

The Fight for Kashmir At the Price of Human Rights

The conflict in Kashmir between India and Pakistan has been at the forefront of human rights violations and the struggle for sovereignty as disputes have been ongoing throughout time and history. Kashmir is a region situated in the Northwestern Indian subcontinent between India, Pakistan, and China. The conflict has occurred since the partition between India and Pakistan in 1947 with a poor geographical division of territory created by the British, as Kashmir has been the region of division between the two with each claiming parts of its land. Pakistan being a Muslim secular state and India with a predominantly Hindu population, Kashmir is left with a majority Muslim population but with ideologies implemented by the Hindu maharaja (Behera, 2016). Kashmir has been at the center of the partition with multiple wars over undivided land by India and Pakistan between 1947-1999 as there have been cases of serious human rights violations as a quest for sovereignty ensues for the Kashmiri people and a pursuit of their land and people by India and Pakistan. This has led the Kashmiri people divided with seeing the strive for self-determination as their only way to diminish the conflict and guarantee their autonomy. Both India and Pakistan have troops stationed within Kashmir as each look to the other in observation of who commits aggression first while making certain they are to not violate any. We can observe the mechanism of the application of international law in how matters between the two states has been handled within this interstate conflict. With bilateral negotiations, treaties, and involvement of the United Nations, we are able to observe that the failures of these mechanisms have extended the conflict and continued aggression as the people of Kashmir struggle for self-determination. In connection with the Nicaragua case, we can seek out the ways in which the case also dealt with matters pertaining to military activities being conducted in

another state and matters being taken up by the International Court of Justice. We will see if this could be the case that Kashmir could apply to with their troubles regarding the conflict. This paper will discuss the negotiations and treaties that both India and Pakistan have been involved in regarding Kashmir and where these legal mechanisms have been severed by the states with human rights violations as the question of self-determination for Kashmir remains.

Pakistan has held a position of upholding human rights where the attainment of global peace has been encouraged by the state. Pakistan's participation in the United Nations with its involvement in the Security Council, UN Peacekeeping, and Human Rights Council displays its commitment to upholding the legitimacy of international law and security within global affairs. Within these goals, Pakistan has publicly declared its commitment to supporting Kashmir's right to self-determination in efforts of coming up with a resolution through the Security Council (Vaish, 2011). The Convention against Torture and Other Cruel Inhumane or Degrading Treatment or Punishment has been signed by Pakistan in 1947 and has been ratified in 2010. India has also signed on to The Convention against Torture and Other Cruel Inhumane or Degrading Treatment or Punishment in 1997 but has not ratified. (OHCHR). The UNCAT was established by the United Nations with more than 160 nations having ratified it with the aim of prohibiting any form of torture and cruel acts including punishment against civilians on the basis of maintain human rights. This convention had come after the Universal Declaration of Human Rights where UNCAT shares certain human rights law that were already established with the UDHR such as Article I which promotes right to physical and

inherent integrity. To promote the efficacy of the treaty, the UN created the United National Committee Against Torture which would monitor the states that have signed and ratified onto the treaty in their maintenance and promotion of the obligations involved and if any violations occur. (Yasin and Ahmed, 2019, Pg. 286. India sits at the Human Rights Council and has had its involvement with the United Nations in upholding international diplomacy and peace and security. Treaties is what would be integral to the conflict in how the two states are to deal with matters regarding Kashmir. Treaties are to be defined as an international agreement that is portrayed in some form of document between states that is created by an international body where all the participants involved are to be subject to international law and the rules and obligations stated in the treaty. Treaties have the objective of creating and including any obligations, rules, rights, and procedures that pertain to a certain subject matter. Treaties must be binding amongst those that have signed and ratified whereby signing the treaty it becomes effective and with ratification, it has been implemented into the domestic legal framework (Glahn and Taulbee, 2009). The question becomes why has India not ratified the treaty against torture and has only remained a signatory? Author Yasin and Ahmed explore this question and state how India has been found guilty on multiple occasions for violating human rights through the act of torture and punishment occurring against citizens. They have done little to nothing to establish a legal framework to address and prohibit the act of cruel torture and punishment. Article 21 of India's constitution includes the right to live with dignity and without torture, yet this has been clearly violated and normalized throughout many parts in India including conflict zones because they lack the specific legislation for Article 21. No definition of torture

had been accepted by India yet in 2017 the Prevention of Torture Bill was brought to Parliament in response to the Law Commission Report on Torture which found India guilty of acts including beating victims with canes, stomping on victims, and more. The report identified clearly that India has violated its own constitution of committing acts of torture and punishment (Yasin and Ahmed, 2019, Pg. 288). Between India and Pakistan, there have been a total of 44 bilateral treaties between 1947 and 2017 that have been signed as the network of treaties keeps growing for multiple contentious topics. The topics of these treaties including security and rights of minorities, trade, rail traffic, water and river systems, visa, withdrawal of troops, air services, religious shrines, telecommunications, shipping, air space violations, and more. (Tandon and Slobodchikoff, 2019). Bilateral treaties are agreements between two states pertaining to a certain subject matter. It is important to note that India and Pakistan both being nuclear states, have refused to sign on to the Non-Proliferation Treaty as this is crucial in its application to the Kashmiri conflict due to the risk it could pose to the people and parties involved. India and Pakistan both having developed their own nuclear weapons with help of other states including China with Pakistan, the tensions for Kashmir rise due to the uncertainty of each state using it as a means to wage war. Both states question their own security with too many conflicting agreements as wars and conflicts have taken place between the two. With two Indo-Pakistan wars having occurred over Kashmir already, the danger of one state signing to the NPT and the other not would pose threat to the state that has already signed.

Bilateral negotiations have transpired over many years with the inclusion of the United Nations for the two countries in addressing the Kashmir conflict. Pakistan first approached the United Nations in 1957 over the issue involving Kashmir and the Security Council had followed up with a resolution with five recommendations. Vaish (2009) states the following recommendations:

“(1) creating an atmosphere favourable to negotiations, (2) reaffirming the integrity of the cease-fire line, (3) withdrawal of Pakistani and Indian troops from Kashmir, (4) interpreting the terms of a plebiscite, and (5) a meeting of the two prime ministers. (Vaish, 2011).”

India had objected to this and negotiations continued till 1964 with nothing coming from them. The resolutions that had been proposed by the United Nations with the establishment of the organization as being a new addition to the international world were difficult for India and Pakistan to follow through as the legitimacy of the UN at the time was not formed. This made it easier for Pakistan and India to bypass the resolutions such as the UNCIP resolution of 1948 since the UN was not seen to have the authoritative status it has today. These resolutions proposed by the Security Council were not binding decisions with the UN Charter Article 25 but rather recommendations as Farrell claims (Farrell, p. 293, 2002). The involvement of third-party actors is considered with outside states having been part in the negotiation peace talks although India wishes for only bilateral negotiations with Pakistan. As Vaish finds, Pakistan desired the inclusion of these third-party actors as a way to equalize themselves against India's strength as a state and of course India did not look favourably upon this. India claimed it would be best if it was done by the two parties involved in the conflict. The

World Bank, U.S, U.K, and the Soviet Union in 1962-1963 were involved in negotiation talks on Kashmir with heavy involvement of the U.S. Yet these talks did not seem to succeed, and they found it was better for the two states involved to only deal bilaterally as the inclusion of outside actors had furthered the complexity of the situation (Vaish, 2011). There are clear discrepancies between the two states' commitment to upholding global peace and security yet lacking the will of negotiating terms based on Kashmir.

The Office of the UN High Commissioner for Human Rights (OHCHR) had come out with a 2019 report that highlighted and documented many concerns and human rights abuses occurring in Kashmir by the two states troops and security forces which is summarized by the Human Rights Watch news release. The OHCHR deals with matters pertaining to human rights and the operations and matters by the states regarding that including violations. The report found that India and Pakistan have both put blame on each other for the violation of human rights as India has dismissed the Update of the Situation of Human Rights in Indian-Administered Kashmir and Pakistan-Administered Kashmir from May 2018 to April 2019 by the OHCHR and Pakistan has acknowledged it with some objections to the statements in the report. There have been findings of excessive use of force against protestors by Indian security forces with the use of pellet-firing and shot guns which have led to mass numbers of deaths and injuries of civilians. Furthermore, there is inclusion of sexual violence, displacement, kidnapping, recruitment of children, and disappearances of civilians by Indian military forces which has been brought up in the 2019 report. It is important to note that India has ratified the Convention for the Protection of All Persons from Enforced Disappearance therefore

India is clearly in violation of the treaty and human rights. What is difficult in making India accountable in this scenario is that the India's Armed Forces Special Powers Act is able to give immunity to militants and security forces for human rights violations that they commit where the Indian government does not follow through in prosecution. This is where domestic law within interstate conflicts gets complicated because this allows certain states to override accountability. (Human Rights Watch). Human Rights Watch also reported that Kashmir Judiciary has been unable to prosecute military personnel that have committed human rights violations and to offer relief to the victims because of the lack of witnesses to testify as well as the Public Safety Act by India. The government of India has implemented this act which allows detention without a trial and this enables those guilty to avoid prosecution. (Human Rights Watch, 199). Pakistan was also held under scrutiny within Pakistan-Kashmir territory where discrimination against certain minority groups with limiting freedom of expression pertaining to political associations, disappearances of civilians by Pakistan intelligence agencies, and threats to journalists was recorded by the OCHCR report. It should be noted that Pakistan has signed and ratified the International Covenant on Civil and Political Rights (ICCPR) (Human Rights Watch). The ICCPR as authors Glahn and Larry state, is the guarantee of rights, freedom of expression and association, equal treatment by government, freedom of religious expression, freedom to move within and between states, and peaceful assembly which Pakistan has clearly violated (Glahn and Taulbee, 2009, p. 403). Overall there have many civilian casualties and deaths over the dispute showcasing that there have been clear violations committed by both states with no commitment to improve and take accountability for their actions.

The UN has to ensure that it is playing a vital role in the dispute in its ability to hold the two states accountable and Farrell finds this to be done by the application of the Simla Agreement in efforts of bilateral solutions with pressure by the UN. This is because without pressure Farrell finds no real progress will be made and only mutual agreement will be met through these negotiations but no change. The Simla agreement is to promote bilateral negotiations and dialogues between India and Pakistan. (Farrell, 2009 p. 316,). The Simla Agreement was signed in 1972 which stated all India and Pakistan issues would be dealt through bilaterally (Snedden, p. 121, 2017). Furthermore, Farrell stresses that for negotiations to flow the UN should offer its organs or special commission to help assist in negotiations and settlements to ensure fair participation. Although the UN should allow for Bilateral negotiations to occur on their own with limited assistance, Farrell states that it is fundamental that the UN is able to react rapidly and take action to any developments of hostility in its assurance of maintaining global peace and security (Farrell, 2009, p. 316,). The United Nations Security Council holds importance in the UN for maintaining global peace and security with five permanent members that ensure order at the global level. Through veto power for the five, these members settle disputes and formulate resolutions on matters concerning global threat and security and we saw the conflict in Kashmir was one of them (Glahn and Taulbee, 2009). Farrell found that the Security Council had a lack of binding action with the conflict in Kashmir as the resolutions were only recommendations but also due to the conflicting goals of each of the permanent five members. Those members being China, Soviet Union, United States, and United

Kingdom. China and the Soviet Union had borders with Kashmir, United States had wanted closer relations with Pakistan, and the United Kingdom had ties to both countries already due to the divide they had created. The Security Council had failed to make binding resolutions showings the ineffectiveness of it (Farrell, 2009, p 312).

International bodies are only able to do so much for the resolution of the conflict because if the states involved refuse to cooperate, no efforts made by external actors will ensure the hostilities between the India and Pakistan will decrease. If the discussion is to hold Pakistan and India accountable for human rights violations, international actors have a higher capacity to ensure that the violations reduce or stop indefinitely. The states committing violations themselves will not put an end to committing human rights abuses unless public pressure is applied, and this is to be accomplished by the UN and international states proposing economic sanctions on India and Pakistan in showcasing the condemning of such acts. If the discussion is to end the Kashmir conflict indefinitely, this can only be done by the two actors involved in the willingness of interstate cooperation as Farrell notes. Each state has to honour each other in its legitimacy and the legitimacy of Kashmir by involving them in negotiations and discussions. Both leaders of each state have to be able to come together in efforts to promote the end of the conflict and promoting the rights of Kashmir to self-determination if that is what is desired by the region (Farrell, p. 317, 2009). It is evident to find that clear human rights violations have occurred where international law has failed in upholding justice for the people in Kashmir that are in the midst of the battle.

Solutions for the Kashmir conflict seem stagnate as the people of Kashmir hold no hope in peaceful negotiations occurring between two states that are adamant to be peaceful so that they ensure their victory for the conflict. Yet the one alternative which might be the only way to ensure that Kashmir can come out of this conflict in one piece is by self-determination or state autonomy for Kashmir. The legitimacy of Kashmir as an independent state would be the most promising way in allowing the region to fend for themselves and their people with no ties to any external states that are aiming to dominate their domestic affairs. Pakistan has made efforts in the past in supporting the idea of Kashmir's right to self-determination as the Kashmir conflict keeps rising. Snedden accounts that General Yahya Khan military in 1970 had established The Azad Jammu and Kashmir Government Act which provided and allowed a system of government with an elected legislative body and a limited constitution for Kashmir as this was the most autonomy the region received. Pakistan still held control over foreign affairs, defence, and currency however this did not last (Snedden, p. 121, 2017). Vaish reports that India and Pakistan have differing positions regarding Kashmir's right to self-determination where India gives in to a right for sovereignty and territory and Pakistan on self-determination principals which is based on Article 1.1 of the ICCPR (Vaish, 2011).

The primary issue with the Kashmir conflict that is in similarity with the Nicaragua case is the objection to military operations and personnel within an unauthorized territory. The Nicaragua v. United States case was brought to the International Court of Justice (ICJ) by Nicaragua on the basis that the U.S was conducting military activities in and

against Nicaragua that they did not approve of within their territory. The U.S argued that the International Court of Justice does not have jurisdiction on these matters. As this involved international treaty matters, it was found that the ICJ did in fact have jurisdiction to hear the case (Damrosch et al, 2010). As troops from both Pakistan and India reside within Kashmir, would Kashmir have the jurisdiction to address the International Court of Justice? Their lack of autonomy as a sovereign state makes it difficult to do so as their link to multiple states including India, Pakistan, and China have restricted their ability in pursuing rights for themselves.

Political analysts and researchers have proposed many solutions to bring peace into the conflict of Kashmir as author Kurr has come up with three. The first one being political independence for Kashmir which is not looked favourably upon by India and Pakistan as the possibility of a referendum is only being desired by the people of Kashmir. The second proposal claims for a formal partition for Kashmir and this has been previously brought up in negotiations between India and Pakistan. This would involve an international border or Line of Control between India and Pakistan which would be acknowledged and recognized by the two states and internationally. With the boundary that is to be set up, there would be calls for demilitarization on both sides to allow the people of Kashmir to stay within their territory in peace. The last proposal calls upon the autonomy of Kashmir which is looked highly upon as a considerable option by those involved in the conflict. This would be seen as the best option to ensure the people of Kashmir get their rights. By receiving the ability of self-rule with an independent legislative body and constitution to practice their own political and legal affairs, it will

guarantee the ability of Kashmir to allow their matters to be dealt with for their own personal interests (Kurr, p. 3-6, 2015). Although many solutions are proposed by state actors, policy analysts, and researchers, the only way that the conflict is to be kept as peaceful as possible is the willingness of India and Pakistan to cooperate with the aim to ensure the best outcome for the people of Kashmir and the realization that they should not be handling their affairs for them.

This paper has examined the legal mechanisms involving negotiations and treaties that both India and Pakistan have been involved regarding Kashmir as it was discovered that there have been limited efforts in promoting peace and security for the region. This was found with both states having violated human rights and UN treaties that both India and Pakistan have signed on which has severely questioned the efficiency of international mechanism in international affairs. Bilateral negotiations, UN treaties, and interstate agreements have been seen to have limited results in promoting peace for the people of Kashmir. The Nicaragua v. U.S case can be applied to the situation in Kashmir where the International Court of Justice should have the ability to hear the case of military involvement in a territory that is not authorized to have outside military personnel's. As the question of self-determination for Kashmir remains, the conflicting perspectives by both India and Pakistan have made it strenuous in both coming to mutual terms of what the future of Kashmir looks like. The Kashmir conflict is highly debated in the international world with international legal mechanisms having failed to bring a peaceful end and solution to the dispute. Without the compliance of

India and Pakistan in addition to pressure from external actors, the fight for Kashmir will remain at the price of human rights.

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