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**KASHMIR CONFLICT: ANALYSIS OF LEGAL ISSUES AND
ARBITRATION AS A PROPOSAL FOR SETTLEMENT**

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TABLE OF CONTENTS

ABSTRACT	4
LIST OF ABBREVIATIONS	5
INTRODUCTION	6
1. LITERATURE REVIEW	9
1.1. Origins and development of the conflict	9
1.2. Theoretical framework for legal settlement of international conflicts	13
2. ANALYSIS AND IDENTIFICATION OF LEGAL ISSUES	15
2.1. Legality of Instrument of Accession & legal status of Kashmir	15
2.2. Plebiscite & self-determination and UNSC resolutions	16
2.3. Human rights violations	18
3. JURISDICTION IN INTERSTATE DISPUTES	20
3.1. UN & UNSC.....	20
3.2. The ICJ	22
4. ARBITRATION OR ADJUDICATION AND THEIR APPLICABILITY, BENEFITS AND DISADVANTAGES TO KASHMIR.....	24
5. CASE LAW: LEGAL APPLICATION TO KASHMIR.....	27
5.1. In relation to the issues of self-determination and human rights.....	27
5.2. In relation to LOC and de facto border.....	28
6. ARBITRAL AWARD AND IMPORTANT QUESTIONS RELATING TO KASHMIR	30
CONCLUSION	34
THE LIST OF REFERENCES.....	36
APPENDICES	42
Appendix 1. Map of disputed Kashmir	42

ABSTRACT

The Kashmir conflict has endured since the problematic partition of the Indian subcontinent and is viewed as the bone of contention between India and Pakistan. Notwithstanding previous attempts by United Nations towards peaceful settlement, the conflict continues to threaten international peace and security due to the highly volatile situation between the nuclear states.

The main argument of this thesis is that the previous efforts failed to bring peace due to the focus on political aspects rather than addressing the issues of legal nature, i.e. self-determination, human rights violations and the legal status of Line of Control. This thesis thus aims to identify the legal issues, and by doing so, justify the legal approach to settlement. The proposal is to focus on arbitration in settling the conflict, due to the flexibility and more informal procedure it provides compared to judicial settlement through the International Court of Justice. The aim of thesis is reached by first conducting literature review and legal analysis of the issues, after which discussion will revolve around international jurisdiction and comparison between arbitration and judicial settlement in their applicability to Kashmir. To support the use of arbitration and to establish precedents to arbitral tribunal process, case laws will be discussed. The conclusion remarks that by grounding the settlement on law and legal issues, arbitration can add sustainability to the peace process and address the outstanding legal issues that have prevented the settlement of the conflict.

Keywords: Kashmir conflict, arbitration, India-Pakistan, conflict settlement

LIST OF ABBREVIATIONS

AJK	Azad Jammu and Kashmir (Pakistan-administered)
BJP	Bharatiya Janata Party
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
IJK	Indian-administered Jammu and Kashmir
J&K	Jammu and Kashmir
LOC	Line of Control
OHCHR	Office of the United Nations High Commissioner for Human Rights
SC	Security Council
UN	United Nations
UNCIP	United Nations Commission for India and Pakistan
UNMOGIP	United Nations Military Observer Group in India and Pakistan
UNSC	United Nations Security Council

INTRODUCTION

The main conflict between India and Pakistan, known as the Kashmir conflict, has endured up to this day since the problematic withdrawal of Britain and the subsequent partition of the Indian sub-continent in 1947. The conflict is an intractable bone of contention between the two countries, both claiming Kashmir in its entity and having fought three wars over the territory as well as diplomatic battles at the United Nations (UN). Since 1949, a ceasefire line or the Line of Control (LOC) after 1972, has divided Kashmir into Pakistan administered Kashmir (Azad Kashmir and Gilgit-Baltistan), Indian administered Kashmir (Jammu and Kashmir) and Chinese Kashmir known as Aksai Chin (result of Sino-Indian war in 1962).

The conflict's intractable nature comes from both India and Pakistan's stance of not conceding in any matter, and placing their arguments of their legal rights to Kashmir on soft law, rather than implementing binding international hard law. For international law applies to Kashmir in varying aspects, not least because of the right of Kashmiris for self-determination as set out in many international and legally binding covenants and the UN resolutions on Kashmir. In addition to violations to the norms of international law, the conflict in Kashmir has global security implications: in contrary to Indian view, the conflict is not only bilateral issue, but includes China as well and creates a threat to international peace and security due to parties' nuclearization. Imran Khan, Prime Minister of Pakistan, in his speech to UN General Assembly explicitly warned that *"India's actions in Kashmir could cause a bloodbath in the region and provoke war between the two nuclear-armed countries [...] when a nuclear-armed country fights to the end it will have consequences far beyond the borders, it will have consequences for the world."*¹.

Oftentimes, the conflict is viewed as political one: however, as political stance ought to be based on law, legal issues need to be the focus of analysis. Arguably, focusing on politics has entrenched Kashmir conflict to a stalemate, whereas if the focus was on the legal issues and their judicial settlement, the conflict might have had a different outcome. Today, the conflict is multifaceted to

¹ Ratcliffe, R. (2019, September 27). Pakistan warns India its actions in Kashmir could provoke war. *The Guardian*. Retrieved from <https://www.theguardian.com/world/2019/sep/27/pakistan-india-kashmir-provoke-war-nuclear-states-imran-khan>, 31 January 2020.

a point of near impossibility, colored by politics and legal issues that remain unanswered and are feeding the feud. Thus far, the settlement of the conflict has been left to the parties, however with little success. The focus on the political aspects ought to change into legal approach, which will provide legality, sustainability and binding settlement to a conflict that threatens international peace and security.

As the conflict poses a threat to regional and global security, a proposal is made to resolve it through legal means of settlement. As peace is the ultimate value in the workings of international law, and the maintenance of international peace and security is enshrined upon the UN and the organization's Security Council, it is logical first to examine an approach through the UN's main judicial organ, the International Court of Justice (ICJ) or of a similar tribunal. Resolving international conflicts through legal means however is both a possibility and a rabbit hole, since the jurisdiction of the ICJ is bound by the principle of consent. Neither party through declaration² has consented to ICJ's jurisdiction in cases that fall under domestic jurisdiction, such as Kashmir. However, as there are serious violations of international law, it can be argued that the UN could resolve to take binding action to bring a final settlement to the conflict through an arbitral tribunal, evoking the participation of both India and Pakistan.

The aim of this thesis is to identify the outstanding legal issues and their violations under international law, and by doing so, to justify a legal settlement for Kashmir conflict. Subsequently, the thesis answers to the following research questions:

1. What is the applicability of arbitration and adjudication to the legal issues for Kashmir conflict?
2. Would a legal settlement through arbitration add sustainability to the peace process?

The structure is as follows. The literature review will define and outline the Kashmir conflict and respectively provide a brief theoretical framework for legal settlement. The following section will revolve around gaining knowledge about the legal issues in order to reach the research's aim. In the third chapter, international jurisdiction will be discussed in conjunction to UNSC and ICJ due to the complexity of jurisdiction in interstate conflicts, after which an examination of arbitration and adjudication can be outlined as well as their applicability to Kashmir (the first research question). Finally, a proposal for legal settlement through arbitration will be presented, following the case laws that have been awarded and can thus shine light on the possibility of similar process

² *Declarations recognizing the jurisdiction of the Court as compulsory*. ICJ. Retrieved from <https://www.icj-cij.org/en/declarations>, 16 February 2020.

to Kashmir. Simplistically, the structure follows chronological order: first identifying the legal issues that justify the use of legal settlement, secondly examining the question of jurisdiction and afterwards, to propose the use of arbitration or adjudication and how the process will be as per the case law examples.

The methodology of the research process will follow qualitative methodology: desk study by the means of reading academic sources (books, journal articles etc.) as well as legislative literature such as treaties, declarations, and case law. To identify the legal issues, a study of UNSC resolutions and official reports will be used to deduct the most outstanding issues. Furthermore, legal case studies will be examined, such as East Timor case, Belgium v. Netherlands, Libya v. Chad and Rann of Kutch case, to compare how the process could be and what could be implemented in the attempt of settling Kashmir.

1. LITERATURE REVIEW

In this section, a review of the literature is done to explain first the historical roots of the conflict and its development and secondly to give a brief theoretical framework for legal settlement of international conflicts.

1.1. Origins and development of the conflict

In order to understand the contemporary framework of the conflict, it is necessary to look back to history to carve out the underlying motives and conditions. The origins of the Kashmir conflict go back to the partition of the Indian subcontinent in 1947 when the British Raj was dismantled and Hindu India and Muslim Pakistan were formed.

The partition was done in a haste due to the situation of weakened Britain after the Second World War and the British's desire to dismiss the brewing civil war in the Indian subcontinent. The last viceroy of British India, Lord Louis Mountbatten halved the time given to him to bring an end to the dispute between the leaders on the subcontinent. The Indian National Congress, led by Mohandas Gandhi and Jawaharlal Nehru sought a unified state founded on the principles of secularism and democracy³, while the Muslim League (founded in 1906 to safeguard Muslims' rights in Hindu majority rule) headed by Mohammad Ali Jinnah, proposed the creation of a separate country for the Muslims in 1940⁴. During the years preceding independence, the gap between Congress and the League widened further, indicating to Lord Mountbatten that the partition would truly happen: on 15 August 1947, the two dominions of India and Pakistan gained independence, with Pakistan gaining the Muslim majority areas in the north and India obtaining the rest of British India⁵. The process of partition thus followed the principles of the "two-nation"

³ Wolpert, S. (2010). *India and Pakistan: Continued Conflict or Cooperation?* University of California Press.

⁴ Paul, T. (2005). Causes of the India-Pakistan enduring rivalry. In Paul, T. (Ed.), *The India-Pakistan Conflict*. Cambridge University Press.

⁵ *Ibid.*

theory voiced by Jinnah, which implied that Hindus and Muslims are two different nations and the only unifying factor for Indian Muslims was religion: for this reason, the partition ought to take place along religious lines, creating separate states for Hindus and Muslims⁶.

Not only did the partition cause one of the largest mass migrations from each side and brutal violence⁷, it also left an outstanding question unanswered. The British India was home to over 500 princely states, the fate of which now rested upon their maharajas. The Indian Independence Act⁸ contained a provision stating that the princely states would have the option to join either India or Pakistan, and nominally, there was a third option for the princely states to stay independent. However, the so-named Iron Man of India, Sardar Vallabhbhai Patel, the newly appointed Home Minister of India was responsible for the successful accession of most princely states to India prior to independence using all methods available as an esteemed politician⁹. Notwithstanding Patel's success, three princely states opted to stay independent from both dominions: Hyderabad, Junagadh and Jammu and Kashmir¹⁰.

Jammu and Kashmir since its formation in 1846 obtained a unique role in British India: J&K hosted a myriad of diverse linguistic, religious and culturally different people under the same jurisdiction. This diversity, however, is what became the issue between India and Pakistan, and gave wind to the Kashmiri insurgency and demand for self-determination. Historically, J&K has not belonged to the Kashmiris, but rather to conquerors and to rulers appointed by the British. In 1846, the leader of neighboring Jammu, Gulab Singh, an ally to the British¹¹, bought Kashmir Valley from the British as per the provisions of the Treaty of Amritsar¹², acceding it to the states of Jammu and Ladakh already under his rule, creating the princely state of Jammu and Kashmir.

The last maharaja of J&K, Hari Singh, a Hindu leader in a Muslim majority state, was facing a seemingly difficult dilemma of whether to accede to India or Pakistan or stay independent. For

⁶ Yousaf, N. (2009). India's Partition in the Face of Opposition: An Unveiled Perspective. *Harvard Asia Quarterly*, 12(2), 19-33. Retrieved from <http://web.a.ebscohost.com/ehost/pdfviewer/pdfviewer?vid=3&sid=27eb6c4f-0362-4fe4-9e7a-d7d9daf3c5a8%40sdc-v-sessmgr01>, 30 January 2020.

⁷ Paul (2005), *supra nota* 4, 7.

⁸ Parliament of the United Kingdom. (1947). *Indian Independence Act, 1947*. Retrieved from http://www.legislation.gov.uk/ukpga/1947/30/pdfs/ukpga_19470030_en.pdf, 10 January 2020.

⁹ Tiwari, A. (2017). *Sardar Patel: Man who United India*. Press Information Bureau, Government of India. Retrieved from <https://pib.gov.in/newsite/printrelease.aspx?relid=172053>, 31 January 2020.

¹⁰ Paul (2005), *supra nota* 4.

¹¹ Bose, S. (2003). *Kashmir: Roots of Conflict, Paths to Peace*. Harvard University Press.

¹² Treaty of Amritsar (1846), §1. Retrieved from http://jklaw.nic.in/treaty_of_amritsar.pdf, 7 January 2020.

Hari Singh, the idea of independence and becoming the “Switzerland of Asia”¹³ was a tempting dream, which was deemed impossible by the events that followed. Nonetheless, as a step towards independence, the maharaja signed a standstill agreement with Pakistan; with India, no such agreements were made¹⁴.

The religious division between the leader and his people came to a boiling point in October 1947, when the Poonch rebellion began. The rebellion against Hari Singh by the Muslims in J&K was aided by tribal forces (allegedly backed by Pakistani regular troops) volunteering in the Jihad to free Kashmir from Hindu rule¹⁵. As a reaction to the invasion, Hari Singh requested the help of India. As a precondition to military help, Indian authorities informed J&K would need to accede to India: thus, the Instrument of Accession¹⁶ was signed and J&K became a territorial part of India in return for military help. As a response to the arrival of Indian forces, Jinnah decided to send Pakistani troops to Kashmir, a decision that exacerbated the situation and started the First Kashmir War, lasting until the end of 1948. After the first war, the UN got involved in the conflict: India decided to evoke the UN Charter article 35, which allows the member states to bring to the SC issues that can potentially endanger the maintenance of international peace and security. Eventually, a ceasefire agreement mediated by the UN was reached, dividing Kashmir (Appendix 1. Map of disputed Kashmir) along a ceasefire line into Indian-administered Jammu and Kashmir (IJK) and Pakistan-administered Kashmir or Azad Kashmir (free Kashmir). The ceasefire line was under the monitoring of the UN mission until 1972 after which it was named the Line of Control (LOC)¹⁷.

Another unique aspect of J&K was its special status granted by the Instrument of Accession. According to the agreement, the Indian government was only able to expand its jurisdiction to J&K in three aspects of governance: foreign affairs, defense and communications. The special status is embodied respectively in constitutional articles 35A and especially 370 of the Indian constitution in the section “*Temporary, Transitional and Special Provisions*”¹⁸. According to the provisions of article 370, J&K was conferred a right to have its own constitution and autonomy

¹³ Wolpert (2010), *supra nota* 3, 23.

¹⁴ Schofield, V. (2003). *Kashmir in Conflict: India, Pakistan and the Unending War*. I.B. Tauris.

¹⁵ Wolpert (2010), *Supra nota* 3.

¹⁶ *Instrument of Accession* (1947). Retrieved from http://jklaw.nic.in/instrument_of_accession_of_jammu_and_kashmir_state.pdf, 31 January 2020.

¹⁷ *Simla Agreement* (1972). Retrieved from <https://mea.gov.in/in-focus-article.htm?19005/Simla+Agreement+July+2+1972>, 31 January 2020.

¹⁸ *The Constitution of India* 26.1.1950, § 370. Retrieved from <http://legislative.gov.in/sites/default/files/COI-updated.pdf> 1 February 2020.

over the internal governance of the state. Article 35A, in turn, defines the permanent residents of J&K and, among other things, forbidding outsiders from permanently settling and buying land in the state.

The Pulwama attack in October 2019 ignited the latent conflict again, as well as worked as a catalyst for the BJP's nationalistic election manifesto promising to abolish the special status in order to aid development and integration in J&K¹⁹. The attack took place in Pulwama, a district in Kashmir, where a vehicle loaded with explosives rammed into a convoy of Indian paramilitary personnel, killing at least 40. The driver of the said vehicle was a Kashmiri and part of Jaish-e-Mohammad terrorist group²⁰. Even though tensions between the two countries calmed down in the aftermath of the attack, the implication for international and South Asian security was clear: Pulwama attack reignited the fears of nuclear war between India and Pakistan and further complicated the relationships and prospects of peaceful negotiation between New Delhi, Srinagar and Islamabad.

Following the Pulwama attack, BJP and Narendra Modi took a definite step towards the unification of India by publicly announcing on fifth August that the special status provided to J&K by the constitutional article 370 would be abolished and J&K divided into two union territories: Jammu & Kashmir and Ladakh. Prior to the events of abrogation, additional military personnel were sent to Kashmir to contain any unrest, where few senior political Kashmiri leaders were put to house arrest and telecommunications were cut in the state. These actions were denounced as oppression of Kashmiris rights and as highly undemocratic²¹. The abolition of special status was the result of a skilled political gamble by India: after accession, the Kashmir Assembly was established to safeguard the relationship between India and J&K and any changes in it had to be approved by the Assembly. The gamble was thus in the form of the Indian government making sure that the Assembly was pro-India, leading to a situation where special status seemed unnecessary and no political opposition would surface in Kashmir. This however, was not the case. The oppression of

¹⁹ Bharatiya Janata Party: Sankalp Patra (Manifesto) (2019), 12. Retrieved from https://timesofindia.indiatimes.com/realtime/BJP_Election_2019_english.pdf, 29 February 2020.

²⁰ Kronstadt, K. (2019). Kashmir: Background, Recent Developments and U.S. Policy. *Congressional Research Service*.

²¹ *Ibid.*

the Kashmiri opposition led to the beginning of the insurgency in 1989, which contemporary constitutes the interstate conflict between the Kashmiris and Indian government²².

The aftermath of the abolition has remained conflicted. Pakistan immediately condemned the action, stating illegality and violation of the UNSC's resolutions. India, on the other hand, maintained its stance of J&K being an integral part of India, thus giving the Indian government the sovereign right to govern the territory. The international community continues to keep an eye on the situation – especially concerning human rights²³ – and not forgetting the threat on international security posed by the nuclear capabilities of both states.

1.2. Theoretical framework for legal settlement of international conflicts

An approach of a legal nature is often overlooked in the case of international conflicts due to the complexity of such conflicts and the notion of sovereignty, although legal settlement methods are viable options in resolving conflicts that are intractable and enduring. Generally, for international disputes, negotiation and mediation are the first steps in the settlement process. The article 33 of the UN Charter maintain that “*The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice*”²⁴. Arbitration and adjudication are employed when a binding decision is desired. Adjudication “*involves the referral of the dispute to an impartial third-party tribunal – normally either an arbitral tribunal or an international court – for binding decision, usually on the basis of international law.*”²⁵, while arbitration requires the parties to set up the legal body to decide on the dispute or conflict that is taking place between the parties²⁶. Legal means of settlement are in most cases utilized if the diplomatic means fail or provide unsatisfactory results. Legal means of settlement are also

²² Margolis, E. S. (2005). *War at the Top of the World: The Struggle for Afghanistan, Kashmir, and Tibet*, 76. New York: Routledge.

²³ Ahmad, Syed Altaf (8 August 2019). ‘Guterres appeals for ‘maximum restraint’ over Jammu and Kashmir, as tensions rise. *UN News*. Retrieved 3 February 2020.

²⁴ Charter of the United Nations (1945). San Francisco, US.

²⁵ Bilder, R. (2007). Adjudication: International Arbitral Tribunals and Courts. In: Zartman, I. W. (Ed.), *Peacemaking in International Conflict: Methods and Techniques* (195-226). Washington DC: United States Institute of Peace Press.

²⁶ Merrills, J. G. (2011). *International Dispute Settlement*. (5th ed.) Cambridge, UK: Cambridge University Press.

important to guarantee sustainability of the process. For international conflicts, arbitration and adjudication are used less compared to the so-called diplomatic means, however if no settlement is reached and the threat on international peace and security prevails, their use can be justified.

2. ANALYSIS AND IDENTIFICATION OF LEGAL ISSUES

Reaching a possible settlement depends on a clear interpretation of the situation and the issues, which in turn requires a prior conceptualization of the conflict²⁷. Thus, in this section the goal is to identify the legal issues as the factors contributing to conflict and instability in the region. Before beginning the analysis, the parameter or scope of analysis should be established: the physical scope is defined by geography, focusing on the sub-region of the contested Kashmir. As per temporal scope, the analysis ought to focus on the period after partition in framing the legal issues surfacing from the conflict and that have been violated under international law.

Kashmir conflict has generally been viewed as political one, dismissing the legal issues that underline the conflict: however, the legal aspects need to be addressed, as political stance is derived from law. Over the years, many legal questions and issues over claims and unilateral actions by both India and Pakistan remain unanswered, e.g. the legality of accession, plebiscite (and self-determination), human rights issues and the abrogation of J&K special status. Both countries have applied legal arguments in favour of their interests, giving them some legality to defend their position, even if the arguments mostly build up from soft law rather than hard international law. The varying legal issues are the source behind Pakistan's attempt to take the conflict to be decided by the ICJ²⁸, thus legal issues should be analysed and justify the legal approach to settlement.

2.1. Legality of Instrument of Accession & legal status of Kashmir

Both India and Pakistan claim Kashmir in its entity. India's legality of claims and interests in J&K is based on the Instrument of Accession: to India, the accession agreement is a legal act and valid in terms of the Indian Independence Act as well as conducted under the auspices of international

²⁷ Woodhouse, T., Miall, H., Ramsbotham, O., Mitchell, C. (Eds.) (2015). *The Contemporary Conflict Resolution Reader*. Cambridge: Polity Press.

²⁸ Kashmir: Pakistan to seek International Court of Justice ruling (August 20, 2019). *BBC News*. Retrieved from <https://www.bbc.com/news/world-asia-india-49414213>, April 19, 2020.

law, thus making J&K an integral part of India and the accession irrevocable and total²⁹. Pakistan however is of the view that accession of Kashmir is not in accordance with law for two reasons: first, the accession violated the Standstill Agreement between Hari Singh and Pakistan. Secondly, as Hari Singh was aware of the approaching Pakistani troops and the risk to his life, it can be argued that he signed the agreement under duress and force, thus making it void and illegal under international law. By the provisions of the Instrument of Accession and Indian Constitution, the accession was to be temporary until a plebiscite could be held in Kashmir, after which the accession would have been given legal effect. As such, Kashmir's legal status is unclear: under international law, Kashmir is a disputed territory, however unknown remains whether it belongs to India or Pakistan or both, or as independent.

However, this fact matters little in the current situation: as J&K was a sovereign princely state after the partition, it was free to accede to either dominion. The Standstill Agreement did not make any provisions about accession or its prevention thereto. Notwithstanding its current importance, the Instrument of Accession did mandate the need for plebiscite, and as such was to be of temporal nature until the will of the Kashmiris can be made known. Thus, the need for the exercise of self-determination has not dissolved, and the legal status of Kashmir should not endanger the fundamental right.

2.2. Plebiscite & self-determination and UNSC resolutions

The right to plebiscite rendered by the UNSC's resolutions is a legal method honouring the right for self-determination of the Kashmiris. After India brought the case to UNSC under the auspices of Charter article 35(1)³⁰, UNSC published multiple resolutions attempting to de-escalate the situation. The resolution 39 (1948)³¹ established United Nations Commission for India and Pakistan (UNCIP), whose role was to mediate and supervise the situation. Subsequently, the

²⁹ Ministry of External Affairs, Government of India. *Kashmir: The True Story*. Retrieved from <https://web.archive.org/web/20070106084737/http://meaindia.nic.in/jk/19jk01.pdf>, 8 March 2020.

³⁰ UN Charter (1945), *supra nota* 24, §35(1): "Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly."

³¹ UN Security Council Resolution 39, S/RES/39 (1948). Retrieved from [https://undocs.org/S/RES/39\(1948\)](https://undocs.org/S/RES/39(1948)), April 7, 2020.

resolution 47 (1948)³² set out plebiscite as the legal method to honor self-determination for the Kashmiris, as the accession was to be temporary until the situation calmed and plebiscite could be held.

Self-determination historically was a right for the people under colonial rule, as set out in UN General Assembly resolution 1514³³. Contemporarily however the right has been expanded to generally cover groups under international law and constitutes a fundamental human right as set out in many international covenants, such as the UN Charter article 1(2) and the International Covenant on Civil and Political Rights (ICCPR)³⁴ article 1(1) and is generally accepted as a *jus cogens* rule. As plebiscite has not been held thus far, the right of Kashmiris to self-determination has not materialized, posing a clear contravention to a *jus cogens* rule. In addition, the resolution 47 suggested a three-step plan as a precondition to the plebiscite: firstly, Pakistan was to withdraw from Kashmir and secondly, in response to withdrawal of Pakistani troops, India was to reduce its military presence in Kashmir. Neither party has withdrawn and especially India is of the view that plebiscite will not take place nor will they demilitarize as its national security and interests are under threat due to Pakistani presence.

The SC proposed in its Resolution 91 (1951)³⁵ that if the parties failed to reach agreement with the appointed UN representative, they would be required to accept arbitration on any outstanding issues preventing demilitarization and plebiscite. This would give SC and ICJ the validity to force upon them arbitration to address the threat to international peace and security and to bring peace to the region.

Another legal issue in contravention with the right of Kashmiris to self-determination is the abrogation of special status. As Kashmir under international law is considered disputed territory, unilateral changes to it is forbidden, and as such, the actions of Indian government are oftentimes questioned. Furthermore, as the Simla Agreement forbids unilateral attempts to change the status of J&K, India's actions negate its obligations under the agreement.

³² UN Security Council Resolution 47, S/RES/47 (21 April 1948), Retrieved from [https://undocs.org/S/RES/47\(1948\)](https://undocs.org/S/RES/47(1948)), 27 February 2020.

³³ Declaration on the Granting of Independence to Colonial Countries and Peoples, A/RES/1514(XV) (December 14, 1960). Retrieved from [https://undocs.org/A/RES/1514\(XV\)](https://undocs.org/A/RES/1514(XV)), April 23, 2020.

³⁴ International Covenant on Civil and Political Rights (1966), adopted by United Nations General Assembly Resolution 2200A (XXI). Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, 19 April 2020.

³⁵ UN Security Council Resolution 91, S/RES/91 (1951). Retrieved from [https://undocs.org/S/RES/91\(1951\)](https://undocs.org/S/RES/91(1951)), April 8, 2020.

The Indian Constitution's article 370 confers the special status to J&K, entailing the right to a separate constitution and autonomy over internal governance. The article is located in the temporary provisions section of the Constitution, possibly due to the legal status of J&K awaiting plebiscite. However, after holding elections in the state, Indian government is of the view that the elections subsided the need for plebiscite and participation in the election showed the desire of Kashmiris to stay with India, notion of which contravenes with the UNSC resolutions. As its sovereign right, Indian government's action to abrogate articles 35A and 370 integrated J&K into India as a union territory with less jurisdictional rights and dismissed autonomy. Since India views the issue of accession and the special status to be finalized, the conflict is merely a situation under international law due to Pakistan's aggression, rather than a territorial dispute between two equal states³⁶.

The legal issue of self-determination and plebiscite is of high importance contemporarily, and should be honored especially on part of India, as they brought the conflict to UN and promised to hold a plebiscite. The Kashmiris continue to demand a plebiscite to honor the right for self-determination promised to them through UNSC resolutions and international law. Furthermore, as UNSC resolutions are binding on the parties, the provisions oblige both countries to hold a plebiscite in Kashmir so as to guarantee the right of self-determination.

2.3. Human rights violations

One of the outstanding legal issues are the violations of human rights in Kashmir. For example, Office of the United Nations High Commissioner for Human Rights (OHCHR) report in 2019³⁷ have voiced concerns over violations such as excessive use of force, use of indiscriminate weapons and freedom of expression in addition to the issue with self-determination that violate international human rights law. The intractable conflict continues to influence many fundamental human rights, e.g. right to life, freedom from torture and freedom of expression among others.

³⁶ Mian, Q. V. (*sine anno*). Resolving Kashmir dispute under international law. Retrieved from http://www.pja.gov.pk/system/files/Resolving_Kashmir_Dispute_Under_International_Law.pdf, April 19, 2020.

³⁷ Human Rights report in Kashmir (8 July 2019). Geneva: Office of the High Commissioner for Human Rights. Retrieved from https://www.ohchr.org/Documents/Countries/IN/KashmirUpdateReport_8July2019.pdf, April 19, 2020.

The OHCHR report³⁸ found varying violations of human right norms enshrined in the ICCPR: right to life (§6), freedom from torture and degrading treatment (§7), arbitrary arrests (§9) and freedom of expression (§19). Furthermore, armed conflicts are regulated in the Geneva Conventions, of which the fourth convention (1949)³⁹ deals with the protection of civilians in time of war. According to its article 27, protected persons are entitled to respect for their persons, honor, family rights and shall be protected against acts of violence. As is visible from the OHCHR report, this has not been the case as human rights violations persist in Kashmir. Due to the armed clashes between India and Pakistan, and between Indian troops and the Kashmiris, casualties are common and the required distinction between combatants and civilians is not followed. After the abrogation of special status, India has put political leaders of Kashmir on home arrest⁴⁰, violating the article 9 of ICCPR. Furthermore, the Indian government shut down telecommunications in and out J&K, which is a clear violation of the right to know for Kashmiris, who were unable to communicate or get information. The Indian government only partly restored telecommunications after seven months⁴¹ of abolishing the special status.

Human rights violations on both sides are a continuous problem, which highlights the need for international involvement and legal approach to settlement, as both countries have not taken steps to honor fundamental human rights and their obligations under international law⁴². As such, human rights violations empower the UN to intervene in the conflict and towards settlement through e.g. a tribunal.

³⁸ *Ibid.*

³⁹ The Geneva Convention relative to the Protection of Civilian Persons in Time of War (August 12, 1949).

⁴⁰ Fareed, R. (August 17, 2019). Key Kashmir political leaders arrested by India since August 5. *Aljazeera*. Retrieved from <https://www.aljazeera.com/news/2019/08/kashmir-key-political-leaders-arrested-india-august-5-190817155454403.html>, April 23, 2020.

⁴¹ India restores internet in Kashmir after 7 months of blackout (March 5, 2020). *Aljazeera*. Retrieved from <https://www.aljazeera.com/news/2020/03/india-restores-internet-kashmir-7-months-blackout-200305053858356.html>, April 19, 2020.

⁴² Bhatnagar, M., Lanham, K., Sarma, B. (2009). *The Myth of Normalcy: Impunity and the Judiciary in Kashmir*. Allard K. Lowenstein International Human Rights Clinic, Yale Law School. Retrieved from https://law.yale.edu/sites/default/files/documents/pdf/Intellectual_Life/Kashmir_MythofNormalcy.pdf, April 23, 2020.

3. JURISDICTION IN INTERSTATE DISPUTES

As conflicts between states happen, the question of jurisdiction becomes topical: who has jurisdiction over interstate conflicts? In international law, the judicial settlement of conflicts is not based on an obligatory system of jurisdiction like in domestic laws⁴³, but rather states are left to settle disputes based on the methods listed in the UN Charter article 33. However, as interstate conflicts are complex and involve multilayered claims, surrendering the case to a third-party for a legal settlement has increased⁴⁴. Traditionally, jurisdiction under international law has been viewed as a question for states⁴⁵: with interstate conflicts, the states are the parties and advisories to the said conflict, thus third-party involvement is often necessary. Generally, the UN organs deal with the question of jurisdiction in interstate conflicts and can be utilized at several levels, e.g. the SC can recommend solutions or take more binding action, and the ICJ can adjudicate a conflict between states. As interstate conflicts are, by nature, complex and sometimes intractable, third-party settlement proves useful in bringing neutral insights and solutions to the discussion. In the following subchapters, the UNSC and ICJ are discussed, as UN and its bodies are likely to be part of the settlement process, since Pakistan has increasingly attempted to internationalize the conflict in the auspices of the UN.

3.1. UN & UNSC

The Charter article 1(1) set the mandate for the UN, which is to maintain international peace and security, and article 2(3) of the charter maintain that conflicts are to be settled without endangering

⁴³ Oellers-Frahm, K. (2001). Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions. In: J.A. Frowein, R. Wolfrum (eds.), *Max Plank Yearbook of United Nations Law* (67-104). Netherlands: Kluwer Law International. Retrieved from https://www.mpil.de/files/pdf1/mpunyb_oellers_frahm_5.pdf, April 22, 2020.

⁴⁴ *Ibid.*

⁴⁵ Mills, A. (2014). Rethinking Jurisdiction in International Law. *The British Yearbook of International Law*, 84 (1), 187-239.

international peace, security and justice⁴⁶. UN has promoted the principle – which is also embodied in the UN Charter article 33,⁴⁷ - of peaceful settlement of conflicts between member states by means of negotiation, mediation, arbitration or adjudication. Under the Charter, the UNSC was created to have the primary responsibility for the maintenance of international peace and security. By the composition of 15 members⁴⁸, the determination is made about whether or not there exists threat to peace and security. The SC calls the parties to a conflict to resolve the conflict peacefully, utilizing the methods conveyed by the Charter article 33. If such settlement is not reached bilaterally, the parties to the conflict are required to refer it to the SC, as stipulated by article 37 of the Charter and voluntary submission of a conflict is stipulated in article 35⁴⁹. If, however, the conflict escalates into hostilities and violence, the SC's concern is to bring the conflict to an end. The SC, under Charter article 36, may intervene in conflict that endanger the maintenance of international peace and security and recommend procedures for the parties, including the referral of the case to ICJ (§36(3)). What is more, it is stated under the UN Charter article 103⁵⁰, that in the event of a conflict between obligations under the Charter and any other international agreement, the obligations to the Charter shall prevail. This would imply that as even the one bilateral agreement that is partly successful, the Simla Agreement, it has not yielded any concrete results in resolving the Kashmir conflict, and as such, India and Pakistan should honor their obligations under the Charter and allow third-party involvement to maintain international peace and security and settle the conflict.

As important as SC role is in guarding international peace and security, its role in settling conflicts is under debate. It has been argued that in the workings of the SC, law plays a minimal role⁵¹. The SC is mainly a political body and as such, often unable to entertain cases of legal nature. Similarly, the SC in relation to Kashmir has mainly focused on the diplomatic means and politics, urging the parties to resolve the conflict bilaterally. However, as there are legal issues in violation of international law, they will have to be taken into consideration when attempting to settle the

⁴⁶ UN Charter, *supra nota* 24, §2(3).

⁴⁷ *Ibid.*

⁴⁸ Five permanent members – China, France, The Russian Federation, the United Kingdom and the United States – and ten members elected by the General Assembly for a term of two years.

⁴⁹ UN Charter, *supra nota* 24, § 35 and 37.

⁵⁰ UN Charter, *supra nota* 24, §103: " *In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.* "

⁵¹ Higgins, R. (1970). The place of international law in the settlement of disputes by the Security Council. *American Journal of International Law*, 64(1), 1-18.

conflict. Furthermore, the issue with SC is the veto power of the permanent members: politics play a significant role in using the veto power, and alliances are highlighted rather than legality. Thus, it would be imperative for SC to utilize Charter article 36(3) to refer legal conflicts to the ICJ or e.g. other tribunal respecting the rule of law.

3.2. The ICJ

The ICJ was established by the UN Charter article 92 as the main judicial organ of the United Nations⁵². ICJ is the only universal court with a general jurisdiction over international disputes and conflicts. The role of the Court is thus to “*settle, in accordance with international law, legal disputes submitted to it by states [...] to give advisory opinions on legal questions referred to it by duly authorized United Nations organs and agencies of the UN system*”⁵³. In addition, all UN member states are parties to the ICJ Statute that establish the Court and gives it its mandate. However, the ICJ does not have automatic or compulsory jurisdiction: it can be determined through compulsory jurisdiction under Statute article 36 (2) or in accordance with article 36 (1)⁵⁴.

The Court can entertain two types of cases: contentious cases and advisory proceedings⁵⁵, as well as incidental jurisdiction. Contentious cases include disputes and conflicts between states, which have been submitted to the jurisdiction of the Court. However, the Court is competent in jurisdiction only in cases where the states concerned have given and declared acceptance over the court’s jurisdiction. The methods of showing acceptance vary: it can be done by a special agreement to submit the dispute or conflict to the Court, jurisdictional clause or via declaration over the jurisdiction of the Court.⁵⁶ Advisory jurisdiction allows the Court to give legal opinions on requests, e.g. from the General Assembly. Advisory opinions are of consultative nature and often non-binding, however otherwise the procedure and applied law is the same as in contentious jurisdiction.

⁵² UN Charter, *supra nota* 24, § 92.

⁵³ *Basic Facts about the United Nations* (2017) (42nd ed.). New York, USA: United Nations Department of Public Information.

⁵⁴ *Statute of the International Court of Justice*. Retrieved from <https://www.icj-cij.org/en/statute>, April 21, 2020.

⁵⁵ *Ibid.*

⁵⁶ *How the Court Works*. International Court of Justice. Retrieved from <https://www.icj-cij.org/en/how-the-court-works>, 27 February 2020.

Incidental jurisdiction allows the Court to indicate e.g. interim measures of protection: these are governed by Statute article 41⁵⁷. For example in Frontier Dispute case (Burkina Faso v. Mali)⁵⁸, the dispute escalated into hostilities before the Court could give its decision, resulting in an arranged ceasefire and interim measures set to prevent prejudiced proceedings and to de-escalate tensions. In Kashmir, the UN resolutions were quite similar to interim measures, requiring the respect of the ceasefire, to withdraw military forces and not to unilaterally attempt to change the administration of Kashmir.

The weakness overall in judicial settlement of interstate conflicts is the question of jurisdiction: the UN Charter posits a legal duty to solve conflicts peacefully, only to be diminished by the lack of compulsion that would make the obligation effective. For example, India has repeatedly stated per the Simla Agreement, that it will not accept third-party involvement. However, Pakistan is attempting to bring the conflict before the ICJ, and as compulsory jurisdiction will not be agreed to by India⁵⁹, Pakistan will need to approach the ICJ from different angle or focus on e.g. arbitration, to which India could also agree to if the conditions are negotiated.

⁵⁷ Statute of the International Court of Justice, *supra nota* 54.

⁵⁸ Frontier Dispute, Judgment of 22 December 1986: I.C.J. Reports 1986, p. 554. Retrieved from <https://www.icj-cij.org/files/case-related/69/069-19861222-JUD-01-00-EN.pdf>, April 21, 2020.

⁵⁹ Pillai, P. (August 25, 2019). Pakistan v India at the International Court of Justice, on Kashmir? *OpinioJuris*. Retrieved from <http://opiniojuris.org/2019/08/25/pakistan-v-india-at-the-international-court-of-justice-on-kashmir/>, April 22, 2020.

4. ARBITRATION OR ADJUDICATION AND THEIR APPLICABILITY, BENEFITS AND DISADVANTAGES TO KASHMIR

Now that the legal issues justifying legal settlement have been identified and jurisdiction discussed, the examination of arbitration and adjudication and their applicability, benefits and disadvantages in relation to Kashmir can be conducted. Conventional legal processes are often unable to obtain complete satisfaction of political needs⁶⁰, however in the case of Kashmir, stripping down the politics is a needed change.

Arbitration is the oldest form of judicial settlement in international relations⁶¹, but the former is still different from adjudication. In general, arbitration and adjudication are both similar in the terms of required consent from the parties in conflict and the fact that the result is legally binding based on international law. The primary difference between the two legal means is the degree of flexibility: arbitration requires the parties to comprise the body, e.g. a tribunal, which decides on the conflict with lesser restrictions than adjudication requiring the involvement of international court with strict procedural rules. This is often preferred by the states, as it allows other aspects to be considered along with the legal issues and can thus add sustainability to the process due to its pervasive take on the conflict.

The primary advantage of arbitration is that it allows parties to have significant control over the process. For example, the parties choose the arbitrators – usually one arbitrator from each side and a neutral third party – and select the procedure based on the defined issue. Furthermore, by defining the specific issue to be arbitrated clearly, the parties can establish the procedure and the jurisdiction over which the tribunal cannot overstep. Given the Kashmir conflict does not only affect India and Pakistan, but also the Kashmiris, arbitration is preferred; since states are the subjects in international courts, non-state actors such as Kashmiris would prefer arbitration. Oftentimes, the

⁶⁰ Menkel-Meadow, C. (2004). From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context. *Journal of Legal Education*, 54 (1).

⁶¹ Indlekofer, M. (2013). *International Arbitration and the Permanent Court of Arbitration*. Netherlands: Kluwer Law International.

sole notion of possible arbitral proceedings will entice the parties to cooperate, which can result in a settlement, dismissing the need for a tribunal.

Notwithstanding the advantages of arbitration, there are also disadvantages that ought to be taken into consideration. Firstly, due to arbitration depending massively on the parties to the conflict and their efforts, it can be a time consuming process: the parties need to agree upon the arbitrators, the process and the specific issue in question. Secondly, due to the tribunals lower standing, a risk of noncompliance can arise in some situations and enforcement of the arbitral awards can be difficult.

Subsequently, there are advantages to adjudication as well in settling international conflicts. As international courts are permanent bodies, they are readily available without the need to decide on the participants and the procedure. The specific issue and its jurisdiction, procedures and judges are often pre-determined, mainly due to international courts being more independent than arbitral tribunals, thus able to have judges present that have been employed for a fixed term. Adjudication also serves for the final decision on the conflict, which is legally binding and valid under international law. Adjudication's advantage of depoliticizing an issue is significant: a conflict such as Kashmir is ridden with politics and stripping those will aid the parties to see the issue straightforwardly, possibly resulting in a legal settlement that is able to deliver a decision on an issue, relieving the parties to focus on the political aspects separately. Interestingly, sometimes parties to a conflict want international law to provide the basis for the decision of either tribunal or court, but wish that specific aspects are emphasized⁶²: with Kashmir conflict, such specific aspects could involve taking into account the UN resolutions and bilateral agreements.

Adjudication has its disadvantages as well. As it is a legal proceeding, the result is a win-lose for either party. As such, oftentimes states are reluctant to bring their case before a court in fear of losing the case and subsequently their reputation. The advantage of depoliticizing can also be a disadvantage, as nearly all conflicts have multiple levels of conflict drivers such as politics and national interests. As adjudication focuses on legal issues, the political issues remain unaddressed, which can result in re-escalation and in the situation where nothing has changed. Similarly, in order for the decision to be effective, a need for enforcement arises: the potential for escalation is high, as countries tend to be protective of their sovereignty and self-determination.

In relation to Kashmir, arbitration demonstrates itself as a better option for a few reasons: firstly, judicial settlement would require the consent for ICJ to adjudicate, which neither have given in

⁶² Merrills J. G. (2011), *supra nota* 26, 94.

issues concerning domestic jurisdiction. Secondly, the process of arbitration is less formal and thus allows the parties to participate, which could add sustainability to the peace process. Arbitration has been found to more effectively resolve international border disputes⁶³, because the process can be more pervasive than that of a court. In addition, by allowing an arbitral tribunal to decide on the conflict, the win-lose situation can be more easily digested as the parties can “blame” the tribunal on the award rather than worry about reputation. However, arbitration should be sought if parties have failed to reach an agreement bilaterally or through diplomatic means, such as the case with Kashmir, not necessarily as the first attempt because arbitration is a legal mean of settlement even though the proceedings are less formal than court proceedings.

⁶³ Copeland, C. S. (1999). The Use of Arbitration To Settle Territorial Disputes. *Fordham Law Review*, 67(6), article 7. Retrieved from <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=3585&context=flr>, April 21, 2020.

5. CASE LAW: LEGAL APPLICATION TO KASHMIR

International conflicts with similarities to Kashmir have received judgment from the ICJ or through arbitral tribunals, and the following cases have surfaced from similar background of colonial history and struggle towards self-determination. Few of the cases can provide examples on how to approach the varying legal issues, e.g. human rights, self-determination and plebiscite, and territorial claims of Kashmir conflict and subsequently demonstrate how the proposed arbitration process could manifest. The similar cases to be examined are the East Timor case, Belgium v. Netherlands, Libya v. Chad and Rann of Kutch case.

5.1. In relation to the issues of self-determination and human rights

As in Kashmir, the case of East Timor (Portugal v. Australia)⁶⁴ deals with self-determination: the people of East Timor fought for self-determination and human rights in the midst of a larger conflict in the aftermath of decolonization. The UN recognized the right of East Timorese to self-determination in its first resolution⁶⁵, in accordance with the Charter and the General Assembly Resolution 1514. In the East Timor case, the ICJ found East Timor to be territory without self-government and East Timorese to have the right to self-determination. Eventually, Portugal and Indonesia reached an agreement to hold an UN-led plebiscite and an observer mission established in UNSC resolution⁶⁶ was tasked with the establishment and supervision of the plebiscite. However, violence broke out after the plebiscite, of which UN warned about but were not prepared

⁶⁴ East Timor (Portugal V. Australia), Judgment of 30 June 1995: I.C.J. Reports 1995, p.90. Retrieved from <https://www.icj-cij.org/files/case-related/84/084-19950630-JUD-01-00-EN.pdf>, April 23, 2020.

⁶⁵ UN Security Council Resolution 384, S/RES/384 (1975). Retrieved from [https://undocs.org/S/RES/384\(1975\)](https://undocs.org/S/RES/384(1975)), April 23, 2020.

⁶⁶ UN Security Council Resolution 1246, S/RES/1246 (June 11, 1999). Retrieved from <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/TL%20SRES1246.pdf>, April 23, 2020.

for. The humanitarian assistance that followed ought to have been prepared beforehand, and thus sets an example for future UN-led plebiscites⁶⁷.

Kashmir similarly, has not been self-governed in its history. Since the accession that was supposed to be temporary, Kashmiris have been fighting for the right of self-determination promised to them. Common to both Kashmir and East Timor conflicts are the uncertain legal status, UNSC resolutions calling for plebiscite and human rights violations, which implies mirroring the plebiscite process of East Timor to Kashmir as a significant possibility.

5.2. In relation to LOC and de facto border

As one of the legal issues was that of the LOC and subsequently international border, arbitration ought to address these issues. Similar cases before ICJ in regards to territorial issues include *Belgium v. Netherlands*, *Libya v. Chad* and *Rann of Kutch* case.

The case *Belgium v. Netherlands*⁶⁸ has similarities to Kashmir: the disputed border between Belgium and Netherlands had unique features in that even though the frontier is linear, the area around the border hosts number of enclaves formed by Baerle-Duc (a Belgian commune) and Baarle-Nassau (a Dutch commune), both enclosed in both Belgium and Netherlands⁶⁹. ICJ's task was to give a decision on the question of who has sovereignty over the communes. When giving its judgment, the Court based its decision on existing treaty that had established the border, subsequently maintaining that the disputed plots belong to Belgium. In the *Libya v. Chad* case⁷⁰, Libya and Chad had submitted a dispute to arbitration over Aozou strip (annexed by Libya) and its boundary. Libya argued that a treaty concluded between the two countries did not establish a boundary, to which court judged that, when interpreted in good faith, the treaty did establish a boundary. Thus, the Court based its decision on an existing treaty between Libya and Chad that established a clear border, ruling in favour and awarding the disputed strip to Chad.

⁶⁷ Avgustin, J. R. (Ed.) (2020). *The United Nations: Friend or Foe of Self-Determination?* Bristol, England: E-International Relations Publishing.

⁶⁸ Case concerning Sovereignty over certain Frontier Land, Judgment of 20 June 1959: I.C.J. Reports 1959, p. 209. Retrieved from <https://www.icj-cij.org/files/case-related/38/038-19590620-JUD-01-00-EN.pdf>, April 20, 2020.

⁶⁹ Sumner, B. T. (2004). Territorial Disputes at the International Court of Justice. *Duke Law Journal*, 53 (1779). Retrieved from <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1227&context=dlj>, April 23, 2020.

⁷⁰ Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment of 3 February 1994: I.C.J. Reports 1994, p. 6. Retrieved from <https://www.icj-cij.org/files/case-related/83/083-19940203-JUD-01-00-EN.pdf>, April 20, 2020.

Similarly, both the Karachi Agreement⁷¹ establishing the ceasefire line and the Simla Agreement that transformed it to the LOC, established de facto border in Kashmir, dividing a previously united community to IJK and AJK. Thus, LOC could be awarded to become de facto international border based on the agreements, which are persuasive at the ICJ due to the article 38 of the Statute obligating the court to consider treaties in making their decisions. In addition, the principle of effective control would promote making LOC the de facto border, as both India and Pakistan have established administrations in their respective sides of Kashmir.

Another case that works as an example for Kashmir is the Rann of Kutch case (India v. Pakistan)⁷². The Rann of Kutch case involved an ad hoc tribunal to determine the western border as a consequence of the partition. Pakistan claimed ownership due to effective control and accession of Sind, while India maintained that only a part of the boundary was not demarcated, other belonged to the princely state of Kutch that acceded to India. Similarly to Kashmir, a war was fought in 1965 prior to establishing ceasefire in Sind-Kutch region. The correspondence and counterclaims resulted in a stalemate where bilateral negotiations proved unfruitful, thus leading to the acceptance of international arbitration instead of adjudication by the ICJ, which India found unacceptable. The following *compromis* maintained that India and Pakistan would seek to determine the border in two months, after which the case would be transferred to the tribunal for a final and binding decision⁷³. The arbitral tribunal awarded Pakistan around ten percent of its claim, while India was awarded majority of the region and the boundary became effective a year later⁷⁴. Due to the similarities to Kashmir, the Rann of Kutch case could set the precedent in settling the legal issue relating to LOC and its status under international law.

⁷¹ Agreement between military representatives of India and Pakistan regarding the establishment of a cease-fire line in the state of Jammu and Kashmir (Karachi Agreement) (July 29, 1949). Retrieved from https://peacemaker.un.org/sites/peacemaker.un.org/files/IN%20PK_490729_%20Karachi%20Agreement.pdf, April 20, 2020.

⁷² Case concerning the Indo-Pakistan western boundary (Rann of Kutch). Arbitral Award 19 February 1968. Retrieved from https://legal.un.org/riaa/cases/vol_XVII/1-576.pdf, April 22, 2020.

⁷³ Mukund, G. U. (1974). The Kutch-Sind Dispute: A Case Study in International Arbitration. *The International and Comparative Law Quarterly*, 23 (4), 818-839. Retrieved from <https://www.jstor.org/stable/pdf/758416.pdf?refreqid=excelsior%3Aa8ec20c567eb6045325eefaf4449ea3>, April 22, 2020.

⁷⁴ *Ibid.*

6. ARBITRAL AWARD AND IMPORTANT QUESTIONS RELATING TO KASHMIR

The legal issues of self-determination, plebiscite, legal status and overall conditions in Kashmir meet legal requirements for legal approach to settlement and the involvement of e.g. UN. Firstly, the uncertain legal status of Kashmir should not be an obstacle, as the purpose of the plebiscite is to define the legal status as per the desires of Kashmiris. Secondly, the threat to international peace and security is significant, as India and Pakistan has fought three wars over Kashmir and possess nuclear capabilities. Thirdly, under international law, the violations of human rights in Kashmir justify legal approach under auspices of the UN in upholding the promise of plebiscite to exercise the Kashmiris' right to self-determination. Arguably, previous attempts by the UNSC might have failed due to the political standpoint rather than legal one, as these issues imply⁷⁵. Surely, seeking a decision from e.g. arbitral tribunal is not an end in itself but a step in the process towards peace and stability⁷⁶.

However, as India is reluctant to internationalize the settlement of conflict, a question remains how to solve the violations and the conflict itself, since the bilateral negotiations have proved unfruitful. For example, Farrell has argued that if Simla Agreement remains unworkable, the UN could resolve to take binding action to settle the conflict in order to maintain international peace and security⁷⁷. It can also be argued that India has indeed internationalized the issue by forwarding the accession to the UN and pledging to hold a plebiscite under the auspices of international law⁷⁸. On the other hand, internationalizing the conflict does not confer ICJ jurisdiction on the matter, which means that, after previously comparing arbitration and adjudication, the former appears the better

⁷⁵ Subbiah, S. (2004). Security Council mediation and the Kashmir dispute: Reflections on its failures and possibilities for renewal. *Boston College International and Comparative Law Review*, 27(1), 173-186.

⁷⁶ Klein, N. (Ed.) (2014). *Litigating International Law Disputes: Weighing the Options*. Cambridge: Cambridge University Press.

⁷⁷ Farrell, B. (2003). The Role of International Law in the Kashmir Conflict. *Penn State International Law Review*, 21 (2). Retrieved from <https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1789&context=psilr>, April 23, 2020.

⁷⁸ Hingorani, A. (2007). The Kashmir issue: Differing perceptions. *International Relations and Security Network*. Zurich: Swiss Federal Institute of Technology. Retrieved from https://www.files.ethz.ch/isn/27333/casestudy_kashmir.pdf, April 23, 2020.

choice in addressing the legal issues in this case. More generally, states have consented to arbitration more often than adjudication, because the former provide many of the benefits of a permanent court but with flexible procedure⁷⁹. The situation is at a bilateral stalemate, which has come about as a result of decreasing power asymmetries between India and Pakistan as both have nuclear capabilities and as bilateral attempts have proved unsuccessful. Furthermore, as bilateral attempts have not yielded results, the conflict ought to be referred to UNSC for settlement. Similarly, the resolution 91⁸⁰ calls the parties to accept arbitration under the auspices of the UN.

As India and Pakistan have not reached a mutually beneficial solution, arbitration ought to be the next step, as has been stipulated in the UN Charter and the Kashmir resolutions. Similarly, as was with the Rann of Kutch case where India and Pakistan were to agree to arbitration given that they do not reach a solution in a certain timeline, same principle could be utilized again in Kashmir. This would ideally create an incentive for bilateral talks between India and Pakistan, and only in the case of failure of settlement in due time would the tribunal be formed to award a legally binding settlement. The process ought to take examples from the cases discussed in chapter five, as these similarities will prove useful in addressing the legal issues revolving Kashmir. As in chapter two, the legal issues with self-determination and plebiscite (in conjunction with human rights violations), and the LOC need to be addressed and discussed how arbitration could tackle these issues and the overall status of the region.

The issue with self-determination and plebiscite are the most outstanding legal questions arising from the conflict. These issues need to be addressed through arbitration and enforced by the UN, as the resolutions and the international treaties view self-determination as a fundamental human right, even as a *jus cogens* rule. Through arbitration, especially the resolution 47 and its three-step plan should be enforced as the most comprehensive approach towards plebiscite. Great care needs to be taken, however, as Kashmir's different regions host demographically diverse people: in Jammu majority are Hindus, whereas in Kashmir Valley the majority are Muslims. Holding a plebiscite without taking demographics into consideration would not yield positive results, as e.g. Hindus are likely on the side of staying with India. Thus, it could be awarded that the plebiscite would only be held in the Kashmir Valley, the home of the insurgency against accession to India. In a reference to case law example of East Timor, the Court stated that East Timor was without self-government, and that East Timorese have the right to self-determination. In conjunction,

⁷⁹ Copeland C. S. (1999), *supra nota* 63.

⁸⁰ UN Security Council Resolution 91 (1951), *supra nota* 35.

Kashmir under international law is a disputed territory, thus implying that Kashmiris will need to practice their right to self-determination prior to any claim over the territory. Subsequently, the arbitral tribunal ought to be tasked to establish the process for the plebiscite, keeping in mind the demographics of Kashmir and the lesson learned from East Timor: the need to prepare for the post-plebiscite period and the possibility of hostilities. Surely, the UN would be the most likely enforcer of the plebiscite and safeguarding peace in the region. Such interim measures as the Court imposed in the case of *Burkina Faso v. Mali* could be implemented in Kashmir to prevent prejudiced proceedings and to de-escalate tensions and to secure the process and peace. The self-determination of Kashmiris will need to materialize one way or another: if plebiscite is off the table, then the arbitral tribunal will need to consider other ways to guarantee the fundamental right of self-determination. One such possibility could be to restate enhanced autonomous status or an economic zone for the purpose of India and Pakistan having access to the resources in Kashmir. On occasion, it has been proposed that Kashmir could become independent, however, this is highly unlikely due to the power dynamics and the geopolitical interests surrounding the region: neither India nor Pakistan would uphold this option.

The option that India prefers includes formalizing the status quo: establishing the LOC as international and *de jure* border, leaving the currently divided areas respectively to India (Jammu, Ladakh and Kashmir Valley) and Pakistan (Azad Kashmir and the Northern areas). Given that the arbitral tribunal focuses on the LOC, it could create an incentive for India to reengage in the talks. This is due to the Indian allegation of illegal cross-border crossing supported by Pakistan, which violates the Simla Agreement and has led India to claim halting of proceeding with talks until Pakistan ceases the support for infiltration across the LOC⁸¹. From case law, applicable examples come from the cases *Belgium v. Netherlands*, *Libya v. Chad* and *Rann of Kutch*: in the two former cases, the arbitral tribunal based the award on existing treaty between the disputants in deciding the border. Similarly, the Karachi and subsequent Simla Agreement establish the LOC as *de facto* border, which could be awarded as the *de jure* international border. Moreover, both India and Pakistan have exercised the principle of effective control in their sides of Kashmir by establishing state administrations, further supporting the transformation of LOC into international border. However, should this happen, it is essential that the right of self-determination for Kashmiris is honored: the arbitral tribunal ought to discuss free movement along the border, thus letting Kashmiris decide where they wish to reside.

⁸¹ Subbiah, S. (2004), *supra nota* 75.

Arguably, the enforcement of the arbitral award is just as important as the reward itself. As the UN resolutions still obliges India and Pakistan to abide by the agreements and the conflict poses a threat to international peace and security, UN would be the most likely body to enforce the fulfillment of arbitral award in Kashmir. It has been argued⁸² that to enforce any award or decision on Kashmir, the UNSC should pass a new resolution under Charter chapter VII, as they are considered legally binding, demanding India and Pakistan to negotiate and authorize involvement of e.g. arbitral tribunal and a peacekeeping mission. Surely, as the Kashmir conflict is a protracted issue between the two states, the UN enforcement mechanism (mostly UNSC) acting under chapter VII, will be essential in enforcing the arbitral award. For example, the UNSC resolution 80⁸³ established the UNMOGIP to monitor the ceasefire line, and similar observer mission could be imposed for the aftermath of the arbitral tribunal's award.

As was discussed, arbitration provides flexibility and engages parties to it more fundamentally than adjudication does. By this reasoning, arbitration adds sustainability to the peace process, as it requires both India and Pakistan to get involved, and allows them to focus on bilateral relations post-tribunal. Furthermore, as arbitration is less formal and less public, the procedure is often viewed as preferred as the threat to a state's reputation is lower, or that the state can "blame" the tribunal for unfavorable outcome. As was mentioned, arbitration is beneficial in settling border disputes as the arbitral process can be flexible and cover also political aspects of conflicts, thus be more persuasive. Lastly, if given similar timeline as in the Rann of Kutch case, the notion of arbitral proceedings alone can add sustainability to the process, as most likely the parties will want to solve the issue bilaterally rather than submit the conflict to a third-party, where the award is not left for the parties to decide. However, India and Pakistan's fight over Kashmir is entrenched to the extent that neutral third-party tribunal will be required to award a decision based on the rule of law.

⁸² Merck, B. (2004). International law and the nuclear threat in Kashmir: proposal for U.S.-led resolution to the dispute under UN authority. *Georgia Journal of International and Comparative Law*, 32(1), 167-198.

⁸³ UN Security Council Resolution 80, S/RES/80 (14 March 1950). Retrieved from https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_80.pdf, 5 May 5, 2020.

CONCLUSION

Main proposal of the thesis, with aim to justify the need for a legal approach in settlement, encourages the use of arbitration as an appropriate measure honoring both the need to address the legal issues and to involve both countries in the process fundamentally in order to settle the conflict that poses a significant threat to international peace and security. As interstate conflicts are highly complex and the principle of state sovereignty applies, settling disputes by arbitration does require the conflicting parties to agree to it. During the 70 years of Kashmir conflict, especially India has been unwilling to accept third-party involvement in the settlement of Kashmir. However, as the bilateral stalemate and the threat to international peace and security prevail, this thesis argued that the focus ought to be shifted towards settling the legal issues through arbitral tribunal agreed and established by the parties under the auspices of the UN. This would allow both India and Pakistan to focus on the political aspects of the conflict, and to honor the right of the Kashmiris to self-determination in order to stabilize the situation in the region.

The UNSC's failure rested on missed focus and attempts to intervene in a political manner, when the conflict's main issues of self-determination, human rights violations and territorial legal status were and are of legal nature. The aim of the thesis was reached by initially identifying the legal issues most prevalent in the conflict, i.e. the question and legal status of LOC, self-determination and human rights violations and by subsequently proposing to shift the focus from politics to legal settlement through arbitration. Furthermore, giving due notice to the importance of political attempts to be conducted bilaterally, arbitration allows for improved flexibility and sustainability compared to judicial settlement, which is one of the reasons why arbitration was chosen as the appropriate means of settlement.

As the discussion about legal issues showed, shifting the focus towards legal approach can potentially settle the core legal issues, allowing for sustainability for both India and Pakistan to focus on confidence-building measures to improve bilateral relations without remaining at a stalemate over the said issues. While discussing and comparing arbitration and adjudication as possible means of settlement, it became relatively clear that arbitration would be the appropriate means due to the flexibility it provides compared to adjudication. As with Rann of Kutch case,

India is more welcoming towards arbitral tribunals on workings of which both parties can have a say in, rather than submit the conflict to judicial settlement through the ICJ.

As a result of examining the case laws in chapter five, a rough sketch of the arbitral process was proposed as per the process of the said cases. From the cases, *Belgium v. Netherlands* and *Libya v. Chad* arbitral award was partly based on an existing treaty clarifying the border, similarly, the *Karachi and Simla Agreement* establish the LOC as *de facto* border. Thus, arbitral award ought to follow existing treaties, and propose making the LOC the *de jure* international border, with concessions for freedom of movement for Kashmiris. From the *East Timor* case, it was awarded that East Timorese' right to self-determination need to be honored, which led UN to hold a plebiscite under its auspices. As self-determination is a fundamental human right, it needs to be taken into account in Kashmir's arbitral tribunal: as the situation is exacerbated, the UN's presence in Kashmir will be necessary to ensure free plebiscite and the safety of the Kashmiris during the process. This includes also the need for enforcement, through e.g. an observer mission similar to that of the UNCIP and UNMOGIP after the partition of British India.

Even though arbitration has become less used in interstate conflicts, its use especially in border disputes is a benefit, which applies to Kashmir conflict. Arbitration's benefits to interstate disputes with issues of legal nature outrank those of purely judicial settlement, as arbitral proceedings allow flexibility and the possibility for the parties to be involved more deeply than solely as adversaries, further allowing awards and processes of political nature and to add sustainability to the peace process while maintaining the rule of law. The Kashmir conflict is an intractable bone of contention between India and Pakistan, and bilateral stalemate has resulted in a dead end: this stalemate allows for the renewal of settlement attempts. However, if the focus is not resifted towards approaching the legal issues, the conflict will prolong further. As the conflict threatens the international community as a whole, the step towards arbitral settlement will need to be taken to secure the maintenance of international peace and security, both regionally and globally.

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APPENDICES

Appendix 1. Map of disputed Kashmir



Source: BBC website.

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