

Whether Kashmir Negotiable

I. Introduction

If there is a heaven on earth, it is Kashmir, it is Kashmir, and it is Kashmir.¹

I would rather describe the present situation in Kashmir as if there is any hell on earth, it is in Kashmir and only in Kashmir. Around seven hundred thousand Indian troops² in Kashmir including paramilitary militias have been held responsible for rape, torture, extrajudicial executions, disappearances and detention of the Kashmiri people.³

Kashmir⁴ is a cause of tension, strife, animosity, and poverty in the sub-continent. It has caused arms race between India and Pakistan, was the reason of three wars between India and Pakistan and recently on Kargil there was likelihood of another war which could have been a nuclear one.

The parties to the issue are Kashmiris, Pakistan and India. Kashmiris want self-determination, which includes the option of independent Kashmir⁵, Pakistan wants implementation of U.N. resolutions on Kashmir⁶, and India claims it as its integral part.

At the time of partition of India into two countries, India and Pakistan, Kashmir, among other 622 princely states, was under the suzerainty of the British rule. As per the partition plan⁷, India was divided on communal lines, therefore, Kashmir being a Muslim dominated State had to go to Pakistan.⁸ In utter confusion and under the pressure of the

¹ Shirazi, a famous Persian poet

² Interview with Mr. Kanju, Former Minister of State for Foreign Affairs of Pakistan (Nov 7, 1999)

³ Human Rights Watch Vol.11, pg. 11, No 3(c)- July 1999

⁴ The State of Jammu and Kashmir is referred as Kashmir in this paper

⁵ Interview with Mr. Mumtaz, a Kashmiri lawyer and human rights activist presently settled in U.S. (Nov 9, 1999)

⁶ Interview with Mr. Kanju, Former Minister of State of Foreign Affairs of Pakistan (Nov 7, 1999)

⁷ India Partion plan of 1947

⁸ Interview with Mr. Kanju, Former Minister of State of Foreign Affairs of Pakistan (Nov 7, 1999)

Indian leaders the Hindu Maharaja of Kashmir is said to have signed the instrument of accession with India.⁹

Till now along with negotiations almost four wars¹⁰ had been fought on this issue of Kashmir but it remains in the situation of status-quo from the last fifty years. Many other young issues, the recent example of which is East Timor does not only stand settled but has been negotiated and resolved in a manner that is in accordance with the wishes of its inhabitants.

Kashmiris are claiming the constitutional and democratic right to choose and decide their own political future and to end the worst human rights crisis in Kashmir. The purpose of this paper is the fixation of responsibility on India and Pakistan in order to settle this issue of Kashmir through negotiations. I believe that fixation of responsibility is must as history without fixation is a narration of a story for babies and even babies today need an ending of substantial results.

II. Kashmir on United Nation's Agenda Since 1948

In the very first year of its independence India sent a letter to the President of the Security Council complaining that the Pakistani nationals and the tribesmen from North-west frontier were crossing into the Kashmir with the aid and help of Pakistan for operations against the State of Jammu and Kashmir. It called on the Security Council to ask Pakistan immediately to stop such assistance and to declare that Pakistan was an aggressor. If Pakistan did not stop, the Government would be compelled to enter

⁹ The original document of accession is not available. It has also been argued that Maharaja never signed the document.

Pakistan territory to take military action against the invaders. This letter called for an immediate action to avoid a breach of international peace.¹¹

This matter was admitted to the agenda of the Security Council at its 226th meeting on January 6, 1948. The question of Kashmir entered the United Nations, the representatives of India and Pakistan were invited to participate in the discussion.

On January 6, 1948, at the 227th meeting, the representative of India said that the Government of India had been compelled to bring the question before the Security Council because of the failure of the direct negotiations between India and Pakistan. The Indian representative pointed out that after the Indian Independence Act had come into force on August 15, 1947, Kashmir had started negotiations with both India and Pakistan concerning accession to one of them. Pakistan applied coercive pressure on Kashmir. It had withheld essential supplies to Kashmir. The armed insurgency was aided from Pakistan. To counteract the mass raid of tribesmen the Maharaja had acceded to the Dominion of India on October 26, 1947. The Government of India had accepted the accession on the understanding that the will of the people regarding it should be made clear in a plebiscite or referendum when law and order had been restored.

The meeting was then postponed to enable the Pakistan Foreign Minister to reach New York. On January 15, the Foreign Minister of Pakistan Sir Muhammad Zafrulla Khan submitted three documents replying to India's charges and leveled countercharges. Pakistan denied the charges of aid and assistance to the 'invaders' or any act of aggression against India. It requested the Security Council, *inter alia*, to arrange for the cessation of fighting in the State of Jammu and Kashmir; the withdrawal of all outsiders,

¹⁰ 1948, 1965, and 1971 wars including the recent clashes between Pakistan and India on Kargil

¹¹ U.N. Doc. S/628 (January 1, 1948); 1947-48 U.N.Y.B. 387

whether belonging to Pakistan or India, including their armed forces; restoration and rehabilitation of all Muslim residents of the Jammu and Kashmir State who have been compelled to leave the State as a result of disturbances; to take steps for impartial and independent administration in Kashmir; and to hold free and fair plebiscite to ascertain the will of the people of the States as to whether they want to accede to Pakistan or India.

On January 17, 1948, the Security Council adopted the resolution S/651 that says, *inter alia*, the following:

“Calls upon both the Government of India and the Government of Pakistan to take immediately all measures within their power (including public appeals to their people) calculated to improve the situation, and to refrain from making any statements and from doing or causing to be done or permitting any acts which might aggravate the situation”

Following the resolution, the representative of the United Kingdom proposed that the President of the Council should meet the representatives of India and Pakistan to try and find some common ground for settlement. The President of the Council met the representatives of both Governments and the Council adopted various resolutions. On January 20, 1948, a Commission of the Security Council for India and Pakistan (UNICIP) was established with a dual function.¹²

- (1) To investigate the facts pursuant to Article 34 of the Charter;
- (2) To exercise, without interrupting the work of the Security Council, any mediatory influence likely to smooth away difficulties; to carry out directions given to it by the Security Council; and to report how far the advice and directions, if any, of the Security Council have been carried out.

¹² U.N. Doc. S/654; 1947-48 U.N.Y.B. 389

Based on conversation with the representatives of India and Pakistan, the President reported that the parties have agreed in principle on the desirability of a plebiscite to determine the accession of the State of Jammu and Kashmir.

The representatives of India and Pakistan submitted then their proposals. The Indian proposal dealt with the following issues:

1. Cessation of fighting.
2. Restoration of peace and normal conditions.
3. The strength of the Indian troops will be reduced, but India will keep adequate troops in the State in order to avoid any future attack from outside and to maintain law and order.
4. The interim Government of Sheikh Abdullah would be converted into Council of Ministers. The ministry would function as responsible ministry.
5. The interim Government of Sheikh Abdullah should convene a National Assembly, which assemble should then constitute a National Government. The National Government would then have the plebiscite taken on the question of accession. The plebiscite would be taken under the advice and observation of the United Nations.¹³

Under the aforesaid proposal of India, two things were controversial, partial demilitarization and plebiscite under the Government of Sheikh Abdullah.

The Pakistani proposal was submitted in the form of a draft resolution. It asked for the following things:

1. The establishment of impartial interim Government in the State of Jammu and Kashmir:

2. Withdrawal of foreign armed forces including tribesmen and Indian troops;
3. Return of all citizens of Kashmir who left the State because of the disturbances;
4. Holding of a free and fair plebiscite to ascertain the will of the people as to whether they want to accede to Pakistan or India.

India wanted the plebiscite to be conducted under Sheikh Abdullah Government Pakistan wanted it to be conducted by the UNO. Moreover India wanted Sheikh Abdullah's Government to continue, to which Pakistan did not agree and instead asked for impartial interim Government. Sheikh Abdullah was not impartial as he was a member of Indian delegation to the Security Council, and had said in the Security Council that Pakistani request for an outside administrator would mean that the people of Kashmir would have no hand in running the country, he mentioned that at the helm of affairs in accordance with the wishes of his people and any one replacing him would not be impartial, and that there was no reason to fear that the Indian army would interfere with the exercise of a free vote.¹⁴

India said the Commission should have no jurisdiction to reorganize the emergency administration or to exercise any functions of an executive character.¹⁵

The Pakistani representative pointed out that Sheikh Abdullah's statement in the Security Council showed how much impartiality could be expected from an administration under him.¹⁶

¹³ U.N. Doc. S/P.V 236 (1948)

¹⁴ 1947-48 U.N.Y.B. 343

¹⁵ U.N. Doc. S/726; id., at 396-98

¹⁶ Id.

On April 17, 1948, the President of Security Council together with the representatives of Belgium, Canada, China, the United Kingdom and the United States introduced a draft resolution.¹⁷ The draft noted with satisfaction that both India and Pakistan desire that the question of accession of Kashmir should be decided through the democratic method of free and impartial plebiscite. The draft resolution provided in particular, that the government of Pakistan should secure the withdrawal of the tribesmen from Kashmir. It specified, in more detail, that the Government of India should, *inter alia*, do the following:

1. Reduce the forces in Kashmir to the minimum strength required for the support of the civil power in the maintenance of law and order;
2. Undertake to ensure that the Government of the State would invite the major political groups to designate responsible representatives to share equitably and fully in the conduct of the administration at the Ministerial level, while the plebiscite is being prepared and carried out;
3. Undertake that there will be established in Jammu and Kashmir a Plebiscite Administration to hold a plebiscite as soon as possible on the question of accession of the State to India or Pakistan:
4. Agree that a nominee of the Secretary General of the United Nations will be appointed as the Plebiscite Administrator.

The Council adopted the draft resolution on April 28, 1948.¹⁸

¹⁷ Id.

¹⁸ U.N. Doc. S/726: 1947-48 U.N.Y.B. 398-99

**III. BASIC RESOLUTION OF THE UNITED NATIONS COMMISSION FOR
INDIA AND PAKISTAN (UNICIP)**

The resolutions of this Commission of August 13, 1948 and January 5, 1949, are the most frequently referred resolutions because they form the foundation for the subsequent resolutions and provide the broader guidelines for the settlement of the dispute. India has been complaining that Pakistan did not comply with the part I of the August 13, 1948 resolution, therefore they are not obligated to implement part II and part III of the said resolution. In order to understand the true interpretation of these two resolutions, I am reproducing part I, II, III hereunder.

UNICEP RESOLUTION OF AUGUST 13, 1948¹⁹

The United Nations Commission for India and Pakistan,
Having given careful consideration to the points of view expressed by the representatives of India and Pakistan regarding the Situation in the State of Jammu and Kashmir; and
Being of the opinion that the prompt cessation of hostilities and the correction of conditions the continuance of which is likely to endanger international peace and security are essential to implementation of its endeavors to assist the Governments of India and Pakistan in effecting a final settlement of the situation;
Resolves to submit simultaneously to the Governments of India and Pakistan the following proposal:

PART I: CEASE-FIRE ORDER

A. The Governments of India and Pakistan agree that their respective High Commands will issue separately a cease-fire order to apply to all forces under their control and in the State of Jammu and Kashmir as of the earliest practicable date or dates to be mutually agreed upon within four days after these proposals have been accepted by both Governments.

B. The High Commands of the Indian and Pakistani forces agree to refrain from taking any measures that might augment the military potential of the forces under their control in the State of Jammu and Kashmir.

(For the purpose of these proposals forces under their control shall be considered to include all forces, organized and unorganized, fighting or participating in hostilities on their respective sides.)

¹⁹ U.N. Doc. S/995: reprinted in Lord Birwood, *the two Nations and Kashmir* 217

C. The Commanders-in-Chief of the forces of India and Pakistan shall promptly confer regarding any necessary local changes in present dispositions, which may facilitate the cease-fire

D. In its discretion and as the Commission may find practicable; the Commission will appoint military observers who, under the authority of the Commission and with the co-operation of both Commands, will supervise the observance of the cease-fire order.

E. The Government of India and the Government of Pakistan agree to appeal to their respective peoples to assist in creating and maintaining an atmosphere favorable to the promotion of further negotiations.

PART II: TRUCE AGREEMENT

Simultaneously with the acceptance of the proposal for the immediate cessation of hostilities as outlined in Part I, both the Governments accept the following principles as a basis for the formulation of a truce agreement, the details of which shall be worked out in discussion between their representatives and the Commission.

A.

1. As the presence of troops in Pakistan in the territory of the State of Jammu and Kashmir constitutes a material change in the situation since it was represented by the Government of Pakistan before the Security Council, the Government of Pakistan agrees to withdraw its troops from that State.

2. The Government of Pakistan will use its best endeavor to secure the withdrawal from the State of Jammu and Kashmir of tribesmen and Pakistani nationals not normally resident therein who have entered the State for the purpose of fighting.

3. Pending a final solution, the territory evacuated by the Pakistani troops will be administered by the local authorities under the surveillance of the Commission.

B.

1. When the Commission shall have notified the Government of India that the tribesmen and Pakistani nationals referred to in Part II, A, 2, hereof have withdrawn, thereby terminating the situation which was represented by the Government of India to the Security Council as having occasioned the presence of Indian forces are being withdrawn from the State of Jammu and Kashmir, and further, that the Pakistani forces are being withdrawn from the State of Jammu and Kashmir, the Government of India agrees to begin to withdraw the bulk of its forces from that State in stages to be agreed upon with the Commission.

2. Pending the acceptance of the conditions for a final settlement of the situation in the State of Jammu and Kashmir, the Indian Government will maintain within the lines existing at the moment of the cease-fire the minimum strength of its forces which in agreement with the Commission is considered necessary to assist local authorities in the observance of law and order. The Commission will have observers stationed where it deems necessary.

3. The Government of India will undertake to ensure that the Government of the State of Jammu and Kashmir will take all measures within its powers to make publicly known that peace, law and order will be safeguarded and that all human and political rights will be guaranteed.

C.

1. Upon signature, the full text of the truce agreement or a communiqué containing the principles thereof as agreed upon between the two Governments and the Commission will be made public.

PART III

The Government of India and the Government of Pakistan reaffirm their wish that the future status of the State of Jammu and Kashmir shall be determined in accordance with the will of the people and to that end, upon acceptance of the truce agreement, Both Governments agree to enter into consultations with the Commission to determine fair and equitable conditions whereby such free expression will be assured.

IV. The McNaughton Report

The hostilities between the parties ended on January 1, 1979, and a cease fire line was established on July 27, 1949.

At the request of the Security Council, its President, McNaughton (Canada) met the representatives of India and Pakistan to find out a mutual solution for the problem.²⁰ On February 3, 1950, he submitted a final report presenting a demilitarization program to be executed prior to the plebiscite.²¹ In the report, he made the following proposals:

- a) Withdrawal of regular forces of Pakistan;
- b) Withdrawal of regular forces of India not required for the maintenance of security and of law and order on the Indian side of the cease fire line;
- c) Reduction of local forces from both sides of cease-fire line;
- d) Assurance by Pakistan that it will deal effectively within its own borders with any possibility of tribal incursion into the State;
- e) Agreement between two parties on the principle of demilitarization;
- f) Agreement by both governments on the appointment by the Secretary-General of a United Nations representative, who would supervise the demilitarization

²⁰ 1948-49 U.N.Y.B. 282-83

²¹ 1950 U.N.Y.B. 304-05

program and interpret agreements between the parties concerning the reduction and disposition of forces;

g) When the program had been accomplished to the satisfaction of the United Nations representative, the Plebiscite Administrator was to exercise the functions assigned to him under the resolution by the United Nations Commission for India and Pakistan on January 5, 1949.

General McNaughton reported that both parties suggested amendments to the proposal, which were not acceptable to either of them. He said that no useful purpose would be served by continued activity on his part. Fleet Admiral Chester Nimitz was appointed as Plebiscite Administrator. On March 14, 1950, the Security Council adopted a resolution which called upon India and Pakistan to make immediate arrangements to prepare and execute within a period of five months from the date of the resolution a program of demilitarization on the principles of paragraph 2 of General McNaughton's proposal.

On April 12, 1950, the Council appointed Sir Owen Dixon of Australia, as United Nations Representative for India and Pakistan.

V. The Owen Dixon Plan

Sir Owen Dixon submitted his report on September 15, 1950.²² In the report, he stated the no agreement could be reached between India and Pakistan on the demilitarization and on the other preparations for holding a free and impartial plebiscite in the State of Jammu and Kashmir. He had made the proposals for withdrawal of regular forces in various steps. The proposal was rejected by the Prime Minister of India on the plea that Pakistan might attack the State.

On the point of administration, the UN representative proposed that the areas west of the cease fire line should be administered by local authorities— that is, Existing District Magistrates— according to the law and custom of the State as they existed before the dispute arose. Each District Magistrate was to be under the supervision of a United Nations Officer. Concerning the Northern area, it was proposed that a political agent appointed by the United Nations should administer the territory. The proposal was rejected by the Prime Minister of India on the ground that it recognized the existing officers, some of whom had replaced former officers, and who might be repugnant to India.

On the point of plebiscite, the United Nations Representative proposed that a United Nations Officer should be attached to each District Magistrate to ensure freedom of plebiscite. Prime Minister of India rejected this proposal also.

The UN representative then put three alternative proposals for bringing into existence for the plebiscite period, a single government for the Whole State:

- (i) A coalition government, representing both parties in Kashmir;
- (ii) An administration consisting of trusted persons outside politics holding high judicial or administrative offices, the chairman being appointed by the United Nations; or
- (iii) An administration wholly set up by the United Nations.

The Indian Prime Minister accepted none of the proposals.

The United Nations Representative also made an effort to work out a settlement by partition of the State.

²² U.N. Doc. S/1791; 1950 U.N.Y.B. 310-12

He ascertained that India would be prepared to discuss the partition plan on the following principles:

- (a) That the areas of the State where there was no doubt as to the wishes of the People should go to Indian or Pakistan without plebiscite:
- (b) That the plebiscite should be limited to those areas where there was doubt:
- (c) That the demarcation line should have due regard to geographical features and to the requirements of an international boundary.

In applying these principles, the Government of India had been led to the following conclusions:

- (1) There should be a plebiscite in the Valley of Kashmir.
- (2) The following areas should go to India:
 - (a) The province of Jammu so far as it lies at the east of the cease-fire lines, subject to minor corrections;
 - (b) The tehsil of Ladakh and the tehsil of Kargil in the Ladakh District with the exception of the area above the Suru River, which should go to India or Pakistan According to the result of the plebiscite in the Valley.
- (3) The following areas should go to Pakistan:
 - (a) Gilgit, Gilgit Agency, Gilgit Wazarat, Political District, tribal territory, Baltisan, and so much of Jammu as lies west of cease-fire line as corrected.

Pakistan opposed this plan on the ground that it would mean a breach of India's part of the agreement that the destination of the State as a whole should be decided by a single plebiscite taken over the entire State.

Sir Owen Dixon resigned. The matter came again for consideration before the Council in 1951. A draft resolution, presented by the United Kingdom and United States, was revised in the light of several weeks of discussion, and was approved on March 30, 1951, by 8 votes to none, with India, USSR and Yugoslavia abstaining.²³ The resolution dealt, *inter alia*, with the following issues;

1. The United Nations Representative would have now the mandate to effect the demilitarization of the State in accordance with the resolutions of August 13, 1948 and January 5, 1949.
2. Both parties were asked to accept arbitration upon the point of difference with respect to these resolutions as might remain after discussion of demilitarization with the United Nations representative.

In particular, the representatives of Brazil, China, Ecuador, France, the Netherlands and Turkey emphasized that the arbitration was the only way of resolving the existing impasse between India and Pakistan.²⁴

VI. Graham Proposals

On April 30, 1951, Frank P. Graham, former United States Senator and former President of the University of North Carolina, was appointed as United Nations Representative for India and Pakistan.²⁵

The United Nations Representative had series of meetings with both the parties and then made twelve proposals. His main proposal was that demilitarization shall be

²³ U.N. Doc. S/2017, Rev. 1 (March 30, 1951); 1951 U.N.Y.B. 340-44

²⁴ *Id.*, at 343

²⁵ *Id.*, at 344

effected in a single, continuous process, which will be completed within 90 days. It was not agreed upon by the parties. The Security Council considered the report on October 18, and November 10, 1951. It noted “with gratification the declared agreement of the two parties to those parts of Dr. Graham’s proposals which reaffirm their determination to work for a peaceful settlement... and their acceptance of the principle that the accession under the auspices of the United Nations.” It instructed Dr. Graham to continue his efforts to obtain agreement of the parties on the plan to effect demilitarization of Kashmir.²⁶

On December 1951, Dr. Graham submitted his second report. In the report, he said that out of his initial twelve proposals, the parties have agreed on eight, but no agreement could be reached on the most basic proposals for demilitarization. He reiterated that the demilitarization should be effected in a single, continuous process. The demilitarization should be completed on July 15, 1952.²⁷ The Security Council considered the second report of Dr. Graham on January 17, 30, and 31, 1952. Discussing the report, the representative of USSR declared that the plans put forward by the United States and the United Kingdom instead of seeking a real settlement, were aimed at prolonging the dispute and converting Kashmir into a trust territory of the United States and the United Kingdom under the pretext of giving it assistance through the United Nations. The real intention was to introduce Anglo-American troops in Kashmir so as to convert it into an Anglo-American colony and a military and strategic base against USSR and the People’s Republic of China.²⁸

²⁶ Id., at 346

²⁷ 1952 U.N.Y.B. 232

²⁸ Id.

Council authorized Dr. Graham to continue his effort and submit his report, which the Council hoped to be final, within two months.²⁹

In his third report to the Security Council Dr. Graham stated that India wanted to keep 21,000 regular forces and 4000 men in Pakistani side. He said that both India and Pakistan had made substantial withdrawals of their forces from Kashmir. The further reduction of forces was directly related to the preparation of the Plebiscite. He considered it necessary that the Plebiscite Administrator should be associated with him in studies and the considerations of common problems.³⁰

Dr. Graham had meetings with the representatives of two governments in New York from May 29 to July 16, 1952 and a ministerial conference was held from August 26 to September 10, 1952 in Geneva. Because of these meetings he had submitted a new draft of his proposals suggesting a minimum force of 6,000 from Pakistan side and of 18,000 on the Indian side.³¹ No agreement could be secured on these draft proposals.³² He made a further draft on September 4, 1952 according to which, at the end of demilitarization, there would be a minimum number of forces required for the maintenance of law and order and the cease-fire agreement.³³

The Security Council considered the third and fourth report and passed a resolution on December 23, 1952, recalling its earlier resolutions and urging upon India and Pakistan to enter into immediate negotiations under the auspices of the United Nations representative to reach agreement on the specific number of forces to remain on each side of the cease fire line at the end of the period of demilitarization, this number to

²⁹ Id., at 233

³⁰ Id., at 234

³¹ Id., at 234-35

³² Id., at 235

be between 12,000 and 18,000 armed forces remaining on the Pakistan side of the cease fire line. The two governments were asked to report to the Security Council no later than thirty days.³⁴

In its fifth report, the United Nations Representative said that the parties were not agreeing to terms of the demilitarization resolutions. The Security Council did not discuss the report.

It is clear from the UN resolutions that both India and Pakistan recognized and accepted that the people of the State of Jammu and Kashmir have a right to decide their political future through free and fair plebiscite conducted under the auspices of the United Nations and world community stands a witness to these promises. These resolutions have been repeated and reiterated by the Security Council repeatedly. It is further clear that the dispute between India and Pakistan was not whether the people of the State of Jammu and Kashmir have a right to self-determination, but the method of demilitarization of the State in order to accomplish the object of plebiscite. At one stage, the Council of 1952 declared that India will be allowed to keep a minimum 18,000 army on its cease fire line and Pakistan be allowed to keep 6,000 units side of cease fire line and that the plebiscite administrator should then start the process of plebiscite.³⁵

The matter is still on the agenda of the United Nations but it is not discussed any more for various reasons. Here it is important to mention that nobody represented people of Kashmir in the United Nations, may be for the reason that under the partition scheme of the subcontinent Kashmir had to accede either to India or Pakistan and the people had no other choice.

³³ Id.

³⁴ U.N. Doc. S/2883; 1952 U.N.Y.B. 241

VII. Tashkent Declaration

In January 1965, there were clashes between India and Pakistan army in run of Kutch and which ultimately resulted in war between India and Pakistan in August 1965. Due to intervention of the United Nations, the war came to a halt on September 23, 1965.

With the efforts of USSR, the Prime Minister of India, Lal Bhadur Shastri and President of Pakistan, General Ayoob Khan met in Tashkent in February 1966. Soviet Prime Minister, Alexei Kosygin acted as an unofficial mediator.

The relevant part of the Tashkent declaration of February 10, 1966 is as follows:

(i) The Prime Minister of India and the President of Pakistan agree that both sides will exert all efforts to create good neighborly relations between India and Pakistan in accordance with the United Nations Charter. They reaffirm their obligation under the Charter not to have recourse to force and to settle their disputes through peaceful means. They considered that the interests of peace in their region and particularly in the Indo-Pakistan subcontinent and, indeed, the interests of the peoples of India and Pakistan were not served by the continuance of tension between the two countries. It was against this background that Jammu and Kashmir was discussed, and each of the sides set forth its respective position.

Within the hours of the negotiation of the agreement, Shastri died of a heart attack.

While Tashkent agreement noted the existence of Kashmir dispute, it put it effectively in cold storage.

VIII. Simla Agreement

After the general election of 1971 in Pakistan, the negotiations between East and the West Pakistan failed. Sheikh Mujib-u-Rehman demanded an independent country. India was eager to support Sheikh Mujib-u-Rehman. It ultimately led to a third war between India and Pakistan. On December 16, 1971, Pakistani army surrendered to India at Dacca

³⁵ See supra note 29

racecourse. Bangladesh came into existence. India retained 94,000 prisoners of war, mainly Pakistani soldiers. India had also occupied 5,000 square miles of Pakistani territory in Sindh.

At the end of June 1972, Indira Gandhi and Zulfikar Ali Bhutto met at Simla. After hectic negotiations an agreement was reached between the two sides on July 3, 1972, relevant part of which is as follows:

In order to achieve this objective, the Government of India and the Government of Pakistan have agreed as follows:

(i) That the principles and purposes of the Charter of the United Nations shall govern the relations between the two countries.

(ii) That the two countries are resolved to settle their differences by peaceful means through bilateral negotiations or by any other peaceful means mutually agreed upon between them. Pending the final settlement of any of the problems between the two countries, neither side shall unilaterally alter the situation and both shall prevent the organization, assistance or encouragement of any acts detrimental to the maintenance of peace and harmonious relations.

(iv) That the basic issues and causes of conflict which have bedeviled the relations between the two countries for the last 25 years shall be resolved by peaceful means.

In order to progressively restore and normalize relations between the two countries step by step, it was agreed that:

(ii) In Jammu and Kashmir, the line of control resulting from the cease-fire of December 17, 1971 shall be respected by both sides without prejudice to the recognized position of either side. Neither side shall seek to alter it unilaterally, irrespective of mutual differences and legal interpretations. Both sides further undertake to refrain from the threat or the use of force in violation of this line.

Simla agreement once again recognized the disputed position of Kashmir. Both the heads of the governments agreed that they would meet again in future for a final settlement of Kashmir, but they never discussed Kashmir until the present movement in Kashmir. Whenever Pakistan wanted to internationalize the issue, India reacted with the argument that it had to be discussed bilaterally under the Simla agreement. Under this agreement they were bound to discuss the final settlement of Kashmir. This agreement can not be read in isolation. It has to be read in its historical prospective and in the light

of the UN resolutions and the commitments made by the Indian leaders. The criminal silence of the parties will not solve the problem. India and Pakistan were obligated to settle the issue of Kashmir, but they did not. Protraction is no solution to the problem. It has to be addressed.

IX. Lahore Declaration³⁶

Two years back the Prime Ministers of India and Pakistan met in Lahore and they agreed to negotiate all matters of controversy including Kashmir. This declaration is known as Lahore Declaration, the relevant part of which is reproduced as under. Lahore declaration is quite important and internationally it has also been regarded as a major breakthrough towards the ongoing process of negotiation between India and Pakistan on Kashmir.

The Prime Ministers of the Islamic Republic of Pakistan, and the Republic of India:- Have agreed that their respective governments:-
-shall intensify their efforts to resolve all issues, including the issue of Jammu and Kashmir.

X. Cost to the parties

All the parties to the dispute are paying a heavy cost. More than half of the Indian population is living below the poverty line. Literacy rate is below thirty percent. Majority of its citizens do not afford to have two meals a day; they are homeless, they walk barefooted. Seventy percent of the population is without pure drinking water or proper sanitation. The situation in Pakistan is not much better than India. At the same

³⁶ Signed at Lahore on the 21st day of February 1999

time, both countries are spending from 30% to 60% of their GNP on defense.³⁷ Both countries are now nuclear powers and if need arises they most probably will use them. Thousands of people have died in three wars between India and Pakistan. The parties to the dispute are paying heavy price to exert control over Kashmir. There is no other reason for both countries to spend so much on defense except Kashmir. The resolution of Kashmir dispute would eradicate poverty from both countries. The defense budget would be diverted towards development.

XI. Need for new approaches Towards Peaceful Negotiations

Now I turn to the different proposals for the Solution of the Kashmir problem.

a. Third option, independent Kashmir

Though Independent Kashmir is the first option, but it is being considered a third option; first being accession to Pakistan and second, accession to India.³⁸

This third option has strong roots even now, and one can even say that it is the dominating view in Kashmir. Therefore, the implementation of the United Nations resolutions, in the present form, may not be a good idea in the new millennium.³⁹

Historically Kashmir was an independent country. After the death of Ashoka in the 4th century BC Kashmir regained its independence under Jaluka. In first century, AD the valley was invaded by Kushans. Thereafter power passed from one dynasty to another. In 14th century Kashmir was again ruled by Kashmiris. By September 1956 the Mughal force of 20,000 cavalry, infantry armed with muskets, and war elephants, reached

³⁷ Alaser Lamb, Kashmir Problem 108

³⁸ Interview with Mr. Mumtaza, Kashmiri lawyer and human rights activist presently settled in U.S. (Nov 9, 1999)

Bimber. Yaqoob Chak, the King of Kashmir, had assembled a large army to resist them. At first the Mughal army had difficulty crossing the passes, but the Kashmiris were unable to stop their advances into Srinagar. When Akbar first arrived in Kashmir in 1589, his journey was not without difficulties he was preceded by 3,000 stone cutters, mountain miners, splinters or rocks and 2,000 diggers whose task it was to level the bumps on the road. Yaqoob Chak died of poison in 1593. Kashmir was independent until this invasion. It ended the valley of Kashmir's long history as a kingdom in its own right.⁴⁰

Kashmir was sold to Gulab Singh in consideration of his betrayal of Sikhs and for an additional sum of 75,000 Rupees (Nankshahi). The sale deed, by virtue of which the Kashmir was sold together with its human beings, is known as Amritsar Agreement signed on March 16, 1846. Under the agreement the suzerainty of the State was retained by the British while the sovereignty passed to Gulab Singh. However, the British control was nominal.

Under the Indian Independence Act, July 18, 1947 section 7(1)(b), the suzerainty of His Majesty over the Indian States lapsed on August 13, 1947, meaning thereby that Kashmir became Independent on August 13, 1947. It remained Independent State until October 26, 1947 when Indian army landed at Srinagar airport. After 361 years, Kashmir got its independence that lasted only for 73 days.

³⁹ Interview with Mr. Mumtaza, Kashmiri lawyer and human rights activist presently settled in U.S. (Nov 9, 1999)

⁴⁰ Schofield, Victoria, Kashmir in the Crossfire 18

Viability of Kashmir as an independent country is another question that is often raised. It is argued that it is land-locked and it does not have enough resources of its own.⁴¹

Independent Kashmir is a popular idea in Kashmir.⁴² Even Kashmiri Pandits are not averse to this idea. Many thinkers from Jammu subscribe to the view of independent Kashmir. Kashmir is larger than sixty-eight members of the United Nations and more populous than ninety members.

b. Implementation of the United Nations resolutions⁴³

The United Nations resolutions on Kashmir, *inter alia*, declared and recognized the following:

1. The future status of Kashmir is undecided.
2. The Kashmiris have the right to decide their future through a free and fair plebiscite to be conducted under the auspices of the United Nations.
3. India and Pakistan should demilitarize Kashmir.
4. Plebiscite Administrator appointed by the United Nations will conduct the plebiscite.
5. A municipal election in Kashmir is not alternative to the plebiscite.

The United Nations resolutions passed by the Security Council or the UNICIP are morally and legally binding not only on the parties but on the world community also. The United Nations has a principal responsibility to seek the implementation of its

⁴¹ Interview with Mr. Kanju former Minister of State of Foreign Affairs of Pakistan (Nov 7, 1999)

⁴² Interview with Mr. Mumtaza, Kashmiri lawyer and human rights activist presently settled in U.S. (Nov 9, 1999)

resolutions. Why the resolutions could not be implemented for half a century? Why the international community is not mounting pressure on the parties to abide by the resolutions? Is it not true that both the parties to the dispute have nuclear capabilities? Is it not a fact that they have fought three wars in the past and used the maximum force at their command against each other? Is not their nuclear capability threat to the world peace? The answer to all these questions is yes. Sooner or later the world community will have to face these questions. The world cannot afford to ignore the Kashmir problem forever. It has the far-reaching consequences; it is a threat to the world peace.⁴⁴

c. Condominium

Condominium is a term from Latin that refers to a regime in which two or more States control a particular area based on equality and in accordance with a specific agreement. It is a joint rule. The examples of colonial condominiums are the Russo-Japanese condominium over Sakhalin Island (1855-1875); the Franco-British condominium over the New Hebrides (1906-60); and the Egyptian-British condominium over Sudan (1899-1956).

This idea can also work in Kashmir. India and Pakistan will have joint control on the State. The Indian army would control the Jammu and Ladakh side of the border and Pakistan army the Valley and Gilgit side of the boarder. The State will have local self-governance with complete autonomy for all the regions and equitable distribution of governance. Both India and Pakistan will have free access to Kashmir and its markets.

⁴³ Interview with Mr. Kanju former Minister of State of Foreign Affairs of Pakistan (Nov 7, 1999)

⁴⁴ Interview with Mr. Kanju former Minister of State of Foreign Affairs of Pakistan (Nov 7, 1999)

d. Arbitration or reference to the International Court of Justice

Depending upon the sincerity of the parties, the matter could be resolved by arbitration. Either the entire issue could be referred to the arbitrator or a part of it in so far as it pertains to the implementation of the United Nations Resolutions. The parties can agree to an independent international arbitration.

There is another way of resolving the dispute. Let the parties refer the dispute to the International Court of Justice and accept its interpretation of the United Nations resolutions, and agree to implement the resolutions in the light of the opinion of the Court. The dispute between the United States and Canada on the Gulf of Maine was submitted to a chamber of the International Court of Justice.⁴⁵ On the other hand, the dispute between Tunisia and Libya on delimitation of continental shelf was referred to the full International Court of Justice.⁴⁶ The delimitation dispute between Libya and Malta was referred to the International Court of Justice. The International Court of Justice decided the last two disputes in accordance with equitable principles and it also made clear that the result was equitable.⁴⁷

XII. Conclusion

As this paper has been written with the very intention of fixation of responsibility, therefore I am of the opinion that it has not only been the failure of India and Pakistan towards the peaceful settlement of this issue of Kashmir but the International community is also equally liable for its double standards.

⁴⁵ Maritime Boundary Settlement Treaty, Mar. 29, 1979. TIAS No. 10, 204

⁴⁶ 1982 I.C.J. 7

I think that a serious process of negotiations should be initiated on Kashmir between India and Pakistan without any further delay. International community should not only monitor and observe, but it should also exercise its influence to resolve this issue.

With the start of negotiations all military forces from Jammu and Kashmir should be pulled out, International neutral observers should be appointed, both Indian and Pakistani leaders should create an environment in their respective countries for the purposes of peaceful negotiations with the intent to settle the issue as per the will of the people of Jammu and Kashmir.

Once Kashmir issue is negotiated and settled peacefully, India and Pakistan having that much natural resources and human capital can attract not only a lot of foreign investment but I can also foresee a free-trade zone in this part of the world as well.

It is for the betterment of all the parties to the dispute to address this issue and it is also in the interest of the world peace to settle this problem. Any one of the proposals suggested in this paper can help in deciding this human issue and delay will not only create more complications but will also be criminal.

⁴⁷ 1985 I.C.J. 7