111] The 1939 Jammu and Kashmir Constitution consisted in 78 sections which detailed the Maharaja's powers including his relationship with the executive, legislature and judiciary. Then, inspired by the British, it provided for the establishment of a High Court formed along with judicial advisors to the Maharaja.

present on part of its territory are to be considered *hostile* and whether this territory is under occupation under international law. There are two reasons that lead to this conclusion and deserve an in-depth discussion: 1. the existence of consent by the territorial State (i.e. the Princely State of Jammu and Kashmir); 2. the existence of a sovereign title (i.e. the Instrument of accession).

3.1. As mentioned above (see Introduction, para. 1), in October 1947 an uprising broke out in the Western Poonch district of the Princely State. The Maharaja was unable to quell it, therefore he asked for military assistance from India. Indian military presence was then consented by the Princely State.

As is known, according to the ICJ, a military intervention, which is in principle contrary to international law, « (…) is (…) allowable at the request of the government of a State»[112]. This statement is in line with the principle *volenti non fit iniura*. In essence, the invitation, or request for military support, functions as a consent to behaviors that would otherwise breach the prohibition to intervene in domestic affairs of other States and to use of force[113]. So, on this premise, the sending of Indian troops in the territory of the Princely State of Jammu and Kashmir would not constitute a violation of the latter's territorial sovereignty.

But did the rule that an intervention is legitimate if it is requested by the territorial State exist in 1947? In my view, the answer is undeniably affirmative, since such an exception from the prohibitions on the use of force and on intervention is based on the principle of consent which has always been a cornerstone of international law being rooted in the principle of State sovereignty. Furthermore, the existence of this rule at the time the facts occurred is confirmed by Oppenheim's Treatise[114]. In the early 1900s he wrote that for interference by one State to be qualified as intervention in the internal affairs of another State (and, thus, to be prohibited by international law), it was necessary that it was forcible or otherwise coercive. Consequently, the fulfilment of this requirement excluded that assistance rendered by one State to another at the latter's request

[112] ICJ, Judgment of 27 June 1986 (Merits), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, para. 246.

[113] About the relation between intervention and consent in literature see lastly D. KRITSIOTIS ET AL., *Armed Intervention and Consent,* Cambridge, 2023.

[114] See L. OPPENHEIM, *International Law: A Treatise*, vol. I, London-New York-Bombay, 1905.

and with its consent amounted to intervention prohibited by international law. According to Oppenheim, « (…) cooperation is the appellation of such interference as consists in help and assistance lent by one State to another at the latter's request for the purpose of suppressing an internal revolution»[115]. On the other hand, if a State exercises exclusive functions of government over a territory (as in the case of the Princely State at issue), logically it can also exercise them through a request for assistance addressed to another State.

3.1.1. Obviously, for the consent of the territorial State to exclude a wrongful conduct, it must be validly given. In this regard, one can question whether this condition was fulfilled by the Maharaja's consent, since, when he requested Indian military assistance, he did not exercise the full effective control over the entire territory of the Princely State because of the creation of an independent State (called Azad Jammu Kashmir) by rebels on the border with Pakistan.

In my view, there are indications that the Maharaja's consent was valid. Based on available information, it seems that the rebels merely controlled part of the territory of the Princely State of Jammu and Kashmir. Indeed, its Capital had not yet fallen into their hands and its capture would have been only the «first step to over-running the whole State»[116]. So, even assuming that the rebels were exercising governmental functions in the part of the territory under their control, this is not enough to argue that they had fully replaced the authorities of the Princely State in their functions of governing the entire territory. In other words, the creation of Azad Jammu and Kashmir did not diminish the right of the Princely State to exercise governmental functions over the territorial community still under its control and to organize the struggle for regaining the whole territory. According to general international law, as long as the civil war lasts, the principle of values preservation saves the legitimate value of only the pre-established central Government[117]. So, the consent given by the Maharaja can be considered valid and, consequently, the presence of Indian troops on the territory of the Princely State was lawful.

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[115] *Ivi*, 182-183, para. 134.

[116] See Maharaja's letter requesting Indian assistance against tribal raids, 26 October 1947, para. 6.

[117] In this sense see F. SALERNO, *op. cit.,* 41.

As the ICJ pointed out in its 2005 judgment on armed activities on the territory of Congo, the consent given by the territorial State usually defines also the legal limits of military intervention[118]. The letter in which the Maharaja requested military assistance from India was no exception in this respect. It contained a timely illustration of events. In particular, it highlighted the «great emergency of the situation» the Princely State of Jammu and Kashmir was in, being at the mercy of the rebels who were «marching on with the aim of capturing Srinagar, the (…) Capital of [the] Government, as first step to over-running the whole State». Significantly, at the bottom of the letter the Maharaja remarked: «[i]f my State has to be saved immediate assistance must be available at Srinagar». So, the sending of Indian troops was urgent in nature and was aimed at impeding that the Capital, and the State as a whole, fell into rebels' hands. The letter did not provide for a precise time limit by which Indian military activities should have ended. However, since the Maharaja's intention was to save his State, that is, to preserve its integrity, it can reasonably be assumed that the mandate of Indian troops would have ceased only when the latter was no longer in danger.

However, this situation never materialized; rather, the integrity of the Princely State of Jammu and Kashmir was further undermined by Pakistani troops which invaded its territory to support the rebels once the Government learned of the Indian military presence. Thus, the threat to the integrity of the Princely State no longer came from a civil war but from a war of aggression[119]. This change could lead one to question the suitability of the request for assistance to justify the Indian military presence in relation to a war of aggression, given that it was originally constructed in relation to a civil war. However, if one looks at the reasons behind the Maharaja's request for military aid, this objection seems to be ill-founded. As noted above, it is clear from the wording of the letter sent by Maharaja to the Governor-General of India that the sender's intention was to preserve the integrity of his State which he was unable to save on his own. And, if he had proved incapable of preserving it from an internal threat, even more he was clearly unable to do so with regard to a more serious threat, such as an external aggression. It can therefore reasonably be assumed that,

[118] See ICJ, *Armed Activities on the Territory of the Congo*, cit., para. 52.

[119] It is worth noting that the sending of Pakistani military forces was neither requested by, nor consented to the Maharaja. So, in principle, it amounted to an intervention in breach of territorial sovereignty of the Princely State of Jammu and Kashmir.

although originally designed to respond to civil war, the request for aid addressed to India also covered the evolution of that threat into a war of aggression. On the other hand, this conclusion is confirmed by the attitude of the Princely State, which in no way disputed the presence of Indian troops in response to Pakistani aggression. This approach finds further explanation in what will be said below.

3.2. It is to be further excluded that India is occupying part of the territory of the former Princely State of Jammu and Kashmir, since it claims a sovereign title over it which is based upon the Instrument of accession concluded between the Maharaja and the Governor-General of India. As mentioned above, in his letter sent to the Governor-General of India on October 26, 1947, the Maharaja offered the accession of his State to the Indian Dominion in exchange for military assistance. Accordingly, he attached to the letter requesting help the text of the Instrument of accession for acceptance by Indian Government. The Governor-General of India replied in writing the next day stating: «I do hereby accept this Instrument of Accession»[120] and forwarded its answer to the Maharaja as an attachment to another letter.

Such *Instrument of accession* was an international treaty, since it was characterized by its distinctive features. It was, in fact, a written document that the parties exchanged so that each one could learn its contents and express his own consent. So, that exchanged document resulted in the meeting of the parties' wills of equal content. Secondly, its parties were undoubtedly subjects of international law. As regards the Princely State, as said (see *supra*, para. 2.2.), it fulfilled the criteria for statehood. As regards India, when the Instrument of accession was concluded, it had recently acquired international subjectivity by virtue of the entry into force of the 1947 Indian Independence Act. According to its Section 1(1) «[a]s from the fifteenth day of August, nineteen hundred and forty-seven, two independent Dominions shall be set up in India, to be known respectively as India and Pakistan» whose «Legislature […] shall have full power to make laws for that Dominion, including laws having extra-territorial operation» (Section 6(1)). In other words, each of the new Dominions was granted the right to exercise governing power over its own territory exclusively

[120] See https://en.wikipedia.org/wiki/Instrument_of _Accession_ (Jammu_and_Kashmir)#/media/File:Kashmir_Accession_document_side_2.jpg

and independently[121]. Moreover, considering that membership in the UN is open only to States (Articles 3-6 of the UN Charter), the existence of India as sovereign State is further confirmed by the fact that it had UN member *status* when the Instrument of accession was concluded[122].

Finally, as regards the framing of the Instrument of accession as an international agreement, its parties' will to bind themselves might be deduced from the language used in the document itself[123]. First, its text made use of terms such as «obligation»[124], as well as of verbs such as «to undertake», «to commit», «to empower»[125] which are a clear indication of an intention to be bound. Moreover, the Instrument of accession entailed specifications as to the conduct expected following its conclusion; thus, for instance, it provided that the Indian authorities exercised «in relation to the State of Jammu and Kashmir of such functions as may be vested in them by or under the Government of India Act, 1935, as in force in the Dominion of India, on the 15th day of August 1947» (Article 1), and it excluded that the Dominion Legislature could «make any law for the State [of Jammu and Kashmir] authorizing the compulsory acquisition of land for any purpose» (Article 6). These elements together with the use of the

[121] See particularly Section 6 (2) (3) (4) and (5) of the 1947 Indian Independence Act.

[122] From the entry into force of the Indian Independence Act, India was given the UN membership position previously accorded to the representation of the British Dominion in the sub-continent. See *ILC Yearbook,* 1962, II, 102-103.

[123] The ICJ has repeatedly maintained that the parties' unequivocal will to be bound should emerge from that act itself. To this end, due consideration must be given to the circumstances in which the act was drafted, and the terminology used, taking particularly into account whether its text enumerates the commitments to which the parties consented. See ICJ, Judgment of 19 December 1978, *Aegean Sea Continental Shelf (Greece v. Turkey)*, paras 96 ff.; ICJ, Judgment of 1 July 1994 (Jurisdiction and admissibility), *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, paras 25 ff.

[124] Article 2 of the Instrument of accession stated: «I hereby *assume the obligation* of ensuring that due effect is given to the provisions of the Act within this State so far as they are applicable therein by virtue of this my Instrument of Accession (italics added)».

[125] In particular, Article 6 of the Instrument of accession stated «Nothing in this Instrument shall empower the Dominion Legislature to make any law for this State authorizing the compulsory acquisition of land for any purpose, (…) but I hereby *undertake* that should the Dominion for the purposes of a Dominion law which applies in this State deem it necessary to acquire any land, I will at their request acquire the land at their expense or if the land belongs to me transfer it to them on such terms as may be agreed (…) (italics added)». Then, pursuant to Article 7 of the Instrument of accession «Nothing in this Instrument shall be deemed *to commit me* in any way to acceptance of any future Constitution of India or to fetter my discretion to enter into arrangements with the Government of India under any such future Constitution (italics added)».

indicative case expressing certain actions can be seen as indications of the parties' intention to be bound by the Instrument of accession.

It is worth noting that the latter failed in regulating its entry into force. However, in accordance with Article 24(2) of the VCLT reflecting customary international law[126], it can be assumed that the Instrument of accession entered into force as soon as the consent to be bound by it was established by both parties. In the present case, this occurred on Octobre 27, 1947, namely the day on which the Governor-General of India accepted the Instrument of accession proposed by the Maharaja and, at the same time, sent its troops in the Princely State.

That being said, in our opinion it can be argued that the conclusion of the Instrument of accession legitimizes the continued Indian military presence on the territory of the Princely State since, pursuant to its Article 3 and the Schedule attached therein Indian authorities acquired legislative power over the Princely State in defense, as well as in communication and foreign affairs. Therefore, Indian military forces cannot be regarded as *hostile army* under the meaning of Article 42 of the 1907 Hague Regulations.

3.2.1. In order to deny the existence of a sovereign title by India over the territory of the former Princely State, Pakistani scholars have often challenged the validity of the Instrument of accession on several grounds, or even its own existence under international law. In this regard, it was argued that the Instrument of accession terminated in accordance with the *inadimplenti non est adimplendum* principle. This assumption is based on the fact that in his letter of reply, the Governor-General stated that «as soon as law and order have been restored in Kashmir and her soil cleared of the invader the question of the State's accession should be settled by a reference to the people»[127]. And, in practice, this commitment was disregarded by India. However, in my view this allegation is not right. As already said, an international agreement is the result of the meeting of equal wills expressed by two or more States. The foregoing statement emanated from the Governor-General, and it does not seem that the

[126] In this sense see H. KRIEGER, *Article 24. Entry into Force*, in O. DÖRR, K. SCHMALENBACH (eds.), *Vienna Convention on the Law of Treaties. A Commentary*, Berlin-Heidelberg, II ed., 2018, 433.

[127] The Governor-General of India used the term «people» to refer to the territorial community settled on the entire territory of the Princely State of Jammu and Kashmir.

Maharaja consented to it. This could be confirmed by the fact that the letter it was contained therein was not signed by him. So, that statement did not form part of an international agreement, and no bilateral legal obligations derived from it.

Additionally, some scholars argue that the Princely State of Jammu and Kashmir lacked the ability to conclude the Instrument of accession due to the content of the Standstill Agreement it had previously concluded with Pakistan[128]. Some others assert that the Maharaja was not legitimized to represent the Princely State of Jammu and Kashmir in external relations because he did not have the effective control of its entire territory[129], while another group argues that his consent to be bound by the Instrument of accession was vitiated[130]. As will be seen below, none of these allegations seem to have a valid legal basis.

3.2.1.1. As mentioned above, in the aftermath of the end of British colonization, the Maharaja decided to conclude two Standstill Agreements with the newly formed States to maintain the administrative *status quo* and to avoid chaos when British protectorate would have lapsed. Thus, on August 12, 1947, the Maharaja sent to India and Pakistan two identical telegrams stating «Jammu and Kashmir Government would welcome Standstill Agreements with Pakistan/India on all matters on which these exist at present moment with outgoing British India Government. It is suggested that existing arrangements should continue pending settlement of details and formal execution of fresh arrangements». The Foreign Ministry of Pakistan replied affirmatively, thus concluding the agreement[131], while Indian Government subordinated its signature to a meeting with

[128] See particularly R. KHAN, *Kashmir and the United Nations,* New Delhi, 1969, 84-89; I. HUSSAIN, *Kashmir Dispute: An International Law Perspective*, Islamabad, 1997, 70.

[129] This position is referred to by M. R. MCCARTHY, *A Subject of Dispute: A legal Analysis of the Claims of India and Pakistan to Kashmir* (Durham University 2002), 21-25, http://etheses.dur.ac.uk/4180/

[130] See particularly R. KHAN, *Kashmir,* cit., 82; A. LAMB, *Kashmir: A Disputed Legacy, 1846-1990,* Hertford, 1991*;* V. SCHOFIELD, *Kashmir in Conflict,* London-New York, 2000, 49-60; J. KORBEL, *Danger in Kashmir,* Princeton, 2003, 78-87.

[131] Pakistani Government replied on August 15, 1947. The Standstill Agreement concluded between the Princely State of Jammu and Kashmir, on the one hand, and Pakistan, on the other hand, was a treaty under the rules of international law, in that it was an international agreement concluded between States in written form through an exchange of letters and governed by international law.

a legal representative of the Princely State in Delhi[132]. That meeting never took place, and the Standstill Agreement with India was not concluded.

On the premise that, by accepting British protectorate, the Princely State of Jammu and Kashmir surrendered to the Crown its right to conduct the foreign and defense policy, some Pakistani scholars assert that the signing of the Standstill Agreement resulted in the transfer of competence to conduct the Princely State's foreign policy from the United Kingdom to Pakistan. Therefore, by virtue of that Agreement the Princely State of Jammu and Kashmir was not competent to conclude international treaties with third States and, consequently, the Instrument of accession was invalid.

In my view, these allegations are not right. First, it is to be observed that the Standstill Agreement did not mention «foreign policy»; rather, it expressed in general terms. It briefly provided that it would have covered «all matters» on which arrangements with British Crown existed. And it must be ruled out that the foreign policy was included in those matters since it was not covered by any *ad hoc* arrangement. Indeed, there was no need for it to be regulated by an arrangement between the Crown and the Princely State, since its exercise by the Crown on behalf of the Princely State was exactly what the British paramountcy consisted of. If one considers the reason why the Standstill Agreement was concluded, namely the termination of British paramountcy and the consequent State's regaining its own sovereign powers on foreign policy, it is evident that the latter constituted the prerequisite for its conclusion, not its object.

The idea that foreign policy was not covered by the Standstill Agreement is further confirmed by Section 7(c) of the 1947 Indian Independence Act which represented the legal basis for its conclusion and where no reference was made to that matter. It provided that, when the paramountcy would have lapsed, «(..) effect shall (…) continue to be given to the provisions of any such agreement as is therein referred to which relate to *customs, transit and communications, posts and telegraphs,* or other like matters, until the provisions in question are denounced by the Ruler of the Indian State

[132] The Indian Government replied to the telegram from the Maharaja stating that it would be glad if the Maharaja «(or some other Minister duly authorized in this behalf) could fly to Delhi for negotiating Standstill Agreement between Kashmir Government and India Dominion. Early action desirable to maintain intact existing agreements and administrative arrangements». That meeting never took place.

(…) or are superseded by subsequent agreements» (italics added). The Standstill Agreement concluded with Pakistan was just an example of such «subsequent agreements» and, consequently, it can be reasonably assumed that the general expression «all matters on which these [agreements] exist at present moment with outgoing British India Government» referred to the arrangements mainly concerning the management of services in the fields of infrastructures and communications, as mentioned in the Indian Independence Act.

Additionally, it is unreasonable to think that by concluding the Standstill Agreement the Princely State of Jammu and Kashmir intended to transfer the responsibility for the conduct of its foreign policy to Pakistan since, as mentioned above, the signing of an identical Agreement was also proposed to India. And, as it is evident, the transfer of sovereign powers in the same matter to two different subjects is unfeasible.

In the light of above evaluations, it can be considered that the Princely State of Jammu and Kashmir possessed legal capacity to conclude international agreements, so the Instrument of accession was valid on this ground.

3.2.1.2. Neither can it be accepted the second strand of criticism contesting the validity of the Maharaja's expressed consent to bind his Princely State to the Instrument of accession.

First, it is to be borne in mind that the Maharaja Hari Singh was the Ruler of the Princely State of Jammu and Kashmir[133], so he was – by definition – endowed with the *jus repraesentationis omnimodae,* that is, he was legitimized to manifest the ultimate will of his State in external relations. Since the Instrument of accession was negotiated and signed by the Maharaja, it can be assumed that, in this respect, it was validly concluded. Nor was the validity of his consent vitiated by the fact that, when the Instrument of accession was concluded, he no longer had effective control over the entire territory of his State[134]. Indeed, as said, as long as the civil war lasts, the pre-established central Government saves its own right to exercise governmental functions over its territorial community even more whether the

[133] Hari Singh was descendant of the Raja Gulab Singh who had concluded the 1846 Treaty of Amritsar establishing the Princely State of Jammu and Kashmir under the paramountcy of the British Crown. His coronation as Ruler of the Princely State was held in February 1926.

[134] See R. KHAN, *Kashmir,* cit., 82; A. LAMB, *op. cit.;* V. SCHOFIELD, *op. cit.,* 49-60; J. KORBEL, *op. cit.,* 78-87.

insurrectionist movement takes the control only of part of the territory[135]. Therefore, the Maharaja was undoubtedly entitled to conclude the Instrument of accession on behalf of the Princely State of Jammu and Kashmir.

The argument that the Instrument was null and void because it was concluded under coercion cannot be considered well-founded either[136]. Pursuant to Article 52 of the VCLT, a treaty is void if it is concluded under the threat or use of force in violation of the principles of international law embodied in the UN Charter. The phrase «threat or use of force» is usually understood as military coercion, because of the reference to the principles incorporated in the UN Charter, where the term «force» clearly refers to «armed force»[137]. This provision was considered to correspond to general international law by the ICJ in 1973. In the *Fisheries Jurisdiction Case*, it stated that «[t]here can be little doubt, as is implied in the Charter of the United Nations and recognized in Article 52 of the VCLT, that under contemporary international law an agreement concluded under the threat or use of force is void»[138]. But did such a customary rule already exist in 1947, when the Instrument of accession was signed? In my view, the answer is affirmative.

Firstly, as it can be deduced from the peremptory statement of the ICJ, the existence of this provision is closely linked to the prohibition of the use of force enshrined in Article 2(4) of the UN Charter which was in force when the Instrument of accession was concluded.

Then, there is a further clue supporting the conclusion that in the 1940s there already was a general rule according to which a treaty concluded under the threat of force is void. It is implicitly offered by

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[135] About the current position of insurrectionist movements in international law, see P. PUSTORINO, *Movimenti insurrezionali e diritto internazionale*, Bari, 2018.

[136] See R. KHAN, *Kashmir,* cit., 82; A. LAMB, *op. cit.;* V. SCHOFIELD, *op. cit.*, 60 ff.; J. KORBEL, *op. cit.,* 85 ff.

[137] Currently, international practice offers no elements to maintain that even other kinds of pressures (e.g. political or economic ones) can fall under the meaning of «threat or use of force» under Article 52 of the VCLT. In this regard see K. SCHMALENBACH, *Article 52,* in O. DÖRR, K. SCHMALENBACH (eds), *Vienna Convention on the Law of Treaties. A Commentary,* Berlin-Heidelberg, II ed., 2018, 949-951. In Italian literature see N. RONZITTI, *Diritto internazionale,* Torino, VI ed., 2019, 229; B. CONFORTI, M. IOVANE, *Diritto internazionale,* Napoli, XII ed. agg., 2023, 150-151; A. GIOIA, *Diritto internazionale,* Milano, VII ed., 2022, 89; F. SALERNO, *op. cit.,* 190-191; P. DE SENA, M. STARITA, *Corso di diritto internazionale*, Bologna, 2023, 78-79; C. FOCARELLI, *Diritto internazionale*, Milano, VII ed., 2023, 200-201.

[138] ICJ, Judgment of 2 February 1973 (Jurisdiction of the Court), *Fisheries Jurisdiction (UK v. Iceland)*, para. 24.

the ICJ itself in 2007 judgment[139]. In reviewing the validity of a 1928 treaty on territorial delimitation between Colombia and Nicaragua, the Court noted that «at no time in [those] 50 years (…) did Nicaragua contend that the Treaty was invalid for whatever reason, including that it had been concluded in violation of its Constitution or under foreign coercion»[140]. The Court did not go further, that is, it did not directly address either the issue of coercion as a ground of invalidity of the treaty, or the possibility of its invocation at the time the treaty was concluded. However, the fact that it pointed out that Nicaragua never challenged the validity of the treaty on the basis of coercion presupposes that, according to the ICJ, it could have done so. In other words, the statement of the ICJ seems to imply the belief that at the time the treaty was concluded (in 1928), international law already recognized the possibility for States to invoke coercion as a cause for its invalidity. If this interpretation is correct, it must then be assumed that this rule was also in force when the Instrument of accession was concluded. Such a conclusion is - in my view – further supported by the preparatory works of the VCLT. Indeed, it is worth noting that the rule set forth in Article 52 was introduced into the draft articles on the law of treaties without encountering objections since – in the light of practice dating back between the 1920s and the 1930s[141] – many members of the ILC believed that it was already part of *lex lata*[142]. Nonetheless, a further confirmation that in 1947 the rule stipulating the nullity of a concluded treaty under coercion already existed comes from national jurisprudence. Consider the judgments by which the 1938 agreements between Germany and Czechoslovakia were

[139] ICJ, Judgment of 13 December 2007 (Preliminary objections), *Territorial and Maritime Dispute (Nicaragua v. Colombia)*.

[140] ICJ, *Territorial and Maritime Dispute,* cit., para. 79.

[141] The cited practice referred to some international legal instruments, such as the treaty concluded between the Russian Soviet Federal Socialist Republic and Turkey on 16 March 1921 which condemned intimidation as a means of imposing contractual obligations; the League of Nations resolution, adopted on 11 March 1932, which had declared that it was incumbent on the Members of the League not to recognize any situation or treaty which might be brought about by means contrary to the League Covenant or to the Briand-Kellogg Pact; the Montevideo Convention on rights and duties of States stating not to recognize territorial acquisitions or special advantages which had been obtained by force (Article 11); and the Charter of the Organization of American States whose Article 17 provided that no territorial acquisitions or special advantages obtained by force would be recognized. See UN Doc. A/CN.4/156 and Addenda of 17 May 1963, para. 76.

[142] In this sense, see, for instance, the position expressed by Mr. Tunkin at the 682nd meeting of the ILC in 1963 (UN Doc. A/CN.4/156 and Addenda, cit., para. 48). *Contra* the idea that Article 52 of the VCLT codified an existing rule of general international law see R. MONACO, *Manuale di diritto internazionale pubblico,* Torino, VI ed., 1971, 113-114.

declared null and void due to the fact that they had been concluded as a result of the unlawful use of force[143].

However, the application of this rule to the present case has to be excluded. As already said, based on available information, the presence of Indian troops on the territory of the Princely State was expressly requested by the Maharaja (see *supra*, para. 3.1.1). Such a formal request equated to State consent. And, as is known, consent by a State to a particular conduct by another State precludes the wrongfulness of that act in relation to the consenting State. Furthermore, consent to the commission of otherwise wrongful conduct may be given by a State in advance or even at the time it is occurring. Therefore, whether it occurred after or concurrently with the request for military assistance, the deployment of Indian troops on the territory of the Princely State of Jammu and Kashmir did not amount to a threat or use of force prohibited by the UN Charter. Consequently, there was no coercion of India against the Princely State.

In any case, it is true that the Instrument of accession was concluded under pressure of arms; however, those arms did not belong to India, but to the rebels supported (it would seem) by Pakistani tribes. Can it be therefore assumed that the Instrument of accession was void because it was concluded under the threat of use of military force by rebels? In my view, the answer is still negative. It is not the purpose of the rule codified by Article 52 of the VCLT to invalidate any treaty concluded under hostilities. The absolute nullity may be invoked if the conclusion of the treaty is not only brought about, but intentionally procured by the threat or use of force[144]. In essence, «a treaty is only procured by coercion if the use or threat of force is directly intended to bring about the treaty or if the treaty is aimed at maintaining a situation which was created by an illegal use of force»[145]. So, what detects is the intention underlying the threat or use

[143] Holland District Court of Arnhem, Judgment of 18 November 1952, *Nederlands Beheers-Instituut* v. *Nimwegen and Männer;* Holland Judicial Division of the Council for the Restoration of Legal Rights, Judgment of 29 June 1956, *Ratz-Lienert and Klein* v. *Nederlands Beheers-Instituut.* In this regard see O. CORTEN, *Article 52*, in O. CORTEN, P. KLEIN (eds), *Les Conventions de Vienne sur le droit des traités. Commentaire article par article. Tome I*, Bruxelles, 2006, 1872.

[144] In this sense see M. E. VILLIGER, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden, 2009, 645; O. CORTEN, *Article 52*, in O. CORTEN, P. KLEIN (eds), *The Vienna Conventions on the Law of Treaties*, Oxford, 2011, 1219; K. SCHMALENBACH, *op. cit.,* 947.

[145] M. BOTHE, *Consequences of the Prohibition of the Use of Force*, in *ZaöRV,* 1969, 513.

of force[146]. And, it is precisely with this element in mind that, in my view, the Instrument of accession was not concluded under coercion of rebels. Indeed, their use of force was in no way intended to induce the Princely State of Jammu and Kashmir to enter into treaty relations with India; rather, they aimed to take the control of the entire territory in order to accede to Pakistan. So, the Instrument of accession was not void.

3.3. The validly concluded Instrument of accession determined a change of sovereignty. As a result of its entry into force - which, as said (see *supra,* para. 3.1.1.) was simultaneous with its signing - India and the Princely State of Jammu and Kashmir ceased to be two separate subjects of international law, and a single State came into existence. According to a literal interpretation of the Instrument's provisions, this unitary entity was not new. Article 1 is relevant in this regard; it read: «I [the Maharaja] hereby declare that I accede to the Dominion of India with the intent that the Governor-General of India, the Dominion Legislature, the Federal Court and any other Dominion authority established for the purposes of the Dominion shall (…) exercise in relation to the State of Jammu and Kashmir (…) such functions as may be vested in them by or under the Government of India Act, 1935, as in force in the Dominion of India, on the 15th day of August 1947». The expression «I hereby declare that I accede to the Dominion of India», and especially the use of the verb «to accede», seem to suggest the Princely State's willingness to become part of the Indian Union. Otherwise, if the intention of the parties had been to merge into a new entity, the Instrument of accession would presumably have read «we declare to join» or something similar. Moreover, the fact that, pursuant to Article 1, Indian authorities would have exercised «in relation to the State of Jammu and Kashmir (…) such functions as may be vested in them by or under the Government of India Act, 1935, as in force in the Dominion of India, on the 15th day of August 1947» suggests the existence of continuity between the governing organization of India prior to the conclusion of the Instrument of accession and the governing organization of the entity resulting from its entry into force.

[146] Conversely, it does not matter between which parties the agreement is concluded; in other words, it does not matter whether the coercing entity's intention is to conclude an international agreement between itself and the coerced State or between the latter and a third State.

Certainly, according to the wording of Article 8 of the Instrument of accession stating that «[n]othing in this Instrument affects the continuance of my sovereignty in and over this state, or, save as provided by or under this Instrument, the exercise of any powers, authority and rights now enjoyed by me as Ruler of this State or the validity of any law at present in force in this State», the Princely State also saved its governing organization. However, a systematic interpretation of this provision easily reveals that such a continuity of the governing organization was not accompanied by formal independence. In fact, as repeatedly mentioned, the Maharaja agreed to «accede» the Indian Union and assigned to its authorities the exercise of sovereign powers in matters indicated in Article 3 and the Schedule attached thereto (i.e., foreign affairs, defense and communications). The lack of formal independence leads to the conclusion that, as a result of the Instrument of accession, the Princely State of Jammu and Kashmir lost international subjectivity.

It can therefore reasonably be assumed that the Instrument of accession resulted in the incorporation of the Princely State into the Indian Union. That is, there occurred the expansion of India's territorial sovereignty over the territorial community of the Princely State of Jammu and Kashmir, which became extinct as a subject of international law since, while enjoying governing powers in some internal matters, it lost its formal independence becoming a component part of a larger government organization. In essence, by virtue of its considerable degree of autonomy, the Princely State amounted to a sort of Federated State under Indian law order (see Introduction, para. 4.1.), but it was regarded as a mere organ of a Federal State (without international subjectivity) under international law.

This conclusion is supported by the wording of both the Indian Constitution approved in 1949 and the Jammu and Kashmir Constitution adopted in 1956. Pursuant to Article 1 of the Indian Constitution read together with the First Schedule attached thereto, Jammu and Kashmir amounted to a *State* of which the Indian Union is composed[147]. Even more unequivocally, the preamble to the 1956 Jammu and Kashmir Constitution read: «[w]e, the people of the State

[147] Pursuant to Article 1 of the Indian Constitution, «India, that is Bharat, shall be a Union of States. 1. The States and the territories thereof shall be as specified in the First Schedule. 2. The territory of India shall comprise: the territories of the States; the Union territories specified in the First Schedule; and such other territories as may be acquired».

of Jammu and Kashmir, having solemnly resolved, in pursuance of the accession of this State to India which took place on the twenty sixth day of October 1947, to further define the existing relationship of the State with the Union of India as an integral part thereof».

The incorporation of a State into another usually results in the *mobility of treaty borders*[148]; that is, the treaties of the incorporating State extend to the incorporated territory. This means that all international agreements concluded by India before the entry into force of the Instrument of accession applied also to the territorial community of the former Princely State. As regards the treaties of the extinguishing State, as a rule, they cease to be in force (unless they are confirmed by the incorporating State). However, in practice there has been no shortage of cases where the treaties concluded by the incorporated States have continued to apply vis-à-vis its territorial community where it amounted to a member of a Federal State[149]. On close inspection, this was not the case of the former Princely State of Jammu and Kashmir. First, there is no evidence that in the short period between its establishment as a sovereign State and its incorporation into the Indian Union it concluded international agreements except for the Standstill Agreement with Pakistan. In my opinion, it must be ruled out that it remained in force because the regulations contained therein were incompatible with the new situation. Indeed, it provided for the Princely State's entrustment of the management of services in the fields of infrastructures and communications to Pakistan, that is, in some of the matters which fell under the competence of Indian authorities as a result of the incorporation. Therefore, the Standstill Agreement can be deemed extinguished by virtue of the *rebus sic stantibus* rule.

4. The incorporation of the Princely State of Jammu and Kashmir into the Indian Union has significant implications for the (alleged) legitimacy of Pakistan's control over part of that State's territory which is located in the North and West side of the LoC.

As already said, Pakistani troops entered the territory of the Princely State in October 1947 in response to the deployment of Indian troops. But, unlike the latter, they did not enjoy the consent of

[148] See A. GIOIA, *op. cit.,* 135-138; B. CONFORTI, M. IOVANE, *op. cit.,* 140; C. FOCARELLI, *op. cit.,* 193-194.

[149] In this regard see practice mentioned in B. CONFORTI, M. IOVANE, *op. cit.,* 141.

the Maharaja. So, Pakistan committed an act of aggression thus violating the prohibition of threat and use of force under Article 2(4) of the UN Charter[150]. Although the UNCIP resolution of August 1948 reaching a ceasefire in the first Indo-Pakistan war provided for the withdrawal of Pakistani troops from the territory of the Princely State of Jammu and Kashmir, this never happened. Since then, the territories of Azad Jammu and Kashmir and of Gilgit-Baltistan are heavily militarized[151]. So, the first requirement of an occupation regime, that of «the presence of foreign forces without the consent of the local government» is met. However, as the ICJ pointed out, «in order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an "occupying Power" in the meaning of the term as understood in the jus in bello» it is to be ascertain whether «there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question»[152]. In this regard, the ICJ has recently pointed out that «[p]hysical military presence in the occupied territory is not indispensable for the exercise by a State of effective control, as long as the State in question has the capacity to enforce its authority, including by making its physical presence felt within a reasonable time»[153]. Thus, it is sufficient the establishment of a regime that is financially, economically and militarily dependent from the occupying power which adopts directives for the local authorities[154].

As already said (*supra*, Introduction, para. 2.2.) both Azad Jammu and Kashmir and Gilgit-Baltistan are formally self-governing territories and are endowed with their own institutions which exercise sovereign powers in all matters except for defense, foreign affairs, communication, and currency vested in Pakistani authorities. In other words, they both have local authorities which are running their

[150] Pakistan became UN member on September 30, 1947, so it was bound by the UN Charter when events occurred.

[151] Over the years, particularly in times of great tensions, Pakistan has even deployed additional soldiers in those territories.

[152] See, ICJ, *Armed Activities on the Territory of the Congo*, cit., para. 173.

[153] ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory,* cit., para. 91). In this regard, see also ICJ, *Armed Activities on the Territory of the Congo*, cit., para. 173 where the Court clarified that it is not relevant whether the foreign power has established a structured military administration of the occupied territory.

[154] In this sense see particularly N. RONZITTI, *Diritto internazionale dei conflitti armati,* cit., 287.

territories «[p]ending a final solution»[155]. It would appear, *prima facie*, that Pakistan did not replace the local authority; so, lacking one of the requirements for a territory to be occupied under international law, Pakistan could not be considered an occupying power.

However, a closer look at the political systems of the two territories reveals that their autonomy is only nominal and that they are strictly controlled by Pakistan. As regards the Azad Jammu and Kashmir, for instance, until 2018 the Pakistani Government had the power to dismiss the local elected Government, the Azad Kashmir Council based in Islamabad and headed by Pakistan's Prime Minister exercised authority over the local Legislative Assembly which cannot challenge the Council's decisions. Tax collection was also controlled by the Council leaving Azad Jammu and Kashmir financially dependent. Moreover, judges of local High Court and Supreme Court were appointed by approval of the Ministry of Kashmir Affairs in Islamabad. In fact, all key administrative officials were filled by Pakistani officials including the office of the Chief Secretary, Inspector General of Police, Auditor General, Health Secretary, Chief Election Commissioner and Home Secretary[156]. Then, in pursuant to the 1988 Azad Jammu and Kashmir Adaptation of Laws Act several Pakistani laws have been adapted and enforced in Azad Jammu and Kashmir over the years. The situation did not significantly change when the 13th amendment to the Azad Kashmir Provisional Constitution passed in 2018[157]. Although it lessened the financial and administrative encroachments of the Azad Jammu and Kashmir Council that existed as a parallel authority vis-à-vis Azad Jammu and Kashmir Government, and the local Legislative Assembly was empowered in decision-making, the Islamabad Government still exercises a strong control. As a proof, now the Azad Jammu and Kashmir Assembly may legislate the 22 subjects listed in Part-B of the Third Schedule of the Provisional Constitution, but it needs the consent of the Government of Pakistan. Moreover, Azad Jammu and Kashmir continues to be under Islamabad's direct influence through a powerful bureaucratic machinery. This influence is primarily exercised through the Ministry of Kashmir Affairs, which holds

[155] UNCIP, *Resolution* of 13 August 1948, cit.

[156] These appointees are known as *lent officers* as they are the real authority within Azad Jammu and Kashmir and exercise control on behalf of Islamabad.

[157] See R. Q AHMED, *Politics of Power-Sharing in Disputed Territories: A Case Study of the 13th Amendment in the Constitution of Azad Jammu and Kashmir*, in *JAAS,* 2022, 1267–1276.

significant sway over the region's affairs. Additionally, Islamabad maintains a grip over Azad Jammu and Kashmir through the appointment of powerful lent officers who effectively wield administrative power. On closer inspection, Azad Jammu and Kashmir seems therefore to amount to a *puppet State.*

It is even more evident that Pakistan established and is exercising stable albeit provisional authority over the territory of Gilgit-Baltistan. The latter does not have its own Constitution, nor is its specific *status* recognized by the Constitution of Pakistan. Nevertheless, it is Pakistan that has regulated the internal political and economic system by issuing Presidential Orders. Moreover, although the appointed Chief Minister and the local legislative assembly exercise certain powers[158], critical matters such as constitutional rights, foreign policy, revenue, and defense affairs remain under Islamabad's jurisdiction. Additionally, even though the 2009 Order mandated the establishment of a separate Gilgit-Baltistan fund, taxes collected within Gilgit-Baltistan were deposited into the Federal Consolidated Fund. Therefore, Gilgit-Baltistan continues to rely on the Pakistani Government to support its needs. This is even more true when considering that Gilgit-Baltistan is so economically backward that its population heavily depends upon Pakistani Government subsidy on wheat[159].

In sum, both Azad Jammu and Kashmir and Gilgit-Baltistan are ruled by regimes that are financially, economically and militarily dependent on Pakistan, which exercises significant political control over them. Although Pakistan has not fully superseded local authorities in the management of aforementioned territories, the *de facto* control exercised over them combined with the fact that it has issued and enforced directions to their populations lets me maintain that the requirement of «sufficient authority» is met. Consequently, it can be assumed that Azad Jammu and Kashmir and Gilgit-Baltistan are occupied under international law.

[158] It is to be borne in mind that representatives of Pakistani institutions are present within the local authorities, thus allowing the Islamabad Government to influence their activities.

[159] In this regard see UNHRC, *Written statement* submitted by Rajasthan Samgrah Kalyan Sansthan, a non-governmental organization in special consultative status*, UN Doc. A/HRC/55/NGO/289 of 18 March 2024.

4.1. Pursuant to Article 2(4) of the UN Charter, «[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State». As is known, the Charter does not further clarify which are actions falling under the meaning of this provision. However, its teleological interpretation and an analysis of the preparatory works of the UN Charter are deemed to illustrate the fact that military force is undeniably the concern of the prohibition of the use of force[160]. The unauthorized entry of armed forces of one State into the territory of another State and the taking control of that territory unquestionably amount to an example of military force, so these conducts fall under the meaning of «use of force» prohibited by Article 2(4) of the Charter. Consequently, an occupation resulting from such a use of force in contravention of the UN Charter is tainted with illegality *ad bellum*[161].

As already said, the occupation of Azad Jammu and Kashmir and of Gilgit-Baltistan stemmed from Pakistan's invasion of the territory Princely State of Jammu and Kashmir that started the first Indo-Pakistan war. Accordingly, arising from an use of military force prohibited by the UN Charter, Pakistani occupation of territories at issue is to be considered illegal *ab initio* and amounts to an unlawful conduct. So, according to the legal regime of international responsibility Pakistan should end it immediately and restore the *status quo ante*. This obligation is even more cogent if one considers that the temporariness is one of main principles underpinning the law of occupation. Nevertheless, Pakistan's occupation of Azad Jammu and Kashmir and Gilgit-Baltistan has been lasting since the late 1940s; the so-called *prolonged occupation* is thus being realized[162].

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[160] A. RANDELZHOFER, O. DÖRR, *Article 2(4),* in B. SIMMA ET AL. (eds.), *The Charter of the United Nations. A Commentary,* Oxford, III ed., 2012, 209.

[161] See UN General Assembly, *Resolution No*. 2542 (XXIV), *Declaration on Social Progress and Development,* UN Doc. A/RES/2542(XXIV) of 11 December 1969, Article 26; UN General Assembly, *Resolution No*. 2625 (XXV), cit.; UN General Assembly, *Resolution No*. 42/22. *Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations*, UN Doc. A/RES/42/22 of 18 November 1987; UN Security Council, *Resolution No*. 674. *On protection of third-State nationals in Iraq and Kuwait*, UN Doc. S/RES/674 of 29 October 1990. In literature see mainly Y. RONEN, *Illegal Occupation and its Consequences*, in *Israel LR*, 2008, 201-245 and literature quoted therein; A. ZEMACH, *Can Occupation Resulting from a War of Self-Defense Become Illegal?*, in *Minnesota JIL,* 2015, 313-350.

[162] About the *prolonged occupation* see lastly N. KISWANSON, S. POWER, *Prolonged Occupation and International Law*, Leiden-Boston, 2023.

The fact that an occupation is illegal *ab initio* and that it has been lasting for more than one year, which is the period indicated in Article 6(3) of the Fourth Geneva Convention for its application, does not exempt the occupying power to comply with the law of occupation and its basic principles, namely the conservationist principle and the related prohibition of annexation, the obligation to act in good faith and in the best interest of occupied population, as well as the principle of temporariness. The ICJ has been very clear on this point: «there is no temporal limit on the application of the obligations of an occupying power under the Hague Regulations»[163]. Nor does the fact that an occupation is prolonged alter in itself its legal status under international humanitarian law[164]. Consequently, Pakistan is firstly called upon to respect customary international law of occupation as codified in the 1907 Hague Regulations. Then, it must comply with relevant provisions of the 1949 Fourth Geneva Convention and of the Convention for the Protection of Cultural Property in the Event of Armed Conflict to which it is a party.

An assessment of Pakistan's policy towards the two territories shows that it has firstly complied with the ban on ruling the occupied territories on a permanent or even an indefinite basis. Indeed, over the years both Azad Jammu and Kashmir and Gilgit-Baltistan have not been formally incorporated into Pakistan and have remained distinct territories. Secondly, the various laws and presidential orders adopted by Pakistani authorities or by local authorities with the influence and endorsement of the Islamabad Government seem, broadly speaking, to be compatible with the obligation «to take all the measures in his power to restore, and ensure, as far as possible, public order and safety»[165]. However, the *Comité International pour le Respect et l'Application de la Charte Africaine des Droits de l'Homme et des Peuples (CIRAC)* has recently denounced lack of access to quality education and healthcare for people living in Azad Jammu and Kashmir and in Gilgit-Baltistan. Moreover, it has reported lack of employment opportunities which further perpetuates poverty and underdevelopment for Kashmiris[166]. So, it can be argued that the

[163] ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory,* cit., para. 107.

[164] *Ibid*.

[165] Article 43 of the 1907 Hague Regulations.

[166] See UNHRC, *Written statement* submitted by Comité International pour le Respect et l'Application de la Charte Africaine des Droits de l'Homme et des Peuples (CIRAC), a non-*

obligation to maintain the proper working of all institutions devoted to the care and education of children and to ensure proper food and medical supplies is not being adequately fulfilled.

Additionally, Pakistani authorities have not complied (and are not complying) with Article 55 of the 1907 Hague Regulations stating that the occupying power must administer «public buildings, real estate, forests, and agricultural estates (…) situated in the occupied country (…) in accordance with the rules of usufruct». Indeed, as reported by the OHCHR, natural resources in Azad Jammu and Kashmir and Gilgit-Baltistan are not controlled by local communities but by Pakistani federal agencies which exploit them for the benefit of Pakistan, while local people continue to remain largely impoverished[167]. Additionally, in its 2018 and 2019 Reports, OHCHR noted structural and extensive human rights violation in the territories of Azad Jammu and Kashmir and of Gilgit-Baltistan[168]. In other words, Pakistan would disregard its obligation to act in good faith and to administer the territories under its control in the interests of the occupied population. This conduct contrary to the law of occupation is in addition to the aforementioned violation of the principle of temporariness.

In his 2017 Report, the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 argued that an occupation may become illegal if the occupying power breaches any one of the principles underpinning the law of occupation, namely the conservationist principle and the related prohibition on annexation, temporality, the best interests of the occupied population, and good faith[169]. Moving from this position which is supported by many international law scholars[170], as a result

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governmental organization in special consultative status, UN Doc. A/HRC/54/NGO/101 of 21 February 2024.

[167] OHCHR, Report of 8 July 2019, *Update of the Situation of Human Rights in Indian-Administered Kashmir and Pakistan-Administered Kashmir from May 2018 to April 2019*.

[168] The human rights situation in the territories that formerly belonged to the Princely State of Jammu and Kashmir will be discussed in Chapter III.

[169] UNHCR, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, UN Doc. A/72/556 of 23 October 2017, paras. 29-38.

[170] See, among others, R. A. FALK, B. H. WESTON, *The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of Intifada*, in *Harvard ILJ,* 1991, 129-157; E. BENVENISTI, *The International Law of Occupation*, cit., 68; O. BEN-NAFTALI ET AL., *Illegal Occupation: Framing the Occupied Palestinian Territory*, in *Berkeley JIL*, 2005, 551-614; Y. RONEN, *op. cit.;* A. ZEMACH, *op. cit.*; M. LYNK, *Prolonged Occupation or Illegal Occupant?*, in *EJIL Talk*, 2018, https://www.ejiltalk.org/prolonged-occupation-or-

of the previous analysis, the regime of occupation instituted by Pakistan over Azad Jammu and Kashmir and Gilgit-Baltistan should be qualified as unlawful *tout court*.

5. India's sovereign title over the territory of the entire Princely State of Jammu and Kashmir and the *status* of Azad Jammu and Kashmir and Gilgit-Baltistan as occupied territories significantly condition the legitimacy of the power exercised by China over Aksai Chin and Shaksgam Valley. Before explaining the rationale underlying this statement, it is worth bearing in mind that the Beijing Government gained the control of these territories at different times and in different ways. So, their *status* under international law must be investigated separately.

5.1. As already said (see Introduction, para. 1), since October 1962 China has been exercising effective control over the territory of Aksai Chin, over which it claims sovereign powers by virtue of the principle of historic rights. The relevance of such principle has been recognized by international judicial bodies which used it as basis for laying down certain parameters for determining sovereign claims. In arbitral proceeding between Eritrea and Yemen, the PCA suggested that the historical title has two constitutive elements: first, that «it has so long been established by common repute that [its] common knowledge is itself a sufficient title»; and second, that possession has continued so long «as to have become accepted by the law as a title»[171]. The ICJ recognized the geographical factor as essential to historic rights[172] and accepted the argument that the success of «historic rights» is contingent upon the exercise of sovereignty over the disputed territory if «the necessary jurisdiction over them [exists] for a long period without opposition from other States»[173]. As regards the disputed territory of Aksai Chin, it is precisely the requirement of *possessio longi temporis* or, better, evidence of its existence that seem to be lacking. Indeed, although China argues that such territory is under its jurisdiction since the Qing Dynasty (1644-1911), this

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illegal-occupant/); V. TODESCHINI, *Out of Time: On the (Il)legality of Israel's Prolonged Occupation of the West Bank,* in N. KISWANSON, S. POWER (eds.), *op. cit.,* 31-51.

[171] PCA, Arbitral award (first stage) of 9 October 1998, *Eritrea v. Yemen*, case n. 1996-04, para. 106.

[172] ICJ, Judgment of 18 December 1951, *Fisheries Case (UK v. Norway),* 139.

[173] *Ivi*, 130 and 138-139.

assertion is not supported by a set of historical facts. Rather, evidence exists that from 1460 to 1842 the territory at issue belonged to the reign of the Namgyal Dynasty which ruled over Ladakh. So, it was not part of Ancient China. Moreover, literature conveniently observes that «considering the inaccessible terrains of Aksai Chin, a scientific survey would not have been possible in that era, making any historical reference to these territories mere conjecture»[174]. While the absence of tangible evidence may cast doubt on the validity of Chinese claims, as well as those of their detractors, it is irrefutable that, following the entry into force of the Treaty of Amritsar which was an offshoot of the Treaty of Lahore, the territory of Ladakh including Aksai Chin became part of the Princely State of Jammu and Kashmir (see *Appendix 2*)[175].

Since the 1962 war, India and China have entered into various bilateral agreements, none of which fix the border along the LAC, or stipulate the cession of the territory of Aksai Chin from India to China[176]. They merely aim to prevent the situation from escalating. Therefore, it is to be excluded that China enjoys a legal title of sovereignty over Aksai Chin. Conversely, it is India that enjoys this title by virtue of the Instrument of accession which resulted in the incorporation of the entire Princely State (including the region at issue) into the Indian Union. Consequently, China's control over the

[174] U. PANDEY, *The India-China Border Question: An Analysis of International Law and State Practices*, Observer Research Foundation (ORF) Occasional Paper 290, December 2020, 10.

[175] As said, by virtue of the Treaty of Lahore and the Treaty of Amritsar, various distinct territories like Jammu, Kashmir, Ladakh, Hunza, Nagar and Gilgit stripped by the East Indian Company from the Sikh Kingdom of Punjab merged to bring into being the Princely State of Jammu and Kashmir under the Maharaja Gulab Singh. See S. SAINI, A. KUMAR, *Military Strategy of Dogra Rulers of J&K State: Its Present Relevance*, in *Elementary Education Online*, 2021, 808.

[176] In addition to the aforementioned 1993 Agreement on the Maintenance of Peace and Tranquility along the Line of Actual Control in the Sino-Indian Border, see Agreement between the Government of the Republic of India and the Government of the People's Republic of China on Confidence-Building Measures in the Military Field along the Line of Actual Control in the Sino-Indian Border (New Delhi, 29 November 1996); Protocol on the Modalities for the Implementation of Confidence-Building Measures in the Military Field along the Line of Actual Control in the Sino-Indian Border (New Delhi, 11 April 2005); *A*greement between the Government of the People's Republic of China and the Government of the Republic of India on the Political Parameters and Guiding Principles for the Settlement of the China-India Boundary Question (New Delhi, 11 April 2005); Establishment of a Working Mechanism for Consultation and Coordination on China-India Border Affairs (New Delhi, 17 January 2012); Border Defense Cooperation Agreement between India and China (Beijing 23 October 2013).

Aksai Chin region constitutes a violation of Indian territorial sovereignty.

On closer inspection, Aksai Chin can be considered an occupied territory since, in my opinion, all aforementioned requirements for an *occupation* under the meaning of Article 42 of 1907 Hague Regulations are met. First, Aksai Chin is characterized by the physical presence of Chinese armed forces, which has also intensified as a result of crashes with Indian troops occurred in Galwan Valley (in Eastern Ladakh) in June 2020. According to media, China would have consolidated its presence in the area with expanded roads, outposts and modern weatherproof camps equipped with parking areas, solar panels and even helipads[177]. Additionally, Chinese authorities have fully substituted local ones, namely Indian ones, in administering the territory. Proof of this is that, as mentioned above (see Introduction, para. 4.3.), within Chinese law Aksai Chin forms part of the Hotan Prefecture of Xinjiang Autonomous Region.

On the premise that the territory of Aksai Chin is under occupation, as an occupying power China must comply with 1907 Hague Regulations which are part of customary international law and are thus binding on it, as well as with the 1949 Fourth Geneva Convention and the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict it is party to.

5.1.1. Considerations about the legal nature of Pakistan's occupation of Azad Jammu and Kashmir and of Gilgit-Baltistan can be easily extended to Chinese occupation of Aksai Chin.

If one looks at the events that led to the occupation of the region at issue, it is evident that it was tainted with illegality *ad bellum*. After failed attempts to solve border dispute through diplomatic means, between 1961 and 1962 India began to implement its Forward Policy, that is, small numbers of lightly armed Indian infantry established several 'forward posts' deep inside unoccupied but disputed border areas. For its part, China attempted to increase its military forces in the disputed areas by setting up check-posts and enhancing border patrols. Although both States were behaving in a manner that increased tension, it was China that violated the prohibition of the use of force imposed by the UN Charter. Indeed, on 20 October 1962 Chinese military forces invaded the disputed territory along the 3,225-

[177] https://www.chathamhouse.org/publications/the-world-today/2023-06/are-china-and-india-bound-another-deadly-border-clash

kilometre border in Ladakh and across the McMahon Line in the northeastern frontier. Although the UN Security Council did not make any determination on the existence of an illegal use of military force, it is undeniable that China acted in contravention of Article 2(4) of the UN Charter. Firstly, its invasion of the disputed territory was not authorized by the UN Security Council. Secondly, it could not amount to self-defense since no armed attack had occurred against China. Indeed, India's establishment of several 'forward posts' deep inside disputed border areas cannot be regarded as an act of aggression simply because they concerned a territory which was not under Chinese sovereignty.

As a result of the unilateral ceasefire on November 22, 1962, China has been exercising control over Aksai Chin region. Arising from an unlawful use of force in contravention to the UN Charter, China's occupation of the territory at issue can be regarded as illegal *ab initio*. Moreover, a quick investigation of legislation passed by Chinese authorities easily reveals China's non-compliance with the law of occupation. Firstly, it is disregarding the principle of temporariness, since occupation of Aksai Chin has been lasting for more than 60 years. Secondly, in my opinion, China has violated the conservationist principle and the related the prohibition on annexation. Indeed, even if its intention to annex Aksai Chin region has not been formally expressed until now, it may be deduced from the State's measures and actions. In this regard, the new official map of the Chinese territories recently released by China's Ministry of Natural Resources is relevant (see *Appendix 4*). It shows Aksai Chin clearly within Chinese borders. This is consistent with China's approach to date; as already said, Aksai Chin is administered as part of the Hotan Prefecture of Xinjiang Autonomous Region. In my view, a *de facto* annexation occurred[178]. Furthermore, in annexing the Aksai Chin to its territory and, therefore, in acquiring *de facto* sovereignty over an occupied territory, China violated the rule stating the prohibition of the use of force in international relations and its corollary principle of the non-acquisition of territory by force[179].

[178] As the ICJ has clarified, «[a]lthough differing in terms of the means through which the annexation is carried out, both types of annexation [*de jure* and *de facto*] share the same objective – the assertion of permanent control over the occupied territory» (ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory,* cit., para. 160).

[179] In this regard, see ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory,* cit., paras. 175-179. It is worth noting that the

Conversely, it cannot be assumed that Chinese conduct is contrary to the obligations to administer the territory in the best interest of the occupied population and to protect its human rights simply because Aksai Chin is devoid of human settlements. In other words, it lacks a population whose best interest and human rights are to be protected. In essence, in the light of above analysis, the regime of occupation instituted by China over Aksai Chin should be considered as illegal *tout court*.

5.2. As already said, China-administered Kashmir also includes Shaksgam Valley over which Chinese authorities exercise full sovereign powers. Such powers have their legal basis in the agreement China concluded with Pakistan in 1963[180]. In order to ensure «the prevailing peace and tranquility on the border», this Agreement fixed «the alignment of the entire boundary line between China's Sinkiang and the contiguous areas the defense of which is under the actual control of Pakistan» (Article 2). Contiguous areas the 1963 boundaries Agreement refers to are the north-eastern part of the former Princely State of Jammu and Kashmir which were under Pakistani occupation at the time when the Agreement was concluded. Pursuant to its Article 1, the boundary was fixed «on the basis of the traditional customary boundary line including features and in a spirit of equality, mutual benefit and friendly cooperation» so that the territory of Shaksgam Valley came under China's control. In other words, a part of a territory under occupation was ceded by the occupying power to a third party. If one assesses the 1963 boundaries Agreement in these terms, it is quite clear that it cannot constitute a valid legal title for China's exercise of sovereignty over Shaksgam Valley.

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principle of prohibition of acquisition of territories by force was affirmed by the UN Security Council in the 1960s and reiterated by the General Assembly. See UN Security Council, *Resolution No.* 242 (1967), *The situation in the Middle East*, UN Doc. S/RES/242(1967) of 22 November 1967; UN Security Council, *Resolution No.* 252 (1968), *On the status of Jerusalem*, UN Doc. S/RES/252(1968) of 21 Mary 1968; UN Security Council, *Resolution No.* 267 (1969), *on the status of Jerusalem*, UN Doc. S/RES/267(1969) of 3 July 1969; UN Security Council, *Resolution No.* 298 (1971), *Middle East,* UN Doc. S/RES/298(1971) of 25 September 1971; UN Security Council, *Resolution No.* 478 (1980), *Territories occupied by Israel*, UN Doc. S/RES/478(1980) of 20 August 1980; UN Security Council, *Resolution No.* 2334 (2016), *on cessation of Israeli settlement activities in the Occupied Palestinian Territory, including East Jerusalem,* UN Doc. S/RES/2334(2026) of 23 December 2016; UN General Assembly, *Resolution No*. 77/126, *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan*, UN Doc. A/RES/77/126 of 12 December 2022.

[180] See *supra*, note 21.

As was pointed out in the Commentary on Article 47 of the 1949 Fourth Geneva Convention, «the occupation of territory is essentially a temporary, *de facto* situation, which deprives the occupied power of neither its statehood nor its sovereignty (…) Consequently occupation as a result of war (…) cannot imply any right whatsoever to dispose of territory»[181]. Therefore, «in any case or in any manner whatsoever», an occupied population cannot «be deprived of the benefits of the (…) Convention (…) by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory» (Article 47). Although the provision at issue refers to annexation by prohibiting it, there is no doubt that the cession of the whole or part of an occupied territory also falls within its scope. This interpretation is further confirmed by Article 7 of the 1949 Fourth Geneva Convention which prohibits the parties to an occupation from forming agreements that would, «adversely affect the situation» or «restrict the rights» guaranteed to occupied populations under the Convention itself. On the premise that the latter protects the rights of an occupied population to their territory, homes and property, in my opinion it is to be assumed that a treaty transferring the sovereignty over the whole or part of an occupied territory also falls under the scope of the aforementioned provisions and is thus prohibited, since it determines a restriction of the right of the occupied population to enjoy their entire territory. So, in concluding the 1963 boundaries Agreement Pakistan violated the 1949 Fourth Geneva Convention to which it was (and still is) bound.

Nor does it matter that, pursuant to Article 6, this Agreement has a provisional character. Indeed, the two contracting parties agreed that «after the settlement of the Kashmir dispute between Pakistan and Indian the sovereign authority concerned will reopen negotiations with the Government of the Peoples' Republic of China on the boundary as described». Lacking sovereignty, Pakistan was in no way entitled to conclude neither an indefinite nor a temporary agreement concerning territories under occupation. So, it committed a wrongful act under international law.

The fact that the 1963 boundaries Agreement was concluded in breach of the 1949 Fourth Geneva Convention could affect its own

[181] See the ICRC Commentary of the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1958.

validity[182]. Indeed, as is known, the rules of the 1949 Geneva Conventions are largely recognized as having the *status* of peremptory norms under international law. The opinion expressed by the ICJ is particularly relevant in this respect. Indeed, it pointed out that «a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" (…) that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law»[183]. In line with this position, in the 2022 Draft Conclusions on identification and legal consequences of peremptory norms of general international law, the ILC included the «basic rules of international humanitarian law» in its non-exhaustive list of peremptory norms[184]. Unfortunately, the ILC did not clarify which rules of international

[182] This assumption could be considered misplaced if one were to admit that - as argued by eminent scholars - the effectiveness of treaties establishing borders does not last. It ends the moment the border is drawn and respect for the latter is a matter for the principle of territorial sovereignty. In this sense see B. CONFORTI, M. IOVANE, *op. cit.,* 128.

[183] See ICJ, Advisory Opinion of 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons,* para. 79. This position was further confirmed in Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* cit. para. 157. Literature argues that the word «intransgressible» must be understood as «non-derogable» since «there is simply no other relevant descriptor of the status of rules of customary international law between binding (inviolable), and peremptory. Thus, in describing the fundamental rules of international humanitarian law as «intransgressible principles of customary international law», the ICJ was effectively describing those rules as rules of customary international law that could not be derogated from – in other words, peremptory norms, according to the criteria prescribed by the VCLT» (R. J. BARBER, *Cooperation through General Assembly to end serious breaches of peremptory norms*, in *ICLQ*, 2022, 11). This interpretation is confirmed by the ILC. See Draft Articles on State Responsibility (2001), commentary on Article 40, para. 5 («[i]n the light of the description by ICJ of the basic rules of international humanitarian law applicable in armed conflict as "intransgressible" in character, it would also seem justified to treat these as peremptory»). About the peremptory character of basic rule of international humanitarian law in literature see mainly L. CONDORELLI, L. BOISSON DE CHAZOURNES, *Quelques remarques à propos de l'obligation des États de "respecter et faire respecter" le droit international humanitaire en toutes circonstances,* in *Études et essais sur le droit international humanitaire et sur les principes de la CroixRouge en l'honneur de Jean Pictet*, 1984, 33; M. SASSÒLI, *State Responsibility for Violations of International Humanitarian Law*, in *IRRC*, 2002, 414; J. CRAWFORD, *State Responsibility: the General Part,* Cambridge, 2013, 380; R. J. BARBER, *op. cit.;* A. R. HINDI, *Membership in an Exclusive Club: International Humanitarian Law Rules as Peremptory International Law Norms*, in *Loyola Univ. Ch. Int'l L. Rev.,* 2023, 127-155.

[184] See ILC, *Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (jus cogens)*, UN Doc. A/77/10 of 12 August 2022, 87 (Conclusion 23 and related commentary (sub-10)).

humanitarian law are the «basic rules». What is certain is that they are other than the prohibition of genocide; the prohibition of crimes against humanity; the prohibition of racial discrimination and apartheid; the prohibition of slavery and the prohibition of torture which are included in the list as autonomous examples of peremptory norms. Some eminent scholars maintain that all rules of international humanitarian law are peremptory by virtue of their peculiar features[185]. On the other hand, one cannot but agree with the consideration that all «rules of international humanitarian law (…) directly or indirectly protect rights of protected persons in international armed conflicts. In both international and non-international armed conflicts, those rules furthermore protect "basic rights of the human person" which are classic examples for jus cogens»[186]. In the light of these reasonings, even the rules expressed in Articles 7 and 47 of the 1949 Fourth Geneva Convention should be considered to belong to *jus cogens*. This conclusion seems to be supported by the wording of Article 47 itself. Indeed, by stating that «[p]rotected persons who are in occupied territory shall not be deprived, *in any case or in any manner whatsoever*, of the benefits of the [present] Convention (italics added) », such Article makes it clear that no derogations are permitted from any Convention provisions. If we assume that foregoing Articles 7 and 47 are peremptory rules, hence, in accordance with the customary rule corresponding to Article 64 of the VCLT[187], the 1963 boundaries Agreement would be void and terminate as it would contradict a norm of *jus cogens superveniens*[188]. Therefore, in the light of this reasoning the

[185] See particularly, L. CONDORELLI, L. BOISSON DE CHAZOURNES, *op. cit.,* 33.

[186] M. SASSÒLI, *op. cit.,* 414.

[187] About the existence of a customary rule corresponding to Article 64 of the VCLT, see A. LAGERWALL, *Article 64. Survenance d'une nouvelle norme impérative du droit international général (jus cogens),* in O. CORTEN, P. KLEIN (coord.), *Les Conventions de Vienne,* cit., 2314; A. PIETROBON, *Trattati antichi e* jus cogens superveniens, in B. CORTESE (a cura di), *Studi in onore di Laura Picchio Forlati*, Torino, 2014, 121; K. SCHMALENBACH, *Article 64. Emergence of a New Peremptory Norm of General International Law (Jus Cogens)*, in O DÖRR, K. SCHMALENBACH (eds.), *Vienna Convention on the Law of Treaties,* cit., 1126.

[188] It is worth noting that the 1963 boundaries Agreement does not fall under the scope of the VCLT due to its non-retroactivity. Moreover, it is widely recognized that its Article 53 and Article 64 were rules of progressive development of international law in 1969 (in this sense see A. LAGERWALL, *op. cit.,* 2310). Therefore, it cannot be asserted that the 1963 boundaries Agreement was null because, at the time of its conclusion, it conflicted with a peremptory norm of international law, since a customary rule corresponding to Article 53 of the VCLT did not exist.

sovereignty exercised by China over Shaksgam Valley would not only be based on an unlawful legal title but would be exercised without a legal title.

As regards the consequences of possible termination of the 1963 boundaries Agreement, it is worth noting that Article 71(2)(b) of the VCLT, saving rights, obligations and legal situations created by the execution of the terminated treaty to the extent that they do not conflict with the new *jus cogens* rule, is not applicable since the Agreement at issue does not fall under the scope of the VCLT. Moreover, due to the lack of practice, the existence of a customary rule reproducing the content of the Article at issue must be excluded at present[189]. On the other hand, the rationale of Article 71(2)(b) of the VCLT is to preserve rights, obligations and legal situations that were valid at the time of their creation. But, as said, the cession determined by the 1963 boundaries Agreement was not valid, therefore, it could be argued that – in principle - the termination of the Agreement also resulted in the *termination* of the cession and the restoration of the *ex ante* situation.

6. The analysis conducted so far allows for some preliminary considerations. First, as a result of the validly concluded Instrument of accession the former Princely State of Jammu and Kashmir became part of the Indian Union. Consequently, not only do the Indian armed forces not amount to a *hostile army* under the meaning of Article 42 of the 1907 Hague Regulations and the current territory of the Federated State of Jammu and Kashmir cannot be considered as occupied. But India is also entitled to exercise governing powers over other territories originally belonging to the Princely State, namely Azad Jammu and Kashmir, Gilgit-Baltistan, Aksai Chin and Shaksgam Valley. Consequently, control exercised over them by Pakistan and China respectively amounts to a hostile occupation that is, moreover, illegal inasmuch as the two States are not complying with most rules of the law of occupation.

Secondly, on the premise that the Federated State of Jammu and Kashmir is not a subject of international law (see *supra*, para. 3.3.) but merely a component part of the Indian Union, its relationship with the

[189] F. CRÉPEAU ET AL., *Article 71. Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law*, in O. CORTEN, P. KLEIN (eds), *The Vienna Conventions,* cit., 1615.

latter and its internal organizational aspects pertain to Indian law order and have no relevance for international law. It is undeniable that, despite the current state of development of international, the organization of governmental functions is one of few matters still falling into State *domaine réservé*. Therefore, it must be ruled out, *prima facie*, that the much-criticized revocation of the autonomy *status* constitutionally guaranteed to the Federated State of Jammu and Kashmir is illegitimate under international law[190].

[190] This topic will be further analyzed in Chapter II, para. 3.4.1.1.

CHAPTER II

THE DISPUTED RIGHT OF THE KASHMIRIS TO SELF-DETERMINATION

TABLE OF CONTENT: 1. The involvement of the right of peoples to self-determination in the *Kashmir issue*. – 2. Self-determination of peoples in international law: origins and evolution of the principle. – 2.1. The content of the principle: the external dimension. – 2.2. …The internal dimension. – 2.3. The notion of «people» for the purposes of self-determination under international law. – 2.4. The temporal scope of the principle of self-determination of peoples. – 3. The Kashmiris and their alleged right to self-determination. – 3.1. The applicability of the notion of «people» to the Kashmiris. – 3.2. The Kashmiris and their alleged right to external self-determination in the light of rules of international law applicable when events occurred. – 3.3. The Kashmiris and their alleged right to external self-determination in the light to current state of development of international law. – 3.4. The Kashmiris and their alleged right to internal self-determination. – 3.4.1. India and its compliance with the Kashmiris' right to internal self-determination. – 3.4.1.1. The revocation of the autonomy *status* of the Federated State of Jammu and Kashmir: its impact on the Kashmiris' right to internal self-determination. – 3.4.1.2. The revocation of the autonomy *status* of the Federated State of Jammu and Kashmir: its legitimacy under other Indian treaty obligations. – 3.4.2. Pakistan and its compliance with the Kashmiris' right to internal self-determination. – 4. Conclusions

1. Over the years, the Islamabad Government and the Pakistani scholars, as well as the OIC have repeatedly invoked the violation of the principle of self-determination of peoples to challenge India's exercise of sovereignty over part of the territory of the former Princely State of Jammu and Kashmir. These allegations take for granted that the population settled on such territory qualifies as «people» for the purposes of the principle of self-determination under international law[191] and are based on the finding that the incorporation of the Princely State into the Indian Union was agreed without its inhabitants being put in a position to decide their own *destiny*.

This was undoubtedly a fact. But, it is equally a fact that even Pakistan did not allow the population settled on Azad Jammu and Kashmir and on Gilgit-Baltistan under its occupation to vote on the accession of these territories to Pakistan or India, although the UN Security Council Resolution of April 1948 provided that it «should undertake to use its best endeavors (…) to make known to all

[191] In this regard, it is worth noting that even scholars supporting the right of Kashmiris to self-determination (see *supra*, note 71) takes it for granted that they fall under the meaning of «people».

concerned that the measures indicated (…) provide full freedom to all subjects of the State, regardless of creed, caste, or party, to express their views and to vote on the question of accession of the State (…)»[192]. Does this mean that both India and Pakistan violate the principle of self-determination of peoples?

It is undeniable that the realization of the principle at issue «requires a free and genuine expression of the will of peoples concerned»[193]. However, the fact that the Kashmiris did not have a say on the accession is not enough to argue that India and Pakistan were/are responsible for violating their right to self-determination. Indeed, its legitimate invocation under international law presupposes that several requirements are met, first and foremost that the people concerned is entitled to self-determination[194]. To ascertain whether the above-mentioned accusations made by Pakistan against India are well-founded, it is then required to investigate the applicability of the principle of self-determination of peoples to the *Kashmir issue*. To this end, the notion of «peoples» and the scope of the principle in question have to be defined.

2. In literature the origins of self-determination of peoples as political principle usually traced back to the late XVIII century, when it was first articulated in the American Revolution and in the French

[192] UN Security Council, *Resolution No.* 47(1948), cit., sub-A 1(b).

[193] In this sense see ICJ, *Western Sahara*, cit., paras. 55, 72 and 162.

[194] About the principle of self-determination of peoples from a legal perspective see, *ex multis*, G. GUARINO, *Autodeterminazione dei popoli,* Napoli, 1984; G. ARANGIO RUIZ, *Autodeterminazione (diritto dei popoli alla)*, in *Enciclopedia Giuridica,* 1988, 1; C. TOMUCHAT, *Modern Law of Self-Determination*, Leiden, 1993; A. CASSESE, *Self-Determination of Peoples. A Legal Reappraisal,* Cambridge, 1995; U. VILLANI, *Autodeterminazione dei popoli e tutela delle minoranze nel sistema delle Nazioni Unite*, in R. COPPOLA, L. TROCCOLI (a cura di), *Minoranze, laicità, fattore religioso. Studi di diritto internazionale e di diritto ecclesiastico comparato*, Bari, 1997, 87 ff.; T. CHRISTAKIS, *Le droit à l'autodétermination en dehors des situations de décolonisation,* Paris, 1999; B. C. NIRMAL, *The Right to Self-Determination,* New Delhi, 2000; B. CONFORTI, *Il significato giuridico del principio di autodeterminazione dei popoli*, in B. CONFORTI, *Scritti di diritto internazionale*, Napoli, 2003, 227-233; D. FRENCH, *Statehood and Self-Determination Reconciling Tradition and Modernity in International Law*, Cambridge, 2013; M. DISTEFANO (a cura di), *Il principio di autodeterminazione dei popoli alla prova del nuovo millennio*, Milano, 2014; F. R. TESÓN (ed.), *The Theory of Self-Determination, Cambridge,* 2016; M. MELANDRI, *Self-Determination, International Law and Post-Conflict Reconstruction. A Right in Abeyance,* London, 2018; T. SPARKS, *Self-Determination in the International Legal System*, London, 2023; P. TACIK, *Deconstructing Self-Determination in International Law*, Leiden, 2023.

one[195]. However, one has to wait until the beginning of the 20th century for it to appear on the international scene. Self-determination of peoples was indeed invoked both by Lenin and Wilson to corroborate their own political thesis. Thus, according to the Soviet doctrine, it amounted to the right of peoples to secede from «imperial» States to form socialist States. As it is evident, such a concept was designed principally as a means of furthering socialism as opposed to popular sovereignty in general[196]. Conversely, Wilson's self-determination, crystallized in his famous Fourteen Points, consisted of the right of a population to choose its own rulers; that is, it was identified with the concept of self-government[197].

Self-determination as a legal principle was considered for the first time in the 1920 *Aaland Islands* case, in which the ethnically Swedish population of the islands sought secession from Finland and union with Sweden[198]. The latter argued for an application of the principle of self-determination; Finland countered by asserting that international law had no jurisdiction in the matter. The League of Nations appointed a tribunal to investigate the merits of the Swedish claim, and it ultimately decided that self-determination was a political principle and not an international legal norm. And, indeed, it was due to the entry into force of the UN Charter that self-determination of peoples came to prominence in international law. Articles 1(2) and 55 mention it among the principles on which the development of friendly relations between States should be based. However, they do not define its precise content, thus amounting it to a mere *desirable programmatic principle*. Its transformation into a *right* to which a real legal obligation corresponds is owed to the UN General Assembly. Indeed, since the early 1950s the latter adopted a series of resolutions that helped define the notion and scope of the principle at issue by applying it specifically to decolonization[199]. The *Declaration on the*

[195] See particularly, A. CASSESE, *Self-Determination of Peoples,* cit., 11-36. According to other scholars the right of peoples to self-determination dates to the Peace of Westphalia. In this sense see particularly R. VIJAYVERGIA, *Understanding the Right to Self Determination: with Special Emphasis on Jammu and Kashmir*, in V. KUMAR ET AL. (eds), *Abrogation of Article 370 & Article 35A. Constitutional Analysis,* New Delhi, 2021, 107.

[196] In this regard, see S. W. PAGE, *Lenin and Self-Determination*, in *SEER,* 1950, 342-358.

[197] In this regard, from a political science perspective see A. LYNCH, *Woodrow Wilson and the principle of 'national self-determination': a reconsideration*, in *RIS,* 2002, 419-436.

[198] See (1920) L.N.O.J. Spec. Supp. No. 3.

[199] See particularly UN General Assembly, *Resolution No.* 637, *The Right of Peoples and Nations to Self-determination*, UN Doc. A/RES/637 of 16 December 1952; *Resolution* No. 738 (VIII), *The Right of Peoples and Nations to Self-determination,* UN Doc.

Granting of Independence to Colonial Countries and Peoples adopted in 1960 was particularly relevant in this regard[200]. Indeed, as the ICJ argued, it represented a milestone in the evolution of the right to self-determination of peoples under foreign domination[201], and marked a decisive moment in the consolidation of State practice in the field of decolonization[202]. The subsequent UN General Assembly *Declaration on Friendly Relations* was of no less relevance[203]; it not only reaffirmed the notion of «self-determination of peoples», but it also better defined and extended its scope (see *infra*, para. 2.1.). The generalization of this principle and its connotation in terms of a «real human right» can be further inferred from the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). They both list the self-determination of peoples as first among the human rights whose protection and promotion their States parties are committed to.

Nevertheless, in the affirmation of the principle of self-determination of peoples, an outstanding role has been played by the ICJ. On several occasions it has recognized the existence of an international customary rule enshrining the right of peoples to self-determination[204] and has clarified its *status* among the sources of international law. Specifically, it stated that «the right of peoples to self-determination is today a right erga omnes»[205]. This means not

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A/RES/738(VIII) of 28 November 1953; *Resolution No*. 1188 (XII), *Recommendations concerning International Respect for the Right of Peoples and Nations to Self-determination*, UN Doc. A/RES/1188(XII) of 11 December 1957; *Resolution No*. 1541 (XV), *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter,* UN Doc. A/RES/1541(XV) of 15 December 1960.

[200] UN General Assembly, *Resolution No*. 1514 (XV), cit.

[201] See ICJ, Advisory Opinion of 21 June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southwest Africa) notwithstanding Security Council Resolution 276 (1970),* 33; *Western Sahara,* cit., 32.

[202] See ICJ, *Chagos Archipelago,* cit., para. 150.

[203] UN General Assembly, *Resolution No.* 2625 (XXV), cit.

[204] See particularly, ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia,* cit., paras. 52-53; *Western Sahara*, cit., paras. 54-59; *Chagos Archipelago*, cit., para. 151 ff.

[205] See ICJ, Judgement of 30 June 1995, *East Timor (Portugal v. Australia)*, para. 29; Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* para. 88 and para. 156; *Chagos Archipelago,* cit., para. 188. Unlike the ICJ, the African Court of Human and Peoples' Rights openly acknowledged that the rule enshrining the right of peoples to self-determination belongs to the category of *jus cogens*. See, Judgment of 22 September 2022, *Bernanrd Anbataayela Mornah* v. *Republic of Benin, Burkina Faso, Republic of Côte d'Ivoire, Republic of Ghana*, Application n. 028/2018, para. 298. About the right of peoples to self-determination as *jus cogens* see also ILC, *Draft*

only that it is addressed to all subjects of international law, but also that its respect is owed by each of them to the international Community as a whole. Consequently, its violation might result in *special* consequences in terms of international responsibility[206].

2.1. According to the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples «all peoples have the right to self-determination; by virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development» (Article 2). This statement is reiterated in the 1970 Declaration on Friendly Relations which reads: «[b]y virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right to freely determine, without external interference, their political status and to pursue their economic, social and cultural development»[207]. However, this Declaration did not stop there and went much further, offering a significant contribution in defining the scope of the principle and its application. Firstly, it helped to circumscribe the notion of «peoples» entitled to the right to self-determination[208], by stating that «subjection of peoples to alien

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Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (jus cogens), cit., 16 (Conclusion 23). In literature see H. GROS ESPIELL, *Self-Determination and Jus Cogens*, in A. CASSESE (ed.), *UN Law, Fundamental Right: Two Topics in International Law*, Leiden, 1979, 167; K. DOERING, *Self-Determination,* in B. SIMMA (ed.), *The Charter of the United Nations: A Commentary*, Oxford, I ed., 1994, 70; A. CASSESE, *Self-Determination of Peoples,* cit., 171-172; H. MORIS, *Self-Determination: An Affirmative Right or Mere Rhetoric*?, in *ILSA J. Int'l & Comp. L.,* 1997, 204; M. RODRIGUEZ-ORELLANA, *Human Rights Talk ... and Self-Determination, Too*, in *Notre Dame LR*, 1998, 1406; B. C. NIRMAL, *op. cit.,* 59-61; A. ORAKHELASHVILI, *Peremptory Norms in International Law*, Oxford, 2006, 51; V. LANOVOY, *Self-Determination in International Law: A Democratic Phenomenon or an Abuse of Right?*, in *Cambridge JICL,* 2015, 390; F. PALOMBINO, *Introduzione al diritto internazionale*, Bari, II ed., 2021, 57; B. CONFORTI, M. IOVANE, *op. cit.,* 28. However, some scholars consider still controversial whether the rule enshrining the right of peoples to self-determination belongs to *jus cogens*. See M. POMERANCE, *Self-Determination in Law and Practice: The New Doctrine of the United Nations*, The Hague-Boston-London, 1982, 70; H. HANNUM, *Rethinking Self-Determination*, in *Virginia JIL,* 1994, 31; J. SUMMERS, *Peoples and International Law*, The Hague-Boston- London, 2014, 84; K-G. PARK, *The Right to Self-Determination and Peremptory Norms*, in D. TLADI (ed.), *Peremptory Norms of General International Law (Jus Cogens)*, Leiden, 2021, 698-712.

[206] In this regard in literature see *ex multis* S. SAHAKYAN, *Aggravated state responsibility and obligations erga omnes: The Concept "Obligations Erga omnes" and its relevance in the Law of State Responsibility*, Saarbrücken, 2010.

[207] UN General Assembly, *Resolution No.* 2625 (XXV), cit., sub 5(1).

[208] For an in-depth analysis of the concept of «people» for the purposes of the principle of self-determination see *infra*, para. 2.3.

subjugation, domination and exploitation constitutes a violation of the principle» and is contrary to the UN Charter. Moreover, the 1970 Declaration on Friendly Relations clarified the forms which self-determination may take. It pointed out that «[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people»[209]. As it is evident, the Declaration amounted to a right to external self-determination that – as pointed out by the ICJ – must be «the expression of the free and genuine will of the people concerned»[210] and exercised in accordance with the principle of territorial integrity[211].

Finally, the 1970 Declaration on Friendly Relations specified what obligations States have in relation to the exercise of self-determination by a people. These obligations firstly consist of a positive duty to individually or jointly promote the realization of self-determination[212], and to render assistance to the people who is legitimately fighting for its self-determination in accordance with the UN Charter[213]. In this regard, the UN General Assembly pointed out that it does not constitute an «aggression» contrary to the UN Charter the struggle waged by peoples under colonial and racial regimes or other forms of alien domination to exercise their own right to self-determination[214]. Simultaneously, States are also under the negative obligation to refrain from resorting to coercive measures to deprive peoples of their right[215].

[209] In this sense see also Principle VI of the UN General Assembly *Resolution No*. 1541 (XV), cit.

[210] In this sense, ICJ, *Western Sahara,* cit., para. 55; ICJ, *Chagos Archipelago,* cit., para. 157.

[211] In this regard, see UN General Assembly, *Resolution No.* 1514 (XV), cit., para. 6; *Resolution No.* 2625 (XXV), cit., sub 5 (7) e (8). It is worth noting that the ICJ considered the principle of territorial integrity as «corollary of the right to self- determination». See ICJ, *Chagos Archipelago*, cit., para. 160.

[212] UN General Assembly, *Resolution No.* 2625 (XXV), cit., sub 5(2).

[213] *Ivi*, sub 5(6).

[214] UN General Assembly, *Resolution No.* 3314 (XXIX), *Definition of Aggression*, UN Doc. A/RES/3314(XXIX) of 14 December 1974, Article 7.

[215] UN General Assembly, *Resolution No.* 2625 (XXV), cit., sub 5(6).

2.2. In addition to *external* self-determination, international law also recognizes and protects the right to internal self-determination[216] which is understood as the right of a people to choose the form of government and political regime of its State and to have equal access to its administration[217]. In this regard, it is relevant Article 1 common to the ICCPR and to the ICESCR[218], whose paragraph 1 enshrines the right of peoples to self-determination in terms entirely identical to those used in the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples. According to the HRC, such right and «the corresponding obligations concerning its implementation are interrelated with other provisions of the Covenant and rules of international law»[219], since «its realization is an essential condition for

[216] About internal self-determination in literature see, *ex multis*, M. POMERANCE, *Self-Determination in Law and Practice,* cit., 37 ff.; G. GUARINO, *Autodeterminazione,* cit., 148-190; F. LATTANZI, *Autodeterminazione dei popoli*, in *Digesto delle Discipline pubblicistiche*, Torino, 1987, vol. II, 31 ff.; P. THORNBERRY, *The Democratic or Internal Aspect of Self-Determination with some Remarks on Federalism,* in C. TOMUCHAT (ed.), *Modern Law of Self-Determination,* Dordrecht, 1993, 101 ff.; A. ROSAS, *Internal Self-Determination*, in C. TOMUCHAT (ed.), *Modern Law of Self-Determination,* Dordrecht, 1993, 225 ff.; J. SALMON, *Internal Aspects of the Right to Self-determination: towards a Democratic Legitimacy Principle?,* in C. TOMUCHAT (ed.), *Modern Law of Self-Determination*, Dordrecht, 1993, 253 ff.; A. CASSESE, *Self-Determination of Peoples*, cit.; G. PALMISANO, *L'autodeterminazione interna nel sistema dei Patti sui diritti dell'uomo,* in *RDI*, 1996, 365 ff.; J. SUMMERS, *Internal and External Aspects of Self-Determination Reconsidered*, in D. FRENCH (ed.), *Statehood and Self-determination: Reconciling Tradition and Modernity in International Law,* Cambridge, 2013, 229-249; M. VALENTI, *La questione del Sahara occidentale alla luce del principio di autodeterminazione dei popoli*, Torino, 2017, 92-98; M. IOVANE, *Il principio di autodeterminazione interna nel diritto internazionale: progressi e fallimenti di un diritto fondamentale*, in *Il Foro Napoletano,* 2018, 430 ff.; K. SENARATNE, *Internal Self-Determination in International Law: History, Theory and Practice*, Cambridge, 2021.

[217] In this sense see Supreme Court of Canada, *Renvoi relatif à la sécession du Québec*, 1998 CanLII 793 (CSC), [1998] 2 RCS 217, para. 126. It stated that «Les sources reconnues du droit international établissent que le droit d'un peuple à disposer de lui-même est normalement réalisé par voie d'autodétermination interne - à savoir la poursuite par ce peuple de son développement politique, économique, social et culturel dans le cadre d'un État existant».

[218] In this sense see J. CRAWFORD, *Democracy and International Law*, in *BYIL*, 1993, 116; I. KLABBERS, R. LEFEBER, *Africa Lost Between Self-Determination and Uti Possidetis,* in C. BRÖLMANN ET AL. (eds), *Peoples and Minorities in International Law*, Leiden, 1993, 43; A. ROSAS, *op. cit.,* 244; A. CASSESE, *Self-Determination of Peoples*, cit., 53 and 96-98; G. PALMISANO, *L'autodeterminazione interna*, cit., 368; Id., *Nazioni Unite e autodeterminazione interna: il principio alla luce degli strumenti rilevanti dell'ONU*, Milano, 1997; D. RAIČ, *Statehood and the Law of Self-Determination*, The Hague, 2002, 237; M. WELLER, *Why the Legal Rules on Self-determination Do not Resolve Self-Determination Disputes*, in M. WELLER, B. METZGER (eds.), *Settling Self-Determination Disputes*, Leiden, 2008, 20; M. VALENTI, *op. cit.,* 94-95; K. SENARATNE, *op. cit.*

[219] HRC, *General Comment No*. 12, *The Right to Self-determination of Peoples (Article 1),* HRI/GEN/1/Rev.9 (Vol. I) of 13 March 1984, para. 2.

the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights»[220]. Therefore, self-determination should be considered realized if, within its own State, the people is permitted to exercise freedom of expression (Article 19 of the ICCPR), freedom of assembly (Article 21 of the ICCPR), freedom of association (Article 22 of the ICCPR) and the right to vote and to participate directly or indirectly in the public life of the State[221] (Article 25 of the ICCPR)[222]. It is quite evident how internal self-determination declined in these terms tends to be equivalent to democracy [223] and, consequently, it can only be considered realized within States that develop democratic systems of government[224].

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[220] *Ivi*, para. 1.

[221] In this sense, in literature, see R. HIGGINS, *Problems and Process: International Law and How We Use It,* Oxford, 1995, 165-166; I. KLABBERS, R. LEFEBER, *op. cit.,* 43; P. THORNBERRY, *op. cit.,* 101; A. ROSAS, *op. cit.,* 244; J. SALMON, *op. cit.,* 253; A. CASSESE, *Self-Determination of Peoples*, cit., 53; J. CRAWFORD, *The Right of Self-Determination in International Law: Its Development and Future*, in P. ALSTON (ed.), *Peoples' Rights*, Oxford, 2002, 5-6; I. KLABBERS, *The Right to be Taken Seriously: Self-Determination in International Law*, in *HRQ*, 2006, 189; D. RAIČ, *op. cit.,* 237; M. WELLER, *op. cit.,* 20. According to G. PALMISANO, *L'autodeterminazione interna*, cit., 406, some social and economic rights enshrined in the ICESCR should be added: the right to work; the right of everyone to form trade unions and join the trade union of his choice; the right to education; the right to take part in cultural life.

[222] In this regard, the HRC stated that «[t]he rights under article 25 are related to, but distinct from, the right of peoples to self-determination». See HRC, *General Comment No.* 25. *Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, CCPR/C/21/Rev.1/Add.7 of 16 July 1996, para. 2. The African Commission on Human and Peoples' Rights seems to share this position (see African Commission on Human and Peoples' Rights, *Communication No.* 318/06, *Open Society Justice Initiative v. Côte d'Ivoire*, Final Report of 28 February 2015, para. 185). In this regard in literature see S. SALOMON, *Self-Determination in the Case Law of the African Commission: Lessons for Europe*, in *VRÜ*, 2017, 217-241.

[223] According to G. ANDERSON, *op. cit.,* 36, the existence of a close link between self-determination and democracy can be also deduced from the Charter of Paris for a New Europe.

[224] In this sense see R. EZETAH, *The Right to Democracy: A Qualitative Inquiry*, in *Brooklyn JIL,* 1996/1997, 504; A. E. ECKERT, *Free Determination or Determination to Be Free? Self-Determination and the Democratic Entitlement*, in *UCLA J. Int'l L. & For. Aff.*, 1999, 55-79; A. M. GARDNER, *Democratic Governance and Non-State Actors*, London, 2011, 21-43; N. CHANDHOKE, *Contested Secessions: Rights, Self-determination, Democracy, and Kashmir*, Oxford, 2012, 158-193; J. SUMMERS, *Internal and External Aspects,* cit., 229; M. IOVANE, *op. cit.,* 429 ff.; F. PALOMBINO, *op. cit.,* 56. In this regard, F. LATTANZI, *Il diritto dei Curdi all'autodeterminazione: modalità di realizzazione*, in *DPCE,* 2020, p. IX, observed that «[i]n un sistema di governo democratico tale diritto si realizza spesso attraverso statuti di autonomia territoriale o personale (ciò soprattutto in situazioni di pluralismo etnico e/o religioso). Ma l'autodeterminazione può anche realizzarsi semplicemente attraverso la

However, due to the lack of relevant practice, it must be ruled out that it was formed and exists at present a customary rule reproducing the content of Article 1(1) common to the 1966 International Covenants, as interpreted by the HRC[225]. In other words, it is to be excluded that, outside the conventional context, international law grants all peoples the right to internal self-determination interpreted as expression of the principle of democratic legitimacy. Indeed, as noted in literature, there is no basis for asserting that general international law requires the Governments of all States to enjoy the consent of the majority of their population and to be freely chosen by it[226]. The right to pursue one's own political, economic, social and cultural development within an existing State is so far recognized under general international law only to peoples subjected to a regime of racial discrimination[227].

2.3. While, on the one hand, the Declarations of the UN General Assembly and the jurisprudence of the ICJ had the merit of transforming self-determination from a *programmatic principle* to a justiciable right and of defining its notion and scope, on the other hand, they had the limitation of not providing the notion of «people». However, guidance is to be obtained from the Final Report and Recommendations elaborated by UNESCO in 1989[228], which roughly

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garanzia costituzionale e l'effettivo rispetto delle diversità di ciascuna comunità componente la popolazione governata». *Contra,* A. SINAGRA, P. BARGIACCHI, *Lezioni di diritto internazionale pubblico*, Milano, III ed., 2019, 102-103. They maintained that «nell'ottica dell'autodeterminazione interna, un popolo è rappresentato in uno Stato plurinazionale e ha accesso alle autorità pubbliche quando la sua esistenza, identità e individualità non è compromessa, limitata o cancellata. Il diritto di partecipare alla vita istituzionale e politica dello Stato, come si realizza nelle democrazie occidentali, non rientra nel contenuto della norma».

[225] In this sense see particularly A. CASSESE, *Self-Determination*, cit., 332; J. VIDMAR, *The Right of Self-Determination and Multiparty Democracy: Two Sides of the Same Coin?*, in *HRLR*, 2010, 239; M. IOVANE, *op. cit.,* 430; F. M. PALOMBINO, *op. cit.,* 56-57; B. CONFORTI, M. IOVANE, *op. cit.,* 31; P. DE SENA, M. STARITA, *op. cit.,* 189. *Contra*, v. A. ROSAS*, op. cit., 2*46-247.

[226] B. CONFORTI, M. IOVANE, *op. cit.,* 31-33. In this sense see also U. VILLANI, *op. cit.,* 88; F. M. PALOMBINO, *op. cit.,* p. 56.

[227] See particularly F. M. PALOMBINO, *op. cit.,* 57; A. CASSESE, *Diritto internazionale (a cura di M. Frulli)*, Bologna, IV ed., 2021, 169; F. SALERNO, *op. cit.,* 74 ff.

[228] UNESCO, *Final Report and Recommendations, International Meeting of Experts on Further Study on the Concept of the Rights of Peoples*, SHS.89/CONF.602/7 of 27-20 November 1989.

retraced the 1972 study of the International Commission of Jurists[229]. A «people» is there described as «a group of individual human beings who enjoy some or all of the following common features: (a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; territorial connection; (g) common economic life»[230]. These objective elements should be accompanied by a subjective element, that is, «the will to be identified as a people or the consciousness of being a people»[231]. Such a description of «people» has been accepted by most international law scholars[232], even if – with reference to the right to self-determination – it does not seem to be fully reflected in practice. The reference is particularly to the process of decolonization occurred in Africa, which – as is known – represents the main context in which the principle of self-determination was applied. There, the right to self-determination was recognized to peoples identified as geo-political entities by virtue of the *uti possidetis iuris* rule. That is, their identification took into account the main internal administrative boundaries of colonial empires and their external boundaries, without considering the historical or ethnic ties, between populations concerned. In other words, the people entitled to the right to self-determination was identified through the territory it inhabited without regard to its racial or national identity, or uniqueness. As international law literature has authoritatively observed, it can be inferred from this practice that the recipient of the right to self-determination is merely a group of individuals inhabiting a given territory who, in turn, has historically developed as a unitary administrative entity[233]. As it is

[229] International Commission of Jurists, *Right of Self-determination in International Law*, in *The Review Jurists*, No. 8, June 1972, 6 ff.

[230] UNESCO, *Final Report and Recommendations,* cit., para. 22(1).

[231] *Ivi*, para. 22(3). In this regard, French literature dealt with the will of «même vouloir-vivre collectif». See C. CHAUMONT, *Recherche du contenu irréductible du concept de souveraineté internationale de l'Etat*, in AA.VV., *Hommage d'une génération des juristes au Président Basdevant,* Paris, 1960, 147; C. CHARBONNEAU, *op. cit.,* 116; P. M. DUPUY, Y. KERBRAT, *Droit international public*, Paris, 2022, 60.

[232] See C. TAYLOR*, Why do Nations Have to Become States*?, in C. TAYLOR*, Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism,* Montreal-Kingston, 1993, 40-52; J. BROSSARD, *L'accession à la souveraineté et le cas du Québec*, Montréal, II ed., 1995, 67; C. CHARBONNEAU, *Le droit des peuples à disposer d'eux-mêmes: un droit collectif à la démocratie ... et rien d'autre*, in *RQDI,* 1995, 116-117; B. C. NIRMAL, *op. cit.,* 100-103; T. SCOVAZZI (a cura di), *Corso di diritto internazionale,* Milano, 2018, 117; A. SINAGRA, P. BARGIACCHI, *op. cit.,* 86-87; P. M. DUPUY, Y. KERBRAT, *op. cit.,* 60.

[233] G. GUARINO, *op. cit.,* 123 and 141-142. In this sense see also A. CASSESE, *Self-Determination of Peoples*, cit., 39–43; M. VALENTI, *op. cit.,* 68; N. JONES, *Self-Determination*

evident, it is a broader notion of «people» in which the objective element is lost, and national minorities are excluded[234]. For the purposes of this study, it is considered preferable to accept this second notion of the «people» since, being inferred from practice, it is consistent with the factual reality of things rather than the ideal one. On the other hand, this is the *de facto* definition also embraced by the ICJ, which has repeatedly argued the importance of the *uti possidetis iuris* rule for the purpose of «predetermining» the people entitled to the right to self-determination[235].

For a people, so defined, to exercise its right to external self-determination under international law, an additional factual condition must be met. Although the UN Charter fails in providing a definition of «people», an interpretation of its Article 1(2) according to the systemic criterion suggests that under its purposes self-determination was originally concerned with developing the self-government of territories whose «peoples have not yet attained a full measure of self-government» (Article 73(b))[236]. In other words, for its purposes, the right to self-determination concerned only peoples which were subject to colonial domination. This conclusion is firstly confirmed by the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples. Indeed, although it read: «all peoples have the right to self-determination», it is obvious that it referred to all peoples subject to colonial domination due to its subject matter[237]. Such an originally circumscribed scope of the right at issue has been

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and the Right of Peoples to Participate in International Law-Making, in *BYIL*, 2021, 9; F. SALERNO, *op. cit.,* 45-47.

[234] It is worth noting that national minorities are protected by *ad hoc* rules of international law. See M. SPATTI, *Minoranze nazionali e autodeterminazione dei popoli*, in *Riv. Int'l Dir. U.,* 2002, 504-526; N. GHANEA ET AL. (eds), *Minorities, Peoples and Self-Determination. Essays in Honour of Patrick Thornberry*, Leiden, 2005; J. CASTELLINO, *International Law and Self-Determination: Peoples, Indigenous Peoples*, *and Minorities,* in C. WALTER et. al (eds), *Self-Determination and Secession in International Law,* Oxford, 2014, 27-44; A. PATTEN, *Self-Determination for National Minorities*, in F. R. TESÓN (ed.), *The Theory of Self-Determination*, Cambridge, 2016, 120-144; A. GIOIA, *op. cit.,* 113; B. CONFORTI, M. IOVANE, *op. cit.,* 28; C. FOCARELLI, *op. cit.,* 60.

[235] See ICJ, *Frontier Dispute* (*Burkina Faso v. Republic of Mali*), cit. paras. 20-21 and 25-26; ICJ, *Chagos Archipelago*, cit., paras. 160 and 174.

[236] See G. ANDERSON, *op. cit.,* 27; T. SCOVAZZI (a cura di), *op. cit.,* 114; P. DE SENA, M. STARITA, *op. cit.,* 186.

[237] This interpretation is supported by the wording of UN General Assembly *Resolution No.* 1541 (XV), cit. Indeed, Principle I of its Annex stated that «[t]he authors of the Charter of the United Nations had in mind that Chapter XI should be applicable to territories which were then known to be of the colonial type».

further confirmed by the ICJ[238] and by practice. Indeed, when put to the test, the principle of self-determination of peoples has been a powerful driving force for the realization of the decolonization process.

It was the 1970 Declaration on Friendly Relations which broadened the category of factual conditions in which a people (identified according to the criteria mentioned above) must fall to be entitled to invoke the right to external self-determination under international law. Indeed, in stating that «subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle», it disentangled self-determination from the colonial context and implicitly opened up the possibility that even in other situations of subjugation, such as military occupation, the right to self-determination can be invoked[239]. The ICJ has not only confirmed this hypothesis in its advisory opinions concerning the Occupied Palestinian Territories, but it has also pointed out that «in cases of foreign occupation (…), the right to self-determination constitutes a peremptory norm of international law»[240].

The 1970 Declaration on Friendly Relations also specified that the right of peoples to self-determination should not be understood «as authorizing or encouraging any action which could dismember on impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without

[238] See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* cit., paras. 52-53; ICJ, *Western Sahara,* cit., para. 55; ICJ, *Chagos Archipelago*, cit., para. 146.

[239] This interpretation is supported by the wording of UN General Assembly, *Resolution No.* 50 (IV). *Declaration on the Occasion of the 50th Anniversary of the United Nations,* UN Doc. A/RES/50/6 of 9 November 1995. Its Article 1(3) stated that the UN will, *inter alia,* «continue to reaffirm the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize the right of peoples to take legitimate action in accordance with the Charter of the United Nations realize their inalienable right of self-determination (…)». About cases where the principle of self-determination has been legitimately invoked by peoples subject to alien subjugation other than colonialism, see A. CASSESE, *Self-Determination,* cit., 90-99.

[240] See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* cit.; ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territories,* cit., para. 233.

distinction as to race, creed or colour»[241]. An *a contrario* reading of this clause seems to suggest that sovereign and independent States that do not behave in accordance with the principle of equal rights and self-determination of peoples are not guaranteed territorial integrity and political unity. Consequently, if a people is denied access to State government on racial or religious grounds, it is entitled to exercise its right to external self-determination[242]. Such literal interpretation of the 1970 Declaration on Friendly Relations supported by the analysis of its preparatory works[243], the modality of its adoption[244], together with State practice[245] led to argue that customary international law also grants the right to external self-determination to racial groups persecuted by the central Government[246].

In essence, in the light of the wording of aforementioned legal instruments and their interpretation, the ICJ's jurisprudence and State practice, it can be assumed that a people – identified by reason of its inhabiting a given territory and of its having historically developed as a unitary administrative entity – is entitled to the right to external self-determination only if it is subject to colonial domination, alien subjugation or racial segregation.

Conversely, the existence of one of these factual conditions does not seem to be necessary for a people to exercise the right to internal self-determination under the ICCPR and the ICESCR. Indeed, their common Article 1 refers to «all peoples» and neither other provisions of the Covenants nor the HRC circumscribed such a notion in any

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[241] UN General Assembly, *Resolution No.* 2625 (XXV), cit., sub 5(7).

[242] In this sense see particularly A. CASSESE, *Self-Determination of Peoples*, cit., 109-115; G. ANDERSON, *Unilateral Non-Colonial Secession and Internal Self-Determination: A Right of Newly Seceded Peoples to Democracy?,* in *Arizona JICL*, 2016, 32; M. VALENTI, *op. cit.,* 116-117.

[243] A. CASSESE, *Self-Determination of Peoples*, cit., 115-118.

[244] UN General Assembly, *Resolution No.* 2625, cit., was adopted by consensus. The broad support it obtained affords an indication of *opinio iuris* of UN Member States. In this regard, see ICJ, *Military and Paramilitary Activities in and against Nicaragua,* cit., para. 191.

[245] The reference is particularly to the cases of racial regimes in South Africa and South Rhodesia. See UN Security Council, *Resolution No*. 253 (1968), *Question concerning the situation in Southern Rhodesia*, UN Doc. S/RES/253 of 29 May 1968; UN General Assembly, *Resolution No*. 2379 (XXIII), *Question of Southern Rhodesia*, UN Doc. A/RES/2379 of 25 October 1968; UN General Assembly, *Resolution No.* 2649 (XXV), *Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights*, UN Doc. A/RES/2649 (XXV) of 30 November 1970; UN Security Council, *Resolution No*. 328 (1973), *Question concerning the situation in Southern Rhodesia*, UN Doc. S/RES/328 of 10 March 1973. In this regard see G. GUARINO, *op. cit.,* 159-161.

[246] A. CASSESE, *Self-Determination of Peoples*, cit., 121-122.

way. Therefore, in the light of the wording the foregoing Article and of the purposes pursued by the ICCPR and the ICESCR, it can be assumed that all populations living in States parties to the ICCPR and/or ICESCR are entitled to the right to internal self-determination [247]. This interpretation is further supported by the wording of a declaration concerning Article 1 made by India on ratifying the 1966 Covenants[248]. It states that «the words "right of self-determination" […] apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people». The fact that India considered it necessary to make such a declaration suggests that there is a widespread belief that all peoples – even those living in sovereign States – are within the scope of Article 1 of the ICCPR or the ICESCR[249].

2.4. The application of the principle of self-determination of peoples meets a time limit; it concerns its non-retroactivity. This means that the principle at issue can only apply to situations occurred after the norm enshrining it was formed in international law or, as regards the internal self-determination, after the entry into force of the ICCPR and the ICESCR.

It is worth noting that this rule of non-retroactivity has no general application; indeed, it does not apply to colonial peoples, who are deemed to enjoy the right to external self-determination regardless of when the domination itself dates back to[250]. In this regard, it was noted that this approach is due to a change in the mindset of the international Community «in base al quale non sarebbe stato più concepibile considerare legittimo il "dominio" su intere popolazioni che, in quanto non organizzate in forma statutale secondo il modello

[247] This conclusion is shared by A. CASSESE, *Self-Determination of Peoples*, cit., 59. According to the author, «the general spirit and the context of Article 1, combined with the preparatory work, lead to the conclusion that Article 1 applies to: (1) entire populations living in independent and sovereign States, (2) entire populations of territories that have yet to attain independence, and (3) population living under foreign military occupation».

[248] The nature of this declaration and its implication will be further analyzed *infra*, para. 3.4.

[249] In this sense see A. CASSESE, *Self-Determination of Peoples*, cit., 60.

[250] In this sense see B. CONFORTI, M. IOVANE, *op. cit.,* 29. See also M. VALENTI, *op. cit.,* 113; G. SCALESE, *Qualche fugace riflessione sul preteso diritto all'autodeterminazione delle minoranze dal punto di vista dell'ordinamento giuridico internazionale*, in *Rev. Est. Jur.*, 2019, n. 19, 220-221; C. FOCARELLI, *op. cit.,* 60.

post westfaliano, erano in passato considerate terrase nullius e quindi, secondo il diritto vigente all'epoca, territory di conquista»[251].

Conversely, by virtue of the rule of non-retroactivity, the right to external self-determination cannot be invoked by peoples subject to alien domination other than colonization, if such domination dates to a time before the formation of the norm enshrining it[252]. As it is evident, crucial in this discourse is to understand when the norm recognizing the right to self-determination for peoples subject to foreign domination was formed in the international legal order. The position expressed by the ICJ is relevant in this regard. In its advisory opinion concerning Chagos Archipelago, it clarified that the right of peoples to self-determination crystallized as a customary rule following the adoption of the UN General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples. Although it is not binding, «[t]he Court considers that […] it has a declaratory character with regard to the right to self-determination as a customary norm, in view of its content and the conditions of its adoption»[253]. Then, «[b]y recognizing the right to self-determination as one of the "basic principles of international law", [the 1970 Declaration on Friendly Relations] confirmed its normative character under customary international law»[254]. Therefore, it is to be assumed that a rule of international law enshrining the right of peoples to self-determination was formed in the 1960s. This conclusion was already implicitly reached by the ICJ in 2004, when it stated that the Palestinian people – who has been under occupation since 1967 – was entitled to the right to self-determination under international law[255].

3. As seen, the principle of self-determination of peoples has a limited scope under international law. First, in both the external and internal dimensions its applicability meets temporal limits. Therefore,

[251] M. VALENTI, *op. cit.,* 113.

[252] In this sense see B. CONFORTI, M. IOVANE*, op. cit.,* 29. M. VALENTI, *op. cit.,* 113; G. SCALESE, *op. cit.,* 221; C. FOCARELLI, *op. cit.,* 60.

[253] In support of its assertion the ICJ observed that the Declaration on the Granting of Independence to Colonial Countries and Peoples was adopted by 89 votes with 9 abstentions. None of the States participating in the vote contested the existence of the right of peoples to self-determination, while certain States justified their abstention based on the time required for the implementation of such a right. See ICJ, *Chagos Archipelago*, cit., para. 152.

[254] *Ivi,* para. 155.

[255] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* cit.

it cannot be said that the Kashmiris' right to self-determination has been violated without having first assessed temporal applicability of such a right to the *Kashmir issue*. Additionally, as regards the right to internal self-determination, it is to be assessed if India, Pakistan and China are bound by Article 1 common to the ICCPR and the ICESCR. Moreover, as said, the right to external self-determination is subject to the existence of specific factual conditions. Therefore, assuming that the principle is temporally applicable to the *Kashmir issue*, for the Kashmiris to be deemed to enjoy this right, it is necessary to ascertain whether they meet one of the above factual conditions, namely, whether they are subject to foreign domination, military occupation, or racial segregation.

The following pages will be devoted to these assessments, which – as anticipated – will be based on an intertemporal application of relevant rules of international law. Clearly, they cannot fail to be preceded by a preliminary examination: whether the Kashmiris fall under the notion of «people» under international law considering that the term «Kashmiris» refers to a group of individuals originally within the territory of the Princely State of Jammu and Kashmir, but which is now divided and subject to the jurisdiction of three different States.

3.1. As already said, the Princely State of Jammu and Kashmir came into existence following the conclusion of the Treaty of Amritsar (see Chapter I, para. 2.1). This means that its territorial boundaries were arbitrarily created by a simple purchase of land and did not reflect the ethnic, religious, or linguistic differences of the region. Actually, the Princely State consisted primarily of the three main provinces: Jammu, the Kashmir Valley, and Ladakh, whose population was divided into Muslims, Hindus, Sikhs, and Buddhists. Such a religious diversity was accompanied by different traditions and habits. Thus, for instance, the Kashmir Valley, which was settled mainly by Muslims, had an influential Hindu minority known as the Pandits. They had specific customs and styles of dress not seen in other parts of the Princely State.

Differences were present even within the same religious group; for example, unlike the Pandits, Hindus in Jammu (which was the southern province, the center of power of the Maharaja dynasty) hailed from a variety of castes.

The Princely State was also characterized by linguistic differences; population settled in the Kashmir Valley spoke Kashmiri.

Conversely, the main languages spoken in Jammu were Dogri and Punjabi, while Ladakhi and Kashur were the most common languages in Ladakh. Furthermore, the latter was sparsely populated and had little influence in the State. The population was primarily Buddhist and most of the residents had Tibetan ties.

Such a great diversity of ethnicities, languages, religions and tradition makes it difficult to argue that the Kashmiris met the objective element pertaining to the definition proposed by the UNESCO and this would orient, *prima facie*, to exclude that they are «people» under international law. However, on the other hand, in spite of such heterogeneity, Kashmiris have historically shown that they possess the «vouloir-vivre collectif» which is expression of the subjective criterion. Indeed, before pre-British colonial period, irrespective of religion and ethnicity, the Kashmiris was enlivened by a social consciousness of brotherhood which was expressed by the term *Kashmiriyat*[256]. It is «the common ethos uniting the people of Kashmir»[257], that is to say, it is a secular ethno-national as well as socio-cultural consciousness based on the values of solidarity, mutual coexistence, resilience and patriotism, that bind the Kashmiris together. The *Kashmiriyat* is generally thought to have been developed under the Muslim governor who ruled the region of Kashmir from 1423 to 1474 A.D., and the Mughal Emperor Abkar in 1542 to 1605 A.D., and its emergence is usually traced back to religious activities of the Hindu-Shaivites and Muslim Sufis in the region[258]. Although this traditional sense of brotherhood originally developed in the Kashmir Valley, it has permeated through all the Kashmiri communities over the centuries and in the 1930s Kashmiri nationalist leaders put pressure on it to redefine the basis of political loyalty and to expand the membership of the Muslim Conference[259].

In the light of these considerations, if we accepted the definition of «people» offered by UNESCO, we would have to conclude that the Kashmiris do not fall under its meaning because they meet only one of

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[256] About *Kashmiriyat* in literature see B. PURI, *Kashmiriyat: The Vitality of Kashmiri Identity*, in *CSA*, 1995, 55-63; T. N. MADAN, *Kashmir, Kashmiris, Kashmiriyat: An Introductory Essay,* in A. RAO (ed.), *The Valley of Kashmir*, New Delhi, 2008.

[257] F. N. LONE, *The Creation Story*, cit., 12.

[258] *Ibid.*

[259] In particular, the Kashmiri national leaders emphasized the unique history of the Kashmiri people, the syncretism of various religious beliefs, and the historical peace between different religions and ethnicities in the region. See K. ARAKOTARAM, *The Rise of Kashmiriyat: People-Building in 20th Century Kashmir*, in *CUJSAS*, 2009, 26-40.

the two defining criteria. However, as noted above (see *supra*, para. 2.3.) accepting the notion that an eminent part of the international law doctrine has inferred from practice and that the ICJ itself has in fact embraced, for the purposes of the present study «people» is a group of individuals inhabiting a given territory who, in turn, has historically developed as a unitary administrative entity. Moving from this definition, a different conclusion can be reached about the framing of the Kashmiris as «people» for the purposes of self-determination. Indeed, it is undisputed that they were a group of individuals living a territory delimited by legally defined boundaries, that of the Princely State of Jammu and Kashmir (see *Appendix 3*). Moreover, as noted in Chapter I (paras 2.1. and 2.2.) starting from 1846 that group has historically developed as a unitary administrative entity endowing itself with an autonomous internal system of government. In my view, it can therefore be concluded that the Kashmiris were a people for the purposes of self-determination under international law.

3.2. The conclusion we have reached is not sufficient to argue that the Kashmiris were entitled to the right to external self-determination as a result of the partition of the territory of the Princely State between India, Pakistan, and China. The temporal applicability of the principle at issue and its scope at the time events occurred must be taken into account! In this regard it is worth bearing in mind that Chinese control over the Aksai Chin and Shaksgam Valley occurred at a time after India and Pakistan initiated control over Jammu and Kashmir and over Azad Jammu and Kashmir and Gilgit-Baltistan respectively.

Indeed, the partition of the territory originally belonging to the Princely State of Jammu and Kashmir between India and Pakistan dates to the late 1940s. At that time, the principle of self-determination of peoples undoubtedly existed under treaty law, being referred to in the UN Charter. As already said, according to a systemic interpretation of its Article 1(2), «self-determination of peoples» for the purposes of the Charter was intended as «self-government» for non-self-governing and trust territories[260]. When the *Kashmir issue* arose, both India and Pakistan were UN Members[261], so they were

[260] See G. ANDERSON, *op. cit.,* 27; T. SCOVAZZI (a cura di), *op. cit.,* 114; P. DE SENA, M. STARITA, *op. cit.,* 186.

[261] As already said, according to the continuity criterion, from the entry into force of the Indian Independence Act, India was given the UN member *status* previously accorded to the

bound by the provisions of the Charter. However, they were not obliged to develop the self-government of Kashmiris, since the Princely State of Jammu and Kashmir was not a non-self-governing territory. As explained above (see Chapter I, para. 2.1.), it already was a subject of international law during the period of British protectorate, and it confirmed – and reinforced – its statehood when – following the end of British domination in Asia and the termination of the protectorate – it became fully independent (see Chapter I, para. 2.2.). Therefore, it did not fall within the meaning of «territories whose peoples have not yet attained a full measure of self-government » and provisions contained in Article 73 of the UN Charter did not apply to it. This conclusion is supported by the fact that the Princely State of Jammu and Kashmir was not included in the list of territories declared by the UN General Assembly to be «non-self-governing territories» within the meaning of Chapter XI of the UN Charter [262]. Consequently, it must be held that the principle of self-determination enunciated in Article 1(2) of the UN Charter could not apply to the Princely State and to its territorial community.

In my view, the soundness of this conclusion is further confirmed by the absence of any explicit reference to this principle in resolutions adopted by the UNCIP and the Security Council under Chapter VI of the UN Charter to promote a settlement of Indo-Pakistan dispute. They merely suggested to solve the question on the accession of the Princely State of Jammu and Kashmir to India or Pakistan through the democratic method of a free and impartial plebiscite[263]. Certainly, the reference to the Kashmiris' right to self-determination could be considered implicit since free and impartial plebiscite is the typical instrument through which such right is usually exercised by a people. However, it is undisputed that a plebiscite/referendum can also take place in different contexts.

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representation of the British Dominion in the sub-continent (see *supra*, note 122). Pakistan became UN member on September 30, 1947.

[262] See UN General Assembly, *Resolution No.* 66(I). *Transmission of information under Article 73e of the Charter,* UN Doc. A/RES/66(I) of 14 December 1946; *Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, UN Doc. A/5446/REV.1 - Annex I of 25 October 1963.

[263] See UN Security Council, *Resolution No.* 47 (1948), cit.; UN Security Council, *Resolution No.* 51 (1948), cit.; UN Security Council, *Resolution No.* 80 (1950), cit.; UN Security Council, *Resolution No.* 91 (1951), cit.; UN Security Council, *Resolution No.* 122 (1957), cit.; UN Security Council, *Resolution No.* 126 (1957), cit. See also UNCIP, *Resolution S/1100,* cit., para. 75; UNCIP, *Resolution No.* S/5/1196, cit., para. 15.

Moreover, according to the UNCIP and the Security Council, the plebiscite to be held under the aegis of the UN was not/is not intended to allow the Kashmiris to freely choose their political *status*. A textual interpretation of aforementioned resolutions, particularly *Resolution No.* 47 of April 1948, leads to this conclusion. Indeed, after ascertaining that «both India and Pakistan desire that the question on the accession of Jammu and Kashmir to India or Pakistan should be decided through the democratic method of a free and impartial plebiscite», the UN Security Council recommended to the Governments of both States to adopt all measures «to create proper conditions for a free and impartial plebiscite to decide whether the State of Jammu and Kashmir is to accede to India or Pakistan». The possibility for the Kashmiris to opt for independence was not contemplated. In essence, in choosing to recognize India and Pakistan as the only parties to the dispute, the UN was deferring to the rule of State sovereignty and, consequently, the suggested free and impartial plebiscite was only a means of resolving that dispute, not the recognition of the existence of a right to self-determination.

On the premise that the resolutions adopted by the Security Council and the UNCIP lacked any implicit, as well as explicit, reference to the Kashmiris' right to self-determination, their silence on this point confirms, in my view, the inapplicability of the principle at issue to the present case, as it existed under the UN system at the time of facts.

Neither can it be assumed that the incorporation of Jammu and Kashmir to India, on the one hand, and Pakistan's occupation of Azad Jammu and Kashmir and Gilgit-Baltistan, on the other hand, were in contrast with an obligation to comply with peoples' right to self-determination imposed by general international law. As mentioned in para. 2.4, according to the ICJ, the right of peoples to self-determination crystallized as a customary rule following the adoption of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples. This means that when the *de facto* partition of the territory of the Princely State between India and Pakistan occurred, such a rule did not exist. Consequently, the Kashmiris could not be entitled to an in-existing right, so as India and Pakistan could not violate a customary rule which had not yet been formed.

Such customary rule existed, however, when China occupied the territory of Aksai Chin, which was originally part of the Princely State of Jammu and Kashmir and then became part of the Federated State of

Jammu and Kashmir within the Indian Union by virtue of the Instrument of accession. Indeed, such an occupation occurred in 1962. However, in my view, there was no violation of the principle of self-determination of peoples. This conclusion is based on two grounds: first, such occupation concerned an uninhabited territory due to their morphological features. Secondly, the Kashmiris living in Jammu and Kashmir to whom the region of Aksai Chin belonged did not fall under one of the factual conditions which are essential for a people to be entitled to the right of self-determination under international law. However, what occurred was undoubtedly a violation of India's territorial integrity which resulted in the arbitrary deprivation of the Kashmiris of part of their territory.

Conversely, a violation of the principle of self-determination of peoples occurred when Pakistan ceded the Shaksgam Valley to China[264]. As said (see Introduction, para. 4.3.), the cession was the result of the oft-mentioned boundaries Agreement, which was concluded in 1963, that is, after the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples. The principle of self-determination of peoples was then applicable. According to the ICJ, «the peoples of non-self-governing territories are entitled to exercise their right to self-determination in relation to their territory as a whole, the integrity of which must be respected by the administering Power». In other words, the right to self-determination entails special guarantees for the people, including that of the integrity of its territory[265]. It follows that «any detachment by the administering Power of part of a non-self-governing territory, unless based on the freely expressed and genuine will of the people of the territory concerned, is contrary to the right to self-determination»[266]. In the light of this reasoning and on the premise that the 1963 boundaries Agreement was concluded without the «free and genuine will» of the people of Gilgit-Baltistan - of which the Shaksgam Valley formed part -, it can be asserted that the

[264] In this sense, see A. TRIVEDI, *Why the 1963 Sino-Pakistan Boundary Agreement Is Unlawful in Light of the Recent ICJ Advisory Opinion on the Chagos Archipelago, 2019*, in *Jurist. Legal News & Commentary*, July 8, 2019, https://www.jurist.org/commentary/2019/07/abhishek-trivedi-sino-pakistan-boundary/#

[265] In this sense see G. GUARINO, *op. cit.,* 143-144; C. FOCARELLI, *op. cit.,* 59-60. It is worth noting that another corollary of the right to self-determination is the right of permanent sovereignty over natural resources (see ICJ, *Legal Consequences arising from Policies and Practices of Israel in Occupied Palestinian Territory,* cit., para. 240).

[266] ICJ, *Chagos Archipelago*, cit., para. 160.

aforementioned Agreement and the resulting detachment of part of Pakistan-Administered Kashmir were unlawful not only because they were at odds of the law of occupation, but also because they were in breach of the customary norm of self-determination.

One could argue that the Court's reasoning is not applicable to the *Kashmir issue*, because it concerns the category of «non-self-governing territories» to which – as said – neither Azad Jammu and Kashmir and Gilgit-Baltistan belonged. Indeed, it was a periphrasis used in practice to designate territories under colonial domination. However, in my opinion, the Court's considerations can be valid, *mutatis mutandis*, for territories under occupation, as in the case of Azad Jammu and Kashmir and Gilgit-Baltistan. First, like the colonial peoples, the population of the territories in question, especially that of Gilgit-Baltistan, had not yet attained a full measure of self-government when the 1963 boundaries Agreement was concluded. In particular, Gilgit-Baltistan was directly administered by the federal Government of Pakistan, it had no Constitution of its own and its people had no fundamental guarantee of civil rights, democratic representation, or separation of powers. Furthermore, at the time when the Shaksgam Valley was ceded from Pakistan to China, customary international law already granted the right to external self-determination to peoples under foreign occupation. As mentioned above, this assertion is supported by the ICJ which recognized the right to self-determination for the people of the Palestinian territory under occupation since 1967[267]. In sum, the obligations arising under international law and reflected in the oft-mentioned Declaration on the Granting of Independence to Colonial Countries and Peoples, as well as those stemming from the law of occupation required Pakistan, as the administrating power in Gilgit-Baltistan, and China to respect the territorial integrity of that region. In violating them, they committed a wrongful act.

3.3. As said, the partition of the Princely State of Jammu and Kashmir between India and Pakistan did not take place, for the reasons stated above, in violation of the principle of self-determination of peoples. However, considering the present state of development of international law, one might wonder whether such a violation is occurring at present. In my view, the answer is negative

[267] See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* cit.

with regard to both India-Administered Kashmir and Pakistan-Administered Kashmir. Reasons are different.

As regard India-Administered Kashmir, the motivation is simple. Its people does not fall in any of the factual conditions (i.e., colonial or other forms of alien domination, racial segregation) that would entitle them to legitimately invoke the right to external self-determination under international law, since India exercises lawful sovereign powers over that territorial community by virtue of a valid legal title: the oft-mentioned Instrument of accession (see Chapter I, para 3.2).

Nor does India's unilateral revocation of the autonomy *status* constitutionally granted to Jammu and Kashmir legitimizes its people to invoke this right. Indeed, the change in the constitutional *status* of the territory of Jammu and Kashmir within the Indian Union did not place it in a condition of foreign occupation. Nor was it accompanied by restrictions of Kashmiris' rights on racial grounds or by their marginalization relative to the rest of the Indian population. That is, a condition of racial segregation was not realized. The revocation of autonomy simply resulted in the *downgrading* of Jammu and Kashmir which moved from the *status* of a Federated State to that of a *territory* of the Indian Union. The current administration of Jammu and Kashmir and the *treatment* accorded to its people is the same as those in force for the other six Indian territories.

On the contrary, the Kashmiri people settled on Azad Jammu and Kashmir and on Gilgit-Baltistan falls – in principle - into one of the categories to which international law recognizes the right to external self-determination. Indeed, as revealed by the previous analysis (see Chapter I, para. 4), these territories are under Pakistani occupation. However, this people cannot invoke the principle at issue, since the latter is non-retroactive. That is, as already said, for the principle of self-determination to be applicable to territories other than colonial ones, it is necessary that foreign domination does not date back beyond the time when the principle itself was established[268]. And this condition is not met by the territorial community of Azad Jammu and Kashmir and of Gilgit-Baltistan which are being occupied since late 1940s, that is, long before it was adopted the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples crystallizing peoples' right to self-determination as a customary rule.

[268] See B. CONFORTI, M. IOVANE, *op. cit.,* 29, as well as other authors quoted at note 252.

3.4. As already said, international legal order currently lacks a customary rule imposing upon States the respect for the peoples' right to internal self-determination. However, the obligation for India, Pakistan and China to abide by this right derives from Article 1(1) common to the ICCPR and the ICESCR to which they are parties[269]. Clearly, since it is a treaty obligation, its compliance with it starts since the entry into force of that treaty. This means that the Kashmiris settled on the territories of India-Administered Kashmir, on those of Azad Jammu and Kashmir and Gilgit-Baltistan, and on China-Administered Kashmir were entitled with the right to internal self-determination only from the moment that the 1966 International Covenants became binding for India, Pakistan and China respectively. This happened in different historical moments, and, in any case, this was long after the *Kashmir issue* arose.

These general considerations deserve some clarifications. As regards Chinese-Administered Kashmir, any reasoning concerning the right to internal self-determination is merely theoretical, since the territory at issue is devoid of human settlements. In other words, there is no people to whom China should concretely recognize the exercise of this right.

As regards India-Administered Kashmir, it is worth noting that India deposited a *declaration* concerning Article 1 when depositing its instrument of accession to the 1966 International Covenants. It declared that «the words "right of self-determination" […] apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people». In spite of its *nomen iuris*, this *declaration* constitutes – in my opinion – a reservation. This conclusion results from the interpretation of this declaration «in good faith in accordance with the ordinary meaning to be given to its terms»[270], aimed at ascertaining the intention that guided its formulation. As the ILC pointed out, such intention is usually reflected in the legal effects flowing from the declaration[271],

[269] India deposited the instrument of accession to both the ICCPR and the ICESCR on 18 April 1979. Pakistan ratified the ICESCR and the ICCPR on 17 April 2008 and 23 June 2010 respectively. China is party only to the ICESCR since March 2001; conversely, it never ratified the ICCPR.

[270] See ILC, *Guide to Practice on Reservation to Treaties, in Yearbook of ILC*, 2011, vol. II, Part Two, par. 1.3.1.

[271] In this regard, the HRC pointed out that «[i]t is not always easy to distinguish a reservation from a declaration as to a State's understanding of the interpretation of a provision, or from a statement of policy. Regard will be had to the intention of the State, rather than the form of the instrument. If a statement, irrespective of its name or title, purports

which – in turn – distinguish a *reservation* from an *interpretative declaration*[272]. If one takes into account the wording of Article 1(1) common to the ICCPR and the ICESCR, and particularly the expression «all peoples have the right of self-determination», the effect deriving from the statement «right of self-determination (…) apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people» is that of limiting the scope of the provision. In other words, India aimed to let it to apply to a limited category of subjects, thus modifying its legal effects. And, on the premise that «[i]f a statement […] purports to exclude or modify the legal effect of a treaty in its application to the State, it constitutes a reservation»[273], Indian *declaration* is to be regarded as a modifying reservation[274]. However, in my view, such a reservation is invalid. As the HRC pointed out, «[t]he intention of the Covenant is that the rights contained therein should be ensured to all those under a State party's jurisdiction»[275]. A reservation, such as that made by India, which has the effect of limiting the recognition of a right enshrined in the Covenants to a restricted category of persons, is therefore contrary to the object and purpose of the Covenants and must therefore be held invalid. This conclusion is supported by the position expressed by the HRC which stated that «[a]pplying more generally the object and purpose test to the Covenant, […] reservation to Article 1 denying peoples the right

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to exclude or modify the legal effect of a treaty in its application to the State, it constitutes a reservation. Conversely, if a so-called reservation merely offers a State's understanding of a provision but does not exclude or modify that provision in its application to that State, it is, in reality, not a reservation». See, HRC, *General Comment No.* 24 (52), *Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant,* CCPR/C/2/Rev.1/Add.6 (1994) of 4 November 1994, para. 3.

[272] See ILC, *Guide to Practice on Reservation to Treaties,* cit., para. 1.3.

[273] See HRC, *General Comment No.* 24 (52), cit., para. 3.

[274] Unlike a reservation, «an interpretative statement neither alters the conventional norm, nor the effect it brings about, in contradistinction to a reservation». In this sense, M. BENATAR, *From Probative Value to Authentic Interpretation Declaration*, in *RBDI*, 2011, 179. About reservations to human rights treaties see, in literature, U. VILLANI, *Tendenze della giurisprudenza internazionale in materia di riserve ai trattati sui diritti umani,* in S. BARIATTI, G. VENTURINI (a cura di), *Liber Fausto Pocar*, Torino, 2009, 969-984; D. RUSSO, *L'efficacia dei trattati sui diritti dell'uomo*, Milano, 2012, 1-69; M. L. BUENGER, *Human Rights Conventions and Reservations,* in *Buffalo HRLR*, 2013/2014, 67-90; L. SOLARO, *The Problem of Reservations to Human Rights Treaties: A New Challenge to the Traditional Concept of International Law*, in *Trento St. L. Rev.,* 2019, 65-76; K. ZVOBGO ET AL., *Reserving Rights: Explaining Human Rights Treaty Reservations,* in *ISQ*, 2020, 785–797.

[275] See HRC, *General Comment No.* 24 (52), cit., para. 12.

to determine their own political status and to pursue their economic, social and cultural development, would be incompatible with the object and purpose of the Covenant»[276]. Moreover, it is worth noting that Pakistan and Germany objected to India's declaration by stating that it was contrary to the object and purpose of the ICCPR[277]. As the HRC clarified, an invalid reservation is to be considered as *not made,* «in the sense that the Covenant will be operative for the reserving party without benefit of the reservation»[278]. So, India is under the obligation to respect the right to internal self-determination, as interpreted by the HRC[279], as does Pakistan which made no reservation to Article 1 of the 1966 International Covenants.

3.4.1. Although, at the time of incorporation of the Princely State of Jammu and Kashmir into the Indian Union, international law did not require respect for the peoples' right to internal self-determination, in my view India complied with it. Indeed, as already said (see Introduction, para. 4.1.), pursuant to the Instrument of accession and the Delhi Agreement, the Indian Constitution granted Jammu and Kashmir a *status* of autonomy within the Union. It had its own Constitution[280], its own flag, as well as its own legislative, executive and judicial bodies which were entitled to exercise sovereign powers on all matters except for foreign policy, defense and communications. The Federated State of Jammu and Kashmir was thus established with specific autonomy guarantees to respect the ethnic, linguistic and religious identities of its people. In such a described situation, in which a *status* of autonomy is constitutionally guaranteed, whereby a territorial community is not only granted the right to participate in the government of the central State, but also to

[276] *Ivi*, para. 9.

[277] Pakistan also pointed out that its objection «shall not preclude the entry into force of the Covenant between the Islamic Republic of Pakistan and India without India benefiting from its reservations». In other words, the ICCPR is into force in its entirety in India-Pakistan relations. It is also worth noting that the *declaration* made by India was also objected by France and Netherlands. However, they neither invoked its opposition to the object and purpose of the 1966 International Covenants, nor expressed their willingness to prevent the entry into force of the Covenants in their mutual relationships with India.

[278] *General Comment No.* 24 (52), cit., para. 20.

[279] It is worth noting that, although the General Comments of the HRC are not formally binding, they constitute an authoritative source of interpretation to which «it should ascribe great weight». In this sense see ICJ, Judgment of 30 November 2010 (Merits), *Ahmadou Sadio Diallo* (*Republic of Guinea* v. *Democratic Republic of the Congo*), para. 66.

[280] It is worth noting that Jammu and Kashmir was the only State of the Indian Union to have a separate Constitution.

develop its own political and social institutions and to enjoy its own economic and cultural resources, internal self-determination cannot but be considered realized[281].

3.4.1.1. In my opinion, India's decision to revoke the autonomy *status* constitutionally granted to the State of Jammu and Kashmir was not – in principle – contrary to general international law. Indeed, although the international legal order is now characterized by an increasing compression of the State's territorial sovereignty and of its *domaine réservé*, the organization of governmental functions is one of the few matters still falling into State exclusive competence. In other words, this is still a matter which international law (at least the customary one) disregards. Accordingly, it must be held that India did not engage in a conduct contrary to general international law in changing the constitutional *status* of Jammu and Kashmir[282].

Moreover, in my view, such a change did not even constitute a violation of Kashmiris' right to internal self-determination. As mentioned above, as of August 2019, the Indian authorities adopted a series of domestic legislative acts that unilaterally revoked the autonomy *status* constitutionally granted to Jammu and Kashmir[283]. Thus, the latter lost its own flag and its criminal code, its own Constitution was abrogated and, as a result of the repeal of Article 370, all provisions of the Indian Constitution apply to the territorial community over Jammu and Kashmir. Accordingly, Jammu and Kashmir legislative, executive and judicial authorities ceased and full sovereign powers over its territorial community are now exercised by Indian central authorities. In other words, Jammu and Kashmir was transformed from a Federated State into two Union territories directly administered by Indian central authorities within the framework of its federal parliamentary Republic. In addition, Article 35A of the Indian Constitution was repealed; this means that the «permanent resident»

[281] It is worth noting that in situations, such as the one described, international law protects the territorial integrity of the State and not people's right to secede. Thus, for instance, the UN has traditionally held that the right to self-determination was fulfilled in the case of States that offered adequate guarantees about the maintenance of the cultural and ethnic identity of the population. In this regard, see particularly G. GUARINO, *op. cit.,* 86 ff.

[282] In this sense see G. HOWARD, *op. cit.,* 510.

[283] Truthfully, the measures taken by the Indian authorities between 2019 and 2020 are the latest step in a broader, more articulated and long-standing strategy. Indeed, since the 1950s the New Delhi Government has adopted a series of Presidential Orders that have gradually emptied its special *status.* In this regard see particularly T. AMICO DI MEANE, *op. cit.,* 99-108.

status may be granted to any Indian citizen who has resided for a period of at least 15 years in the territory of Jammu and Kashmir. So, rights and privileges in State public sector jobs, acquisition of property within the State, scholarships and other public aid and welfare programs are granted to a wider category of persons[284].

Although these measures and the unilateral and surreptitious way they were sprung might be challenged in socio-political[285] and/or constitutional perspective[286], they are not, in principle, in breach of the Kashmiris' right to internal self-determination as interpreted by the HRC. Indeed, the revocation of the autonomy *status* did not entail *per se* a limitation of democratic *standards* and civil and political rights granted to the Kashmiris. If it is true that a Federated State represents the highest expression of self-determination of a people within a State, it is sufficient that the central Government allows the people subject to its sovereignty the exercise of freedom of expression and association, the right of assembly, of voting and of participation, straight or indirect, in the public life of the State for the obligation to respect this right to be considered fulfilled. Therefore, given that the domestic acts by which the autonomous *status* was revoked and the Federated State of Jammu and Kashmir was transformed into two administrative units did not result in a compression of the Kashmiris' access to the government of the Indian Union, it cannot be assumed that they

[284] The Indian Government argued that the revocation of the special *status* accorded to Jammu and Kashmir was undertaken with the aim of integrating Kashmiris into the Indian mainstream and to accord to them the same rights that other Indians enjoy.

[285] Indian decision to revoke the autonomy *status* of the State of Jammu and Kashmir might be regrettable in sociopolitical perspective, since it aimed to *detonate* the aspirations of the predominantly Muslim Kashmiri people, thus bringing about a *de facto* demographic change. In this sense see particularly, M. KHAN, S. KHAN, *Demographic Change,* cit.; A. RAHMAN, S. MUNEER, *Demographic Changes in Indian Administered Jammu and Kashmir: A Legal Perspective*, in *Pakistan Vision,* 2020, 77-84. In this regard the Special Rapporteur on minority issues and the Special Rapporteur on freedom of religion or belief of the UNHRC also expressed their concern. See https://www.ohchr.org/en/press-releases/2021/02/india-un-experts-say-jammu-and-kashmir-changes-risk-undermining-minorities).

[286] In this sense see, *ex multis*, T. AMICO DI MEANE, *op. cit.,*109-113. However, the Indian Supreme Court has unanimously upheld the Indian Government's decision to abrogate Article 370 of the Indian Constitution stating that the latter was a 'temporary provision' and the Indian President had the power to revoke it. It also recommended that elections be held in Jammu and Kashmir before 30 September 2024 (see Supreme Court of India, Writ Petition (Civil) n. 1099 of 2019, *Article 370 of the Constitution,* 2023 INSC 1058 of 11 December 2023). According to press reports, the polling was held on 18 September 2024 (Phase I), 25 September 2024 (Phase II) and 1 October 2024 (Phase III) to elect 90 members of Jammu and Kashmir Legislative Assembly.

infringed the ICCPR and that the internal right to self-determination was violated.

3.4.1.2. However, leaving aside the 1966 International Covenants and obligations arising therefrom, Indian legislative measures changing the constitutional *status* of Jammu and Kashmir might be contrary to some other treaty obligations hanging over India. The reference is particularly to obligations arising from the Instrument of accession concluded in 1947. Its Article 10 stated that the incorporation of the Princely State of Jammu and Kashmir to India would have not affected the continuance of the Maharaja's sovereignty in and over his State, and the validity of any law in force at the moment of the accession[287]. In other words, the Maharaja agreed to the incorporation of his Princely State to the Indian Union on condition that he would preserve his sovereign powers. The decision to grant Jammu and Kashmir a special *status* of autonomy within the Indian Union was fully consistent and complied with this provision. Consequently, its revocation amounted to a violation of Article 10 of the Instrument of accession inasmuch as it deprived Kashmiri authorities of sovereign powers over the State. Furthermore, the wording of the Article at issue and particularly its *incipit* «[n]othing in this Instrument affects» make clear that the conservation of the Maharaja's authority, powers and rights was a *conditio sine qua non* for accession and for the conclusion of the Instrument of accession. So, Article 10 could be considered as an essential provision of the Instrument of accession with respect to the realization of its purpose, i.e. the accession of the Princely State to India. If this interpretation was right, India's revocation of the special *status* of autonomy would amount to a material breach of a bilateral treaty. Consequently, in accordance with the rule summarized in the Latin brocardo *inadimplenti non est adimplendum*, the other party of the agreement would be entitled to invoke that breach as a ground for terminating the Instrument of accession or suspending its operation in whole or in part. However, in the present case, the other party of the agreement, namely the Princely State of Jammu and Kashmir, is no

[287] Article 10 of the Instrument of accession read: «Nothing in this Instrument affects the continuance of my sovereignty in and over this state, or, save as provided by or under this Instrument, the exercise of any powers, authority and rights now enjoyed by me as Ruler of this State or the validity of any law at present in force in this State». Furthermore, any change in the terms of the Instrument of accession would necessitate the conclusion of a supplementary agreement (Article 5).

longer a subject of international law (see Chapter I, para. 3.3), so such an ability is not granted to it.

Furthermore, even if Jammu and Kashmir had been empowered by international law to invoke India's breach to terminate the Instrument of accession, termination would not have retroactive effect[288]. Indeed, pursuant to Article 70(1)(b) of the VCLT which codifies an existing customary international rule, a terminated agreement ceases to exist *ex nunc*, so any right, obligation or legal situation created by its application is not affected by termination. Consequently, the incorporation of Jammu and Kashmir into India would not cease.

Furthermore, according to eminent scholars, agreements that fix borders between neighboring States (like the Instrument of accession) exhaust their effects at the moment the border is determined[289]. Then, it is not the agreement, but the right of territorial sovereignty acquired through it that is to be respected. So, according to this reasoning, it could not be said that the Indian conduct in August 2019 violated the Instrument of accession and, consequently, Jammu and Kashmir could in no way denounce it, since it would be extinguished by the time of its execution.

3.4.2. As already said, it is generally accepted that the occupying power must ensure the enforcement of human rights standards over the territorial community under its control[290]. Therefore, Pakistan is under the obligation to comply with and to ensure respect for the rights enshrined in the 1966 International Covenants – to which it is a party – also in Pakistan-Administered Kashmir[291]. In practice, it does not seem to fulfil this obligation and, in particular, it does not seem to grant peoples of Azad Jammu and

[288] The idea that Indian revocation of Jammu and Kashmir's autonomy was in breach of the principle of *pacta sunt servanda* is shared also by F. MUSTAFA, *Article 370, Federalism and the Basic Structure of the Constitution*, in *The India Forum (online)*, 2019, 1 ff. However, according to the author, such a violation returned the territory of Jammu and Kashmir to its pre-accession position as a sovereign State.

[289] B. CONFORTI, M. IOVANE, *op. cit.,* 128.

[290] In this regard, in literature see, *ex multis*, A. ANNONI, *op. cit.,* 110-122.

[291] It is worth noting that Pakistan made a reservation to the ICSECR which was then withdrawn. It stated that «Pakistan, with a view to achieving progressively the full realization of the rights recognized in the present Covenant, shall use all appropriate means to the maximum of its available resources». Upon ratification to the ICCPR, Pakistan made reservations to Articles 3, 6, 7, 12, 13, 18, 19, 25 and 40. On 14 September 2011, it withdrew most of them and modified those concerning Articles 3 and 25 whose application was subjected to their compatibility with Pakistani domestic law.

Kashmir and of Gilgit-Baltistan their own right to internal self-determination. Indeed, although the aforementioned occupied territories enjoy a form of self-government or of partial autonomy, this is merely nominal since Pakistani federal institutions have predominant influence over security, the courts, and most important policy matters. What is relevant is that their peoples lack the parliamentary representation and other rights of Pakistani provinces. Moreover, freedoms of expression and association, as well as any political activity deemed contrary to Pakistan's policy on Pakistan-Administered Kashmir are restricted. In particular, in its 2018 Report, OHCHR highlighted that the Interim Constitution of Azad Jammu and Kashmir placed several restrictions on anyone criticizing the region's accession to Pakistan. Additionally, according to the CIRAC, a non-governmental organization in special consultative status within UN, residents of Azad Jammu and Kashmir and of Gilgit-Baltistan are denied civil rights such as freedom of speech[292], assembly, and association, and their political rights are also under threat, as regions often feel marginalized in national political discourse[293]. In both occupied territories pro-independence political parties and activists are not allowed to participate in the political process, while political leaders who are seen to be opposing Pakistani rule have been subject to surveillance, harassment, and even imprisonment. In this regard, the 2018 OHCHR Report stated that «the ban on political parties that do not support the eventual accession of Jammu and Kashmir to Pakistan has in effect silenced all kinds of dissent, including demands for greater transparency and accountability» [294] and that «those who protest Pakistan's position face threats and travel bans, and are subject to imprisonment and torture»[295].

In the light of these considerations and on the premise that – as pointed out by the HRC – peoples' right to internal self-determination is realized if, within their own State, the people are permitted to

[292] As a proof of the denial of freedom of speech, human rights groups report that publishers of books or periodicals are also required to make a declaration of loyalty to accession to Pakistan. In this sense, see OHCHR, Report of 14 June 2018, *on the Situation of Human Rights in Kashmir: Development in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltisan,* para. 149.

[293] See UNHRC, *Written statement* submitted by Comité International pour le Respect et l'Application de la Charte Africaine des Droits de l'Homme et des Peuples*, cit.

[294] OHCHR, Report of 14 June 2018, *on the Situation of Human Rights in Kashmir*..., cit., para. 148.

[295] *Ibid*.

exercise freedoms of expression, assembly and association, and the right to vote and to participate directly or indirectly in the public life of the State, it is to be concluded that the exercise of such a right is not guaranteed to Kashmiris under Pakistan occupation. In other words, the Islamabad Government, which persistently accuses India of violating the Kashmiris' right to self-determination, is the first not to comply with it.

4. The analysis developed in this Chapter has traced the contours of a rather complex and multifaceted situation. It results that no single answer can be given to the question: are the Kashmiris entitled to the right to self-determination? This is firstly due to the fact that – as already said – when dealing with the Kashmiris we refer to a group of individuals originally living as a unitary administrative entity within the territory of the Princely State of Jammu and Kashmir, but which is now divided and subject to the jurisdiction of three different States, thus falling under different factual conditions. Then, any discourse on the principle of self-determination of peoples cannot fail to consider its articulation into two distinct dimensions governed by separate rules in international law, and the evolution of its scope over the years.

That said, in sum, both the Kashmiris living in India-Administered Kashmir and those settled on Azad Jammu and Kashmir and on Gilgit-Baltistan were not entitled to the right to self-determination in its dual dimension, just as it did not exist when the partition of the Princely State took place in the 1940s. Then, the Kashmiris living in India-Administered Kashmir are not entitled to the right to external self-determination now since they do not meet any of three factual conditions to which the conferment of this right is subject under international law. Nor is there any evidence that India is violating the Kashmiris' right to internal self-determination. Conversely, the Kashmiris settled on the territories of Azad Jammu and Kashmir and on Gilgit-Baltistan meet one of the three factual conditions, but they cannot invoke the principle of external self-determination due to its non-retroactivity. They can however invoke the right to internal self-determination which Pakistan is believed to be violating.

Finally, as regards China-Administered Kashmir, one cannot speak of a right to self-determination since these territories are

uninhabited; in other words, there is not a people settled on them to recognize such right. There is, however, the right of the people living in Gilgit-Baltistan to their territorial integrity which China and Pakistan violated by concluding the 1963 boundaries Agreement (see *supra*, para. 3.2.).

CHAPTER III

HUMAN RIGHTS SITUATION IN THE TERRITORY OF THE FORMER PRINCELY STATE OF JAMMU AND KASHMIR

TABLE OF CONTENT: 1. Human rights situation in Asia. – 2. International human rights obligations falling on India and Pakistan. – 3. Human rights situation in India. – 3.1. Human rights situation in India-Administered Kashmir before the revocation of the autonomy *status* of the Federated State of Jammu and Kashmir. – 3.2. Human rights situation in India-Administered Kashmir following the revocation of the autonomy *status* of the Federated State of Jammu and Kashmir. – 4. Human rights situation in Pakistan. – 4.1. Protection of human rights in Pakistan-Administered Kashmir. – 5. Conclusions

1. As already said, Pakistan and the Islamic World accuse India of persistent human rights violations against the Kashmiris. Such an allegation is not surprising considering that the Asian continent is known to have a low level of human rights protection[296]. Serious violations affecting mainly religious and ethnic minorities and indigenous groups, women and children, LGTBI persons, as well as journalists and human rights activists are documented as occurring in numerous countries in the region[297] which has the worst record on international human rights treaties ratification globally[298]. Thus, for instance, some Asian countries are not yet parties to the ICCPR and to the ICESCR[299]. Such a general *hesitation* has been attenuated in recent years by more widespread accession to some international human rights treaties of a more specific nature; the reference is

[296] About human rights protection in Asia, see mainly C. TREMEWAN, *Human Rights in Asia*, in *Pac. Rev*., 1993, 17-30; H. HASHIMOTO, *The prospects for a regional human rights mechanism in East Asia,* New York-London, 2004; R. PEERENBOOM ET AL. (eds), *Human Rights in Asia. A Comparative Legal Study of Twelve Asian Jurisdictions, France and the USA*, London, 2006; L. AVONIUS, D. KINGSBURY (eds), *Human Rights in Asia. A Reassessment of the Asian Values Debate,* New York, 2008; T. W.D. DAVIS, B. GALLIGAN (eds), *Human Rights in Asia,* Cheltenham, 2011.

[297] In this regard see AMNESTY INTERNATIONAL, *The State of the World's Human Rights,* London, 2024, which offers a general overview of human rights situation in Asia (41-49), as well as a detailed analysis State by State.

[298] Thus, for instance, only Bangladesh, Philippines, Indonesia and Sri Lanka form part of the CMW. The ICPPED has met only seven ratifications (Thailand, Sri Lanka, Republic of Korea, Mongolia, Maldives, Kazakhstan, and Cambogia), while North Korea, Myanmar, Malaysia, Papua New Guinea, India, Brunei, Bhutan are not yet parties to the CAT.

[299] Thus, for instance, China and Myanmar are not parties to the ICCPR, while Bhutan, Brunei, Malaysia, Singapore are parties neither to the ICCPR nor to the ICESCR.

specifically to the CRC, the CEDAW and the CRPD which have been ratified by all Asian countries. However, their implementation is usually weak.

This *mistrust* towards international human rights instruments affects the attitude towards the possibility of a regional human rights instrument. Indeed, apart from the ASEAN Human Rights Declaration[300] – which, however, has the double limitation of being non-binding and addressing only the ten ASEAN Member States – the Asian Continent lacks its own human rights legal instrument and, consequently, a regional system for their protection[301]. Additionally, national institutional human rights mechanisms are notorious for being the least developed[302], particularly compared to the European ones.

However, these brief remarks are not sufficient to find the accusations made by Pakistan against India well-founded. Their acceptance requires an assessment of the conduct of the Indian authorities towards the Kashmiris, not before defining the scope of India's human rights obligations. Nonetheless, the observation that the level of human rights protection in Asia is rather low raises the doubt

[300] ASEAN Human Rights Declaration, Phnom Penh, 18 November 2012. ASEAN is a regional organization comprising ten Southeast Asian States. Pursuant to Article 14 of the ASEAN Charter, in 2009 they established the Intergovernmental Commission on Human Rights (AICHR) which was designed to be an integral part of ASEAN organizational structure and an overarching institution with overall responsibility for the promotion and protection of human rights in ASEAN. For this purpose, it formulated the ASEAN Declaration on Human Rights as a soft law to guide the human rights approach in the sub-region. From the beginning, the AICHR engaged more in human rights promotion and only later it has gradually progressed towards more human rights protection. Although it was not originally provided for, the AICHR can now receive communications from affected parties (individuals and NGOs) who seek remedies. Where a complaint is lodged with the ASEAN Secretariat, the latter passes it on to the AICHR Chair. The Chair is then responsible for circulating the complaint amongst the other AICHR Representatives and tabling it for consideration during an AICHR meeting. Discussions of complaints take place during closed meetings, so it cannot be confirmed if and what cases have been discussed by AICHR. The process is informal and AICHR has not yet taken any public action to respond to a human rights situation or complaint.

[301] In this regard see T-U BAIK, *Emerging Regional Human Rights Systems in Asia*, Cambridge, 2012; W. XIAODAN, *The Current Situation and Prospects for Regional System(s) of Human Rights in Asia*, in *DUDI,* 2012, 45-77; S. DWI ARDHANARISWARI, *Regionalizing Global Human Rights Norms in Southeast Asia,* Cham, 2021; F. MCGAUGHEY ET AL., *The Significance of the UPR in the Absence of a Regional Human Rights System: The Case of the Asia Pacific*, in D. ETONE ET AL. (eds), *Human Rights and the UN Universal Periodic Review Mechanism. A Research Companion*, New York-London, 2024, 215-247.

[302] In this regard see B. BURDEKIN, J. NAUM, *National Human Rights Institutions in the Asia Pacific Region,* Leiden, 2007; J. GOMEZ, R. RAMCHARAN, *National Human Rights Institutions in Southeast Asia: Selected Cases Studie*s, Singapore, 2020.

that allegations of violations can also be levelled at other parties involved in the *Kashmir issue*. This chapter will be devoted to ascertaining the merits of these criticisms and assumptions with particular regard to India and Pakistan.

Chinese conduct regarding the protection of human rights, however, will not be examined because, as it has already been mentioned several times, the territories within China-Administered Kashmir are devoid of human settlements. In other words, that territory lacks individuals to whom human rights must be guaranteed. At the same time, it is irrelevant for the purposes of this study to investigate China's observance of human rights in territories subject to its sovereignty other than Aksai Chin and the Shaksgam Valley[303].

2. Regardless of the title under which a State exercises governing powers over a territorial community, the latter are limited by the obligation to ensure a fundamental and inalienable core of human rights. Indeed, customary international law imposes on all States the prohibition of gross violations, i.e. the prohibition of conducts grossly violating human dignity, such as torture, forced labor, deprivation of liberty not authorized by a judge, and enforced disappearances, etc. Additionally, the protection of human rights is imposed upon States by virtue of specific international conventions to which each one is voluntarily party. Thus, for instance, India, which is persistently accused by the Islamabad Government of perpetrating human rights abuses against the Kashmiris[304], is bound to the so-called *core* international human rights treaties[305], e.g. the CPPCG[306],

[303] For the sake of completeness, please note that China is bound to the CAT, the CEDAW, the CERD, the CRC included its two Optional Protocols, the CRPD and the ICESCR. It is not party to ICCPR. Moreover, it has not yet accepted any individual complaints procedure and inquiry procedure provided for in the aforementioned human rights treaties. For an assessment of the state of the art, please refer to the results of the recently concluded 4th Universal Periodic Review process (https://www.ohchr.org/en/hr-bodies/upr/cn-index). About human rights protection in China, in literature see mainly P. SUN, *Chinese Contributions to International Discourse of Human Rights*, Singapore, 2022; R. DAI, *China and International Human Rights Law*, in I. DE LA RASILLA, C. CAI (eds), *The Cambridge Handbook of China and International Law,* Cambridge, 2024, 261-283.

[304] See *supra*, note 72.

[305] OHCHR, *The Core International Human Rights Treaties*, New York-Geneva, 2014.

[306] India became party to the CPPCG on 27 August 1959. At the moment of ratification, it made a reservation stating that «With reference to article IX of the Convention, the Government of India declares that, for the submission of any dispute in terms of this article to

the CEDAW[307], the CERD[308], the CRC included its two Optional Protocols[309] and the CRPD[310], as well as the oft-mentioned 1966 International Covenants[311].

An analogous obligation to ensure the protection of the human rights of individuals subject to its jurisdiction is also incumbent on Pakistan, which is party not only to the aforementioned Conventions, but also to the CAT[312]. Furthermore, such an obligation is not subject to any restriction, although Pakistan made several reservations upon ratification of aforementioned human rights treaties. Indeed, most of them were withdrawn[313], while those which have not yet been withdrawn have an indefinite character and, according to the view expressed in international law literature and supported by international

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the jurisdiction of the ICJ, the consent of all the parties to the dispute is required in each case».

[307] India ratified the CEDAW on 9 July 1993. It is worth noting that upon signature It made two declarations and one reservation which were confirmed upon ratification. As regards Articles 5 (a) and 16 (1) of the CEDAW, India declared that «it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent». With regard to Article 16 (2), it declared that «though in principle it fully supports the principle of compulsory registration of marriages, it is not practical in a vast country like India with its variety of customs, religions and level of literacy». Finally, India excluded the application to it of Article 29(1).

[308] India ratified the CERD on 3 December 1968. Upon ratification, it made a reservation stating that «[t]he Government of India declare that for reference of any dispute to the ICJ for decision in terms of Article 22 of the International Convention on the Elimination of all Forms of Racial Discrimination, the consent of all parties to the dispute is necessary in each individual case». This reservation was not accepted by Pakistan.

[309] India adhered to the CRC on 11 December 1992. It is also party to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict and to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Upon accession to the CRC India made a declaration stating that it «undertakes to take measures to progressively implement the provisions of article 32, particularly paragraph 2 (a), in accordance with its national legislation and relevant international instruments to which it is a State Party».

[310] India ratified the CRPD on 1 October 2007.

[311] It is worth noting that India has not accepted any individual complaints procedures provided for in aforementioned Conventions or established by *ad hoc* protocols related thereto until now.

[312] Pakistan became party to the CAT on 23 January 2010.

[313] As regards to reservations made to the ICCPR see *supra,* note 291. Upon ratification of CAT, Pakistan made reservations to Articles 3, 4, 6, 12, 13 and 16 stating that the provisions thereof shall be so applied as to be in conformity with Pakistan domestic law. These reservations were withdrawn in September 2011, while those concerning Article 8 (extradition), Article 28 (declaration not to recognize the competence of the Committee) and Article 30 (disputes settlement) still survive. In 1997 Pakistan also withdrew its reservation made upon signature of the CRC and confirmed upon ratification which read: «Provisions of the Convention shall be interpreted in the light of the principles of Islamic laws and values».

practice, they are to be considered as invalid[314]. The reference is particularly to reservation to Article 3 of the ICCPR stating that its provisions «(…) shall be so applied as to be in conformity with Personal Law of the citizens and Qanoon-e-Shahadat». Such a reservation consisting to a general reference to part of domestic law without specifying its content does not clearly define the extent to which Pakistan commits itself to the ICCPR. Therefore, it may create doubts about its commitments to the object and purpose of the Covenant. This conclusion is supported by the position expressed by Government of the Kingdom of the Netherlands. It objected to the aforementioned reservation by stating that it «makes it unclear to what extent the Islamic Republic of Pakistan considers itself bound by the obligations of the treaty and raises concerns as to the commitment of the Islamic Republic of Pakistan to the object and purpose of the Covenant» and it concluded that «reservations of this kind must be regarded as incompatible with the object and purpose of the Covenant». The same reasoning was followed by Portugal, Sweden and Denmark to object to the Pakistani general declaration made upon accession to CEDAW[315]. Since, as a rule, a reservation incompatible with the object and purpose of a human rights treaty is not permitted and is without effect under international law[316], Pakistan is bound by the ICCPR and the CEDAW as a whole, as well as by all other human rights treaties it is a party to.

3. It is not a mystery that the level of human rights protection is tragically low in India. This is confirmed by the last UPR Process. 130 States addressed to Indian authorities 339 recommendations highlighting some of the most urgent human rights concerns in the

[314] In this regard, see F. M. PALOMBINO, *Compliance with International Judgments: Between Supremacy of International Law and National Fundamental Principles*, in *ZaöRV*, 2015, 523-524.

[315] Pakistan declared that «[t]he accession by [the] Government of the Islamic Republic of Pakistan to the [said Convention] is subject to the provisions of the Constitution of the Islamic Republic of Pakistan».

[316] In this sense, in addition to *General Comment No.* 24 (52), cit., par. 20, see ECtHR, Judgement of 29 April 1988, *Belilos v. Switzerland*, para. 60; ECtHR, Judgement of 23 March 1995 (Preliminary Objections), *Loizidou* v. *Turkey,* paras 89 and 97. In this regard in literature, in addition to authors quoted at note 274, see A. SINAGRA, P. BARGIACCHI, *op. cit.,* 213-216; A. CASSESE (a cura di M. Frulli), *op. cit.,* 275-276; F. SALERNO, *op. cit.,* 205; A. GIOIA, *op. cit.,* 65; E. CANNIZZARO, *Diritto internazionale*, Torino, VI ed., 2023, 178-181; B. CONFORTI, M. IOVANE, *op. cit.,* 114.

country. They cover particularly the protection of minority communities and vulnerable groups, tackling gender-based violence, upholding civil society freedoms, protecting human rights defenders, and ending torture in custody[317].

The UPR Process, as well as a recent Amnesty International Report[318], have firstly highlighted systematic violations of freedom of expression, association and assembly. In December 2023 the Indian Parliament passed a bill reintroducing the sedition law that was arbitrarily used to suppress government critics and increased the possible punishment for sedition from seven years to life imprisonment. Moreover, the Government amended the Information Technology Act expanding its control over online content[319]. Restrictions in digital space involved particularly human rights defenders, activists and journalists who have also been the recipients of specific tax, money laundering, foreign contribution and anti-terrorist laws aimed at hampering their activities[320]. Furthermore, in recent years there has been an increasing number of arbitrary arrests and detention without trial against these categories of individuals[321]. Likewise, human rights defenders and journalists are often subject to enforced disappearances. In this regard, it is worth noting that during the period between 1980 and 2023, 445 cases referred to India by the Working Group on Enforced or Involuntary Disappearances under its humanitarian procedure remained pending, with the fate and whereabouts of the alleged victims unknown[322].

Freedom of religion and belief is also not effectively guaranteed in India. Attacks on this right particularly affect Muslims, while widespread forms of discrimination and sexual violence are used to be perpetrated against women, particularly against Muslim ones and those belonging to indigenous peoples[323], by member of dominant

[317] See UNHRC, A/HRC/WG.6/41/IND/2 of 19 August 2022; A/HRC/52/11 of 14 December 2022.

[318] AMNESTY INTERNATIONAL, *The State*, cit., 194-198.

[319] See Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, published in the Gazette of India, Extra., Pt. II, Sec. 3(i), dated 25 February 2021, as amended on 6th of April 2023.

[320] See AMNESTY INTERNATIONAL, *The State,* cit., 195.

[321] *Ivi,* 195-196.

[322] See UNHRC, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/54/22 of 8 August 2023.

[323] High number of incidents of sexual violence against Dalits, Adivasi and Kuki women were recorded.

castes[324]. After all, caste-based discrimination continued unabated. Then, Indian authorities are also failing to protect ethnic minorities from violence and displacement; evidence of this comes from ethnic violence occurred in Manipur State where the tribal and predominantly Christian Kuki community faced massive abuses from the majority Meitei community during 2023[325].

Amnesty International Report and the UPR process have revealed that it is not only civil and political rights that are violated; several abuses concerning economic and social rights are also recorded. In particular, it is reported that close to 300,000 people were made homeless following the demolition of informal settlements in Delhi ahead of the G20 Summit, and demolitions of largely Muslim homes, businesses and places of worship continued in punishment for communal violence.

Deep concern about this situation has been recently expressed by UN human rights experts[326], who has deplored the low level of response from India to their communications[327] and its failure to reply to their request of permission to conduct official visits to the country[328].

It can therefore be interpreted as a timid sign of openness that India accepted 221 out of 339 recommendations addressed in occasion of the last UPR Process, including those to eliminate caste discrimination, guarantee the right to freedom of expression, and to protect the rights of religious minorities. Moreover, it noted recommendations to repeal, amend or bring the Foreign Contribution (Regulation) Act (FCRA), the Unlawful Activities (Prevention) Act (UAPA) and the laws on sedition and criminal defamation in line with international human rights standards. It remains to be seen whether this initial tentative opening will be followed by conclusive facts.

[324] AMNESTY INTERNATIONAL, *The State,* cit., 196-197.

[325] *Ibid.*

[326] See https://www.ohchr.org/en/press-releases/2024/03/india-un-experts-urge-corrective-action-protect-human-rights-and-end-attacks

[327] From 7 March 2019 to 6 March 2024, UN human rights experts sent 78 communications to India, but only 18 received replies from the Government.

[328] As many as 15 active requests by UN human rights experts are pending, thus there have been no country visits since 2017.

3.1. The situation concerning human rights protection is even more serious in India-Administered Kashmir[329]. There, abuses have particularly intensified since the late 1980s. In 1989 the Kashmiris started a military struggle against India which was accused of rigging the 1987 assembly elections and breaking its promise of greater autonomy. The Indian authorities responded by deploying a harsh repression. In particular, they sent a massive number of soldiers into the territory and passed several laws giving them complete impunity for their action against «terrorists», namely against Kashmiris calling for greater autonomy[330]. During the first cycle of UPR Process it emerged that most of the more than 300 outstanding cases of disappearances and abuses recorded between 1983 and 2004 occurred in the context of ethnic and religious disturbances in Jammu and Kashmir[331]. It also noted molestation of women and girls from Kashmiri families during searches by the police or members of the army who remained mostly unpunished[332]. Additionally, it emphasized the particular situation of vulnerability and discrimination to which children living in Jammu and Kashmir were subjected; the

[329] About human rights violation in Jammu and Kashmir in literature see particularly, I. HAQ, *Kashmir Conflict and Human Rights Violation*, in *HONAI: Int'l J. Ed. Soc. Pol & Cult. St.,* 2018, 129–138; S. A. BHAT, *The Kashmir Conflict and Human Rights*, in *Race & Class*, 2019, 77–86; M. AZAM, *op. cit.,* 72-80; S. MALIK, N. AKHTAR, *op. cit.,* 29-31; R. Q. IDREES ET AL., *op. cit.,* 108-113; M. HUSSAIN, S. MEHMOOD, *Genocide in Kashmir and the United Nations Failure to Invoke Responsibility to Protect (R2P): Causes and Consequences*, in *Muslim WJHR*, 2021, 55-77; P. BALCEROWICZ, A. KUSZEWSKA, *Human Rights Violations in Kashmir*, Abington, 2022, 5-105.

[330] The reference is to: Jammu and Kashmir Public Safety Act 1978; Terrorist and Disruptive Activities (Prevention) Act 1985; Armed Forces (Jammu and Kashmir) Special Power Act (1990); Prevention of Terrorism Act 2002. In this regard, the OHCHR observed that «impunity for human rights violations and lack to justice are key human rights challenges in Jammu and Kashmir. Special laws in force in the State, such as the Armed Forces (Jammu and Kashmir) Special Powers Act (1990) and the Jammu and Kashmir Public Safety Act (1978), have created structures that obstruct the normal course of law, impede accountability, and jeopardize the right to remedy for victims of human rights violations» (2018 OHCHR Report, cit., para. 42). Therefore, it is no coincidence that during India's UPR in 2008, 2012 and 2017, several UN Member States recommended to repeal or revise these acts.

[331] UNHRC, *Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1 - India*, UN Doc. A/HRC/WG.6/1/IND/2 of 27 March 2008, para. 19.

[332] *Ivi,* para. 20.

Juvenile Justice (Care and Protection of Children) Act, 2000[333], did not apply to them[334].

The second and the third cycles of the UPR Process depicted an even worse situation. In addition to dangerous situation of children and violences against women, they noted an excessive use of force by State security forces in confronting demonstrations, human rights defenders and journalists in Jammu and Kashmir and recommended to repeal public security laws giving impunity to police forces, such as the Jammu and Kashmir Public Safety Act[335].

Reports elaborated over the years by non-governmental human rights organizations[336] and international organizations (e.g. OIC[337], EU[338]), as well as the OHCHR[339] fell into the same groove. They chronicled in detail killings, tortures and inhuman and degrading treatment, enforced disappearance, abductions, arbitrary detentions, using pellet guns against protesters and unarmed civilians, and other forms of deprivation and prosecution. The OHCHR also noticed several cases of arbitrary arrests and detention concerning children[340], as well as sexual violence[341], and accounted for obstruction of basic medical services that limited Kashmiris' right to health, and restrictions on their right to freedom of expression not justified on the ground of protection of public order[342].

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[333] The Juvenile Justice (Care and Protection of Children) Act, 2000 provided for a special approach towards the prevention and treatment of juvenile delinquency and provided a framework for the protection, treatment and rehabilitation of children in the purview of the juvenile justice system. It was the primary legal framework for juvenile justice in India.

[334] UNHRC, UN Doc. A/HRC/WG.6/1/IND/2, cit., paras. 27 and 31.

[335] UNHRC, *Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 – India*, UN Doc. A/HRC/WG.6/13/IND/2 of 11 April 2012, paras. 24-25; UNHRC, *Report of the Office of the United Nations High Commissioner for Human Rights – Compilation on India*, UN Doc. A/HRC/WG.6/27/IND/2 of 22 February 2017, paras. 5 and 8.

[336] See UNHRC, *Summary of stakeholders' submissions on India,* UN Doc. A/HRC/WG.6/41/IND/3 of 22 July 2022, paras. 173-175.

[337] See OIC-IPHRC, *Report on the fact-finding visit to the State of Azad Jammu and Kashmir to assess human rights situation in the Indian Occupied Kashmir (March 2017),* OIC-IPHRC Journal (2018), 141-153.

[338] European Parliament Report A6-0158/2007 of 24 April 2007.

[339] See the 2018 OHCHR Report, cit.; OHCHR, *Update of the Situation of Human Rights in Indian-Administered Kashmir and Pakistan-Administered Kashmir from May 2018 to April 2019,* 8 July 2019 (2019 OHCHR Report).

[340] 2018 OHCHR Report, cit., paras. 86-91.

[341] 2018 OHCHR Report, cit., paras. 125-133.

[342] In particular, Kashmiris experienced frequent communications blockades, as the State government suspended mobile and internet services on several occasions. Restrictions of

As it is evident, such conducts by Indian authorities amounted to violations of several rights guaranteed by the core human rights treaties to which India is party, such as the right to life and to protection against violence (Article 6(1) of the ICCPR), the right to liberty and security of person (Article 8 of the ICCPR), the right to due process (Article 14 ICCPR), the principle of legality (Article 15 ICCPR), the right to non-discrimination (Article 26 of the ICCPR) and the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Article 12 of the ICESCR). Nevertheless, systematic violations of certain provisions of the CRC (particularly Article 6 and Article 16) and the prohibition of torture (Article 7 of the ICCPR) are evident.

3.2. Although the fourth cycle of the UPR Process did not focus particularly on the situation in India-Administered Kashmir[343], thus suggesting that the Kashmiris are not subject to different and additional violations than the rest of the Indian population[344], non-governmental human rights organizations reported a deterioration of human rights situation since August 2019[345]. The revocation of the autonomy *status* of Jammu and Kashmir was strongly contested by the Kashmiris, which engaged in heated protests. Indian authorities responded with force. Thus, non-governmental organizations reported an intensification of serious human rights violations, including arbitrary detention of hundreds of people, and severe restrictions on

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expression and opinion also targeted media and journalists. See 2018 OHCHR Report, cit., paras. 107-113.

[343] The Compilation of information prepared by the OHCHR refers to the situation in Jammu and Kashmir merely in last three concise paragraphs expressing concern for detention of children and lack of information about persons with disabilities. See UNHRC, UN Doc. A/HRC/WG.6/41/IND/2, cit., paras. 120-122.

[344] In this regard, the Kashmir Institute of International Relations stated that «Jammu and Kashmir remained a blind side in the Universal Periodic Review». See UNHRC, UN Doc. A/HRC/WG.6/41/IND/3, cit., para. 173.

I. [345] See particularly 2019 Human Rights Watch Report on India, https://www.hrw.org/world-report/2020/country-chapters/india; 2020 Human Rights Watch Report on India, https://www.hrw.org/world-report/2021/country-chapters/india; Amnesty International 2023 Report, *India: Protection of the human rights of the people of Jammu and Kashmir must guide the way forward*, https://www.amnesty.org/en/latest/news/2023/12/india-protection-of-the-human-rights-of-the-people-of-jammu-and-kashmir-must-guide-the-way-forward/#:~:text=Amnesty%20International%20has%20documented%20the,of%20various%20human%20rights%20in; AMNESTY INTERNATIONAL, *The State,* cit., 197-198. See also OIC-IPHRC, *Report on the fact-finding visit to the State of Azad Jammu and Kashmir to assess human rights situation in the Indian Occupied Kashmir (November 2021),* OIC-IPHRC Journal 2 (2022).

freedom of movement and peaceful assembly. Moreover, revocation of the autonomy *status* was accompanied by a security lockdown and a media blackout. Since then, Indian authorities have released many of the detainees and restored the internet, but the situation keeps on being tense. On the one hand, the Kashmiris continue to protest and oppose Indian policy; on the other hand, Indian authorities have intensified their crackdown on media, civil society groups and oppositions, including through the continuous use of counterterrorism and public safety laws[346]. Likewise, arbitrary detentions and acts of torture against journalists, human rights defenders and political opponents are persisting[347]. In this regard, the words recently expressed by the Working Group on Arbitrary Detention are relevant. First of all, it noted that the arrest of the coordinator of the Jammu and Kashmir Coalition of Civil Society forms part of a broader attack and then, it expressed serious concern about «the chilling effects of [that] arrest and prolonged detention on civil society, human rights defenders and journalists in India who are exercising their fundamental rights to freedom of expression, opinion and association in conducting their work»[348]. The systematic use of reprisals against Kashmiri journalists and activists, as well as civil society actors for their cooperation with the UN, its representatives and human rights mechanisms were also spotlighted by the UN Secretary-General in his Annual Reports on Reprisals[349]. In particular, by citing specific instances, the Reports revealed various forms and methods of intimidation and harassment, such as online smear campaign against human right activists, death threats, international travel bans, arbitrary

[346] See UNHRC, A/HRC/WG.6/41/IND/3, cit., para. 175.

[347] *Ibid*.

[348] UNHRC – Working Group on Arbitrary Detention, Opinion No. 8/2023 concerning Khurram Parvez (India) of 5 June 2023, A/HRC/WGAD/2023/8, paras. 29 and 86.

[349] See UN Secretary-General, *Cooperation with the United Nations, its Representatives and Mechanisms in the Field of Human Rights - Report of the Secretary-General*, UN Doc. A/HRC/42/30 of 9 September 2019, para. 59; UN Secretary-General, *Cooperation with the United Nations, its Representatives and Mechanisms in the Field of Human Rights - Report of the Secretary-General*, UN Doc. A/HRC/45/36 of 25 September 2020, paras. 74-76; UN Secretary-General, *Cooperation with the United Nations, its Representatives and Mechanisms in the Field of Human Rights - Report of the Secretary-General*, UN Doc. A/HRC/48/28 of 1 December 2021, paras. 62-72; UN Secretary-General, *Cooperation with the United Nations, its Representatives and Mechanisms in the Field of Human Rights - Report of the Secretary-General*, UN Doc. A/HRC/51/47 of 14 September 2022, paras. 82-87; UN Secretary-General, *Cooperation with the United Nations, its Representatives and Mechanisms in the Field of Human Rights – Report of the Secretary-General*, UN Doc. A/HRC/54/61 of 21 August 2023, paras. 74-82.

arrest and detention, and 'routine verification' of concerned human rights activists by local authorities.

The condition of children and persons with disabilities is also particularly serious in Jammu and Kashmir. Both the UN Secretary-General and the OHCHR expressed their concern about the increased number of violations and acts of torture against children[350], and about their detention by Indian security forces for alleged association with armed groups or on national security grounds[351]. Therefore, the Indian Government was called upon to strengthen children protection, including by ending the use of pellet guns against them and building the capacity of its forces, and to ensure that they are detained as a last resort and for the shortest appropriate period of time. On the other hand, the Committee on the rights of persons with disabilities was concerned about the lack of information about this category of persons and strategies to ensure appropriate humanitarian assistance[352].

In its World Report 2023, Human Rights Watch noted that «[t]hree years after the government revoked Jammu and Kashmir's constitutional autonomous status and split it into two federally governed territories, violence continued with 229 reported deaths as of October, including 28 civilians, 29 security force personnel, and 172 suspected militants' and that 'Minority Hindu and Sikh communities in the Muslim-majority Kashmir Valley came under attack»[353]. The general situation tends to be so serious that the UN Special Rapporteur on the situation of human rights defenders has recently demanded

[350] In his 2022 Report on children and armed conflicts the UN Secretary-General noted that «total of 33 boys were detained by Indian security forces in Jammu and Kashmir for their alleged association with armed groups or on national security grounds» and that «a total of 34 children (30 boys, 4 girls) were killed (5) and maimed (29) by Indian security forces, including by the use of pellets by the Central Reserve Police Force (19), unidentified perpetrators (4), crossfire between armed groups and unidentified perpetrators (7), and crossfire and shelling across the line of control (4)». See UN Secretary-General, *Children and Armed Conflict - Report of the Secretary-General,* UN Doc. A/76/871-S/2022/493 of 23 June 2022, paras. 247-248.

[351] See UN Doc. A/HRC/WG.6/41/IND/2, cit., paras. 120-121; UN Secretary-General, *Children and Armed Conflict - Report of the Secretary-General,* UN Doc. A/74/845–S/2020/525 of 9 June 2020, paras. 200-205; *Children and Armed Conflict - Report of the Secretary-General,* UN Doc. A/75/873–S/2021/437 of 6 May 2021, paras. 233-239; UN Doc. A/76/871-S/2022/493, cit., paras. 245-252.

[352] Committee on the Rights of Persons with Disabilities, CRPD/C/IND/CO/1 of 29 October 2019, para. 24(c).

[353] https://www.hrw.org/world-report/2023/country-chapters/india .

India to immediately put an end to human rights abuses in Jammu and Kashmir[354].

As said (*supra*, para. 3.1.) India's conduct against its own citizens and, above all, against Kashmiris constitutes a clear violation of several provisions contained in core human rights treaties to which it is party. Moreover, some specific abuses, such as arbitrary deprivation of liberty, torture, enforced disappearances are ascribable to gross violations prohibited under general international law. However, in the light of current state of development of international law, such serious and persistent breach of human rights does not seem to give the Kashmiris living in India-Administered Kashmir the right to external self-determination. Indeed, the theory of remedial secession supported by some scholars[355] is not reflected in relevant State practice at present[356].

4. Like India, Pakistan is certainly not the *champion* of human rights. This has clearly resulted from its last UPR Process[357]. It noted a significant violation of the principle of non-discrimination due to decision of the High Court in Islamabad ordering the obligatory declaration of religion or belief in all official documents[358]. Moreover, it reported, among others, endemic violence against women with access to justice remaining out of reach for many[359], high incidence of

[354] https://www.ohchr.org/en/press-releases/2023/03/india-un-expert-demands-immediate-end-crackdown-kashmiri-human-rights .

[355] In recent years the idea has emerged that peoples may exercise a right to external self-determination outside colonial setting and military occupation, if their rights are consistently and flagrantly violated. In this sense see S. OETER, *Self-Determination*, in B. SIMMA ET AL. (eds), *The Charter of the United Nations: A Commentary*, Oxford, III ed., 2012, 331; C. TOMUSCHAT, *Secession and Self-Determination*, in M. KOHEN (ed.), *Secession: International Law Perspective*, Cambridge, 2012, 42. See also the concurring opinion of the Judge Wildhaber, joined by Judge Ryssdal, in ECtHR, *Loizidou* v. *Turkey,* Application No. 1531/89 of 18 December 1996.

[356] See A. TANCREDI, *La secessione nel diritto internazionale,* Milano, 2001; K. DEL MAR, *The Myth of Remedial Secession,* in D. FRENCH (ed.), *Statehood and Self-Determination Reconciling Tradition and Modernity in International Law*, Cambridge, 2013, 79-108; A. TANCREDI, *Secessione e diritto internazionale: un'analisi del dibattito,* in *DPCE,* 2015, 467-470; B. CONFORTI, M. IOVANE, *op. cit.,* 32; C. FOCARELLI, *op. cit.,* 62.

[357] In this regard see UNHRC, *Pakistan - Compilation of information prepared by the Office of the United Nations High Commissioner for Human Rights,* UN Doc. A/HRC/WG.6/42/PAK/2 of 15 November 2022.

[358] *Ivi,* para. 9

[359] In its last Report, Amnesty International noted that, despite the Pakistani Government pledged to enact the Domestic Violence (Prevention and Protection) Bill 2021, it still had to make any concrete efforts to do so. See AMNESTY INTERNATIONAL, *The State,* cit., 294.

enforced disappearances and extrajudicial killings allegedly perpetrated by the police[360] and military and security forces, together with the absence of explicit criminalization of enforced disappearances in domestic law[361]. Then, the UPR Process highlighted Pakistan's resort to the same approach used by India to silence political opposition; indeed, its authorities usually apply anti-terrorism legislation which legitimizes arbitrary arrests and detention, and leaves police forces unpunished. Moreover, it confirmed a practice already accounted by the HRC in its 2017 concluding observations on the initial report of Pakistan[362] and by the 2021 Report of the UN Secretary-General on reprisal[363]; this is the wide employment by the police, military and security forces and intelligence agencies of acts of torture against detained persons[364]. Furthermore, allegations of torture are not promptly and thoroughly investigated, and perpetrators are rarely brought to justice. Journalists, human rights defenders and critics of the Government and military establishment are particularly among those subjected to arbitrary arrest and detention, torture, and enforced disappearance. This is confirmed in the 2023 annual Report of the UN Secretary-General on reprisal that gave account of acts of intimidation and harassment against a civil society organization advocating for human rights allegedly in reprisal for its participation in the UPR Process of Pakistan[365].

The UPR Process also revealed frequent cases of trafficking in women and girls for sexual exploitation and forced or bonded labour[366], as well as severe restrictions on freedom of expression, freedom of peaceful association and assembly and freedom of religion and belief. Indeed, on the one hand, Pakistani authorities usually seek to ban protests and frequently resorted to excessive and other unlawful force against protesters. On the other hand, religious minorities are often subjected to harassment and vague and draconian blasphemy

[360] Incidents of enforced disappearances are also reported by the UN Secretary-General in his annual reports on reprisals (see UN Doc. A/HRC/45/36, cit., paras. 93-94; UN Doc. A/HRC/48/28, cit., paras. 83-84). See also UNHRC, UN Doc. A/HRC/WG.6/42/PAK/2, cit., para. 12.

[361] HRC, *Concluding Observations on the Initial Report of Pakistan*, CCPR/C/PAK/CO/1 of 23 August 2017, para. 13 and para. 19.

[362] In this regard see UNHRC, UN Doc. A/HRC/WG.6/42/PAK/2, cit., para. 13.

[363] UN Secretary-General, UN Doc. A/HRC/48/28, cit., paras. 85-86.

[364] HRC, *Concluding Observations on the Initial Report of Pakistan,* cit., para. 25.

[365] UN Doc. A/HRC/54/61, cit., paras. 92-95. In this regard see also AMNESTY INTERNATIONAL, *The State,* cit., 21.

[366] UNHRC, UN Doc. A/HRC/WG.6/42/PAK/2, cit., para. 30.

laws are routinely used to target them and allow extremist groups to operate with impunity. In this regard, the UPR Process noted that 75 persons had reportedly been killed with impunity following allegations of blasphemy.

In essence, the last UPR Process has confirmed the concluding observations delivered in 2017 by the HRC and the CESCR; they expressed deep concern that the rights enshrined in the 1966 International Covenants were not given full effect in the domestic legal order and that national courts had, in certain cases, proved reluctant to apply them[367]. In particular, the CESCR noted that the Constitution of the State party does not recognize economic, social and cultural rights as fundamental rights that are justiciable but recognizes them only as policy guidelines[368].

4.1. Although neither in the last UPR cycle nor in the three previous ones is there any specific reference to Azad Jammu and Kashmir and to Gilgit-Baltistan[369], the human rights situation in those territories was subject of attention by OHCHR[370] which revealed that individuals living there suffer similar and additional abuses to those suffered by Pakistani citizens. In this regard, the 2019 OHCHR Report emblematically stated that «the human rights violations in Pakistan-Administered Kashmir are of a different caliber or magnitude and of a more structural nature than those in India-Administered Kashmir»[371] and recommended to the Islamabad Government to «[f]ully respect international human rights law obligations in Pakistan-Administered Kashmir»[372].

In its 2018 Report the OHCHR noted that the Interim Constitution of Azad Jammu and Kashmir placed several restrictions on anyone criticizing the accession of the territory to Pakistan, in

[367] See HRC, *Concluding Observations on the Initial Report of Pakistan*, cit., para. 5, and CESCR, *Concluding Observations on the Initial Report of Pakistan*, E/C.12/PAK/CO/1 of 20 July 2017, para. 5.

[368] CESCR, *Concluding Observations on the Initial Report of Pakistan,* cit., para. 5.

[369] The absence of explicit reference to Azad Jammu and Kashmir and to Gilgit-Baltistan suggests that the human rights situation is similar to that in other territories under Pakistan's jurisdiction and that no specific abuses are perpetrated against Kashmiris living there.

[370] See 2018 OHCHR Report, cit.; 2019 OHCHR Report, cit. About human rights situation in Azad Jammu and Kashmir and in Gilgit-Baltistan, see in literature A. BANSAL, *Gilgit-Baltistan and its Saga of Unending Human Rights Violations*, New Delhi, 2018; P. BALCEROWICZ, A. KUSZEWSKA, *op. cit.,* 113-188.

[371] 2019 OHCHR Report, cit., para. 146.

[372] *Ivi*, 42.

contravention to international standards on the rights to freedoms of expression and opinion, assembly and association[373]. Moreover, it expressed deep concern about a widespread use of Pakistan's 1997 Anti-Terrorism Act against young activists and the related extensive jurisdiction of anti-terrorism courts whose proceedings are characterized by lack of procedural safeguards[374]. The 2018 OHCHR Report also accounted for reported media censorship[375], as well as for civilians killed and injured by increasing ceasefire violations[376].

Recent reforms introduced both in Azad Jammu and Kashmir and in Gilgit-Baltistan have not contributed to an improvement in the situation; rather, they made it worse! Consider, for instance, Pakistan Administered Kashmir Elections Act 2020 which made it mandatory for all political parties to declare loyalty to Pakistan. Indeed, its Article 126 provides that no political party shall be formed with the object of propagating any opinion or acting in any manner prejudicial to the Ideology of State's Accession to Pakistan. On the other hand, the 2018 Government of Gilgit-Baltistan Order was accused of failing to protect the fundamental freedoms of the people of Gilgit-Baltistan[377]. It is worth noting that violations and limitations on freedoms are set against a backdrop of widespread poverty that has engendered deep discontent among Kashmiris who are often the protagonists of heated protests. The last ones date back to May 2023 and were caused by a steep rise in the prices of wheat flour and electricity and by the need to obtain more governmental[378]. Pakistani authorities responded with a disproportionate use of force. Thus, the voices of the Kashmiris to free themselves from Pakistani rules have resulted in regular instances of human rights abuses including forced disappearances [379], political repression, electoral rigging, and suppression of freedom of speech[380]. Moreover, torture and deaths in

[373] See 2018 OHCHR Report, cit., para. 147. These restrictions resulted in silencing all kinds of dissent, including demands for greater transparency and accountability (*ivi,* para. 148).

[374] *Ivi,* paras. 155-156.

[375] *Ivi*, para. 154.

[376] *Ivi*, paras. 162-164.

[377] See 2019 OHCHR Report, cit., para. 154.

[378] https://www.aljazeera.com/news/2024/5/14/unrest-in-pakistani-kashmir-whats-behind-the-recent-wave-of-protests .

[379] Enforced disappearances of people from Pakistan-Administered Kashmir were also documented by OHCHR. See 2019 OHCHR Report, cit., para. 179.

[380] UNHRC, *Written statement* submitted by Centre for Human Rights and Peace Advocacy, a non-governmental organization in special consultative status,* UN Doc. A/HRC/49/NGO/26 of 10 February 2022, 2.

custody at the hands of security forces have been reported, especially in the cases of independence supporters and other activists[381]. Therefore, apart from continuous violations of main civil rights (e.g. the right to life and to protection against violence, the right to liberty and security of person, the right to freedom of speech[382]), limitations in political rights (e.g. freedom of assembly, and association[383]), and suspension of many economic and cultural rights (e.g. the right of everyone to an adequate standard of living; the right of everyone to the enjoyment of the highest attainable standard of physical and mental health[384]) protected by the core human rights treaties Pakistan is a party to, individuals living in Azad Jammu and Kashmir and in Gilgit-Baltistan continue to suffer from abuses, largely carried out by the army and other security agencies with impunity.

Then, in his Annual Reports on children and armed conflicts the UN Secretary-General gave account of attacks against schools in Pakistan-administered Kashmir across the line of control, as well as killing or injuring children occurred during armed clashes or by shelling or targeted fire across the line of control, by improvised explosive devices and explosive remnants of war in Pakistan-Administered Kashmir[385].

5. Among the many accusations made by Pakistan against India, the one related to the violation of human rights can be considered well-founded. On the other hand, however, the same accusation can be made against Pakistan. Indeed, on closer inspection human rights situation in both countries has significant commonalities.

First, in both India and Pakistan, and in the territories originally belonging to the Princely State of Jammu and Kashmir under their

[381] Freedom in the World 2023 - Pakistani Kashmir, cit.

[382] Pakistani Government keeps in controlling over the press and media, as evidenced by the fact that «media owners in the region still have to obtain permission to publish from the Kashmir Council and the Ministry of Kashmir Affairs» and «journalists in Pakistan-Administered Kashmir continue to face threats and harassment in the course of carrying out their professional duties» (2019 OHCHR Report, cit., para. 158 and para. 160).

[383] See particularly, *Freedom in the World 2023 - Pakistani Kashmir*, 2023 https://www.ecoi.net/en/document/2097721.html (accessed on 14 February 2024).

[384] See UNHRC, *Written statement* submitted by Comité International pour le Respect et l'Application de la Charte Africaine des Droits* …, cit. In this regard, see also 2019 OHCHR Report, cit. paras. 163-166 which raised concern about the effective enjoyment rights enshrined in the ICESCR as a consequence China-Pakistan Economic Corridor (CPEC).

[385] See UN Doc. A/74/845–S/2020/525, cit., paras. 217-218; UN Doc. A/75/873 S/2021/437, cit., paras. 261-262.

control, human rights violations are widespread and systematic. While they both are willing to accept – at least in principle – the *core* human rights, they are particularly reticent about freedom of expression, freedom of association, limits on national security and unity which they see as undermined by political opposition, minorities and indigenous communities, and by the role of human rights non-governmental organizations. Moreover, neither India nor Pakistan accepted the request by the Special Rapporteur on human rights defenders for country visits and the competence of committees established under international human rights treaties they are parties to[386]. Their unwillingness to cooperate with international human rights monitoring mechanisms seems to suggest their preference for a non-confrontational approach to human rights linked to the perception of human rights protection as a purely internal affair of a State. This view, which is in open contrast to the idea of the universality of human rights and of international concern of their violations, is in line with the so-called «Asian Values» which would provide the background for a different perception of human rights based on the assumption that they are not universal and cannot be globalized[387]. The values commonly proposed as the essence of Asian culture and identity are pragmatism, consensus, harmony, unity, and community. Additionally, unlike Western societies, Asian ones are centered not on the individual but on the family and on the nation. Consequently, according to Asian understanding, their combined interests of family and nation go before the interests of each individual and, therefore, Asian societies rank social and economic rights over an individual's political rights. This explains why India and Pakistan, as well as other Asian countries, are characterized by strong Governments, deference to authority, respect for the community and emphasis on economic development first (and, perhaps, political development later). On the other hand, the idea that human rights are internal affairs, together with Asian intrinsic pragmatism and the preference for quiet diplomacy, explains why Asia has not yet developed its own regional

[386] In this regard, see *infra*, Final remarks.

[387] The arguments of «Asian Values» first emerged in the 1990s and since then they are used by Asian Governments to challenge the universality of international human rights according to the Western view. In this regard in literature, in addition to authors quoted at note 296, see M. JACOBSEN, O. BRUUN, *Human Rights and Asian Values: Contesting National Identities and Cultural Representation in Asia*, London, 2003. In a political perspective see A. SEN, *Human Rights and Asian Values*, New York, 1997.

system for the protection of human rights which would provide room for accountability, confrontation and reprimand.

The fact that India and Pakistan's conducts find a justification in the deep-rooted Asian culture does not exempt them from complying with international human rights obligations that in most cases they have voluntarily assumed. On the other hand, if States are not enabled to invoke their domestic law as a justification for their failure to perform international obligations[388], even less can they invoke their regional culture.

[388] As is well-known, the existence of a rule of general international law prohibiting States from invoking their domestic law to evade compliance with international obligations was originally recognized by the PCIJ (Advisory Opinion of 4 February 1932, *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory,* in *Series A/B,* No. 44, 24), then codified in the VCLT (Article 27) and confirmed by international jurisprudence (see particularly ICJ, Judgement of 22 July 2012, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal),* para. 113; African Court of Human and Peoples' Rights, Judgment of 14 June 2013, *Tanganyika Law Society, The Legal and Human Rights Centre & Rev. Christopher R. Mtikila* v. *The Tanzania*, para. 108).

FINAL REMARKS

Analyzed through the lens of international law, the *Kashmir issue* takes on very different contours from those resulting from the narrative of each of the three States involved. Internationally wrongful acts are identifiable in the conduct of all of them; these range from the commission of human rights abuses by India, to the violation of many rules of the law of occupation, including the obligation to protect human rights, by Pakistan, and the violation of the principle of territorial integrity and of the prohibition of the acquisition of territory by force by China. Consequently, accusations that the three States have made against each other have turned out to have little or, in some cases, no basis in relevant rules of international law. Therefore, none of them can be considered the *repository of legal reason* in absolute terms.

At this point, one cannot but wonder what instruments international law has at its disposal to promote a solution of the *Kashmir issue* and to bring it back into the realm of law.

It is clear that the regime of international State responsibility is first and foremost relevant, and it goes without saying that India, Pakistan and China are all under the obligation to cease internationally wrongful acts and to offer appropriate assurances and guarantees of non-repetition. This means that Indian military forces should stop perpetrating physical abuses (torture, rape, arbitrary arrests and detentions, enforced disappearances, etc.)[389]. For its part, Pakistan should, first and foremost, cease the occupation of the territories of Azad Jammu and Kashmir and of Gilgit-Baltistan which amounts to a violation of the principle of temporariness since it has been lasting for almost 80 years, in addition to be illegal *ab initio*. In the meantime, it should really act in the best interest of the Kashmiris by enabling them to realize their right to internal self-determination. Thus, Pakistan should cease to deprive them of their rights to freedom of expression and opinion, assembly and association, exploitation of their own resources, as well as it should stop the disproportionate use of force by police which is often actor of torture, arbitrary arrests and detentions,

[389] In fairness, this is due to the entire Indian population who are victims of human rights abuses.

and enforced disappearances against the Kashmiris. Finally, for its part, China should cease exercising sovereign powers over the territories of Aksai Chin and the Shaksgam Valley, thus ending the violation of Indian territorial sovereignty.

Obviously, India, Pakistan and China should also comply with the obligation to redress the wrong caused, firstly by providing the re-establishment of the situation that existed prior the occurrence of the wrongful act. In this regard, it is worth pointing out that, as far as India is concerned, this does not mean the restoration of the autonomy *status* originally granted to the Federated State of Jammu and Kashmir. Rather, it means that India should abrogate legal and administrative measures which legitimize abuses against the Kashmiris and violations of their core rights.

At this point, one cannot but wonder what are the legal consequences that derive from the failure in complying with the aforementioned obligations. To answer this question, the nature of rules violated is to be taken into account.

By its very nature, the rule of international law conferring upon each State the right to territorial sovereignty is synallagmatic; so, its violation by China legitimizes the offended State (namely, India) to take appropriate countermeasures. Obviously, whether and which countermeasures India decides to take depends on assessments of political expediency. As far as international law is concerned, they are required to fulfil the proportionality yardstick. On the other hand, however, the violation of territorial sovereignty resulted in the acquisition of part of Indian territory by force, namely in a conduct that is prohibited by a rule of international law which, as the ICJ has recently clarified, is *erga omnes* in character[390].

Conversely, internationally wrongful acts by India and Pakistan mainly consist in violations of human rights enshrined in international treaties which provide for specific enforcement mechanisms. They are interstate communication procedures and individual complaints procedures whose operation is conditional on the acceptance by the States parties. And, neither India nor Pakistan expressed it, therefore those mechanisms cannot operate against them.

However, this does not mean that their internationally wrongful acts to the detriment of the Kashmiris remain unpunished. It is generally accepted that *erga omnes* obligations stem from the rules

[390] ICJ, *Legal Consequences arising from Policies and Practices of Israel in the Occupied Palestinian Territory,* cit., para. 274.

protecting human rights (at least «basic» ones)[391]; they certainly include the prohibitions on genocide, torture, slavery, racial discrimination as well as «principles and rules concerning the basic rights of the human person», such as the right to life, the prohibitions on enforced disappearances and on arbitrary deprivation of personal freedom, etc. On closer inspection, this list may be further extended including all rules of the ICCPR provided that – as the HRC pointed out – «every State Party has a legal interest in the performance by every other State Party of its obligations» and that «(…) as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms»[392]. Rather, according to some scholars[393], all rules protecting human rights have *erga omnes* nature, as long as they likely fulfill the common interest requirement[394]. Likewise, it is indisputable that the rules of international humanitarian law[395] have an *erga omnes* character too. Provided that – as already said – internationally wrongful acts carried out by the parties to the *Kashmir issue* mainly consist in violation of: 1. rules concerning basic rights of the person (i.e. torture and inhuman treatments, enforced disappearances, arbitrary detention, restriction of

[391] See ICJ, Judgment of 5 February 1970 (Preliminary Objections), *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, 32. About *erga omnes* obligations in literature see, *ex multis*, P. PICONE, *Comunità internazionale e obblighi «erga omnes»,* Napoli, 2010.

[392] HRC, General Comment No. 31 [80], *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add. 13 of 26 May 2004, para. 2.

[393] See particularly T. MERON, *On a Hierarchy of International Human Rights*, in *AJIL,* 1986, 10; I. SEIDERMAN, *Hierarchy in International Law. The Human Rights Dimension,* Antwerp, 2001, 131-133; E. CANNIZZARO, *op. cit*., 251-252; A. HACHEM, O. A. HATHAWAY, J. COLE, *A New Tool for Enforcing Human Rights: Erga Omnes Partes Standing*, in *CJTL,* 2024, n. 2, 45.

[394] In this regard, the ICJ stated that «[a]ll the States parties to the Genocide Convention (…) have a common interest to ensure the prevention, suppression [,] and punishment of genocide, by committing themselves to fulfilling the obligations contained in the Convention. (…) [S]uch a common interest implies that the obligations in question are owed by any State party to all the other States parties to the relevant convention; they are obligations *erga omnes partes*, in the sense that each State party has an interest in compliance with them in any given case» (see Judgment of 22 July 2022 (preliminary objections), *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v. Myanmar),* para 107. In the same vein, ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, cit., paras. 68-70.

[395] In this vein, see particularly ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* cit., para. 157. In literature see particularly, L. CONDORELLI, L. BOISSON DE CHAZOURNES, *op. cit.,* 29 ff.; A. CASSESE, *Diritto internazionale*, cit., 35.

the right to speech, assembly, etc.) (India and Pakistan); 2. rules of international humanitarian law (Pakistan), and 3. rule enshrining the prohibition of the acquisition of territory by force (China), and provided that these rules have *erga omnes partes*/*erga omnes* nature, all States parties or, as the case may be, the entire international Community may have an interest in bringing the unlawful conduct to an end.

Specific consequences derive from the existence of such a *collective interest*. Firstly, as pointed out by the ICJ, every State is under a duty not to recognize the situation resulting from violation of *erga omnes* obligations[396]. Moreover, any State party to human rights treaties to whom India and Pakistan are also parties and whose provisions were violated by them[397] is entitled to invoke their responsibility for violating *erga omnes partes* obligations. Additionally, if the wrongful behavior consists in torture, inhuman and degrading treatments, enforced disappearances which are also prohibited by customary international law, any State of the international Community may invoke the international responsibility of India and Pakistan, although it is not directly injured by their conduct. Likewise, any State of the international Community may invoke the international responsibility of China for violation of the rule prohibiting the acquisition of territory by force. In particular, according to Article 48 of the Draft Articles on State Responsibility, any State party to treaties violated or, where appropriate, any State of the international Community may claim to cessation of the internationally wrongful act, and assurances of non-repetition (para. 2(a)), as well as to reparation in the interest of the beneficiaries of the obligation breached (para. 2(b))[398], namely the Kashmiris. The ILC Commentary of the Draft Articles on State Responsibility clarified that «invocation should be understood as taking measures of a

[396] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* cit., para. 159. About the fact that the duty not to recognize concerns serious breach not only of *jus cogens*, but also of *erga omnes* obligations see M. LONGOBARDO, *The Contribution of International Humanitarian Law to the Development of the Law of International Responsibility Regarding Obligations Erga Omnes and Erga Omnes Partes*, in *JCSL*, 2018, 387 ff.

[397] They are, particularly, the ICCPR by India and the latter, the CAT, as well as the Fourth 1949 Geneva Convention by Pakistan.

[398] This provision expresses a measure of progressive development, which is justified by ILC since it provides a means of protecting the community or collective interest at stake and it reflects certain provisions contained in various human rights treaties, allowing invocation of responsibility by any State party.

relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal»[399]. However, this second option is hardly feasible as regards the case at issue, at least in relation to human rights treaties obligations. Firstly, as already said, neither India nor Pakistan accepted the competence of *ad hoc* committees established under human rights treaties to receive interstate communications and individual complaints. Secondly, although human rights treaties to whom India and Pakistan are parties explicitly or implicitly allow for recourse to a judicial body where the treaty-specific means of dispute settlement have failed[400], neither India nor Pakistan has conveniently accepted the jurisdiction of the ICJ[401]. In

[399] See ILC, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, UN Doc. A/56/10 of 10 August 2001, 117, para. 2.

[400] Article 44 of the ICCPR and Article 16 of the CERD both contain explicit non-exclusivity clauses, providing that the respective enforcement systems «shall not prevent the states parties (…) from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them». Additionally, Article 22 CERD, Article 29(1) of the CEDAW and Article 30(1) of the CAT also specifically assert that States parties can institute ICJ proceedings.

[401] India and Pakistan made similar declarations recognizing the jurisdiction of the ICJ as compulsory *ex* Article 36(2) of the Statute. India excluded from the Court's jurisdiction: disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement; (2) disputes with the government of any State which is or has been a Member of the Commonwealth of Nations; (3) disputes in regard to matters which are essentially within the domestic jurisdiction of the Republic of India; (4) disputes relating to or connected with facts or situations of hostilities, armed conflicts, individual or collective actions taken in self-defense, resistance to aggression, fulfilment of obligations imposed by international bodies, and other similar or related acts, measures or situations in which India is, has been or may in future be involved, including the measures taken for protection of national security and ensuring national defense; (5) disputes with regard to which any other party to a dispute has accepted the compulsory jurisdiction of the ICJ exclusively for or in relation to the purposes of such dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of a party to the dispute was deposited or ratified less than 12 months prior to the filing of the application bringing the dispute before the Court; (6) disputes where the jurisdiction of the Court is or may be founded on the basis of a treaty concluded under the auspices of the League of Nations, unless the Government of India specially agree to jurisdiction in each case; (7) disputes concerning the interpretation or application of a multilateral treaty to which India is not a party; and disputes concerning the interpretation or application of a multilateral treaty to which India is a party, unless all the parties to the treaty are also parties to the case before the Court or the Government of India specially agree to jurisdiction; (8) disputes with the Government of any State with which, on the date of an application to bring a dispute before the Court, the Government of India has no diplomatic relations or which has not been recognized by the Government of India; (9) disputes with non-sovereign States or territories; (10) disputes with India concerning or relating to: (a) the status of its territory or the modification or delimitation of its frontiers or any other matter concerning boundaries; (b) the territorial sea, the continental shelf and the margins, the exclusive fishery zone, the exclusive economic zone, and other zones of national

particular, similar clauses contained in Article 44 of the ICCPR and in Article 16 of the CERD cannot be applied since both States do not recognize as compulsory *ipso facto* the jurisdiction of the Court over disputes arising under a multilateral treaty or any other international obligation that they have specifically undertaken «unless: i) all the parties to the treaty affected by the decision are also parties to the case before the Court»[402]. And, as it is understandable, it is highly unlikely that 173 States (in the case of the ICCPR) or 182 States (in the case of the CERD) institute a proceeding before the ICJ. An alternate condition that would have to be fulfilled for the ICJ to hear a dispute concerning the ICCPR or the CERD or under Article 30(1) CAT is that India and Pakistan specifically agree to jurisdiction, and such an

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maritime jurisdiction including for the regulation and control of marine pollution and the conduct of scientific research by foreign vessels; (c) the condition and status of its islands, bays and gulfs and that of the bays and gulfs that for historical reasons belong to it; (d) the airspace superjacent to its land and maritime territory; and (e) the determination and delimitation of its maritime boundaries. (11) disputes prior to the date of this declaration, including any dispute the foundations, reasons, facts, causes, origins, definitions, allegations or bases of which existed prior to this date, even if they are submitted or brought to the knowledge of the Court hereafter.

According to Pakistan's declaration, the ICJ cannot hear: disputes the resolution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or b) disputes relating to questions which fall essentially within the domestic jurisdiction of the Islamic Republic of Pakistan; c) disputes relating to or connected with any aspect of hostilities, armed conflicts, individual or collective self-defense or the discharge of any functions pursuant to any decision or recommendation of international bodies, the deployment of armed forces abroad, as well as action relating and ancillary thereto in which Pakistan is, has been or may in future be involved; d) disputes with regard to which any other party to a dispute has accepted the compulsory jurisdiction of the ICJ exclusively for or in relation to the purposes of such dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of a party to the dispute as deposited or ratified less than 12 months prior to the filing of the application bringing the dispute before the Court; e) all matters related to the national security of the Islamic Republic of Pakistan; f) disputes arising under a multilateral treaty or any other international obligation that the Islamic Republic of Pakistan bas specifically undertaken unless: i) all the parties to the treaty affected by the decision are also parties to the case before the Court, or ii) the Government of the Islamic Republic of Pakistan specifically agrees to jurisdiction, and iii) the Government of the Islamic Republic of Pakistan is also a Party to the treaty. g) any dispute about the delimitation of maritime zones, including the territorial sea, the exclusive economic zone, the continental shelf, the exclusive fishery zone and other zones of national maritime jurisdiction or the exploitation of any disputed area adjacent to any such maritime zone; h) disputes with the Islamic Republic of Pakistan pertaining to the determination of its territory or the modification or delimitation of its frontiers or boundaries; i) all disputes prior to this Declaration although they are filed before this Court hereafter.

[402] See Pakistan's declaration recognizing the jurisdiction of the Court as compulsory of 29 March 2017, https://www.icj-cij.org/declarations/pk ; India's declaration recognizing the jurisdiction of the Court as compulsory of 27 September 2019, https://www.icj-cij.org/declarations/in .

acceptance has not yet occurred[403]. In essence, the possibility that a non-directly injured State sues India and/or Pakistan before the ICJ might merely concern conducts consisting in gross violations of human rights prohibited by general international law or – as regards Pakistan – in violations of customary rules of the law of occupation. Recent practice in terms of *erga omnes partes* standing at the Court makes this hypothesis anything but peregrine[404]. Furthermore, in this regard, while referring to *Gambia v. Myanmar case*, the ILC stated that «[w]hile the case concerned obligations *erga omnes partes*, the principle applies equally to *erga omnes* obligations generally»[405].

Obviously, India and Pakistan might object that according to the 1972 Simla Agreement the *Kashmir issue* has a bilateral nature and must be settled through bilateral negotiations. However, to this objection, one could reply that the dispute before the Court would not be specifically about the *Kashmir issue* but about the protection of human rights and/or the compliance with the law of occupation. Moreover, by virtue of the principle *pacta tertii nec nocent nec prosunt*, the 1972 Simla Agreement does not bind States other than its parties. So, States other than India and Pakistan are not precluded – in

[403] Upon ratification of the CAT, Pakistan made a reservation pursuant to Article 30(2). It states that «The Government of the Islamic Republic of Pakistan does not consider itself bound by Article 30, paragraph 1 of the Convention».

[404] See ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal),* cit.; Provisional measures, Order of 23 January 2020, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar),* paras. 39-42. See also recent applications brought before the ICJ by South Africa against Israel as regards 1948 Genocide Convention, and by the Netherlands and Canada against Syria concerning the CAT. About the trend of non-directly injured States to invoke the responsibility of States for their violations of *erga omnes partes* obligations before the ICJ, in literature see M. I. PAPA, *Interesse ad agire davanti alla Corte Internazionale di Giustizia e tutela dei valori collettivi nella sentenza sul caso "Belgio c. Senegal"*, in *DUDI,* 2013, 79-104; Y. TANAKA, *Reflections on locus standi in response to a breach of obligations erga omnes partes,* in *The Law & Prac. Int'l Courts & Trib.*, 2018, 527-554; M. I. PAPA, *La tutela degli interessi collettivi nell'ordinanza sulle misure provvisorie nel caso Gambia c. Myanmar*, in *RDI*, 2020, 729-755; M. LONGOBARDO, *The Standing of Indirectly Injured States in the Litigation of Community Interests before the ICJ: Lessons Learned and Future Implications in Light of The Gambia v. Myanmar and Beyond*, in *ICLR,* 2022, 476-506; M. RAMSDEN, *Strategic Litigation before the ICJ: Evaluating Impact in the Campaign for Rohingya Rights*, in *EJIL*, 2022, 441–472; E. CARLI, *Legittimazione di Stati diversi da uno Stato leso ad agire in giudizio per violazione di obblighi solidali*, in *RDI*, 2023, 989-1030; A. HACHEM, O. A. HATHAWAY, J. COLE, *op. cit.;* M. I. PAPA, *Litigating Collective Obligations before the ICJ: Progress, Challenges and Prospects*, in *The Law & Prac. Int'l Courts & Trib.,* 2024, 36-72.

[405] ILC, *Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (jus cogens),* cit., 68, para. 7.

principle – from invoking their international responsibility even before an international tribunal.

On the other hand, it is highly unlikely that the violation of the prohibition of territorial acquisition by force will be addressed by the ICJ in litigation (and, not only for political reasons). Indeed, China has not made the declaration recognizing as compulsory its jurisdiction and it is utopian to think that it could agree to sue at the request of any State in the international Community challenging its conduct.

Actually, there is another way to submit the *Kashmir issue* to the attention of the ICJ. Pursuant to Article 96(1) of the UN Charter, the UN General Assembly might request it to give an advisory opinion about the legality of conducts carried out by Pakistan, India and/or China. Albeit non-binding, the Court's advisory opinion might influence States to re-evaluate their diplomatic, economic and trade relations with States concerned, if they were found to have engaged in illegal conducts. In other words, the Court's opinion could provide an incentive for States to act in compliance with Article 54 of the Draft Articles on State Responsibility providing that any non-directly injured State may take lawful measures against the State responsible for the violation of an *erga omnes* obligation. As is well known, the provision in question is surrounded by an aura of uncertainty, since it is still unclear which measures concretely fall under its meaning. According to some scholars, there is sufficient uniform State practice to affirm that peaceful countermeasures may be adopted by non-directly injured States[406]. On the contrary, according to other scholars, the wording of Article 54 of the Draft Articles on State Responsibility, and particularly the expression «lawful measures» induce to exclude the adoption of countermeasures[407]. While it is therefore controversial

[406] See P. M. DUPUY, *Observations sur la pratique récente des "sanctions" de l'illicite*, in *RGDIP,* 1983, 505; L-A. SICILIANOS, *Les réactions décentralisées à l'illicite: des contre-mesures à la légitime défense*, Paris, 1990, 155-174; J. A. FROWEIN, *Reactions by Not Directly Affected States to Breaches of Public International Law*, in *RdC,* 1994, vol. 248, 405-422; E. KATSELLI PROUKAKI, *The Problem of Enforcement in International Law: Countermeasures, the Non-injured State and the Idea of International Community, London,* 2009, 90-209; A. SINAGRA, P. BARGIACCHI, *op. cit.,* 431; N. RONZITTI, *Diritto internazionale*, cit., 421; M. ARCARI, *The future of the Articles on State Responsibility: A matter of form or of substance*?, in *QIL. Zoom-in*, 2022, 18-19; P. M. DUPUY, Y. KERBRAT, *op. cit.,* 604-605. In this sense see also D. AKANDE, *Use of Force Under Public International Law. The Case of Ukraine*, in 62nd meeting of the Committee of Legal Advisers on Public International Law (CAHDI) on 25 March 2022 in Strasbourg, para. 20.

[407] In this sense, see M. I. PAPA, *Autodeterminazione dei popoli e Stati terzi*, in M. DISTEFANO (a cura di), *op. cit.,* 62-64; F. SALERNO, *op. cit.,* 541; A. GIOIA, *op. cit.,* 440; B.

whether these can be lawfully taken against India and Pakistan, it is absolutely certain that any non-directly injured State might adopt unfriendly measures, that are intrinsically lawful and in conformity with international law. They might consist of the convocation of the Indian/Pakistan/Chinese ambassador for consultations; visa denials or the introduction of a visa regime[408]; the denial of access to ports; etc.

Although Article 54 of the Draft Article on State Responsibility does not require prior consultation and cooperation between non-directly injured States, it is desirable (and not contrary to international law) that aforementioned «lawful measures» are agreed upon and adopted within international organizations, so that they have greater authority and impact. To this end, a decisive role could be played by the UN and, in particular, the General Assembly which is endowed with the power to make recommendations to assist in the realization of human rights (Article 13(1)(b) of the UN Charter), and on matters of international peace and security, as well as «to recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations» (Article 14 of the UN Charter). And it is undeniable that the *Kashmir issue* is such a situation. The UN General Assembly could act upon its powers to establish fact-finding missions and/or commissions of inquiry to investigate violations of international human rights law and international humanitarian law occurred in India-Administered Kashmir and in Pakistan-Administered Kashmir, along the lines of the one established by the OIC-Independent Permanent Human Rights Commission (IPHRC) which tried – unsuccessfully – to ascertain the human rights situation in Jammu and Kashmir[409]. As a result of this investigative activity, the General Assembly could make determinations regarding the application of existing legal principles to specific Indian and Pakistani

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CONFORTI, M. IOVANE, *op. cit.,* 465-466. On the other hand, as explained by the ILC Commentary, the choice of expression mainly derives from the consideration that international practice concerning countermeasures taken to protect a collective interest is «uncertain […] sparse and [it] involves a limited number of States». See ILC, *Draft Articles on Responsibility of States,* cit., 139, para 6.

[408] See, in this regard, the introduction by Spain of a visa requirement for Canadians during the so-called Spanish-Canadian «Turbot War» in April 1995.

[409] Through its Resolution No. 8/43-Pol and No. 5 2/43-Pol2, the 43rd OIC Council of Foreign Ministers (CFM) requested the IPHRC to establish a fact-finding body to ascertain the human rights situation in Jammu and Kashmir and report its findings to the OIC CFM. However, India did not agree to this fact-finding body conducting investigations on its territory.

conducts and, to induce their cessation, it could recommend collective measures. In particular, as happened in the past, the General Assembly could recommend diplomatic, economic and other sanctions. Other possible actions which have a relevant political value could be: the rejection of the credentials of India and Pakistan's representatives on human rights grounds under Rule 27 of the Rules of Procedure of the General Assembly; the suspension of India from the UNHRC pursuant to Article 8 of the Resolution 60/251[410]; the rejection of India and Pakistan as eligible candidates as members of the UNHRC, as long as they continue to perpetrate human rights abuses against the Kashmiris. Finally, if the General Assembly considers the situation in India-Administered Kashmir and in Pakistan-Administered Kashmir likely to endanger international peace and security, it might call the attention of the Security Council to it.

On the other hand, the path of direct involvement of the UN Secretary-General as a mediator is hardly feasible, as the parties involved, and especially India, are unwilling to accept the involvement of a third party by continuing to consider the *Kashmir issue* a bilateral affair in accordance with the Simla Agreement.

Apart from any measures that the UN and non-directly injured States might decide to take against India, Pakistan and China to induce them to cease their internationally wrongful conducts, a lasting solution of the *Kashmir issue* in accordance with existing international law cannot be achieved without a positive dialogue between the parties involving actively the Kashmiris. Indeed, although – as noted above – the incorporation of the Princely State into the Indian Union occurred validly under international law and the Kashmiris living in India-Administered Kashmir and Pakistan-Administered Kashmir are not entitled to the right to external self-determination (except for the right to the integrity of their territory violated by the conclusion of the 1963 boundaries Agreement), their deep-rooted and pronounced discontent with their rulers resulting in frequent street unrest and, sometimes, in insurgency cannot be ignored. Therefore, although not compelled by international law, it would be appropriate for India and

[410] India is currently a member of the UNHRC. Its term is going to expire in 2024. In 2022 the UN General Assembly acted pursuant to Article 8 of the Resolution 60/251 and suspended Russian Federation from the UNHRC following the aggression of Ukraine and the discovery of gross violations of human rights (torture, rape, etc.) in Bucha. See UN General Assembly, *Suspension of the rights of membership of the Russian Federation in the UNHRC,* UN Doc. A/RES/ES-11/3 of 7 April 2022. It is worth noting that India abstained during the vote to adopt this resolution.

Pakistan to listen to the voice of the Kashmiris and try to meet their needs so as to ensure a climate of internal pacification and stability. It is in this perspective that indications expressed by the UNCIP and the Security Council at the end of 1940s to hold «a free and impartial plebiscite» can be considered still valid.

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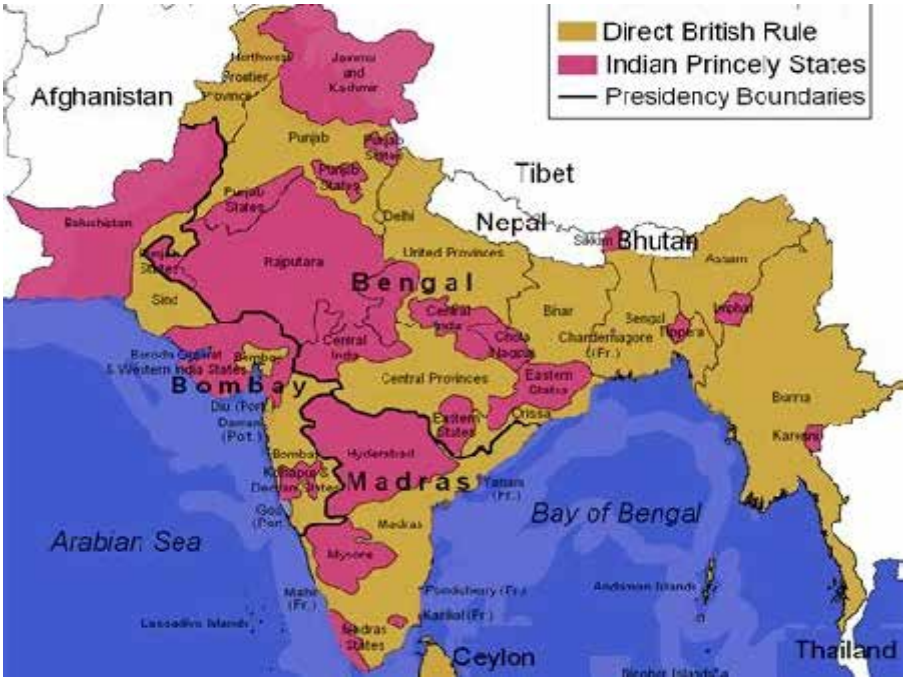
Appendix 1

British Raj

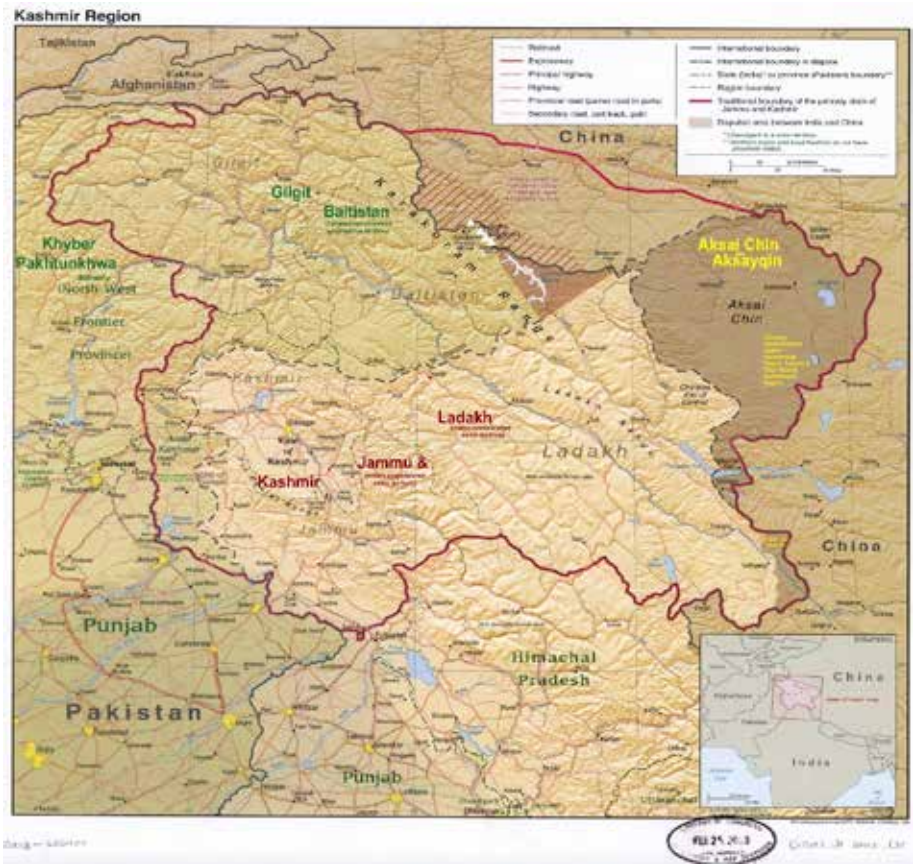


Appendix 2

Historical Map of the Princely State of Jammu and Kashmir

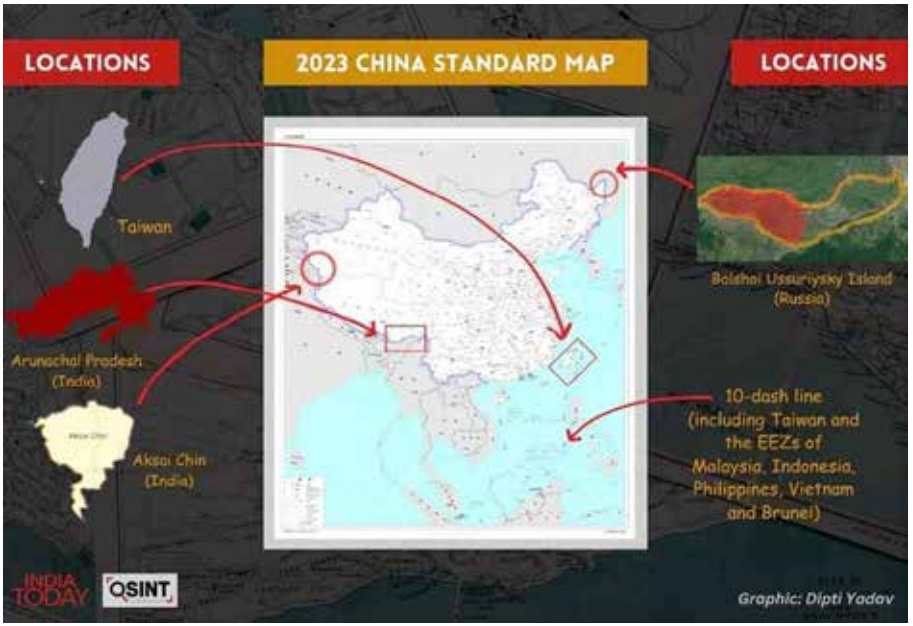
Appendix 3

Boundaries of the Princely State of Jammu and Kashmir



Appendix 4

2023 China Standard Map



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