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THE UNITED NATIONS SECURITY COUNCIL RESOLUTIONS ON KASHMIR AND CHAPTER VII OF THE UNITED NATIONS CHARTER

BİRLEŞMİŞ MİLLETLER GÜVENLİK KONSEYİ KAŞMİR KARARLARI VE BİRLEŞMİŞ MİLLETLER SÖZLEŞMESİ'NİN VII. BÖLÜMÜ

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Abstract

The peaceful solution of the Kashmir Dispute occupies an important place in its relations of Turkey with India subject to the rule of law as enshrined in the United Nations Charter. The territorial dispute on Kashmir as a matter of fact is a dispute on the interpretation of the Indian Independence Act of 1947, originating from Article 73 of the United Nations` Charter. If the past United Nations Security Council's resolutions on Kashmir are proven to be adopted as binding under Chapter VII, the peaceful solution of the Kashmir dispute can be achievable. The United Nations Security Council resolutions on Kashmir are open ended. The subsequent development of international law in regard to decolonization, made the principle of self-determination on the interpretation of Article 73 of the United Nations Charter to be accepted as a peremptory norm with the relevant decisions of the International Court of Justice. Following the development of international law on self-determination as a peremptory norm, the United Nations Security Council resolutions on Kashmir have automatically moved from Chapter VI to Chapter VII of the United Nations Charter.

Keywords: UN, Decolonization, self-determination, Kashmir, Jammu

Özet

Keşmir İhtilafının barışçıl çözümü, Türkiye'nin Hindistan ile olan ilişkilerinde, Birleşmiş Milletler Sözleşmesi'nde yer alan hukukun üstünlüğü ilkesine bağlı olarak önemli bir yer tutmaktadır. Aslında Keşmir üzerindeki toprak anlaşmazlığı, Birleşmiş Milletler Şartı'nın 73. Maddesinden kaynaklanan 1947 tarihli Hindistan Bağımsızlık Yasası'nın yorumlanmasıyla ilgili bir anlaşmazlıktır. Birleşmiş Milletler Güvenlik Konseyi'nin geçmişteki Keşmir kararlarının Bölüm VII kapsamında bağlayıcı olarak kabul edildiği kanıtlanırsa, Keşmir anlaşmazlığının barışçıl çözümü ulaşılabilir olabilir.

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Birleşmiş Milletler Güvenlik Konseyi'nin Keşmir ile ilgili kararları açık uçludur. Uluslararası hukukun dekolonizasyonla ilgili olarak daha sonra gelişmesi, Birleşmiş Milletler Sözleşmesi'nin 73. maddesinin yorumlanmasında kendi kaderini tayin etme ilkesinin Uluslararası Adalet Divanı'nın ilgili karar0larıyla kesin bir norm olarak kabul edilmesini sağlamıştır. Kendi kaderini tayin hakkına ilişkin uluslararası hukukun zorunlu bir norm olarak gelişmesinin ardından, Birleşmiş Milletler Güvenlik Konseyi'nin Keşmir hakkındaki kararları otomatik olarak Birleşmiş Milletler Sözleşmesi'nin VI. Bölümünden VII. Bölümüne geçmiştir.

Anahtar Kelimeler: BM, Dekolonizasyon, kendi kaderini tayin hakki, Kaşhmir, Jammu

INTRODUCTION

On July 4th, 1947 the Indian Independence Act (II A) was introduced in the British Parliament and was passed The Act formulated on 18 July, made provision for the Partition of the sub-continent into two sovereign states. Pakistan celebrated Independence on 14 August 1947, and India on 15 August. Thus came to an end, the more than 200 years of colonial rule in the subcontinent. The provinces which were formerly administered directly by the British are attached to one or other of these two states, depending on whether the majority of the population is Hindu or Muslim. The princely states are free to decide whether they belong to Pakistan or India. (UKGPA, 2021) Section 7 of the 1947 Act declared that as of 15 August 1947 "the suzerainty of His Majesty over the Indian States lapses." The amended Government of India Act of 1935 provided in Section 6 that "a princely Indian state shall be deemed to have acceded to either of the dominion on the acceptance of the Instrument of Accession (IOA) executed by the Ruler thereof." (Hingorani, 2007, p.7)

During colonial rule, Kashmir was governed by the princely state of Jammu and Kashmir, an amalgam of five areas governed by a Hindu maharajah Hari Singh. The intention of the Maharaja of Kashmir to remain independent became obvious when he sought to enter into the Standstill Agreements with both India and Pakistan, in accordance with the IIA 1947. The Maharaja sent identical telegrams to both the dominions on 12 August 1947.The text is as follows:

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

In the reply from the Pakistan Government dated August 15th 1947, it was stated that:

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

In the reply from Government of India, it is written that:

> "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 India dominion. Early action desirable to maintain intact existing agreements and administrative arrangements." (EFSAS, 2021)

On 24 October, the rebels in Poonch declared independence as Azad Kashmir and the Pathans advanced to within 30 miles of Srinagar. They met with little resistance from the Jammu and Kashmir State forces, many of whom were Muslims from Poonch who changed sides. However, the Kashmiri Muslims did not rise in support of the invaders - at least in part because of the gross misbehavior of the Pathans in Baramulla, which they treated as a conquered rather than a liberated town. On the same day, the Maharaja asked for Indian military assistance. The Indian Government insisted on the Maharaja signing the IOA before sending help. The Maharaja signed the IOA on 26 October 1947. (ICJ, 1995, p.12-13) In the aftermath, the first India-Pakistan war broke out over Jammu and Kashmir.

Since the Maharaja of Jammu and Kashmir did execute IOA in favour of India in 1947, India considers all questions relating to Kashmir, including to hold a referendum or plebiscite in the state to decide its future, as falling within its domestic jurisdiction.1 The eventual stand taken by India before the United Nations Security Council (UNSC) for the Kashmir dispute is that following the princely British Indian state of Jammu and Kashmir's accession to the Dominion of India, India's commitment to hold the plebiscite to decide the state's future – after peace was to be restored. According to India, such commitment does not constitute an "international obligation" but is merely an "engagement" that falls within the domestic jurisdiction of India. Any question regarding that princely Indian state, having acceded to the dominion of India, should logically fall within the domestic jurisdiction of India and be excluded from discussion at the UN or other international fora. (Hingorani, 2007, p.10)

On 5 August 2019, the Government of India revoked the special status granted to Jammu and Kashmir by Article 370 of its Constitution. Article 370 allows Jammu and Kashmir to have its own constitution, a separate flag and independence over all matters except foreign affairs, defence and communications. The legality of the revocation of Article 370 of the Indian Consitution depends on the question that wheter the UNSC resolutions are binding or not or in other words if thez are under Chapter VII of the UN Charter or not.

1. KASHMIR IN THE UNITED NATIONS SECURITY COUNCIL

The Kashmir question made its initial appearance on the Security Council agenda on 6 January 1948. The first UN debate on Kashmir started under the rubric of "Kashmir Question" but afterwards the UN shifted form "Kashmir Question" to "India-Pakistan Dispute". India approached the UNSC to lodge a complaint, pursuant to Article 35 under the UN Charter, invoking the UNSC's dispute resolution capacity. Within two weeks, Pakistan filed a response and counterclaim, pursuant to Article 35 of the UN Charter, and framed the situation in a fundamentally different way. (UN Doc. S/646, 1948)

First, Pakistan denied the charge of directly giving aid and assistance to the tribesmen, claiming that they were actors independent from the Pakistani government. Second, Pakistan broadened the focus of the dispute by raising a litany of objections. One of these objections was to the validity of Kashmir's accession to India. Pakistan claimed that the accession had occurred by "fraud and violence" and alleged conspiracy between India and Hari Singh. Pakistan argued that any arrangement between India and Hari Singh was illegitimate. Any decision about Kashmir's legal status should thus be made in reference to the Kashmiri people's will through a plebiscite. (Subbiah, 2021)

The UNSC took action after receiving these letters from India and Pakistan, in accordance with Article 34 of its Charter. It passed Resolutions 38 and 39, which were its first statements on the dispute. Resolution 39 created the UN Commission for India and Pakistan (UNCIP) on January 20, 1948. In its established function, UNCIP was tasked with (1) investigating the facts that led to the Kashmir dispute, and (2) exercising any mediation influence likely to smooth away difficulties, implementing UNSC directions, and reporting progress on the implementation of those directions and advice. Resolution 47 was passed by the UNSC in April 1948 and outlines the framework for recommending a permanent solution. Demilitarization and a plebiscite constituted a two-pronged recommendation in Resolution 47.

In 23 years' time, the UNSC had 18 resolutions on Jammu and Kashmir. Last resolution of the UNSC on Kashmir, resolution 307 was adopted on 21 December 1971 after the third Pakistan-India war of 1971.

The UNSC selected diplomacy and mediation under Chapter VI of the UN Charter as a method for resolving the issue of the accession of Kashmir to either India or Pakistan, stating that the question should be decided democratically during a free and impartial plebiscite. In fact, the UNSC appointed both India and Pakistan as administrative States subject to Article 73 of the UN till the realization of the free and impartial plebiscite. By asking a plebiscite, the UNSC in fact defined Kashmir as an unfinished decolonization case and Indian and Pakistan

agreed to be the administrative states until a plebiscite was realized by not opposing UNSC resolutions on Kashmir.

2. DECOLONIZATION AS AN *ERGA OMNES* NORM

The recent International Court of Justice (ICJ) Advisory Opinion concerning the decolonization of Chagos Islands has defined at the end of the opinion, in paragraph 180 the *erga omnes* character of the obligation to respect self-determination subject to the interpretation of Article 73 of the UN Charter. The ICJ finds that there exists an obligation, binding on all states, to cooperate with the UN to complete the decolonisation of Mauritius in paragraph 180:

> "Since respect for the right to self-determination is an obligation *erga omnes*, all States have a legal interest in protecting that right […]. The Court considers that, while it is for the General Assembly to pronounce on the modalities required to ensure the completion of the decolonization of Mauritius, all Member States must co-operate with the United Nations to put those modalities into effect. As recalled in the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations:
>
> "Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle" […].' (emphasis added)."

In paragraph 182, the ICJ stated that:

> "The Court concludes that the United Kingdom has an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible, and that all Member States must co-operate with the UN to complete the decolonization of Mauritius."

By mentioning an *erga omnes* obligation, the ICJ had made a radical approach from its past advisory opinions that is the concept of the jurisdiction of the ICJ is based on the consent of the parties in the cases. It is one of the principles which formed the foundation of both the Statute of the Permanent International Court of Justice and the Statute of the ICJ at a time when the concepts of *erga omnes* obligations and peremptory norms were unknown.

While rights and obligations go hand in hand, it is *obligations* that have *erga omnes* character, not rights. It does not make sense to speak of rights *erga omnes* in this context. To say that a right has *erga omnes* character or is "opposable towards all" is simply a description of the scope of application of the right. For example, the right of a coastal state to enact certain legislation in relation to its Exclusive Economic Zone is opposable towards all other states. In this sense it a right *erga omnes*. But many rights have this kind of structure – this does not make them special. If a state fails to respect these rights of a coastal state, this does not generate a procedural right of standing on the part of all states to invoke responsibility on that basis. An obligation *erga omnes*, is one that is owed to the international community as a whole. The legal effect of such a characterisation is the generation of a procedural right of standing, on the part of all states, to invoke the responsibility of a state that is in breach of this obligation. The *erga omnes* character of a given obligation may indeed be dependent upon 'the importance of the rights involved'. Each of these rights may entail a number of different obligations, from the obligation to respect that right to the obligation to promote or protect it. Some of these obligations may be opposable *erga omnes* some may not be. In any case, the concept of *erga omnes* attaches to the obligation, not the right. There is therefore an important distinction between and obligation *erga omnes* and its corresponding right(s). By referring to the obligation *erga omnes* to respect the right to self-determination, the Court in *Chagos* provided a welcome clarification on this point. (EJIL, 2021)

But most importantly before giving the definition the *erga omnes* character of the obligation to respect self-determination subject to the interpretation of Article 73 of the UN Charter in paragraph 180, the ICJ in paragraph 175, informed that the text is drafted in the present tense, on the basis of the international law applicable at the time its opinion is given.

3. THE CONCEPT OF CONTEST FOR THE ADVISORY OPINIONS OF THE INTERNATIONAL COURT OF JUSTICE

The advisory opinions of the ICJ is accepted to be subject to the consent of the States. The consent principle negate the ICJ's jurisdiction in cases involving possible breaches of obligations towards the international community as a whole, arising from an *erga omnes* obligation. The ICJ has been clear in issuing its positive response to this question on East Timor, a specific case that affected the right of peoples to self-determination and was the subject of an action brought by Portugal against Australia, relating to Indonesia's conduct, which had not accepted the Court's jurisdiction: (Pigrau, 2018, p.135)

> "The Court recalls in this respect that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its

> jurisdiction. This principle was reaffirmed in the Judgment given by the Court in the case concerning Monetary Gold Removed from Rome in 1943 and confirmed in several of its subsequent decisions". (ICJ, 1995, para.26.)

In relation to the *erga omnes* obligations:

> "Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes"* (ICJ, 1995, para.29.)

And, concerning *jus cogens* norms:

> "The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, [...] cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties". (ICJ, 2006, para.64.)

According to the ICJ this criterion "does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation". (ICJ, 2012, para.93) In the operative part of its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ first stated the obligation incumbent upon Israel to cease forthwith the works of the construction of the wall and, "[g]iven the character and the importance of the rights and obligations involved", the obligation for all States "not to recognize the illegal situation resulting from the construction of the wall … [and] not to render aid or assistance in maintaining the situation created by such construction". The ICJ then added:

> "The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime, taking due account of the present Advisory Opinion."

4. THE UNITED NATIONS SECURITY COUNCIL AND *ERGA OMNES*

International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties." (ICJ, 1980, para. 73) The UNSC is a creature of the UN Charter, upon which sovereign

states agree to confer some of their powers for the purpose of maintaining international peace and security most notably under Chapter VII of the UN Charter, and its decisions are binding on UN members. The UN members agreed that when acting the UNSC "acts on their behalf ". The member states also agreed to "accept and carry out the decisions of the UNSC", an obligation that, in combination with Article 103 of the UN Charter, makes decisions of the Council binding on member states even if they are inconsistent with other treaty obligations. These broad powers give the UNSC something of a supreme position in international law, given their unparalleled nature and their potential to bind even non-member states. (Whittle, 2015, p.674)The crucial issue is whether the political decision-making of the UNSC is free of legal constraints. The ICJ clarified that the political character of an organ does not exempt it from the observance of legal provisions which constitute limitations on its powers or criteria for its judgment. (Cannizaro & Palchetti 1996) Judge Jennings clearly affirmed in Lockerbie that: (Orakhelashvili, 2015, p.674)

> "All discretionary powers of lawful decision-making are necessarily derived from the law, and are therefore governed and qualified by the law. This must be so if only because the sole authority of such decisions flows itself from the law. It is not logically possible to claim to represent the power and authority of the law, and at the same time, claim to be above the law."

Article 24 (2) of the UN Charter is the starting point of much analysis of restraints on the UNSC. These restraints usually attempt to ascertain what legal rules apply to the UNSC and then to determine how the validity of UNSC conduct could be adjudicated in light of those rules. For example, David Schweigman reads Article 24 (2) as requiring compliance with norms such as human rights, self-determination and the principle of good faith. Similarly, Erika de Wet recognizes the UNSC's broad powers but argues that it is still bound by *jus cogens* and the purposes and principles of the UN. While there can be little doubt that the UN Charter itself creates a bare framework of the limits of UNSC action, it also delivers "scant clarity concerning the specific contours of those limits". The UN Charter's text is notoriously vague, making it difficult to use it to construct a meaningful regime to constrain the UNSC. The other main avenue to ground legal limits to UNSC action is J*us cogens*. As Alexander Orakhelashvili has argued, as states can never derogate from the peremptory norms of international law, this limitation must also carry over to institutions created by states. Thus, it is argued, all international organizations are limited by *Jus cogens* norms such as the prohibition on the use of force and certain fundamental universal rights. While, again, it seems clear that the UNSC cannot act contrary to *jus cogens*, ascertaining which norms fall within this rarefied category is difficult. Even if a hard core of peremptory norms were established, the extent of such a legal regime would be limited or at least contested. (Cannizaro & Palchetti 1996) Since

the right to self-determination, is a *jus cogens* norm, and since the ICJ has clearly referred to it as an *erga omnes* obligation, by drawing an analogy with the other *erga omnes* obligations in the Barcelona Traction case deriving from *jus cogens* norms, it is safe to regard the obligation to respect the right to self-determination as an *erga omnes* obligation. (Hossein & Hojatzadeh, 2015, p.202)

Obligations *erga omnes* are different from Article 103 of the UN Charter and *jus cogens*. Whereas the latter are distinguished by their normative power—their ability to override a conflicting norm—obligations *erga omnes* designate the scope of application of the relevant law and the procedural consequences that follow from this. A norm that is creative of obligations *erga omnes* is owed to the "international community as a whole," and all states, irrespective of their particular interest in the matter, are entitled to invoke state responsibility in case of a breach. (ILC, 2006, p.193) The UNSC resolution with a mentioned *erga omnes* obligation language cannot be exhotary but binding. If the UNSC resolutions deal with an *erga omnes* obligation, they are automatically accepted to be binding under Chapter VII of the UN Charter. By ratifying the UN Charter, the members states of the UN accepted to be bound by the UNSC resolutions adopted under Chapter VII of the UN Charter.

5. CONCLUSION

The UN Charter Article 2.7 is the Charter's reference to sovereignty. The UN Charter Article 2.7, shifts the focus from the analytical and normative to the empirical. It provides a short overview of continuing problems in exploring the nature of sovereignty. It stipulates that nothing in the Charter authorize the UN to intervene in matters, which are "essentially within the domestic jurisdiction of any State. (Winston P. Nagan-Aitza M. Haddad, 2012, p.462) In its Advisory Opinion on the Tunis and Morocco Nationality Decrees of 1923, the Permanent Court of International Justice (PCIJ) on citizenship stated that whether a certain matter is or is not solely within the domestic jurisdiction of a State is an essentially relative question; it depends on the development of international relations of the State. The PCIJ said that while nationality issues were, in principle, within domestic jurisdiction, States must, nonetheless, honour their obligations to other States as governed by the rules of international law. One of the basic principles governing the creation and performance of international legal obligations for the States, whatever their source, is the principle of good faith.

The UN was formally introduced to the Kashmir problem on 30 December 1947 when the Government of India announced its decision to bring the dispute before the UNSC under Article 35 of the UN Charter. Article 24 of the UN Charter defines functions and powers of the UNSC. Article 24.1 mentions the primary responsibility for the UNSC for the maintenance of international peace and security whereas Article 24.2 articulates the responsibility of the UNSC to act in

accordance with the Purposes and Principles of the UN Charter to achieve the duties. Accordance with article 25 of the Charter which obligent members of the UN to accept and carry out the decisions of the UNSC adopted under Chapter VII of the UN Charter.

The ICJ, asked for the non-recognition of the unlawful decolonization of Chagos in its advisory opinion. The ICJ refers to cooperation as an obligation from a self-standing rule of customary international law of non-recognition. In referring to the obligation to cooperate, by giving reference to the UN Generals Assembly resolution 2625, the ICJ asking not to recognize as lawful the situation created from the member States. As recalled resolution 2625, the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the UN, it is specified that :

> "Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle"

Recognition and non-recognition possess a central importance in the international system as a significant part of its reaction to the consequences of acts, which violate established standards of international law. The principle *ex-injuria jus non oritur* is one of the fundamental maxims of jurisprudence. An illegality cannot, as a rule, become a source of the legal right to the wrongdoer. In the Namibia advisory opinion of 1971, the ICJ held that the presence of South Africa in Namibia was illegal and that States Members of the UN were under an obligation to refrain from any act and in particular any dealings with the Government of South Africa implying the recognition of the legality of South Africa's presence and administration.

In its Articles on ARSIWA, the ILC has extended the obligation "not to recognize as lawful" beyond aggression and the illegal use of force to all situations created by a serious breach of a jus cogens obligation. While there is some State practice with regard to the non-recognition of situations created by a serious breach of the right of self-determination of peoples and the prohibition of racial discrimination (viz. the prohibition of apartheid), there is virtually no such practice to support a duty of non-recognition with regard to situations created by serious breaches of other jus cogens norms such as the prohibitions of slavery and the slave trade, genocide, torture and other cruel, inhuman or degrading treatment, crimes against humanity, or the basic rules of international humanitarian law.

The ICJ in its advisory opinion on Namibia specified that:

> "The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council". (ICJ, 1971, para.53)

The obligation of non-recognition by the UNSC for a breach of an *erga omnes* obligation as defined by the juridical organ of the UN, means all its resolutions related with an *erga omnes* obligation should be considered and accepted to be adopted under Chapter VII of the UN Charter. According to the ICJ, the *erga omnes* obligation is to be applied to all cases of unfinished decolonization when it reports that it has given its advisory opinion on Chagos in accordance with the applicable international law at the time it gave its opinion.

The UNSC resolutions on Kashmir dispute are still valid as of today as they were adopted open-ended. The UNSC resolutions on Kashmir, when they were adopted, were not recognized under Chapter VII of the UN Charter, however, with today's development of peremptory norms of *erga omnes* and *jus cogen* on the interpretation of Article 73 of the UN Charter, the resolutions of Kashmir of the UNSC fall within the scope of under Chapter VII of the UN Charter.

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