RESOLVING KASHMIR DISPUTE UNDER INTERNATIONAL LAW

By:

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"peoples may now be dominated and governed only by their own consent" (Pres. Woodrow Wilson)"

On March 16, 1846 the territory of Jammu and Kashmir alongwith several hundred thousand Kashmiri nationals were sold for a meagre sum by the British to Gulab Singh pursuant to a sale-deed commonly called the Treaty of Amratsar. A question arises whether, under International Law, a buyer and a seller can also buy and sell the people, their liberty, honour, respect, and other inalienable rights without their consent? And again what would be the legal position if a successor of the buyer wants to further alienate, partly or wholly, the territory so inherited to a third party without reference to the people?

About the Kashmir dispute Mr. Noel Baker, the British Representative declared in the Security Council in 1948 that"... it is greatest and gravest single issue in international affairs". The Kashmir dispute has been discussed in the United Nations more than 113 times since 1948; formal talks took place over a 100 times between India and Pakistan; once between Russia, India and Pakistan; once again between India and Pakistan at Simla and for innumerable times in the press of the world. There has been one private war in 1948, two full scale wars in 1965 and in 1971, and several border clashes. The unique thing about this dispute is, that a solution has been found by the United Nations and agreed to by the parties *; i.e.* India and Pakistan. The only difficulty is the passive behaviour of the United Nations in implementing the solution. The problem, of course, entails very important legal points, which are dealt with in the following:

1. <u>The Partition Formula and its Effects.</u>

The basis of the division of the sub-continent as agreed to by the , three parties *e.g.* British, Congress and Muslim League was that the contiguous territories of Muslim majority would form Pakistan while contiguous territories of Hindu majority would form Bharat. The Indian Independence Act of 1947, technically speaking, was not applicable to the Princely States. However, it was understood that the rulers of such states would decide the future status of their respective territories in consultation with their people and give due consideration to the geographical compulsions of such areas. (See the text of the Cabinet Mission's Memorundam of May 12,1946 and His Majesty's Plan of June 3,1947).

During his address to the Security Council of March 8, 1948, the Indian Representative Mr. Gopalasawamy Ayanger said that, "No doubt the Ruler, as the head of State, has to take action in respect of accession. When he and his people are in agreement as to the Dominion to which they should accede, he applies for accession to that Dominion. However, when he has taken one view and his people take another view, the wishes of the people have to be ascertained. When so ascertained, the ruler had to take action in accordance with the verdict of the people (qouted from Sardar M. Ibrahim Khan. "The Kashmir Saga", Pakistan, 1985, P. 2).

Furthermore, the White Paper on Hyderabad issued by the Government of India on August 10, 1948 stated that, "The Government of p India are firmly of the view that whatever

sovereign rights reverted to the States on the lapse of paramountcy, they vest in the people and conditions must be created in every State for a free and unfettered exercise of these rights". (quoted from Sardar M. Ibrahim Khan, *ibid,* P-190) The Government of Pakistan fully endorsed the aforesaid view on several occasions. Still there were problems, regarding the accession of Hyderabad, Junagadh and & Kashmir.

The Ruler of Hyderabad was a Muslim but the majority population of the State was Hindu. The Ruler, on Nov. 29, 1947, entered into a "Standstill Agreement" with India for a duration of 12 months. However, the circumstances took such a turn that the Government of Hyderabad filed a complaint in the Security Council under-Article 35, para 2 of the U.N. Charter on August 21, 1948. Hyderabad accused India of "violent intimidation, to threats of invasion and to crippling economic blockade". While the question was still pending in the Security Council, India invaded the State by force on Sept. 16, 1948. The aforesaid matter is, technically, still on the agenda of the Security Council (See, Clyde Eagleton. "The case of Hyderabad Before the Security Council", American journal of International Law 1950, Vol. 44, P. 277).

Junagadh also had a Muslim Ruler but a majority of Hindu population. The Ruler first entered into a "Standstill Agreement" with Pakistan and then on Sept. 15, 1947 acceded to her on the basis of' geographical, contiguity by sea. India strongly protested the accession and itself conducted a plebiscite while it was already in military occupation of the State, resulting in its accession to India.

The Ruler of Kashmir, like the Ruler of Hyderabad wanted some time to make the decision and for that reason he requested both India and Pakistan to enter into a Standstill Agreement with Kashmir. Pakistan signed the "Standstill Agreement" immediately, but India wanted to enter into negotiations for the purpose of seeking some "clarifications". The tilt of the Hindu Ruler was towards India while the overwhelming population being Muslim (such majority is admitted by India in the Security Council; 27th Mtg. S.C. Jan. 15, 1S48) wanted to join Pakistan. Due to the favourable attitude of the Ruler towards India, communal disturbances broke out in July, *1947* and reached the degree where the Ruler had to flee from Srinagar (the Capital) in darkness and take refuge in Jammu where the majority population was Hindu. The Muslim with the help of their Muslim brothers from Rajasthan, now a part of Pakistan, established the "Azad Government" which gained control over a substantial part of Kashmir. The Ruler of Kashmir appealed to India for military help to repel the revolutionaries. In lieu of giving help, India demanded and got the (so called) State's accession on Oct. 27, 1947. It is to be noted that the letter of the Governor General of India dated Oct. 27, 1947 accepted the accession only conditionally and made it clear that the final decision would be made by reference to the people of Kashmir.

While addressing the Security Council the Foreign Minister of Pakistan said, "Cannot Pakistan with equal justice retort with regard to Kashmir in the very words employed by the Government of India in respect of Junagadh, that the so-called accession of Kashmir to India is in utter violation of the principles on which the partition of the country was agreed upon and effected, that it is an encroachment on Pakistan's sovereignty and territory and that it represents an attempt to disturb the integrity of Pakistan?" (quoted from Sardar M. Ibrahim Khan, Loc cit, P. 192).

2. Lapse of Paramountcy.

The lawyers, statesmen, and political scientists have greatly debated the issue of the legal position of Indian Princely States. On this, they are divided into two groups. According to one, since the Indian Independence Act of 1947 did not apply, to the Princely States, technically, they became sovereign in every sense of international law. The other group maintains that the Princely States did not become sovereign and were liable to accede to either Pakistan or India. According to the former view the States could exercise the right of self-determination by any of the ways, such as, but not limited to, declaring independence, accession, autonomy, association, confederation etc., provided such an act reflected the wishes of the people. So, the Ruler of Kashmir should have sought the will of the Kashmiri people.

The latter view maintains that the states were to accede to one of the two Dominions on the basis of the principle that, contiguous areas of Muslim majority shall form Pakistan and contiguous areas of Hindu majority shall constitute Bharat. Since the state of Jammu and Kashmir is, without any doubt, contiguous to Pakistan, and the majority population is also Muslim, hence, the Kashmir state should be a part of Pakistan.

3. United Nations' Involvement

India filed a complaint in the U.N. Security Council on January 1, 1948 alleging that Pakistani forces were fighting in Kashmir. On April 21, 1948 the Security Council recommended the formation of a U.N. Commission for India and Pakistan (UNCIP) to proceed immediately to the scene of the dispute and to submit its findings to the Security Council. After lengthy investigations, the UNCIP passed two resolutions, one on Aug. 13, 1948 and the other on Jan. 5, 1949. The latter resolution begins as follows: -

> "Having received from the Governments of India and Pakistan, the communications dated 23, Dec. and 25, Dec. 1948, respectively, their acceptance of the following principles which are supplementary to the Commission's resolution of 13 Aug. 1948:
>
> 1. The question of the accession of the State of Jammu and Kashmir to India or Pakistan will be determined through the democratic method of a free and impartial plebiscite

After the establishment of the cease-fire line by the UNCIP both the parts of Kashmir became legally autonomous and their accession to either of the two countries made subject to a plebiscite according to the Security Council resolutions. Several attempts have been made after 1957 to resolve this issue but they have turned out to be fruitless.

4. Summary of Contentions.

Over the period, .India has deviated from the position taken by it earlier *i.e.* holding a fair plebiscite. India now contends that, pursuant to the Accession Instrument, it became sovereign over Kashmir, and Pakistan's presence in the territory, is a violation of India's right of sovereignty. India maintains that the Kashmir dispute is not a "territorial dispute" between the two countries, rather, it is a "situation" in the eye of International Law which has arisen due to Pakistan's aggression in the territory *i.e.* against India. Hence, the situation could not and should not be allowed to change the legal, political and geographical status of Jammu and Kashmir which has become an integral part of India by virtue of the Accession.

Pakistan's contention is that sovereignty over Kashmir does not rest in either India or Pakistan. The issue involves the right of self-determination of the people of Kashmir. The will of the people must be ascertained on the disputed question of Accession. Where a ruler did not belong to the majority community of the subjects, and where the state had not acceded to the dominion the majority community of which is the same as that of the state, the question of accession must be resolved by seeking the will of the people.

5. Competence of the Ruler.

(a) Treaty of Amratsar.

It is an admitted fact that the Ruler of Kashmir made an offer of accession to India which India accepted subject to certain conditions. The question now arises whether the Ruler of Kashmir was legally competent to enter into the Accession Agreement? Whether he could validly represent the people of Kashmir vis-à-vis India? It is contended that the Ruler lacked the competence to represent the State of Jammu and Kashmir. The Treaty of Amratsar has been bitterly criticized as legally obnoxious. Treaties entered into by feudal lords giving away the basic rights of the people have been held to be illegal by statesmen, jurists and judges. Lord McNair wrote, "According to the modern doctrine of International Law, an agreement between a state and native chief or tribe cannot be regarded as a treaty in the International sense of the term; nor can it be said that such an agreement produces the International Legal effects commonly produced by a treaty. (Law of Treaties, (1961) P. 52). This statement of Lord McNair is based on the Award of Max Huber in the "Island of Palmas" arbitration made in 1928 which reads as follows:

> "As regards contracts between a State or a Company such as the Dutch East India Company and native princes or chiefs of people not recognized as members of the community of nations, they are not, in the International Law sense, treaties or conventions capable of creating rights and obligations such as may in International Law, arise out of treaties. But, on the other hand, contracts of this nature are not wholly void of indirect effects on situations governed by International Law; if they do not constitute titles in International Law, they are none the less facts of which that law must in certain circumstances take account." (2 R. 1. A.A., P. 858).

The reason for not being considered as having "International capacity" to make treaties, according to Lord McNair, is that native chiefs and tribes are neither States nor International Organizations. He further stated that, The official British view upon the status of the Indian native States until after the Indian Independence Act, 1947, was that they possessed no International Status and that the relation of them and their rulers with the British Crown was regulated by the doctrine of paramountcy and by agreement, custom and usage". (International Law Opinions, (1956) Vol. 1, P. 64)

(b) The Ruler had Fled.

At the time when the Ruler made an offer of accession to India, in fact, he had lost control over a substantial part of the State. He had "fled" from Srinagar and took refuge in Jammu. The revolutionaries had established the "Azad Government". Mr. V.P. Menon, the Indian Secretary of State, says, "that when he reached the airport of Srinagar to get the draft of the Accession Instrument from the Ruler of Kashmir, he felt as if he was standing in a haunted graveyard. A kind of fearful quietness and depression was prevailing all around .... the Ruler was looking terribly afraid and upset. In the circumstances, the Ruler felt himself all alone and helpless. Practically the army of the State had vanished and the infiltrators had almost entered into Baramula. If they could maintain the same tempo, it was very probable for them to reach Srinagar within a day or half, "(The Story of the Integration of the Indian States", Macmillan, This extract is quoted from its translation by Raees Ahmad Jafri, Kitab Manzil, Lahore, Pp. 168-9).

Here, the intention of India is also to be noted. Mr. V.P. Menon knowing that the Ruler had "fled" and had no control over the State, had no capacity to represent the people of

Kashmir, took the Instrument of Accession to Delhi which was happily accepted by his Government. In this regard Lord Birdwood commented, "Having used the Ruler conveniently to satisfy legal obligations, India had lost interest in his fate. He may not have merited state mourning. But his departure does lend the legality of accession in a somewhat artificial appearance". (Two Nations and Kashmir, P. 2)

6. Plea of Self-Defence

The Ruler invoked the doctrine of the right of self-defence as a pretext to invite Indian forces. Hence, it is appropriate to discuss this right under the International Law. The questions for determination of the right of self-defence according to Professor Quincy Wright are: "What is the "self" which a state can defend by armed force? Is it the territory, the Government agencies, the people, or the policy of the state? What is the degree of danger to the "self which justifies the exercise of this right? Is it an actual armed attack, or a more remote danger? What is the scope of defensive action permitted? Is it only temporary action? Is prolonged occupation permissible, or can territory be annexed? Who can decide whether an action taken conforms to the requirements of International Law"? (U.S. Intervention in Lebnon, A.J.I.L., 1959, Vol. 53, P. 116).

The answer to these questions is provided by Article 51 of the Charter of the United Nations which reads: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occur against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain International peace and security". It means that the plea of self-defence can be invoked only if an "armed attack" is carried out on a "Member" state. The second part of the Article shows that the actions taken in self-defence must be terminated if the Security Council has taken appropriate measures. Therefore, it is pertinent to note that:

(i) Kashmir was not a Member of the United Nations. The Dogra Government was not "generally recognized" Government in International community;

(ii) No "armed attack" was inflicted by Pakistan on the territory of Kashmir. The allegation levelled by the Ruler against Pakistan was that it failed to prevent the infiltrators entering into Kashmir from the Pakistan side

According to Professor Quincy Wright, intervention may be justified if the inviting state is a target of an "armed attack" from "outside" and if the de jure Government, which requested the "help" was not so pressed by internal revolt that it was incompetent to represent the state. William E. Hall wrote, ... the fact that it has been necessary to call in foreign help is enough to show that the issue of the conflict would without it lie uncertain, and consequently that there is a doubt as to which side would ultimately establish itself as the legal representative of the state" ("A Treatise on International Law", Sec. 94, P. 347, 8th Ed., Oxford, 1924) Professor Q. Wright viewed that, "When it is a question only of external aggression the capacity of the *de jure* Government is presumed. When, on the other hand, it is a question only of internal revolt the capacity of that Government has been doubted by most writers, if the results of the revolt are uncertain". (Q. Wright, Loc Cit.)

The position of the Ruler of Kashmir in the words of Mr. V.P. Menon, the Indian Secretary of State was as follows:

> "On arrival at the Palace I found it in a state of utter turmoil with valuable articles strewn all over the place. The Maharaja was asleep, he had left Srinagar the previous evening and had been driving all night. I woke him up and told him what had taken place at the

Defence Committee Meeting. He was ready to accede at once .... just as I was leaving, he told me that before he went to sleep he had left instructions with his A.D.C. that if I came back from Delhi, he was not to be disturbed, as it would mean that the Government of India had decided to come to his rescue and he should therefore, be allowed to sleep in peace; but that if I failed to return, it meant that every thing was lost and in that case, his A.D.C. was to shoot him in' his sleep". (V.P. Menon, LOC Cit, P. 399) This shows that only "military assistance" from India could change the fate of the Ruler.

The question of the capacity of a Government to invite a foreign power was also involved in the case of Hungary in 1956 and United Nations General Assembly decided that it was not the proper Government who invited the Soviet troops for assistance. "The state is an abstract entity and cannot speak except through its Government. Governments come and go, sometimes by Constitutional process, sometimes by revolution. It is presumed that Government in firm possession of the territory of a state, even if not generally recognized, can speak for the state". This was the opinion of Chief Justice Taft in Tinoco Arbitration between Great Britain and Costa Rica in 1923. (Tinoco Arbitration, 18, A.J.I.L. 147, 1924). "There is a presumption, on the other hand, that a Government, even if generally recognized, cannot speak for the state if it is not in firm possession of the state's territory. It International Law the defacto situation is presumed to overrule the *de jure* situation ______ *jus ex injuria non* oritur". *(H.* Lauterpacht, "Recognition of International Law", Quoted by Q. Wright, Loc Cit, P. 120);

It has already been pointed out that the Dogra Government of Kashmir was-neither generally recognized nor was in firm possession of the state territory because "Azad Kashmir" Government had been established over quite a large part of the State, which exists even today. Hence, the Dogra Government was not competent to speak on behalf of the State of; Jammu and Kashmir.

7. Standstill Agreement.

Telegram of the Prime Minister of Kashmir addressed to the States Relations Department, Govt, of Pakistan, 12 August, 1947.

> "Jammu and Kashmir Government would welcome Standstill Agreements with Pakistan on all matters on which these exists at present moment with outgoing British India Government. It is suggested that existing arrangements should continue pending settlement of details and formal execution of fresh agreements."

Telegram of the Foreign Secretary, Govt, of Pakistan addressed to the Prime Minister of Kashmir, 15 August, 1947.

> "Your telegram of the 12th. The Government of Pakistan agree to g have a Standstill Agreement with the Government of Jammu" and Kashmir for the continuance of the existing arrangements pending settlement of details and formal execution of fresh agreements."

The Government of Jammu and Kashmir also wanted to have standstill agreement with India.

Telegram of the Government of Jammu and Kashmir addressed to the Government of India, August, 1947.

> "Jammu and Kashmir Government would welcome Standstill Agreement with Union of India on all matters in which these exist at the present moment with outgoing British

Indian Government. It is suggested that existing arrangements should continue pending settlement of details and formal execution of fresh agreements."

Telegram of the Government of India addressed to the Government of Jammu and Kashmir, August, 1947. "Government of India would be glad if you or some other Minister duly authorized in this behalf could fly-to Delhi for negotiating Standstill Agreement between Kashmir Government and Indian Dominion. Early action desirable to maintain intact existing agreements and administrative arrangements."

It is important to note that India never executed a standstill agreement with Kashmir. The interpretations of Pakistan-Kashmir Standstill Agreement by different quarters can be grouped into three:

I. That all the rights and obligations accrued by the Treaty of Amratsar and later on by custom and usage whereby the British Government was responsible for the foreign affairs, defence and communications became the responsibility of Pakistan. Thus, technically, Kashmir was estopped from entering into any agreement with any country except Pakistan unless the Standstill Agreement was revoked. Justice Elias states the law that. "Unless there is evidence of a contrary intention, the parties must be presumed to have intended to terminate or modify the earlier treaty when they conclude a subsequent treaty which is incompatible with the earlier one. Where, however, the parties to a treaty purporting to override an earlier treaty do not include all the parties to the earlier one, the later treaty cannot deprive a state that is not a party to it of its rights under the earlier treaty. This is the effect of the rule *pacta teriis non nocent"* (T.O. Elias, "The Modern Law of Treaties", P. 55)

II. According to the second view, Pakistan was to perform such functions, as specifically requested by the Kashmir Government. Hence, Pakistan was administering only the communications, supplies, post office and telegraphic departments in the State. The purpose was to keep the thing; running temporarily until Kashmir finally decided its future political status. It is further argued that, by virtue of the so called Accession Agreement, only foreign affairs, defence and communication departments were entrusted to India Therefore, Pakistan could perform all other functions. Hence there is no clash between the Accession Instrument and the Standstill Agreement.

III. According to the third view the real spirit of the Standstill Agreement was only to run and administer the thing temporarily. It did not contain any understanding presumption, guarantee, intent etc. regarding accession or n accession to Pakistan or to India. The advocates of this view however, differ on the point of termination of the Standstill Agreement. Some of them think that th6 Standstill Agreement automatically came to an end when the Kashmir State execute the Accession Instrument. While others opine that it came to £ end when both the parties *i.e.* Pakistan and India levelly serious and severe allegations against each other after executing the Standstill Agreement, and prior to signing the Accession Instrument.

8. <u>Unequal Treaty.</u>

It is, also, contended that the Accession Instrument, *per se,* is against the jus cogens of International Law and comes under the term "Unequal Treaty". The letter of the Ruler addressed to the Governor General of India on Oct. 26, 1947 which was attached to the Instrument of Accession partly reads as follows:

"With the conditions obtaining at present in my State and the great emergency of the situation as it exists, I have no option but to ask for help from the Indian Dominion. Naturally they cannot send the help asked for by me without my State acceding to the Dominion of India. I have accordingly decided to do so and I attach the Instrument of Accession for acceptance by your Government. The alternative is to leave my State and my people to freebooters .... If my State has to be saved immediate assistance must be available at Srinagar. Mr. Menon is fully aware of the situation and he will explain it to you, if further explanation is needed."

According to Nazari, by the term "Unequal Treaty" is meant a treaty which, through the application of direct or indirect pressure, is imposed, wholly or partly, by a powerful state on a weaker state a situation which is the consequence of a state of inequality existing between the contracting parties at the time of the inception of the treaty, and which enables the powerful state to dictate its wishes to the weaker state. Inequality can be either political or legal, or both legal and political at the same time. The pressure applied by the powerful state can be physical, social, economic or political, all depending on the circumstances in every specific case.

An unequal treaty is presumed to have imposed wholly, if the circumstances show that the weaker party had not declared its free will to be party to a treaty, a situation which invalidates the treaty *ab initio.* And unequal treaty is presumed to have been impose partly, if the circumstances show that the weaker state had declared its free will to be party to the treaty but the powerful state by taking advantage of the inferior bargaining power of the weaker state, had imposed certain obligations on the weaker state; which the latter would not have otherwise consented to, if pressure was not applied at the time of the inception of the treaty. Such a treaty is subjected to revision or severability of the imposed obligations, if the concerned provisions are properly severable .... Thus the proposed assumption that an unequal treaty is a treaty which is imposed by a powerful state upon a weaker, and it is the inequality of the bargaining power at the time of the inception of the treaty which brings about the conclusion of an unequal treaty, appears to be the most proper definition of the term "unequal treaty". (Fariborz Nazari, "Unequal Treaties in International Law", (Stockholm, 1971), P. 119-20).

Regarding the recognition of the term "Unequal Treaty" by the International Law Commission, Nazari States, "It should finally be pointed out that although the International Law Commission did not attempt to include, in its Draft Articles on the Law of Treaties, specific provisions according to which all unequal treaties could he dealt with, it must be Submitted that the inclusion of Articles 52 and 53 in the Convention on the Law of Treaties is of great importance in the development and recognition of the norm "Unequal Treaty". Although, not all kind of Unequal Treaties are covered by the rules concerning coercion of a state by the threat or use of force (Art. 52), as the extent of the application and definition of the term "threat or use of force" is not clear; It can be said that all treaties which eventually fall within the applications of this Article and Article 51 (coercion of representative of a state) are, *prima facie,* unequal treaties. But only some of the treaties falling within the application of the rules of jus cogens (Art. 53) can be considered as unequal treaties; for instance, treaties which infringe upon the independence of a state or the right to self-preservation of nations". (Nazari, *ibid.* P. 121)

It is to be submitted that there was nothing which could hinder India from rendering armed assistance at the request of a lawful Government of Kashmir for lawful purposes, without asking for her accession. Not rendering armed assistance without her accession to India, at a time when the State of Kashmir was going through a great crises, amounts to indirect

imposition of treaty. Thus, by taking advantage of the inferior bargaining power, India led him to enter into a treaty which the ruler may not have entered otherwise.

Regarding the effect of treaties which are against the *jus cogens* of International Law, Article 53 of the Vienna Convention reads:

> "A treaty is void if, at the time of its conclusion, it conflicts with a per-emptory norm of general International Law. For the purpose of the present Convention, a per-emptory norm of general International Law is a norm accepted and recognized by the International Community of States as a whole as norm from which no derogations are permitted and which can be modified only by a subsequent norm of general International "Law having the same character."

In his dissenting opinion, judge padillo Nervo observed in the Fisheries Jurisdiction case that:

> "A big power can use force and pressure against a small nation in many ways, even by a very fact of diplomatically insisting on having its view recognized and accepted. The Royal Navy did not need, to use armed force, its mere presence on the seas inside the fishery limits of the coastal state could be enough pressure. It is well known by professors, jurists and diplomates acquainted with International relations and foreign policies, that certain "Notes" delivered by the Government of a strong power to the Government of a small nation, may have the same purpose and the same effect as the use of threat or force.
> There are moral and political pressures which cannot be prove by the so-called documentary evidence, but which are in fact indisputably real and which have, in history, given rise to the treaties and conventions claimed to be freely concluded and subjected to the principle of pacta sunt servanda". International Court of Justice Reports 1973.

While discussing the Fisheries Jurisdiction Case. T.O. Elias stated that, "Note should also be taken of what the Court itself held in the main body of the judgment concerning the conditions subject to which a party can invoke the threat or use of force as a ground, of invalidity of a treaty. In commenting on a statement in a letter of May 29, 1972 which the Minister of Foreign Affairs of Iceland wrote to the Registrar, the Court, said:

> The 1961 Exchange of Notes took place under extremely difficult circumstances, when the British Royal Navy had been using force to oppose the 12-mile fishery limit established by the Icelandic Government in 1958. (I.C.J. Reports 1973)

That statement could be interpreted as a veiled charge of duress I purportedly rendering the Exchange of Notes void *ab initio,* and it was dealt fc with as such by the United Kingdom in its Memorial. There can be little doubt, as is implied in the Charter of the United Nations and recognized in Article 52 of the Vienna Convention on the Law of Treaties, that under contemporary International Law an agreement concluded under "the threat or use of force" is void (T.O. Elias, Loc Cit, PP. 175-76).

9. <u>Position Adopted by India.</u>

The Governor General of India accepted the Accession instrument in the following words:

"Your highness' letter dated 26 Oct. has been delivered to me by Mr. V.P. Menon. In the special circumstances mentioned by Your Highness my Government has decided to accept the accession of Kashmir State to the Dominion of India. In consistence with their policy that in the case of any state, where the issue of accession has been the subject of dispute, the question of accession should be decided in accordance with the wishes of the people of the state, it is my Government's wish that as soon as law and order have beeps restored in Kashmir and her soil cleared of the invader, the question of the Stale's accession should he settled fay a reference to the people".

Mr. Nehru, the Prime Minister of India, said in a broadcast on Nov. 2. 1947, that, "We are anxious not to finalize anything in a moment of crisis and without the fullest opportunity to be given to the people of Kashmir to have their say. It was for them ultimately to decide. And let me make it clear that it has been our policy ail along that where there is a dispute about, accession of a state to either Dominion, the accession must be made by the people of that state. It was m accordance with this policy that, we have added a proviso to the Instrument of Accession of Kashmir."

It must be recalled that, pursuant to the Accession Instrument the State of Kashmir surrendered only defence, foreign affairs and communications. She could not surrender residuary powers to India. The accession in the three surrendered subjects was also subject to confirmation by the people. This contention is supported by the fact that Article 370 of the Indian Constitution, which defined the status of the State of Jammu and Kashmir was a temporary clause.

It is, however, to be noted that the pledge of India to refer the matter to the public of the State for confirmation does not in any way legalize the Accession Instrument as such. The instrument is illegal due to the aforesaid reasons. However, it can be legalized by ratification by the general will of the people or a representative (legal) Government of the State of Jammu and Kashmir after revoking the Standstill Agreement.

10. Conclusion.

There is a great disagreement with regard to the sovereignty gained by the Princely States of India after the lapse of paramountcy. However, there is unanimity on the point that the States could accede, if they so desired, either to India or Pakistan. Two basic points of the accession were (i) will of the people (ii) contiguity of areas. However, it is regretted that no consideration was given to these two factors while acceding to India.

It has been sought to establish that the Ruler was not competent to enter into the Accession Agreement because the Ruler was in "flight" and the "Azad Government" was in *de facto* control of a large part of the State which exists even today. The very circumstances of the accession east great blur on it. And India, taking undue advantage of the inferior bargaining power, led the Ruler to accede to her. However, the accession vas accepted by India subject to the condition that the accession shall be confirmed, not to say tested, by a plebiscite. The plebiscite pledge once made by India, noted by Pakistan and the rest of the world, further confirmed in the resolutions of UNCIP became absolutely binding.