

# INDIA'S BOUNDARY AND TERRITORIAL DISPUTES

SURYA P. SHARMA



VIKAS PUBLICATIONS

DELHI \* BOMBAY \* BANGALORE

KANPUR \* LONDON

*To*

*Dr. Nagendra Singh, I.C.S.  
(Secretary, President of India; Member,  
International Law Commission)*

# VIKAS PUBLICATIONS

5 DARYAGANJ, ANSARI ROAD, DELHI-6

SAVOY CHAMBERS, 5 WALLACE STREET, BOMBAY-1

10 FIRST MAIN ROAD, GANDHI NAGAR, BANGALORE-9

80 CANNING ROAD, KANPUR

64 LADBROKE GROVE, LONDON W11, ENGLAND

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SBN 7069 0088 x

PRINTED IN INDIA

AT NEW INDIA PRESS, CONNAUGHT CIRCUS, NEW DELHI, AND  
PUBLISHED BY MRS SHARDA CHAWLA, VIKAS PUBLICATIONS,  
5 DARYAGANJ, ANSARI ROAD, DELHI-6

## PREFACE

Boundaries and territories are important in determining the bases of a state's power in relation to other states. Recognizing this fact, International Law prescribes various rules and policies designed to protect states in their territorial integrity and independence of decision.

Boundary and territorial questions are part of a larger question of territorial sovereignty. Both classes of disputes refer to comparable sets of claims and counter-claims and legal policies. The object of this study is to present, analyze and evaluate, in terms of principles of International Law, claims and counter-claims involved in boundary and territorial disputes in which the parties are India on the one side and its neighbouring state or states on the other.

I am indebted to the American Society of International Law and the Philippine Society of International Law for permission to make use of the material in the first two chapters, previously published in their journals.

Varanasi  
September 6, 1971.

Surya P. Sharma





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## C H A P T E R I

# THE SINO-INDIAN DISPUTE— CLAIMS CONCERNING LOCATION OF THE BOUNDARY

INTERNATIONAL LAW recognizes that boundaries are fundamental to the bases of national power and therefore projects various prescriptions for their protection as the demarcation lines of territorial integrity and exclusive control. By far the most important principle is that prohibiting the use of coercion in reshaping boundaries.<sup>1</sup> This principle assumes, however, the effective application of other principles or norms for establishing and identifying boundaries.<sup>2</sup> Fundamental general community policies require that states do not employ coercion in the settlement of boundary disputes, but rather make positive efforts to honour reasonable demands and expectations of other states concerning their political independence and territorial sovereignty.<sup>3</sup> Effective implementation of these policies can be achieved only when states refrain from unilateral imposition of territorial claims upon other states and assert their freedom of decision in a way not to interfere with the comparable freedom of others. The Sino-Indian border dispute, manifesting the effects of the violation of these basic principles and policies, illustrates their importance.

The dispute between China and India is set in an arena of vast proportions. China and India have some 2,500 miles of common frontier extending from northwest Kashmir to the tripartite junction of India, Burma and

China near Talu Pass. At three main areas along this frontier the two governments have advanced conflicting claims to approximately 50,000 square miles of territory.† (The most important area, in terms of geographic resource base and peoples located there, is on the south-east border of Tibet, known generally as the North East Frontier Agency or NEFA. In the NEFA, India claims that the border is the McMahon Line, which runs some 700 miles along a mountain range between Tibet and northeast India from the eastern border of Bhutan to the point near Talu Pass. The McMahon Line follows the northern watershed of the Brahmaputra River, which is variously described as the crest of the Himalayas, and if not the Himalayan range, then the highest range in the area. China claims nearly 33,000 square miles south of the McMahon Line. For purposes of clarity, this area will be referred to as the Eastern Sector.)

The second area of dispute lies roughly north of the Indian city of Darjeeling and involves specific border passes and certain specific places along the Tibetan and Indian frontier. Two Indian protectorates are directly affected: Sikkim and Bhutan. According to the Indian description, the boundary in this sector throughout lies "along the main watershed in the region between the Spiti River and the Pare Chu, between the tributaries of the Sutlej and between the Ganges and the Sutlej basins."<sup>5</sup> The Chinese claims in this area are limited to specific border passes and certain individual places, all of which at present fall south of the boundary described by India.<sup>6</sup> However, propaganda organs in Tibet, as well as the declarations of various Chinese officials there, suggest that Chinese territorial ambitions include all of Sikkim and Bhutan.<sup>7</sup> This disputed area will be described hereafter as the Central Sector.

Finally, large areas in the Jammu and Kashmir section of India are disputed. Conflicting territorial claims involve large pieces of India's remote northern province of Ladakh in the Himalayas. Approximately 15,000 square

miles are subject to conflicting claims. This section of the boundary is nearly 1,100 miles long. About two-thirds of the boundary divides Ladakh and Tibet; the remainder serves as a boundary between Kashmir and Sinkiang, China. The specific delimitation descriptions advanced by India in this sector are too elaborate to record in full here.<sup>8</sup> It will suffice to state that they follow watersheds throughout, the majority of which are geographically well defined. Chinese claims are extensive in this area, particularly in the most northern and remote sectors of the border.<sup>9</sup> This area will be called the Western Sector.

Beginning slowly, the boundary dispute had later unfolded with dramatic rapidity.<sup>10</sup> Between 1954 and 1959, incidents of increasing seriousness occurred along the frontier. These incidents had, however, little real effect upon continuing Sino-Indian friendly relations. The Indian Government wishfully believed that through negotiations and conciliation it could come to a peaceful settlement with China. This belief was encouraged by the Chinese, who gave no indication of the territorial claims that they were soon to assert. Even in 1954 the Governments of India and China negotiated an agreement on Tibet based on the India-China "co-existence" legend. At that time all outstanding problems between them were fully considered, and yet China remained quiet on the currently asserted claims to 50,000 square miles of Indian territory. The Chinese during these five years contented themselves with a certain amount of border activity, probing here and there and occasionally publishing maps tentatively showing claims far into territory south of what India considered to be the border. When confronted with these maps the Chinese Government would shrug them off as being merely obsolete copies of older maps which they did not have the time to revise.<sup>11</sup>

The seriousness of the dispute, which neither government would at first admit, finally came out into the open on the heels of the Chinese capture of Tibet in March.

1959. Borders that had been shown on Chinese maps—maps which the Chinese had implied were due for revision—suddenly found their way into direct and extensive Chinese claims. The continuing border incidents suddenly took on a new seriousness, culminating on 20 October 1962, in a massive military invasion of India's northern frontier, from Ladakh in the west to the NEFA in the east. The fighting was suspended after the Chinese announced a unilateral cease-fire on 21 November 1962.<sup>12</sup>

The claims and counter-claims of the parties in this dispute may be categorized as of six main types: (1) claims relating to agreements; (2) claims regarding historic possession; (3) claims concerning acquiescence and estoppel; (4) claims based upon physical or geographic conditions; (5) claims involving *rebus sic stantibus* or change of conditions; and, finally, (6) claims concerning change of government.

#### CLAIMS RELATING TO AGREEMENTS

An explicit international agreement would appear to afford the most persuasive proof for establishing the existence and location of a boundary. The underlying policy relating to the honouring of agreements demands that the genuinely shared expectations of the parties to the boundary agreement be protected. The Indian Government asserts that most of the traditional boundaries of India have the sanction of specific international agreements.<sup>13</sup> It claims that the Simla Convention of 1914 delimited the traditional boundary in the Eastern Sector and the resulting so-called McMahon Line was unequivocally reaffirmed by the Chinese Premier Chou En-lai during his talks with Nehru in 1956.<sup>14</sup> The 1954 Sino-Indian Agreement is cited as declarative of the established Central Sector boundary location. Several agreements are invoked to support India's placement of the Sikkim and Bhutan boundaries. The 1684 and 1842 treaties are cited in support of Indian boundary claims in the

Western Sector.<sup>15</sup> The Indian Government has declared that it is prepared to negotiate in regard to the location of specific places on the boundary.<sup>16</sup> China, on the other hand, insists that no valid boundary treaties or agreements exist between India and the People's Republic and demands that the two governments negotiate and reach a new agreement on all boundary locations.<sup>17</sup> The validity under international law of the agreements invoked by India becomes accordingly of crucial importance.

### *Eastern Sector*

The governments of India, China, and Tibet participated in the famous Simla Conference delimiting the boundaries between India and Tibet.<sup>18</sup> The Conference lasted from October 1913 to July 1914. The celebrated McMahon Line was a product of the Simla Conference. On 27 April 1914, a Convention and attached map were initialled by the three plenipotentiaries. The map closely defines the frontiers between Tibet and India on the basis of the McMahon demarcation. The map shows that the line follows the Himalayan crest from the northeast corner of Bhutan across the Brahmaputra near the "big loop" to a pass called Isurazi in the northern corner of Burma.<sup>19</sup> On the basis of this Agreement, the Indian Government claims the McMahon Line as the valid boundary between India and China.<sup>20</sup>

For various reasons, the Chinese Government has declared the Simla Agreement void and the ensuing McMahon Line invalid.<sup>21</sup> China raises the question whether Tibet was an independent member of the community of nations in 1914 and had the legal capacity to enter into the Simla Agreement.

What constitutes a state under international law must inevitably be somewhat flexible.<sup>22</sup> Through a progression of past declarations and multipartite agreements, a rather unsatisfactory set of criteria for statehood has evolved. By these criteria, a state is commonly said to



require a people, territory, government and independence. Whether Tibet met these criteria must depend upon the genuine expectations of others at the relevant time.

Let us review the status of Tibet at the time of the Simla Conference.<sup>23</sup> Tibet had enjoyed, for many decades, the freedom to make agreements with other peoples.<sup>24</sup> Intermittently, for centuries, Tibet had been overrun and had then witnessed the withdrawal of Chinese forces. Yet Tibet enjoyed, during the times of its relative independence, freedom to conduct foreign relations. The year 1914 saw Tibet once again exercising control over its foreign affairs, a control that it was not to lose for a long time to come.<sup>25</sup> In terms of contemporaneous expectations—the most crucial factor in determining whether an entity is a state—Tibet was, indeed, a state, recognized as such by China itself. The Chinese argument that Tibet concluded the treaty “without authorization and consent of the Chinese Central Government” is, therefore, not persuasive.

Furthermore, contemporary international law does not exclude the possibility that a community may have competence to make agreements, even if it does not possess all ingredients of statehood.<sup>26</sup> In the light of genuine expectations of other parties at the time of the Simla Conference about Tibet's claims of statehood, and of the assessment of the past experience of Tibet in the field of treaty-making independently of China, the fact that Great Britain acknowledged China's suzerainty over Tibet should not decisively affect the competence of Tibet in 1914 to conclude the Simla Agreement.<sup>27</sup> Chinese suzerainty over Tibet has been described “as a constitutional fiction, a political affection” which had only to be maintained because of its convenience to both parties, China and Britain.<sup>28</sup> But it was not in conformity with the *de facto* situation, to wit, existence of effective competence of Tibet to conduct internal and external relations. Thus Professor Alexandrowicz has

suggested that "as there was discrepancy between *de facto* arrangements and legal title, the first, which after all matters most, calls for legal formulation by international lawyers who are entitled to disregard a meaningless term repeated in textbooks of International Law without any factual basis."<sup>29</sup>

The Chinese People's Republic also argues that the Chinese Government of 1913-1914 was not a signatory to the Simla Convention, and in any case did not ratify it. China's participation in the negotiation of the treaty is beyond dispute.<sup>30</sup> The treaty by its terms did not require ratification in the sense of a formal final utterance, but specified only that "the present Convention will take effect from the date of signature,"<sup>31</sup> and the whole course of subsequent conduct by China in factual acceptance (following the initialling of the treaty instrument<sup>32</sup> and, indeed, the attached map of 27 April 1914) of the particular delimitation of the boundary between Tibet and India would appear, in any objective appraisal of the shared expectations of the parties, to make the lack of signature purely academic. Commitment to an agreement may be indicated by co-operative activity as well as by ceremonial formalities.

The criteria for establishing commitment to an agreement under contemporary international law are, indeed, most flexible.<sup>33</sup> The most realistic conception of final commitment is that it occurs when the parties create in each other shared expectations of mutual obligation. What is important is an indication to the other party that a final commitment has been made. This indication can be made with pomp and ceremony as in a public formal ratification, or by a course of conduct which reflects the acceptance of commitment. It is well known that even oral agreements, or agreements inferred from a course of conduct, may be just as valid as the most formally ratified written agreements. The conduct of China until the recent dispute arose, establishes Chinese approval of the continuing validity of the McMahon Line and the

Simla Convention on that subject. <sup>34</sup>

Moreover, the fact is that at one point only, and at a presently irrelevant point, did the original negotiations about delimitation between the three governments break down. The breakdown was due to a lack of agreement over the frontier to be established between China and Tibet, not that between Tibet and India. <sup>35</sup> By 6 June 1914, the British Minister at Peking informed the Chinese that Great Britain and Tibet regarded the Convention as already concluded by the act of initialling, and in default of subsequent Chinese adherence to their border with Tibet, the Tibetans and British would sign the treaty independently. <sup>36</sup> Regarding their mutual border, Tibet and Britain formally signed the Convention on 3 July 1914. <sup>37</sup> This procedure was felt necessary only because of Chinese intransigence concerning the Tibetan-Chinese border. In view of the clear competence of both Tibet and Great Britain, this is the only agreement needed to confirm the validity of the particular boundary in question.

Finally, with regard to the Simla Conference, China attempts to establish that the McMahon Line is just another example of British imperialism. Britain, it is claimed, applied duress upon the other signatories. <sup>38</sup> The Chinese argument is built upon the premise that China's consent was necessary to the Tibetan-Indian boundary decisions, but if this premise is unacceptable, any duress applied against the Chinese would have no bearing on the Tibetan-Indian border issue. Let us then explore whether duress was applied against the Tibetans.

The Simla Conference required six months to reach an agreement. The McMahon Line, drawn only after a full and rather exhaustive negotiation, was subsequently confirmed by a formal exchange of letters. A message from the Tibetan representative to the British reads:

As it was feared that there might be friction in future unless the boundary between India and Tibet is clearly defined, I submitted the map . . . to the Tibetan

Government at Lhasa for orders. I have now received orders from Lhasa, and I accordingly agree to the Boundary. . . .<sup>39</sup>

Clearly this deliberate statement of agreement, based on explicit authorization from his home government, shows that the British did not apply pressure upon the Tibetan representative.

Historically, apart from obligation flowing from anti-war agreements, duress against a state has not been regarded as invalidating a treaty, only duress against the negotiator.<sup>40</sup> *A fortiori* a state claiming duress as a defence in attempting to void an international agreement cannot, in deprivation of others, be a judge in its own case.<sup>41</sup>

Finally, one more aspect of the claims about the McMahon Line may be considered. During the course of a visit by Prime Minister Chou En-lai to India in 1956, after detailed discussions between the two Prime Ministers, Nehru wrote this in the Minutes composed immediately after the talks:

Premier Chou referred to the McMahon Line and again said that he had never heard of this before though of course the then Chinese Government had dealt with this matter and not accepted this line. He had gone into this matter in connection with the border dispute with Burma. Although he thought that this line, established by British Imperialists, was not fair, nevertheless, because it was an accomplished fact and because of the friendly relations which existed between China and the countries concerned, namely, India and Burma, the Chinese Government were of the opinion that they should give recognition to this McMahon Line. . . .<sup>42</sup>

International law recognizes such oral agreements as being binding and valid.<sup>43</sup> Even less precise and less

categorical oral declarations than the one made by Prime Minister Chou En-lai in the current case, have been held to be binding agreements. For instance, in the *Eastern Greenland Case*, an oral declaration made by the Minister of Foreign Affairs of Norway was considered by the Permanent Court of International Justice as binding upon the Minister's country.<sup>44</sup> Chou En-lai's declaration accepting the McMahon Line is not only analogous to the one made by the Minister of Norway in the *Eastern Greenland Case*, but it is more authoritative and hence more persuasive, because it is a communication of commitment deliberately flowing from one Head of State to another. There are very strong reasons, it may be emphasized, for concluding that the declaration of Prime Minister Chou En-lai represents a categorical acceptance by China of the McMahon Line and such acceptance, supported by a Minute, constitutes an agreement between India and China on the subject.

### *Central Sector*

The dispute in the Central Sector revolves around the status of a number of mountain passes and other individual and relatively small areas. The Indian Government bases its claims on an agreement concluded with China in 1954.<sup>45</sup> In Article IV of the Agreement, six mountain passes are enumerated as being open to the nationals of both countries. The Chinese claim that the 1954 Sino-Indian Treaty was purely a bilateral trade agreement and as such was devoted to commercial relations only.<sup>46</sup> There was not at any time an attempt by either party to limit the conversations solely to trade and commercial relations. A joint communique issued by the two signatories, dated 29 April 1954, clearly states the intended scope of the negotiations: "both parties discussed fully questions existing in the relations between China and India on the Tibet region of China. . . ."<sup>47</sup>

Specifically, the problem of border passes became the

substance of Article IV. The negotiations over Article IV merit some elaboration here. The original Chinese draft on the border passes stated that the Chinese Government agreed to open them. Mr Kaul, representing India, immediately challenged this statement declaring that the six passes were, after all, Indian. Obviously who owned the passes was in issue. After some further discussion it was agreed that the passes were border passes. By tradition, then, they were to be thrown open to the nationals of both countries. India was content to support this outcome and the Chinese described this as the fifth concession on their part.<sup>48</sup>

From a community perspective, this effort to achieve the closest possible approximation to the actual shared expectation of the parties reveals two significant outcomes. First, China clearly regarded the passes under discussion as border passes, and borders were discussed in 1954.<sup>49</sup> Secondly, the mere term "border" passes is such a clear admission of where the borders were agreed to be, that any areas lying south of the "border passes" must necessarily have been beyond China's territorial claims.<sup>50</sup>

Regarding Sikkim and Bhutan, in April 1960, Premier Chou En-lai seems to have recognized India's authority to conduct their foreign relations. Later, the Chinese Government changed this position, and tried to deal with the protectorates separately.<sup>51</sup> Because China may be awaiting a better day to claim larger parts of the Central Sector, a discussion of the status of this entire area may be useful. Sikkim and Bhutan are protectorates that enjoy a degree of autonomy under Indian authority.<sup>52</sup> They have concluded agreements with India whereby India is to exercise all exterior manifestations of statehood, such as diplomatic and economic relations with foreign states. Because India's right to conduct the foreign affairs of these two states has been disputed, some examination of the sources of that right will be useful.

In 1890, Great Britain and China concluded a treaty

declaring that India was henceforth to exercise direct and exclusive control in the conduct of Sikkim's foreign relations.<sup>53</sup> Article I of the treaty clearly defines the boundary between Tibet and Sikkim which conforms to the boundary now claimed by India.<sup>54</sup> The boundary was jointly demarcated on the ground in 1895.<sup>55</sup> An Anglo-Tibetan treaty of 1904 reiterated this provision regarding the agreed-upon borders.<sup>56</sup> In 1950, India and Sikkim concluded a similar treaty, providing that the external relations of Sikkim shall be conducted and regulated solely by the Government of India.<sup>57</sup>

As for Bhutan, by a treaty in 1910, Bhutan and British India agreed that henceforth British India would be the sole spokesman for Bhutan in external affairs.<sup>58</sup> This treaty was supplemented in 1949, whereunder India appears to be the only competent authority to regulate the external affairs of Bhutan.<sup>59</sup> The Chinese have never protested against these treaties.<sup>60</sup> Thus it is clear that any dispute about the boundaries of Bhutan and Sikkim would, of necessity, be an Indian dispute with Tibet or China. In consequence, any advances made by China concerning this area can be made only to the Indian Government.

### *Western Sector*

In the Western sector, the Indian Government bases its claims upon two agreements: the 1684 treaty between Ladakh and Tibet and the 1842 treaty between Kashmir, Tibet and China.

The treaty of 1684 between Ladakh and Tibet which confirmed the traditional Ladakh-Tibet border, does not require any comprehensive survey. The authenticity of this treaty, upon which India based its claims in Prime Minister Nehru's letter of 26 September 1959, was not questioned by the Chinese Government either in its note of 26 December 1959 which was in reply to the Indian Prime Minister's letter, or in subsequent diplomatic

exchanges between the two countries. It was only in July 1960, that the Chinese Government registered its objection to the agreement of 1684 between Ladakh and Tibet.<sup>61</sup> The Chinese challenge the very existence of the agreement. The crucial issue is the initial and continuing validity of the agreement of 1684 and the location of the boundary to which it referred.<sup>62</sup>

Ladakh, which at first was an independent state, came under the suzerainty of the Mughul Empire about 1664. A mixed force of Mongols and Tibetans invaded Ladakh during 1681-1683 but they were ousted *in toto* by the Ladakhis with the support of the Mughul Government of Kashmir. This was followed by a Treaty of Peace in 1684 between Ladakh and Tibet which stated:

The boundaries fixed, in the beginning, when King Skyid-Ida-ngeemagon gave a kingdom to each of his three sons, shall still be maintained.<sup>63</sup>

In the shared expectations of the parties, even in the 17th century, the boundary of Ladakh was so well known that the parties to the agreement of 1684 did not find it necessary to define them with any great precision.<sup>64</sup> The fact that some of the provisions of the agreement were in operation until contemporary times establishes its continuing validity and the maintenance of shared expectations of mutual commitment.<sup>65</sup>

The treaty of 1842 was signed between the representatives of the Maharaja of Kashmir, the Dalai Lama of Tibet, and the Chinese Emperor. India rests its case upon the continuing validity of this treaty.<sup>66</sup> China's attack on the 1842 treaty is similar to its attack on the Simla Convention. China claims that it was not a party to the 1842 treaty and that it did not ratify it. China adds one new element concerning this treaty that was absent in its assertion against the Simla Convention; the treaty, it says, does not define the boundary in other than general terms.<sup>67</sup>



China's first two arguments in disputing the 1842 treaty may be dispatched with facility. Authoritative proof that China was a party to the 1842 Agreement lies in the fact that the Chinese representative, a Tibetan with Chinese rank, signed the agreement in the name of the Emperor of China.<sup>68</sup> A translation of the statement by the most neutral of the signatories, assuredly without coercive objectives against China or pro-Ladakh in 1842, may be lifted from the Tibetan version of the treaty. It indicates that the treaty was being concluded between "the King of the World Siri Khalsaji Sahib and Siri Maharaj Sahib Raja-i-Rajagan (Raja of Rajas) Raja Sahib Bahadur, and the Khagan (Emperor) of China and the Lama Guru Sahib of Lhassa."<sup>69</sup> After emphasizing that the Chinese played a significant role in the settlement of 1842, the authoritative International Commission of Jurists concluded that it was a tripartite treaty "to which the Raja of Jammu, the Government of China and *the Government of Tibet* appear to have been signatories."<sup>70</sup>

China claims that it did not ratify the 1842 treaty. Both contemporary statements at the time of the signature and subsequent conduct by the Chinese leave little doubt that there were indeed shared expectations of mutual commitment. The statement of a Chinese official in 1847 is illustrative of such contemporary manifested expectations: "The borders of those territories (the Ladakh) have been sufficiently and distinctly fixed, so that it will be best to adhere to this ancient arrangement and it will prove far more convenient to abstain from any additional measures for fixing them."<sup>71</sup> Subsequent conduct is exemplified by the fact that China complied with other provisions of the 1842 treaty, notably the exchange of goods and presents, without interruption until 1946.<sup>72</sup> Additional evidence of Chinese acceptance can be provided by a subsequent treaty binding the same parties and concluded in 1852, providing that the boundary between Tibet and Ladakh would remain the same as before.<sup>73</sup>

China's third argument concerning the 1842 Tripartite Agreement raises issues that will repay close scrutiny. China asserts that the treaty mentions frontiers in general terms only, without specifying exact locations. This assertion may be true. The treaty referred simply to the "old established frontiers." However, all three signatories in their shared expectations knew what the "old established frontiers" meant in 1842, because they had been demarcated. This demarcation corresponds with Indian claims today. Ironically, the lack of a precise boundary delimitation in the 1842 treaty was due to the fact that the boundary was thought to be so patent and well identified that no question could ever arise over it. These three signatories of 1842 were preceded by almost two hundred years by other signatories with the same shared expectations as to where the boundary was located.

The treaty of 1684 between Ladakh and Tibet, which we discussed earlier, stipulated that "the boundaries fixed in the beginning . . . shall still be maintained."<sup>74</sup> Three years later, after the expulsion of the Mongols from Ladakh, well defined piles of stones were set up to demarcate the eastern boundary of Ladakh on the basis of this definite prescription. These demarcation pillars were sufficiently evident in 1854 to allow the British traveller Cunningham to say that the eastern boundary of Ladakh was well defined.<sup>75</sup> India can clinch its argument if it can prove that these demarcation pillars, which no longer exist, conformed precisely with the boundary now claimed by its government. This is dealt with in the next section. Robert A. Huttenback, a contemporary historian, has concluded that the boundaries between Ladakh and Tibet "as precisely defined by the treaty between Lhasa and Ladakh signed in 1684 were deemed sufficiently clear through custom and tradition that their detailed exposition was never considered necessary and it is significant that at least from 1842 until the present day there was no controversy over the matter."<sup>76</sup>

CLAIMS RELATING TO HISTORIC POSSESSION  
AND BOUNDARIES

The underlying policies concerning historic possession require that the stability of expectations created by long-term exercise of jurisdiction and effective control, not be disrupted. To invoke these underlying policies in favour of one nation's claims to territorial possession against another nation's similar claims, certain legal prescriptions must be fulfilled.

The Indian exercise of jurisdiction has met even the most stringent requirements of international law concerning possession.<sup>77</sup> Precedents exist in quantity to prove this point. A fundamental principle may be found in the *Island of Palmas Arbitration*, where a tribunal of the Permanent Court of Arbitration stated that possession is manifested by the peaceful and continuous display of sovereignty, and may assume different forms.<sup>78</sup> It also declared that it is not necessary that sovereignty be exercised, in fact, at every moment on every point of a territory.<sup>79</sup> Later, in the *Clipperton Island Arbitration*, it was established that possession is accomplished in previously uninhabited territory at the moment of exercise of possession; a later claiming state must prove that the prior state had the intent or *animus* to abandon the area.<sup>80</sup> The Permanent Court of International Justice, in the *Eastern Greenland Case*, after laying down "the intention and will to act as sovereign, and some actual exercise or display of such authority" as an established test of title to the territory, added that:

. . . in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in case of claims of sovereignty over areas in thinly populated or unsettled countries.<sup>81</sup>

These precedents were again followed in the *Minquiers and Ecrehos Case*<sup>82</sup> where the International Court of Justice supported the flexible criteria which take into account the nature of territory for establishing effective occupation. Similarly, in the *Case Concerning Sovereignty Over Certain Frontier Land*,<sup>83</sup> the International Court of Justice gave full weight to the difficulties confronting Belgium in exercising its sovereignty over the disputed areas.

International law thus recognizes that in certain cases, particularly where there are geographical difficulties, a more limited exercise of jurisdiction than that exercised by India in the Eastern Sector, for instance, is nevertheless considered adequate to establish possession.<sup>84</sup> The Indian proof of peaceful and continuous display of sovereignty, with the attendant Chinese failure to prove any Indian *animus* to abandon the Eastern territory, are such persuasive arguments that they hardly require exposition of more elaborate legal precedents. In the Ladakh Sector, however, the geographical character of the border regions is somewhat different; therefore, a more thorough discussion of legal precedent may be desirable in dealing with this sector.

India bases its possessory claims on a mass of historical fact and data, seeking to prove that not only has it enjoyed possession of the disputed territory for centuries, but it has exercised jurisdiction and administered the territories in accordance with the fullest reaches of sovereignty. India has produced, along with other evidence, continuous revenue and tax records that show it has so administered the areas for such a long period of time.<sup>85</sup> China, in contrast, has mostly relied on broad assertions about administrative authority, without bringing forth concrete facts and data to prove its actual exercise. The Chinese, in fact, have made no consistent or precise claims to the exercise of effective control or display of any form of authority over the vast areas now disputed.<sup>86</sup>

*Eastern Sector*

The Indian Government is clearly able to establish historic possession up to the crest of the Himalayas in the Eastern Sector. Documents drawn from as long ago as the epic period, 1500 B.C., establish the fact that the northern frontier of India stretched along the crest of the Himalayan ranges. Among the earliest of Sanskrit texts the *Vishnu Purana* states that the Himalayas form the frontier of India. Through the ages the references to the Himalayas as the Indian frontier continues.<sup>87</sup> At no time was sovereignty of the northern territory to the crest of the Himalayas lost by the rulers of Assam or acquired by either the Tibetans or Chinese. In 1838, Assam was annexed by the British; with this, the British Indian control and administration were gradually extended into the regions south of the McMahon Line, inhabited by the tribes known as the Menbas, Akas, Daflas, Muris, Abors, and Mishmis.<sup>88</sup> From the very beginning, the various tribal areas were placed under the jurisdiction either of "Political Agents" or of the "Deputy Commissioners" of the adjoining districts.

There is ample evidence to prove the actual exercise of the authority of the British-Indian Government affecting the lives, births, deaths, marriages, agreements, torts, crimes, business activity, property and so on, of the peoples inside the tribal areas, among themselves and between them and the peoples living on the plains.<sup>89</sup> The Indian tribes in Assam may not have been overjoyed by British rule; of importance, however, is that they accepted it, but at no time did they concede to any Chinese or Tibetan attempts to rule.

Shortly after Indian independence in 1947, the new Government decided to bring the disputed areas in the NEFA under even more direct administrative control, with the view to sharing more fully the benefits of the Indian Welfare State. These frontier divisions are now identified under new titles; Kameng, Subansiri, Siang, and Lohit,

Constitutionally, the entire North East Frontier Agency is now part of Assam, under the direct administration of the Union Government of India. Indian civil and police administrative personnel have been functioning in the area right up to the McMahon Line for several years. In this, the present Indian Government has continued the open assertion and exercise of authority begun centuries ago. The Government of India has in fact exercised much more elaborate administrative activities than merely maintaining law and order.<sup>90</sup> It has provided for the opening of schools and road building. Impressive provisions are incorporated in the present Five Year Plans to raise the living standards of the people in the Eastern Sector. Christopher von Furer-Haimendorf confirms the sum of all this historic practice:

. . . I know from personal observation that the Daflu and Miri Country. . . had then within human memory never been entered by Chinese or Tibetans. . . . It is difficult to imagine what historical arguments China could put forward in support of a claim to country which has never been part of China and is today administered by India.<sup>91</sup>

### *Central Sector*

In the Central Sector, the Chinese Government has changed its assertions. In 1959 the Chinese claimed that Indian maps of the border did not conform to reality.<sup>92</sup> At the end of that year, however, the Chinese retracted this claim, stating that the boundary alignment in the Central Sector conformed to reality for the most part.<sup>93</sup> Implicit in this statement is the broad acceptance by China of the boundary alignment asserted by India in this sector. The "for the most part" qualification was a forewarning of the present controversy centered around particular places.<sup>94</sup>

The people of Sikkim and Bhutan have for centuries

inhabited and exercised jurisdiction all the way to the border now claimed by India. The specific instances of March 1886, when Tibetans trespassed across the eastern boundary of Sikkim with Tibet, and of June 1902, when those who trespassed across the northern border were ousted, are representative of Sikkim's exercise of authority and jurisdiction up to the traditional boundary.<sup>95</sup> Similarly, the exercise of Bhutan's effective administrative jurisdiction up to the traditional boundary is well manifested in the regular tours of Bhutanese officials and collectors of taxes from the lands extending up to the border.<sup>96</sup> India, as the legally authorized external spokesman for these two States, bases and proves its claim upon historic possession. The areas presently at issue fall into this same category in terms of rights based upon possession.

### *Western Sector*

Concerning the Western Sector, the Indian Government has established, with the support of a large variety of documents and the maps of many different countries (including China itself), that throughout the ages the boundary of Ladakh with Sinkiang and Tibet had been where India now claims, and the disputed areas in this sector have always been under Indian authority and control.

The earliest reference to Ladakh, after the period of the Epics, is found during the Kushan empire established in the first century A.D. Subsequent history proves that the Karakoram and Kuen Lun mountain ranges formed the traditional boundary of Ladakh with Sinkiang and Tibet.<sup>97</sup> After passing through a temporary phase of loose Tibetan influence in the eighth century,<sup>98</sup> followed by a period of independence, Ladakh came under the suzerainty of the Mughal Empire about 1664. After the downfall of the Mughals, Ladakh was conquered by Gulab Singh of Jammu, a feudatory of the Sikhs. The year 1841 saw battles between one of the generals of Gulab Singh and Tibetan armies, and at this juncture the Tibe-

tans were joined by the Chinese. The venture was hardly successful enough to initiate any possessory rights on the part of Tibet or China, then or now; the Chinese-Tibetan armies were defeated before they reached Leh. However, a peace treaty was concluded in 1842.<sup>99</sup> This brief interlude still marks the only Chinese penetration of Ladakh. Ladakhan possession within its border remained intact.

Four years later Kashmir came under the suzerainty of the British. The British recognized Gulab Singh as the Maharaja of the entire Ladakh-Kashmir sector, under British Indian Central authority. Around the same time Alexander Cunningham, a British Indian official who visited the Ladakh area, stated that the boundary between Ladakh and Tibet was well defined, and added:

A large stone was then (after the expulsion of the Mongols) set up as a permanent boundary between the two countries, the line of demarcation being drawn from the village of Dechhog (Demchok) to the hill of Karbonas.<sup>100</sup>

Thus once more the established traditional boundary was reaffirmed. The traditional boundary further north which lay along the Lanak Pass at the top of Chang Chenmo Valley can be identified by similar evidence.<sup>101</sup>

Further proof of Indian possession of the disputed areas of Ladakh can be derived from the fact that the people of Ladakh had been variously utilizing these territories right up to the boundary,<sup>102</sup> and the control and authority of India in the form of effective administration and jurisdiction prevailed all through the Ladakh Sector.<sup>103</sup> The exercise of jurisdiction by the governments of Kashmir and India in the Ladakh Sector, indeed, has continued uninterrupted right up to contemporary times. In 1947, free India immediately assumed the rights of sovereignty over the entire area. Since its independence it has sent regular patrols up to the frontier and established several police check-posts at various distances



from the frontier in order to control trade routes.

The Indian Government freely admits, however, that its exercise of sovereignty in the Ladakh area has been less extensive than, by comparison, in the Eastern Sector. This is due to the different character of the terrain in the Ladakh Sector. The area along the frontier is a formidable one with altitudes in excess of 14,000 feet above sea level, and reaching 20,000 feet at the border and higher at some crests. As a result the area is relatively uninhabited.

The precedents that were advanced concerning the more general requirements that India has met in all boundary sectors hardly need repetition.<sup>104</sup> India does not claim to have border guards standing at arm's distance from each other along the crest of the Himalayas. India has been content, on the basis of initial historical possession and constant manifestations of state activity in Ladakh, to send patrol parties up to the most formidable border crests periodically. There seems to be little doubt that this satisfies the criteria for possessory rights. Until 1957, the various Indian patrols, going as far as the bleak Karakoram Pass, discovered no evidence of the Chinese ever having been there. The Chinese were able in 1956-1957 to construct a road, however, in the Aksai Chin area of the northernmost part in the Ladakh Sector. On the basis of this road, China claims that it has exercised sovereignty in this distant sector, and the Indian Government has lost possession of it, for India has supposedly acquiesced in the Chinese activities. This argument is without merit.

International law contains a fund of precedents regarding the degree and the character of the exercise of sovereignty necessary in order to support a claim of acquiescence. Rejecting the claims of The Netherlands, the International Court of Justice, in the *Case Concerning Sovereignty over Certain Frontier Land*, aptly stated that the acts of sovereignty alleged to have been exercised, including such activities as surveys, sale of land taxes, rent laws, and so forth, were insufficient to dis-

place Belgian sovereignty and as such, did not prove acquiescence on the part of Belgium.<sup>105</sup> Moreover, as stated earlier, sovereignty need not be exercised at every point of territory. The courts are far more interested in patent and easily recognizable acts of effective control than in setting standards for acts of sovereignty that prove to be unreasonable to expect a nation to fulfil.<sup>106</sup>

No Chinese objections were registered concerning the Indian exercise of effective control at any point on the frontier until the recent dispute arose. Clearly, the construction of a road in a distant and uninhabited area cannot be termed a patent or easily detectable exercise of sovereignty. This so-called exercise of sovereignty by the Chinese was not acquiesced in by India, for India was not aware of it for some months. When India became aware of it, she unequivocally objected.

Since the basis of the doctrine of acquiescence is presumed consent, knowledge must of course be a prerequisite of acquiescence. The requirement of knowledge is frequently asserted by states before international courts. The United States invoked it in *Title to Islands in Passamaquoddy Bay*<sup>107</sup> by asserting that a claim or act of one party could form no authoritative precedent for the future unless it were known or acknowledged by the other. Great Britain supported the invocation of knowledge in the *Alaskan Boundary* dispute<sup>108</sup> and asserted that she knew nothing of the acts in question and that her ignorance was excusable in view of the uncivilized and inaccessible nature of the country. The United States once more in the *Island of Palmas Arbitration*,<sup>109</sup> clarifying the failure of Spain to challenge the claims of the Netherlands to the ownership of the Island of Palmas, added that "the Spanish Government had no reason to suppose that the Netherlands Government claimed sovereignty over the island...." The reasoning given by the Arbitrator in the case concerning *Pensions of Officials of the Saar Territory*,<sup>110</sup> that the right of the government to protest was acquired only as and when it knew of the facts, is even more signi-

ficant and instructive. The *Clipperton Island Arbitration*,<sup>111</sup> prescribed that in order for one nation to prove that another has acquiesced in its exercise of sovereignty, the state that is said to have acquiesced must be shown to have had the intent or the *animus* to abandon the disputed area. No persuasive evidence has been presented by China to prove such an intent on India's part.<sup>112</sup>

The acquiescence and *animus* arguments seem to go to the other way. There is ample evidence to establish that the Chinese have acquiesced in every Indian manifestation of sovereignty and effective control prior to the present dispute, and this as a result is the basis of India's next category of claims. Suffice it to say at this point that India has established historic rights of possession based upon centuries of exercise of that possession.

#### CLAIMS RELATING TO ACQUIESCENCE AND ESTOPPEL

The concepts of acquiescence and estoppel are closely related.<sup>113</sup> Acquiescence refers to features of the context indicating explicit or implicit consent to a claim; it manifests a silence or absence of protest in particular contexts of conduct of a state which, according to community expectations, demand a positive responding action to preserve a right. The resulting outcome is to prevent an acquiescent state from denying or challenging the validity of a claim which it has not protested. The operative value of acquiescence is well described in general by a contemporary scholar, who states that:

it serves as a form of recognition of legality and condonation of illegality and provides a criterion which is both objective and practical.<sup>114</sup>

The traditional and contemporary conceptions of estoppel, emphasizing features of the context under which a state is not allowed in law to deny a fact, demand that a state ought to be consistent in its attitude toward a particular situation of authority or control.<sup>115</sup> The re-

inforcing character of the two conceptions is well established. Authorities in international law have stated that acquiescence in a particular situation establishes an estoppel.<sup>116</sup> From broad community perspectives, the most relevant policy relating to the maintenance of stability and to some degree predictability in the pattern of state conduct requires decision-makers "to create estoppels which prevent states from contesting titles which they have recognized or in which they have acquiesced."<sup>117</sup>

The basic policy, recognizing that title may be established through acquiescence by one nation in the exercise or territorial sovereignty by another, is directed toward maintaining the stability of expectations based on long and sustained co-operative behaviour. General relevancies of authority and control in this regard prescribe that: (a) long acquiescence in boundaries, as delimited by published maps or demarcated by patent surveys, estop one nation from subsequently making different claims; (b) boundary agreements, either explicit or implicit, offer strong evidence that boundaries remain where they have been delimited in the agreements; (c) positive acceptance, both historical and contemporary, either by word or by deed, of certain established boundaries further serve to estop nations subsequently from making claims that differ.

From the facts that follow, it can be said that China has long acquiesced in several distinguishable ways in the boundaries now claimed by India.<sup>118</sup> As a result, China should be regarded as estopped from disputing the boundaries at this late date.

A sector by sector analysis of the merits of the Indian assertions will be illuminating. In the Eastern Sector the McMahon Line, as has been stated, was the definitive product of the 1914 Simla Conference. This area was extensively surveyed long before the conclusion of the treaty.<sup>119</sup> The issues of the validity of the Simla Treaty and the ensuing McMahon Line have been discussed earlier. Of significance now is the fact that China has acquiesced in the McMahon Line for over 45 years. A

clearer case of positive acquiescence would be hard to find. China is, therefore, estopped from asserting any valid objection to the McMahon Line at this late date.

Furthermore, maps published in India both before and after the Simla Conference met no objection from China. In addition, the Chinese themselves printed maps showing the same boundaries. *The Postal Map of India*, published in 1917 by the Chinese Government, shows the whole northern boundary of India, with slight deviation, in the same location as that presently claimed by India. The maps of Tibet in *New Atlas and Commercial Gazetteer of China*, published in Shanghai after 1917, by the *North China Daily News and Herald*, and in the *Atlas of the Chinese Empire*, published by the China Inland Mission in 1908, show the McMahon Line as the boundary in the North East Frontier Agency.<sup>120</sup> Several maps published by other than the two parties to this dispute may underscore China's acquiescence and, also of importance, the general expectations of the world community at the time.<sup>121</sup>

Acceptance of, indeed the publication of, particular boundaries delimited on maps or demarcated on the ground is weighty evidence for a claimant building a case of acquiescence and estoppel. In the *Case Concerning Sovereignty over Certain Frontier Land*,<sup>122</sup> the International Court seemed to establish that publication of certain Belgian Military Staff maps since 1874, and inclusion of the territory in question in Belgian Survey Records, despite a great deal of sovereignty exercised by the Netherlands, in the interim, was enough to estop the Netherlands from later objecting to the borders shown on the maps. The Netherlands lost the case and the territory on the basis, among others, of the Belgian maps.

C. C. Hyde declared that one map merely represented what seemed to be the territorial limits. Several maps, however, printed over a period of time, are in his view, relatively conclusive of the claimed boundaries.<sup>123</sup> Weissberg, in his "reappraisal"—based on the decisions of the International Court of Justice—of the evidentiary value

of maps, goes much further than C. C. Hyde and concludes that maps "may be termed and treated as admissions, considered as binding, and said to possess a force of their own."<sup>124</sup>

Acquiescence and the attendant legal mechanism of estoppel are sometimes said to be a tenuous, artificial legal mechanism. It may appear to run against the public's expectations of what is "just" to allow claimants to lose property or wealth merely because they are guilty of "sleeping on their rights." However, in this case, China had not only acquiesced by not objecting to the published maps which showed the McMahon Line with precision, but such maps were printed in China itself. China is, on the basis of the maps, of territorial possession and exercise of authority and control by India, and of a definite treaty—the Simla Convention of 1914—estopped from asserting another boundary at this time.

Regarding the Central Sector, curiously the Chinese note of 26 December, 1969, expressly stated that Indian maps conform to reality.<sup>125</sup> The Chinese have acquiesced in this sector, disputing only small areas along the border.

In the Ladakh area, the Indian claim of Chinese acquiescence in the Indian view of the boundary seems as well founded as in the other two sectors.

Maps derived from extensive Indian surveys and conforming to Indian claims have been published since the sixties of the nineteenth century.<sup>126</sup> Indeed, even official Chinese maps have shown the frontiers in the Kashmir area as they exist in Indian claims today.<sup>127</sup> Such resolute acquiescence in the past must be a potent ground for estoppel in the present.

India's claims can be further strengthened by more recent manifestations of acquiescence on the part of the Chinese. Although the 1954 Sino-Indian Agreement dealt with all outstanding problems, no Chinese intention to change the existing border was voiced at that time.<sup>128</sup> The Chinese were aware of Indian maps as well as of their own, but they said nothing. They were well aware

of the elaborate authoritative declaration made by the Indian Prime Minister in 1950 on northern borders.<sup>129</sup> Yet they said nothing. They were also aware of the provisions of the Indian Constitution, which included the Sixth Schedule, explicitly incorporating within Indian frontiers the largest area now in dispute, some 30,000 square miles of territory in the North East Frontier Agency; and still they said nothing.

The 1954 conversations between Nehru and Chou En-lai may also be referred to, when the former drew the attention of the latter to some Chinese maps then showing the common frontier incorrectly. Although the maps did not approach the exaggerated Chinese claims of some five years later, nevertheless, the Indian Premier voiced some concern over the matter, and it was dropped finally with Chinese assurances that the maps in question were erroneous and of little significance.<sup>130</sup> Again, at the end of 1956, Chou En-lai and Nehru held talks in New Delhi, during which the former, as also stated earlier, categorically stated that he would recognize the McMahon Line.<sup>131</sup> These were the occasions when China if it disagreed with the then existing boundaries, should have reacted: but it did nothing, and thus by its conduct had acquiesced in them. The Chinese Government is, therefore, estopped from claiming different boundaries on any part of the border at this late date.

Opinions of international law writers emphasizing state behaviour are definitive. Leading publicists, like Witenberg,<sup>132</sup> Verykios,<sup>133</sup> and Anzilotti<sup>134</sup> agree that silence could create an estoppel. Once a particular situation is notified or becomes generally known and a particular state still observes silence, in the reasoned opinion of Anzilotti, the latter can fairly be interpreted to have acquiesced and to have abandoned counter-claims, and more particularly if the situation demanded a responding protest.<sup>135</sup> The relevance and significance of acquiescence may be amplified by reference to certain authoritative decisions on disputed title to territory. The decision of the International Court of Justice on 15 June

1962, in the *Case Concerning the Temple of Preah Vihear (Cambodia versus Thailand)*, *Merits*,<sup>136</sup> established a criterion for invoking the effects of subsequent conduct by absence of protest, or silence leading to estoppel or acquiescence. This case involved the conflicting claims of sovereignty between Thailand (Siam) and Cambodia (former French protectorate) over the region of the Temple of Preah Vihear. The issue before the Court was whether the map in issue and the boundary line indicated on it were adopted by the parties.

The Court took notice of wide publicity and communication of maps. In response to Thailand's assertion that no formal acknowledgement of the maps was made by her, the Court stated that an acknowledgement by conduct was made in a very definite way; but even if it were otherwise, it was clear that the circumstances were such as called for reaction on the part of Siamese authorities, if they were to disagree with the map or had any question to raise in regard to it. The Court in fact made a comprehensive inquiry to discover the several distinct opportunities during fifty years, which demanded reaction by Thailand in the form of protests, but in which Thailand did nothing.<sup>137</sup> Because of these failures to react, the Court inferred a tacit recognition by Siam of the sovereignty of Cambodia (under French Protectorate) over Preah Vihear and concluded that Thailand was now precluded by her conduct from asserting the non-acceptance of the map in question.<sup>138</sup>

Reference to the subsequent conduct of the parties was the basis of the assertions made by the United States members of the tribunal in the *Alaskan Boundary Dispute*.<sup>139</sup> The United States contention emphasized that for more than sixty years after the conclusion of the treaty, Russia, and after her the United States, retained territorial possession and exercised sovereignty in the territory without any protest or objection, while Great Britain never exercised authority and control or even asserted it had exercised any such authority and control. The *Guatemala-Honduras Boundary Arbitration*, in re-



ording an occasion when a protest might fruitfully have been made and emphasizing the resulting outcome of failure to protest, is equally significant.<sup>140</sup> While supporting the claims of Guatemala on the basis of its uninterrupted and unopposed assertion of authority over part of the disputed territory, the tribunal clearly characterized the failure of Honduras to protest as a fatal defect of its case. The potentiality and significance of the doctrine of acquiescence, in the form of absence of protest, are further established in the decisions of the International Court of Justice in the *Anglo-Norwegian Fisheries Case*<sup>141</sup> and the *Case Concerning Sovereignty Over Certain Frontier Land*.<sup>142</sup>

China, in the current controversy, has never invoked any sustained objection to the established boundaries, even in those specific situations when it was required to do so to maintain its claim. On the contrary, China in its subsequent conduct has accepted the boundary as asserted by India, consistently and unequivocally. India's assertion, therefore, that China is estopped to blow "hot and cold" or from reversing its earlier acceptance of the general Indian frontier is conclusive and indisputable.

#### CLAIMS RELATING TO PHYSICAL AND GEOGRAPHIC CONDITIONS

The physical features of the terrain between two countries are not, of course, conclusive of the expectations of neighbouring states about boundaries between them, but when coupled with patterns in use and other evidence, have been regarded as highly significant indexes of expectations. Fundamental policies relating to "natural" or geographic frontiers require that in order to promote certainty and stability in community expectations, boundaries should conform to the most distinctive "natural" or geographic features. Historically, mountain crests and watersheds have been regarded as especially significant. India is in the happy position both that the explicit agreements relating to the India-China border do in

fact confirm and substantiate expectations stemming from the physical terrain, and that the expectations resulting from the physical terrain in turn confirm and stabilize the shared expectations under the explicit agreements.

The Chinese contention at best begs a question without any sustainable support and authority from the physical terrain or explicit agreements:

Could there possibly be any more untenable argument in the world for the seizure of 90,000 square kilometres of territory from China than by describing a watershed as the boundary between China and India, just because there happens to be a watershed there?<sup>143</sup>

Conversely, the persuasiveness of the Indian claim<sup>144</sup> is established by the fact that the significance of the watershed as a modality of demarcation of a natural boundary described generally as a mountain range has been sanctioned by the opinions of distinguished authorities in international law, the effective practice of states, and historic judgments of courts and tribunals.

Thomas Holdich says that of all natural features, "a definite line of watershed carried by a conspicuous mountain ridge, or range, is undoubtedly the most lasting, the most unmistakable and the most efficient as a barrier."<sup>145</sup> According to J. B. Moore, "Where a boundary follows mountains or hills, the water divide constitutes the frontier."<sup>146</sup> Bluntschli states also that "when two countries are separated by a mountain chain, it is in case of doubt admitted that the highest ridge and the water line mark the boundary."<sup>147</sup> Other distinguished publicists such as Adami,<sup>148</sup> Taylor,<sup>149</sup> and Oppenheim<sup>150</sup> have made similar observations in support of the basic formulation.

The watershed principle has been employed in a variety of historically important cases. France and Spain agreed upon it, and that frontier still exists;<sup>151</sup> the boundaries between Brazil and Venezuela,<sup>152</sup> between Brazil and the two Guianas,<sup>153</sup> and between Argentina and

Chile<sup>154</sup> all follow the watershed principle explicitly stated as such.

Similarly, the watershed principle has been adopted by the decision-makers in certain historic decisions as a decisive factor in affecting their decisions. For instance, the watershed line is explicitly referred to in the arbitral decision of the President of the French Republic in 1900 on the boundary dispute between the Republic of Columbia and Costa Rica.<sup>155</sup> Often the watershed principle is explicitly invoked in agreements between states. In the various boundary agreements concluded between France and the former Kingdom of Sardinia, for instance, the principle of watershed, characterized as "*des eaux pendantes*," is frequently made use of. It is arresting to notice that in order to achieve conformity to this prescription, the two sides had to agree to the exchange of territory more than once.<sup>156</sup> Similarly, in a boundary agreement between France and Spain, the term "crest" is distinctly used and followed by another term "*ligne de faite*."<sup>157</sup>

Finally, China has become party to certain international agreements which explicitly lay down the watershed as a modality of demarcation. The Agreement of 1890 between China and Great Britain relating to the boundary of Sikkim and Tibet, explicitly applying the watershed, is representative.<sup>158</sup> More recently, the boundary agreements concluded by China with Nepal<sup>159</sup> and Burma,<sup>160</sup> again, follow the watershed principle and thus strengthen its authority. It is a strange irony that China has accepted the watershed as the basis of the Sino-Burmese boundary alignment which runs along the McMahon Line for some 120 miles, while it has refused to apply the same criterion in the case of the McMahon Line forming the boundary between India and China.

#### CLAIMS RELATING TO CHANGE OF CONDITIONS

China's first arguments attempting to invalidate the several existing border agreements having failed, it may in

the future resort to more imaginative, if more tenuous, arguments. In anticipation, an attempt may be made to consider certain possible Chinese arguments

One such argument would rely upon *rebus sic stantibus*, a classical doctrine in international law whereby a signatory state may allege changed conditions as a defence for the non-performance of an agreement. Lord McNair observes that an agreement which declares, creates, or regulates rights of a kind that are usually regarded as permanent may establish rights independent of the treaty, and independent, therefore, of the subsequent fate of the treaty. McNair includes boundary treaties in this category.<sup>161</sup> Other distinguished authorities limit the indiscriminate use of *rebus sic stantibus* by requiring that the parties to a treaty do not have the right to terminate a treaty unilaterally,<sup>162</sup> and that the doctrine refers only to the continued existence of conditions which the negotiators envisage as a determining factor moving them to undertake the obligations stipulated.<sup>163</sup> Broadly conceived, the community policy demands that, for *rebus sic stantibus* to be invoked, there must be an important change "in the context of conditions attending performance, frustrating the major purpose of the parties, and making impossible their maintenance of a consensus towards equivalent substituted objectives."<sup>164</sup> These particular requirements make it improbable that China can successfully claim the obsolescence of the relevant treaties on grounds of *rebus sic stantibus*.

If a mere change of government could be regarded as a sufficient basis for invocation of *rebus sic stantibus*, then no international agreement would be secure. If even a change of state could be invoked to avoid a boundary agreement, then no state would be secure. Boundary agreements "run with the land" and are in no way dependent upon the relative permanence or impermanence of particular governments or internal political institutions.<sup>165</sup> In no way does a change of such factors change or frustrate the shared objectives of the parties.

In the case of the Simla Convention, the shared objec-

tives of the signatories are explicitly stated in an exchange of letters accompanying the convention. McMahon wrote to the Tibetan plenipotentiary that "the final settlement of this India-Tibet frontier will help to prevent cause of future dispute and thus cannot fail to be of great advantage to both Governments."<sup>166</sup> Tibet replied that the boundary delimitation obviated any cause of friction in the future.<sup>167</sup> Surely, the mutual expectations of the signatories are clear. Any attempt to assert that the rights established by the treaties were void because of a change in underlying conditions runs counter to the very purposes to be promoted by the treaties in the first place: the maintenance of peaceful relations along a peaceful frontier. Those shared objectives have not changed, but have added relevance at this later date.

It thus seems clear that if China should invoke *rebus sic stantibus* and seek to terminate the boundary agreements unilaterally, it would grossly violate relevant community principles. These principles, it may be emphasized, do not honour "doctrines making the initial or continuing validity of an agreement dependent upon 'objective conditions', of unspecified content or of content specified only by Marxian metaphysics or totalitarian tactics."<sup>168</sup> This projection finds further substantiation in the reasoned opinion of Fitzmaurice, who insists that changes may influence:

. . . the willingness of one or other of the parties, on ideological or political grounds—often of an internal character—to continue to carry it (the treaty) out. Such cases . . . cannot and ought not to be made a basis for importing into treaty law a juridical doctrine of release that is wholly at variance with its spirit and fundamental purpose.<sup>169</sup>

#### CLAIMS RELATING TO CHANGE OF GOVERNMENT

The argument in terms of *rebus sic stantibus* is no more persuasive when made in another form. China asserts that

it is not now bound by agreements which were negotiated by the weak government that preceded it. It is asserted that, since China has been freed from the hands of the imperialist powers by means of a people's revolution, it is now free to disregard prior obligations.<sup>170</sup> The issue is whether governments are bound by boundary treaties negotiated and concluded by prior governments. An abundance of authoritative precedent exists. Hyde declares that a change in the form of government of a contracting state does not serve to terminate its pre-existing treaties;<sup>171</sup> Moore adds that the state is bound by engagements entered into by governments that have ceased to exist.<sup>172</sup> The Harvard Research on the Law of Treaties best summarizes leading authorities by stating:

Unless otherwise provided in the treaty itself, the obligations of a state under a treaty are not affected by any change in its governmental organization or its constitutional system.<sup>173</sup>

Historical examples may also have relevance. Perhaps the Soviet Union is the best example to choose in applying an analogy to the People's Republic of China. The Soviet Union, it is to be remembered, unilaterally declared many treaties void in 1918 on the basis that internal political change was so violent in their country that most existing treaties were no longer compatible with the new social order. The Soviets, however, placed some restrictions upon such unilateral disavowals. After declaring himself generally in support of the maxim *pacta sunt servanda*, Professor Korovin made it clear that, "for the purpose of reorganizing not only economic ties but the governing principles of internal and external politics, the old agreements, in so far as they reflect the pre-existing order of things,"<sup>174</sup> were null and void. But all those states which accepted to some degree the Soviet viewpoint, it may be observed, made new agreements with the Soviet Union to embody their reviewed desires.<sup>175</sup>

The People's Republic of China does not limit itself to

unilaterally voiding only those treaties which stand in the way of political and economic reorganization, as did the Soviet Union. It wishes to void all treaties which stand in the way of its territorial ambitions. It is attempting a wholesale denial of the present existence of the treaties, asserting that the treaties did not survive the changeover from a Chinese Republic to a Chinese People's Republic.

Shifting to other cases, when Mexico became independent of Spanish rule in 1821, the existing Spanish-United States boundary line survived;<sup>176</sup> and when Canada became a Dominion, existing British-American boundaries and boundary disputes survived the succession to autonomy by the Canadians. This is the case with India as successor to British rule.

Under the Indian Independence Act of 1947, the precise incidents of the change of governments were specified at length. India was to be considered as continuing its membership in international organizations and the treaty rights and obligations of undivided India.<sup>177</sup> Recognizing this fact, India at once made it clear that it would abide by all pre-existing treaty rights and obligations.<sup>178</sup> India's explicit acknowledgment of treaty obligations and the acceptance of its treaty partners, including Tibet and China, establish the fact beyond all reasonable doubt that independent India was the same state as pre-partition India, and its northern border therefore survives intact.

#### CONCLUSIONS

The above discussion in detail of the claims and counter-claims of the parties in the current India-China border dispute permit certain conclusions.

The boundary in dispute has been established and identified for centuries in conformity with the established criteria of international law and practice. The assessment of historic practices in regard to the long-term exercise of jurisdiction and effective control supports the Indian claim to sovereignty of the disputed areas. The Chinese assertion that no valid boundary agreements exist bet-

ween India and China is not supportable. Our discussion has shown that agreements were made with respect to most parts of the boundary and that they were initially valid and continue to be valid. They therefore serve as the most persuasive proof of the existence and location of the India-China border. Furthermore, in conformity with the traditional view, the boundary in most part follows "natural" or geographic features. Finally, through conduct, manifesting at times distinctive, positive acceptance and at other times significant silence and absence of protest, China has accepted and acquiesced in the entire boundary as it is asserted by India. In sum, all the relevant principles of contemporary international law, whether taken severally or in aggregate, would appear to establish the continuing sovereignty of India in the areas now demanded by the Chinese.

#### NOTES

1. The most authoritative contemporary expression of this principle is found in the U.N. Charter, especially under Art. 2, Pars. 3 and 4. The United Nations also provides "certain procedures which might be used for establishing as a legal principle the invalidity of title to territory acquired by conquest or by the threat or use of force." Briggs, *The Law of Nations* 252 (2nd ed., 1952).

2. Other principles are mostly grounded in time honoured authoritative prescriptions and policies relating to following the boundary treaties and conventions, relying upon established historical possession, conforming boundaries to natural and geographical features, and so forth. See generally, Boggs, *International Boundaries* (1940); Jones, *Hand Book on Boundary-Making* (1945); material cited in Briggs, note 1, pp. 239-52; Jennings, *The Acquisition of Territory in International Law* (1963); Adami, *National Frontiers in Relation to International Law*, trans. T. T. Behrens (Oxford, 1927); McMahon, "International Boundaries," 84 *Journal of Royal Society of Arts*. 2 (1935-36).

3. Territorial sovereignty embraces in general, "a situation recognized and delimited in space, either by so-called natural frontiers as recognized by international law or by outward signs of delimitation that are undisputed, or else by legal engagements en-



tered into between interested neighbours, such as frontier conventions, or by acts of recognition of States within fixed boundaries." The Island of Palmas (Miangas) Arbitration 2 Int. Arb. Awards 838, 22A.J.I.L. 815 (1928).

4. For facts concerning specific claims made, as well as evidence presented in support of the various claims by India and China, consult, generally, "Government of India Notes, Memoranda and Letters exchanged and Agreements signed between the Government of India and China," White Paper I, 1954-1959; White Paper II, September-November 1959; White Paper III, November 1959-March 1960; White Paper IV, March 1960-November 1960; White Paper V, November 1960-November 1961; White Paper VI, November 1961-July 1962; White Paper VII, July 1962-October 1962; White Paper VIII, October 1962-January 1963; White Paper IX, January 1963-July 1963; hereafter cited as White Paper I, II, *et seq.*; also Government of India Report of the 'Officials of the Government of India and the People's Republic of China on the Boundary Question, February 1961, thereafter cited as Report.

5. Report, p. 71. The Central Sector of the boundary between Tibet and India is the frontier of Uttar Pradesh, Himachal Pradesh and the Punjab States in north India.

6. Six border passes (specified in the Agreement between China and India on Trade and Intercourse, 1954, Lok Sabha Secretariat, Foreign Policy of India, Text of Documents, 1947-1958, p. 87, 1958), are Shipki, Mana, Niti, Kungri, Bingri, Darma, and Lipu Lekh. Specific places under controversy include: Spiti area (Chuva and Chuji), Shipki Pass. Niang-Jadhang area (Sang and Tsungsha), Barahoti (Wu-je), Sangchamalla and Laphthal. Report, p. CR-39.

7. White Paper IV, p. 100.

8. Report, pp. 1-2.

9. The Chinese claims in this area include the greater part of Aksai Chin, a part of Chang-Chenmi Valley (Pangong Area), a small part of the territory near Khurnak, the Demchok or Parigas area. White Paper III, pp. 66-7.

10. Fuller development is given by the author in Chapter 2.

11. White Paper I, pp. 49-51; White Paper II, p. 30.

12. See Statement of the Chinese Government, 21 November 1962, White Paper VIII, p. 17. For discussion on the issue of lawfulness of the Chinese resort to force, see note 10.

13. Rubin, in "The Sino-Indian Border Disputes" (9 Int. and Comp. L.Q. 96, 1960), assumes that "it would seem unwise to rely . . . on the relations apparently set up by the relevant treaties between the British and the border politics . . ." (p. 105). His treatment of the subject (pp. 104-5) not only underestimates the functional value of international agreements which are the most persuasive source for proving rights concerning existing bounda-

ries, but also comes perilously close to emasculating the basic community policy of achieving stability in the shared expectations of the parties to those relevant agreements. Fundamental policies concerning the honouring of agreements have been recently reiterated in the decision of the International Court of Justice in the *Case Concerning the Temple of Preah Vihear* (Cambodia versus Thailand), Merits, (1962), I.C.J. Rep. 34, 42; 56 A.J.I.L. 1033 (1962). How rights derived from treaties prevail over acts of sovereignty is well established in the *Case Concerning Sovereignty Over Certain Frontier Land* (Belgium versus Netherlands), (1959) I.C.J. Rep. 227-9; 53 A.J.I.L. 937 (1959).

14. White Paper I, pp. 49-50.

15. Full texts are given in *The Sino-Indian Boundary—Texts of Treaties, Agreements and Certain Exchange of Notes Relating to the Sino-Indian Boundary*, 1-3 (The Indian Society of International Law, 1962).

16. White Paper III, p. 86.

17. White Paper IV, p. 11.

18. For general discussion, see Bell, *Tibet: Past and Present* (1924), p. 154 *et seq.*

19. The boundary was described by Art. 9 of the Convention: "For the purpose of the present Convention the borders of Tibet, and the boundary between Outer and Inner Tibet, shall be as shown in red and blue respectively on the map attached hereto." Note 15, p. 38.

20. For an elaborate account, consult White Paper II, pp. 37-41; White Paper III, pp. 94-7; Report, pp. 110-15.

21. See generally, White Paper II, pp. 29-31; White Paper III, pp. 63-66; White Paper IV, pp. 9, 12-14; Report, pp. CR-19-CR128.

22. Lacking a definitive set of criteria for membership in the community of nations, the Harvard Research (Research in International Law, Draft Convention on the Law of Treaties-Comment, Art. 2(a) 29 A.J.I.L. Supp. 703, 1935) lays down that the precise application of the term "state" (meaning a member of the community of nations) can be decided upon only with reference to a particular set of facts. Lissitzyn's formulation may also be noted: "It may, indeed, be doubted that international law contains any objective criteria of international personality or treaty-making capacity. The very act or practice of entering into international agreements is sometimes the only test that can be applied to determine whether an entity has such personality or capacity, or, indeed, 'statehood.'" Lissitzyn, "Efforts to Codify or Restate the Law of Treaties," 62 Columbia Law Review 1183 (1962).

23. Tibet was an independent state under the rule of the Dalai Lama before it became a vassal of China. In the autumn of

1911, Chinese power in Tibet came to an end. With the breakdown of the Manchu Dynasty, Chinese troops in Tibet revolted and, by 1912, had been ousted *in toto*. The results are correctly stated by the International Commission of Jurists: "Tibet's position on the expulsion of the Chinese in 1912 can fairly be described as one of *de facto* independence and there are...strong legal grounds for thinking that any form of legal subservience to China had vanished. It is therefore submitted that the events of 1911-1912 mark the re-emergence of Tibet as a fully sovereign state, independent in fact and in law of Chinese control." The question of Tibet and the Rule of Law 85 (1959).

Appadorai *et. al.*, consider Tibet's declaration of its independence in 1912 as having "legal validity in international law similar to that of the declaration of Bulgaria of 1908 terminating Turkish suzerainty over it." "Bases of India's Title on the North-East Frontier," 1 International Studies 362-363 (April 1960). See also the opinion of Alexandrowicz, that in view of the developments of 1911, the suzerain-vassal relationship between the Dalai Lama and the Chinese Emperors must have come to an end. "Comment on the Legal Position of Tibet," 5 Indian Year Book of International Affairs 172-3 (1956); *idem.*, "The Legal Position of Tibet" 48 A.J.I.L. 270 (1954). In contrast, see Tieh-Tseng Li, 50 A.J.I.L. 394-404 (1956). Rubin, denying the existence of the Declaration of Independence by Tibet, has stated that there "does not seem to exist any document or recorded statement that can properly be called a 'declaration of independence in 1912' issued by any Tibetan authority..." ("A Matter of Fact," 59 A.J.I.L. p. 586, 1965). In reply McCabe has cited three documents to refute the statement of Rubin. ("Tibet's Declarations of Independence," 60 A.J.I.L. p. 370, 1966). These documents include the Tibetan-Mongolian Treaty (1912), signed at Urga; the affirmation of the validity of this treaty in several British Foreign Office Files, and Tibet's opening brief at the Simla Conference. Tibet's declaration of independence was acknowledged in these documents. For Rubin's version of the authority of these documents see, Rubin, "Tibet's Declaration of Independence," 60 A.J.I.L. 812 (1966).

24. The earliest relevant agreement concluded by Tibet was in 1684 (note 15). A tripartite treaty was signed in 1842 between the Raja of Jammu, the Government of China and the Government of Tibet, all acting as sovereign, independent states (*ibid*). This shows that some seventy-two years before the Simla Conference Tibet signed a treaty as an independent power on the traditional boundaries between Ladakh and Tibet, the very matters at issue at the Simla Conference. In 1856, Nepal concluded a bilateral treaty with Tibet, Tibet again acting as an independent

sovereign power (See International Commission of Jurists, note 23, p. 76). Tibet signed a separate treaty with Britain in 1904. Indeed, the year 1904 saw Tibet passing to very real and independent participation in foreign affairs. Only after this bilateral Tibetan-British Agreement of 1904 did Tibet undertake to honour the terms of treaties which China made in 1890 and 1893 with Britain concerning Tibet. (See the Preamble, Arts. I and II of the 1904 Convention, *ibid.*, p. 110; 1 A.J.I.L.; Supp. 80, 1907). In fact, the Convention of 1906 concluded between Great Britain and China referred to the refusal of Tibet to recognize the validity of the Anglo-Chinese Convention of 17 March, 1890, and Regulations of 5 December 1893, and affirmed the initial and continuing validity of the 1904 Convention. (Commission of Jurists, *op. cit.*, p. 113, A.J.I.L. Supp. 78 1907). Commenting on the Agreement of 1904, the International Commission of Jurists states that it leaves small room for doubt that "the Tibetan Government could in fact at this time act independently of China without let or hindrance." In 1908 a new agreement to settle the trade matters, undecided by the Conventions of 1893 and 1904, was concluded between China, Britain and Tibet. It is significant to notice that Tibet was a party to this agreement and that in Arts. 4 and 8 emphasis was made upon "Tibetan subjects" as distinguished from the "Chinese subjects." This shows that Tibet played a decisive role in making the agreement (*ibid.*, pp. 82-3). Drawing on the treaty practice of Tibet with India, Krishna Rao) in "The Sino-Indian Boundary Question and International Law," 11 *Int. and Comp. L.Q.* 395, 1962), makes a point that there does not appear to be any treaty between Tibet and China prohibiting the former from "entering into any treaty relations with other entities."

25. How Tibet asserted freedom about that time is evident in terms they proposed before the Simla Conference. In a letter to Lord Harding on 27 July 1913, they stated these terms: Tibet should be given complete control over its internal affairs, and also in external affairs, except few major matters which they were prepared to delegate to the British. No Chinese officials and soldiers, not even the Amban and his small escort, would be permitted to return to Tibet. The definition of Tibet was also stretched. See Lamb, *The McMahon Line* (1966). These demands were reiterated at the conference in a written statement. *Id.*, pp. 478-9.

26. See for instance, Art. 3, par. 1 of the Draft Articles on the Law of Treaties prepared by the International Law Commission, which states that "capacity to conclude treaties under international law is possessed by states and by other subjects of International law." 57 *A.J.I.L.* 203-4 (1963). See also Art. 2

(a) and 3, Harvard Research, *loc cit.*, note 22, pp. 703, 705. A large number of cases, illustrating competence of entities not having all ingredients of statehood to enter into treaty relations, are reported in current literature. See especially *ibid.*, pp. 699, 700, 706. Lissitzyn, *loc. cit.*, note 22, p. 1183.

27. See International Commission of Jurists, notes 23, pp. 79 and 80. See also for related discussion, *ibid.*, *Tibet and the Chinese People's Republic*, 149-161 (1960). A Convention between Great Britain and Russia in 1907 1 A.J.I.L. Supp. 398-403 (1907), which contained an undertaking of the signatories to negotiate with Tibet through the intermediary of China only, has been invoked to provide legal evidence of Chinese suzerainty over Tibet (White Paper III, p. 64). This contention lacks persuasiveness because neither Tibet nor China were parties to this Convention. Cf. Green, "Legal Aspects of the Sino-Indian Border Dispute," *The China Quarterly* 43 (July-September, 1960, No. 3).

28. Lord Curzon's dispatch to the Secretary of State for India in January 1903, quoted in Rama Rao, "Some Legal Aspects of the Sino-Indian Border Dispute," 1962 *Indian Year Book of International Affairs* 1, 22. Alexandrowicz, *Legal Position of Tibet*, note 23, p. 272, also states that Great Britain and Russia striving for influence over the Tibetan-Mongolian area, found it convenient to support the legal title of China against each other. For detailed reasons why Britain did not recognize, (except at the time of the Simla conference) Tibetan independence in 1912, see Rama Rao, *op. cit.*, pp. 26-9. See Lamb, note 2, p. 477, n.i.

29. Alexandrowicz, "Legal Position of Tibet" note 23, p. 272.

30. Even an impressionistic recall of some of the facts and their contexts would confirm this. On 4 June 1913, the President of China expressed acceptance of the tripartite Simla Conference. The Foreign Minister of China wrote to the British representative on 7 August, 1913, that the Chinese plenipotentiary would proceed to India "to open negotiations for a treaty jointly" with the Tibetan and British plenipotentiaries (Report, p. 114). The credentials of the three plenipotentiaries stated that the Conference was to discuss all matters regarding Tibet. Moreover, at the 7th meeting on 22 April 1914, the British representative clarified that the draft convention referred both to the Sino-Tibetan frontier in the east and Indo-Tibetan frontier on the south (*ibid.*, p. 112).

31. Art. 11; see note 15, p. 38.

32. In fact, the Chinese delegate to the conference wrote his full name on the draft. See Lamb, note 25, p. 505.

33. For a more complete general inquiry, see Lissitzyn, *loc cit.*, note 22, p. 1166 *et seq.*

34. See note 14. See also discussion in Sec. V below.

35. See note 18, p. 156. In its memoranda of 2 April, 1 May and 13 June 1914, and 30 May 1919, the Chinese Government noted that it did not accept the delimited Tibetan-Chinese border, but made no mention of the Tibetan-Indian border on the McMahon Line. Report, *op. cit.*, p. 135.

36. Bell, note 18, p. 156. A question has been raised to dispute the status of India to conclude the Simla convention with Tibet. Lamb has, for example, contended that by the 1906 Convention the British had recognized China's right to conduct Tibetan relations and had denied that they could themselves negotiate with Tibet beyond the scope of earlier agreement, note 25, p. 556. First, Lamb's interpretation of the 1906 Convention denying Britain's capacity to negotiate with Tibet is questionable. Secondly, he misses the point that Tibetan independence in 1912 and thereafter had changed the entire context of conditions. Tibet was then a sovereign state in full possession of rights to conclude treaties with other states including Britain. The earlier arrangements under the 1906 Convention, even if true, were not binding upon Tibet in 1914 who was not a party to it and who was by then free from the control of China. Britain could not refuse to see these new facts. Besides, as China itself was the equally active participant in the conference and was repeatedly warned by the British delegate about the possibility of a bilateral agreement with Tibet she should have protested and invoked the 1906 agreement. By not doing it, she recognized the clear competence of both Britain and Tibet to conclude the McMahon Line Agreement.

37. The Tibetans reaffirmed the McMahon Line in 1936 and 1938, and respected it during all these years. See White Paper III, p. 96. Even Alastair Lamb who is otherwise unsympathetic to the Indian case has this to say: "The Chinese would possibly have signed the Simla Convention had it not been for the alignment of the boundary between Inner and Outer Tibet. . . ." Note 25, p. 523.

38. Report, pp. CR-20 and CR-24.

39. Note 15, p. 34.

40. See 1 Oppenheim, International Law 802-803 (7th ed., Lauterpacht, 1948).

41. Harvard Research, *loc. cit.*, note 22, pp. 1159-61.

42. White Paper I, pp. 49-50. To be sure, this statement referred to the line between China and Burma, as well as between India and China.

43. "There may be an international agreement, but there may be no instrument embodying it—i.e., it is an oral agreement, made for example, between heads of States or Governments. . . ." 1959 I.L.C. Yr. Bk. (Vol. II) 94. See also Judge Jessup, in South West Africa Cases, (1962) I.C.J. Rep. 402-405.

44. P.C.I.J., Ser. A/B, No. 53, at 71 (1933). The declaration of the Norwegian Foreign Minister stated that the plans of the Danish Government respecting Danish sovereignty over Eastern Greenland would meet with no difficulties on the part of Norway. A Minute of the declaration had been prepared and initialled by the Norwegian Government, but the Court treated this as being of no greater significance than a mere verbal declaration. See McDougal and Lans, "Treaties and Executive Agreements," 54 *Yale Law Journal* 322, note 78 (1945). Thus the fact that a Minute is not initialled does not affect the binding nature of the oral declaration.

45. See note 6. India also rests its claims as to the boundary between Tibet and India in the Spiti area on the Agreements of 1684 and 1842, which are discussed in connection with the Western Sector, note 15 above. The boundary in the Barahoti area is supported by diplomatic correspondence and exchange in 1889-1890, and in 1914. Report, p. 81.

46. White Paper III, p. 74.

47. Lok Sabha Secretariat, *Foreign Policy of India, op. cit.*, note 6, p. 87.

48. White Paper II, p. 37.

49. See note 128.

50. Although this treaty has expired (on 2 June 1962) for the purpose of trade and intercourse, its terms exhibited very clearly the understanding of the Chinese as to the location of the boundary.

51. Government of India, Ministry of External Affairs, "Summary of the Report of the Officials of the Government of India and the People's Republic of China," pp. 7-8.

52. For an extended discussion, see Alexandrowicz, "India's Himalayan Dependencies," 10 *Year Book of World Affairs* 128 (1960).

53. The text of the treaty is given in Bell, note 18, p. 280.

54. Art. 1 laid down: "The boundary of Sikkim and Tibet shall be the crest of the mountain range separating the waters flowing into the Sikkim Teesta and its affluents from the waters flowing into the Tibetan Mochu and northwards into other rivers of Tibet . . ." *Ibid.*

The Chinese Government, in its note of 26 December 1959, accepted this identification of the boundary and stated that "there is neither any discrepancy between the maps nor any dispute in practice." White Paper III, p. 79.

55. White Paper I, p. 55.

56. See International Commission of Jurists, note 23, p. 110; 1 *A.J.I.L.*, Supp. 80 (1907). It was again confirmed by the Anglo-Chinese Convention of 1906 1 *A.J.I.L.* Supp. 78 (1907), and the Simla Convention of 1914. International Commission of Jurists, *op. cit.*,

pp. 113, 124-7.

57. For the text of the treaty, see Lok Sabha Secretariat, Foreign Policy of India, note 6, pp. 25-30.

58. For a detailed discussion of the Agreement, see Bell, note 18, pp. 99-106. References to earlier treaties are found in Aitchison, *A Collection of Treaties, Engagements and Sanads Relating to India and Neighbouring Countries*, Vol. XIV, (1929), p. 81, *et. seq.*

59. For text, see 2 Indian Year Book of International Affairs 295-8 (1952).

60. Additional evidence of China's acceptance of India's responsibilities towards Bhutan can be afforded by the fact that the Indian Government has taken up a number of matters with the Chinese Government on behalf of Bhutan, including the delineation of Bhutan's external boundaries. Report, at 199.

61. See Report, p. 51.

62. See notes 74 and 75.

63. Note 15, p. 1.

64. Indeed, treaties may be concluded in any form which serves to express the intentions of the negotiating parties. See Pradier-Fodere, *Traite de Droit International Secs. 1071 and 1084* (1885), cited in Harvard Research, *loc. cit.*, note 22, p. 722-3. As to location of the boundary, see note 100.

65. Minsar, the sovereignty of which under the provisions of the Agreement was retained by Ladakh, was at first administered by the latter and, since 1841, when Gulab Singh annexed Ladakh, has been under the jurisdiction of the Kashmir Government. Similarly, other provisions of the treaty, particularly those relating to trade and the exchange of the Lapchak and Chaba Missions, have remained operative. Report, p. 52.

66. White Paper II, pp. 35-6; White Paper III, pp. 86-9.

67. White Paper II, p. 28.

68. The names of the signatories representing the Emperor of China and Lama Guru Sahab of Lhasa were, respectively, Kalon Sakon and Depon Shabeho Bakshi.

69. White Paper II, p. 35.

70. *Op. cit.*, note 23, p. 76.

71. White Paper II, p. 36.

72. *Ibid.*

73. Report, p. 54. A translation of the treaty is provided in Panikar, *The Founding of the Kashmir State* 146-148 (1953).

74. See note 63.

75. Cunningham, *Ladakh* 261 (1854). See note 100. Prime Minister Chou En-lai cited Cunningham with approval, though in a different context. See White Paper II, p. 29.

76. Huttenback, "The Historical Genesis of India's Northern Frontier Problem," 13 (Working Paper presented before the South



Asia Colloquium, 27 April 1961; the paper was also circulated by Centre of South Asia Studies, University of California, Berkeley).

77. For a survey of these requirements, see generally, Schwarzenberger, "Title to Territory: Response to a Challenge," 51 A.J.I.L. 308 (1957); MacGibbon, "The Scope of Acquiescence in International Law," 31 Brit. Yr. Bk. Int. Law 152-167 (1954).

78. See note 3, 2 Int. Arb. Awards 839.

79. *Ibid.*, p. 840.

80. Briggs, note 1, pp. 247, 249-50; 26 A.J.I.L. 390 (1932).

81. Ser. A/B, No. 53, p. 46 (1933).

82. (1953) I.C.J. Rep. 53, 78. 98-9; 48 A.J.I.L. 316 (1954).

83. (1959) I.C.J. Rep. 229; 53 A.J.I.L. 937 (1959).

84. See *The Island of Palmas Arbitration*, note 3, 2 Int. Art. Awards 840. See also (1959) I.C.J. Rep. 229.

85. A comprehensive itemization of the evidence presented by India is documented in White Paper II, pp. 19-24, 36-46, 125-32; White Paper III, at 85-98; Report, pp. 41-50, 71-83. 101-9, 137-287, 302-9, 318-28, 332-8.

86. See generally, Report, at CR-33-CR-154, CR-198-CR-213. For references to the inconsistencies in, and inadequacy of, the Chinese evidence, see Summary of the Report, *op. cit.*, note 51 above, pp. 4-7.

87. The *Mahabharata* and *Ramayana* both probably dating to 400 B.C., speak of the activities of tribes that are Indians to this day. After the period of the Epics, we have firmer historical evidence to prove the consolidation of Indian rule in Northern India. At times, the consolidation stretched even beyond the Himalayas, variously including certain Central Asian provinces as Kashgar, Yarkand and Khotan, and extending as far as the borders of Parthia and Persia, *e.g.* during the Kushan Empire in the first century A.D. For centuries, the Hindu dynasties held sway over Eastern India. In the thirteenth century it passed to the Ahom rulers who controlled the entire area (Assam) until the emergence of the Britishers. See White Paper II, pp. 125-30. For a useful list of authorities supporting the proposition that the limits of Tibet have lain along the high Himalayan range, see Report, pp. 104-7.

88. British India entered into many agreements with the Indian tribes of Assam, involving peace, economic aid and administrative matters. These undertakings by tribes confirmed their acceptance of the authority of the Indian Government. An agreement with the leaders of the Aka Tribes was concluded in 1888; with the Abors three treaties were signed between November 1862 and January 1863, and the fourth in 1866. Further evidence of the establishment and consolidation of British control in the Eastern Sector can be provided by the fact that during the period 1912-1932 two frontier tracts, Sadiya Frontier Tract, nearly 10,000

square miles in area, and the Balipura Frontier Tract of the same size, were formed before the Simla Conference in 1914. Later, in 1942, a new Tirap Frontier Tract was carved out of the Sadiya Frontier Tract and the Malipura Frontier Tract was divided into two divisions, the Abor Hills and Mishmi Hills. In 1954 the frontier divisions were identified as Kameng, Subansiri, Siang, Lohit, Tirap and Tuensang. In 1957 Tuensang was united with the Naga Hills District; both are now parts of the new Naga State.

89. For full documentation, see Report, pp. 202-6.

90. A good account of the immense constructive work leading to a rise in the level of living standards of the NEFA people, which is seeping up in all tribal areas, can be found in Verrier Elwin, *A Philosophy for NEFA* (1959). For a review of welfare activities in this area during the British period, see Report, pp. 208-9.

91. Christopher von Furer-Haimendorf, "Primitive Peoples of the McMahon Line Country: Tribal Life in a Territory Now Claimed by China," 236 *The Illustrated London News* 94 (16 January 1950).

92. *Peking Review*, 15 September 1959, p. 18.

93. White Paper III, p. 72.

94. See note 6. Evidence presented by India with respect to these specific places can be found in Report, *op. cit.*, pp. 71-83 and 165-98. For the Chinese evidence, see Report, at CR-39-CR-43 and CR-83-CR-90.

95. *Ibid.*, p. 199.

96. *Ibid.*

97. Ladakh was part of the Harsha Empire in the seventh century A.D. The account of the noted Chinese pilgrim Hieun Tsang about his extensive travels in Northern India at that time included a spirited reference to the State of Kashmir and Ladakh. For a brief description of the subsequent history, see White Paper II, pp. 128-30.

98. The Tibetan influence during this time was devoid of any authority and control. In fact after the tenth century, Tibetan influence sharply declined, never to return, and Kashmiri influences assumed the responsibility for control and authority. A Tibetan chronicle of the 17th century, *La Dvags Rgyal Rabs*, establishes that in the tenth century the boundary between Ladakh and Tibet was identified as shown by the current Indian maps. See Report, *op. cit.*, pp. 41-2.

99. See note 15.

100. Cunningham note 75, pp. 328-9. For accounts of other travellers, see Report, at 43-4.

101. See *ibid.*, at 44-5.

102. Details of these activities appear *ibid.*, pp. 47-50.
103. For an informative description of facts about India's administrative jurisdiction comprising collection of revenue, maintenance of trade routes, control of expenditures, maintenance of law and order, conduct of surveys, etc., see *ibid.*, pp. 137-51.
104. See notes 78-84.
105. (1959) I.C.J. Rep. pp. 227-9.
106. In the face of such a rationality and clarity in community expectations, one can only marvel at Bains' suggestion in *India's International Disputes*, at 162 *et seq.* (1962), that China's occupation by force of the Aksai area has given it a prescriptive title. His speculations have been appropriately answered by Krishna Rao, "Title to Territory," 2 *Indian Journal of International Law* 200-210 (1962). See also note 108 below.
107. 6 *Moore International Adjudications (Modern Series)* 95 (1933). See also the dissents in the *Anglo-Norwegian Fisheries Case*, (1951) I.C.J. Rep. 180, 201, 204.
108. *Proceedings of the Alaskan Boundary Tribunal*, Vol. VII, pp. 531 and 533.
109. *Island of Palmas Arbitration*, Memorandum of the United States of America, p. 94.
110. 3 *Int. Arb. Awards* 1567 (U.N. Series).
111. Briggs, note 1, p. 250.
112. The fact that India has repeatedly protested would appear to about any presumption of acquiescence and prevent China from acquiring "prescriptive" title in Aksai Chin. For general inquiry, see MacGibbon, "Protest in International Law," 30 *Brit. Yr. Bk. Int. Law* 306 ff. (1953).
113. The policies underlying the notions of "acquiescence," "estoppel," and "prescription" are of course much the same but while "acquiescence" and "estoppel" build largely from agreement or implied agreement, "prescription" builds upon inferences from the lapse of time. For general discussion, See McDougal, Lasswell and Vlasic, *Law and Public Order in Space* (1963), especially Chapter 7.
114. MacGibbon, *loc. cit.*, note 77, p. 145. A brilliant exposition of the doctrine of acquiescence is also found in the separate opinions of Judges Alfaro and Fitzmaurice in *Temple of Preah Vihear (Merits)*, (1962) I.C.J. Rep. 39-66.
115. See MacGibbon, "Estoppel in International Law," 7 *Int. and Comp. L.Q.* 468 (1958).
116. *E.g.* see Schwarzenberger, "The Fundamental Principles of International Law," 87 *Hague Academy Recueil des Cours* 256 (1955).
117. Schwarzenberger, *loc. cit.*, note 77, p. 323.
118. There is no general agreement in international law about the time requirement for "prescription" or "acquiescence," which seems to depend upon many varying circumstances. See generally,

Johnson, "Acquisitive Prescription in International Law," 27 Bri. Yr. Bk. Int. Law 334 (1950); Jennings, note 2, p. 21. See also Judge de Visscherfi in *Norwegian Fisheries Case* (1950), I.C.J. Rep. 130; Italy (Gentini) v. Venezuela, cited in Bishop, *International Law, Cases and Materials* 44 (2nd ed., 1962).

119. Details are offered in White Paper II, p. 40; Report p. 207.

120. These and several other Chinese maps since 1711, showing the boundary alignment in the Eastern Sector more or less identical to the ones shown on Indian maps, are listed in Report, pp. 107-8.

121. A catalogue of Chinese maps is given in *ibid.*, at 109. While India has relied on such maps as evidence of tradition, China maintains that they "cannot serve as valid evidence." *Ibid.*, at CR-61. In the *Minquiers and Ecrehos Case* (1953), I.C.J. Rep. 47 at 105, Judge Levi Carneiro attached "slight value" to unofficial neutral maps Weissberg, "Maps as Evidence in International Boundary Disputes: A Reappraisal," 57 A.J.I.L. 787 and 803 (1963).

122. (1959) I.C.J. Rep. 227; see also (1962) I.C.J. Rep. 23.

123. Hyde, "Maps as Evidence in International Law," 27 A.J.I.L. 315-316 (1933); See also *The Canada-Newfoundland Boundary Dispute*, 137 L.T.R. 187, 199.

124. Weissberg, *loc. cit.*, note 121, p. 803; see also MacGibbon, *loc. cit.*, note 77, pp. 180-81.

125. White Paper III, p. 72. As for Bhutan and Sikkim, see *ibid.*, p. 79.

126. A list of these maps appears in Report, at 149-50. For an elaborate account of surveys carried out by the Government of India since 1862, see *ibid.*, pp. 143-7.

127. *E.g.*, several editions of Postal Atlas of China published between 1917 and 1933.

128. An inquiry into all the relevant comprehensive features of this agreement shows that there was no reference, explicit or implied, by China to its claims over the large Indian territory as it is now asserted. Throughout the negotiations the Indian Delegation took the line that all questions at issue between the two countries were being considered, and as a settlement was made, there was no room for any dispute which China now asserts remained unsettled. After signing the agreement, the leader of the Indian Delegation, in his speech on 29 April 1954, declared: "We have gone through fully questions at issue between the two countries in this (Tibetan) region." This indicated that in India's view no dispute remained. Since the Indian viewpoint about the boundary was known to China, and since no objection of any sort was raised by it, it could be inferred that China had no disagreement therewith. The Chinese assertion that the boundary question could not have been discussed in 1954 because at that time "the ques-

tion which the two countries were most concerned about and which called for urgent solution was the establishment of normal relations between India and the Tibet region of China on a new basis" (White Paper III, p. 74), is hardly tenable. Could the Chinese establish normal relations, if the border claims of about 50,000 square miles, as they are asserted today, were unresolved and unexplored? This indicates that China did not think then, as it asserts now, that there was any border problem.

129. Report, p. 97.
130. See White Paper I, p. 49.
131. See note 42.
132. Witenberg 60 *Journal du Droit International* 520, 531, 537-538 (1933).
133. *La Prescription en droit international* 26 (1934).
134. Anzilotti, *Cours de droit international* 344 (French trans. by Gidel, 1929).
135. *Ibid.*
136. 56 *A.J.I.L.* 1033 (1962); (1962) *I.C.J. Rep.* 6.
137. *Ibid.*, pp. 27-31.
138. *Ibid.*, pp. 23, 31, 32.
139. The Alaskan Boundary Tribunal: Award of 20 October 1903, *Cmd.* 1877 (1904), p. 79. See also *Cmd.* 2166 (1904), p. 4; *Grisbadarna Arbitration*, 4 *A.J.I.L.* 226 ff. (1910); *Island of Palmas Arbitration*, note 3 above, 2 *Int. Arb. Awards* 843.
140. 2 *Int. Arb. Awards* 1309, 1327 (U.N. Series).
141. (1951) *I.C.J. Rep.* 116, 144, 154, 188. 194-195, 197 *et seq.* The fact that for a period of more than sixty years there was no protest from the United Kingdom weighed heavily with the Court.
142. (1959) *I.C.J. Rep.* 230; see also the Case Concerning the Arbitral Award made by the King of Spain on 23 December 1906 (*Honduras v. Nicaragua*), (1960) *I.C.J. Rep.* 192, 207, 213; 55 *A.J.I.L.* 478 (1961). In the face of such a wide consensus, the Chinese contention that silence does not mean acquiescence, and that the rule of estoppel is "absurd" (Report, at CR-31 and 99) appears at least idiosyncratic; moreover the attempted justification: "Can it be said that a sovereign state has no right to reserve its proposition concerning questions of its own sovereignty and to raise it on suitable occasions?" (*Ibid.*, at CR-31), appears to be destructive of the basic policy of "certainty, stability, and finality of frontiers."
143. *Peking Review*, 15 September 1959, p. 11; see also White Paper III, p. 69.
144. For a brief description of the Indian claim, see White Paper III, p. 89; Report 38-9.
145. Thomas Holdich, *Political Frontiers and Boundary Making*, 147 (1916).

146. I. Moore, *Digest of International Law* 616 (1906).
147. *Le droit international codifié* (Paris 1874), cited by Adami, note 2, p. 8.
148. *Ibid.*
149. Taylor, *A Treatise on Public International Law* 298 299 (1901).
150. 1 Oppenheim, *International Law*, 543 (1955).
151. See Adami, note 2, p. 9.
152. Boggs, note 2, p. 75, *Ireland, Boundaries, Possessions and Conflicts in South America* 138 (1938).
153. Boggs, *op. cit.*, *Ireland. op. cit.*, pp. 144, 152.
154. Boggs, *op. cit.*, *Ireland, op. cit.*, pp. 17, 20.
155. See Adami, note 2, p. 9.
156. *Ibid.* p. 9.
157. Document of delimitation signed at Bayonne on 11 July 1868, *ibid.*, note 1.
158. Art. 1, See Bell, note 18, pp. 280-81 Krishna Rao, *loc. cit.*, note 24, p. 407, lists a few more such agreements.
159. Boundary Treaty Between the People's Republic of China and the Kingdom of Nepal, 1960, Text in 1 *Indian Journal of Int. Law* 704 (1961).
160. Boundary Treaty Between the People's Republic of China and the Union of Burma, 1960 (text *ibid.*, p. 695).
161. McNair, *Law of Treaties* 533 (1st ed., 1938); see also *idem.*, 256, 655-8 (2nd ed., 1961). See Art. 44, para. 3(a), of the Draft Article on the Law of Treaties prepared by him for the International Law Commission, which excepts treaties fixing a boundary from the operation of the rule of *rebus sic stantibus*. The Commentary states that in the Free Zones case both states appear to have recognized this, as do most writers. 58 *A.J.I.L.* 283, 290 (1964).
162. For instance, Chesney Hill, "The Doctrine of *Rebus Sic Stantibus*, in *International Law*," 9 *University of Missouri Studies* 78 (1934).
163. Art. 28 (a), Harvard Research, *loc. cit.* notes 22 above, p. 1096. A Swiss Federal Court decision demanding that a party invoking *clausula rebus sic stantibus* must invoke it within a certain established time from the change being perceived, adds one more limitation. *Annual Digest*, 1927-1928, Case No. 289.
164. McDougal and Associates, *Studies in World Public Order* 1014 (1960).
165. Starke, *Introduction to International Law*, 240-241 (ed. 1958). See also Wright. "Some Legal Aspects of the Berlin-Crisis," 55 *A.J.I.L.* 963 (1961).
166. This communication was made on 24 March 1914. See *India-Tibetan Frontier* (1914), Exchange of notes between British and Tibetan plenipotentiaries, note 15 p. 33.

167. *Id.*, p. 34.
168. McDougal and Associates, note 164, p. 1014.
169. Second Report on Law of Treaties to the General Assembly, 1957 I.L.C. Year Book (Vol. 2) 57.
170. For amplification see White Paper II, p. 27; White Paper III, p. 63.
171. 2 Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 1523-1524 (2nd ed. 1945).
172. Note 146, p. 249.
173. Art. 24, *loc. cit.* note 22, p. 1044.
174. 22 A.J.I.L. 763 (1928). Reference may also be made to the action of the Second all-Russian Congress of Soviets on 25 October 1917, which annulled certain treaties "in so far as they tend to the augmentation of the profits and the privileges of the Russian capitalists." The Soviet memorial at the Genoa Conference on 20 April 1922, spoke of the break of succession of only those civil obligations "which were component elements of the economic relations of the social order now extinct." See Harvard Research, *loc. cit.*, note 22, p. 1052.
175. Some of these agreements are listed, *id.*, p. 1053.
176. Moore, note 146, p. 303-4. See also U.S. versus Texas, 143 U.S. 621.
177. See Indian Independence (International Arrangements) Order of 1947; text in U.N. Doc. A/C.6/161, 6 October 1947. See also legal opinion of Dr Ivan Kerno, Assistant Secretary General of the United Nations, stating that Pakistan, as a new state, will not have the treaty rights and obligations of the old state. Briggs, note 1, p. 429-5.
178. White Paper II, p. 39.

## C H A P T E R I I

### THE SINO-INDIAN DISPUTE — CLAIMS CONCERNING USE OF FORCE FOR RE-SHAPING BOUNDARIES

"Frontiers are indeed the razor's edge on which hang suspended the modern issues of war and peace, of life or death of nations."

[Lord Curzon, "Frontiers." The Romans Lecture, Oxford, 1970.]

INTERNATIONAL LAW, as stated in Chapter I, recognizes that the possession of a land mass, including internal waters, is a fundamental base of national power. The size and richness in resources of the national land mass determines in large measure a state's power in relation to other states.<sup>1</sup>

In order to secure for states the maximum benefits from their land masses as bases of power, international law seeks to protect states in their territorial integrity and independence of decision. International law protects boundaries as the demarcation lines of territorial integrity and exclusive control; boundaries become, therefore, the visible limits of the bases of power of nations.

International law projects various prescriptions for the protection of boundaries, foremost of which is the prohibition of resort to coercion in reshaping these boundaries. The most authoritative contemporary expression of this prescription is in Article 2 (4) of the U.N. Charter which obligates member-states to

refrain in their international relations from the threat



or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

This prescription is made applicable to non-members as well,<sup>2</sup> and this is certainly the general community expectation. From the viewpoint of the general community, the most fundamental of its prescription must be enforced even against those who do not participate in all of its formal processes.

It is true that the above prescription, prohibiting coercion, presupposes the effective application of yet other prescriptions and policies for the establishment and identification of boundaries.<sup>3</sup> But the cardinal tenet remains unchanged, to wit, that there should be no unilateral alteration of extant boundary lines by application of unlawful coercion. Because boundaries are important in marketing out the bases of national power, and because international law outlaws the use of coercion in international boundary relations, any armed aggression across international boundaries, whereby the territorial integrity of the target state is affected is, apart from self-defence,<sup>4</sup> a gross violation of these authoritative prescriptions.

The peaceful solution of boundary disputes can be achieved only when states accept the requirements of law and make positive efforts to implement them in practice.

The current India-China border dispute, manifesting the effects of the violation of minimum order in international boundary relations, reflects the continuing importance of the above fundamental rule of international law.

#### THE RECOURSE TO FORCE: A SUMMARY ACCOUNT<sup>5</sup>

When India and China concluded an Agreement on Trade and Intercourse between Tibet and India in 1954,<sup>6</sup> which incorporated their shared commitments to abide by the Five Principles of Co-existence (Panchsheel)—mutual respect for each other's territorial integrity and sovereignty, mutual non-aggression, mutual non-interference in

each other's internal affairs, equality and mutual benefit, and peaceful coexistence—it was felt by many that a landmark had been established in the peaceful relations between India and China.<sup>7</sup> Hopes of the peoples of the world were raised when the Prime Ministers of India and China, in their joint statement on 28 June 1954, declared :

If these principles are applied not only between various countries but also in international relations generally they would form a solid foundation for peace and security and the fears and apprehensions that exist today would give place to a feeling of confidence. . . . The Prime Ministers expressed their confidence in the friendship between India and China which would help the cause of world peace and the peaceful development of their respective countries as well as the other countries of Asia.<sup>8</sup>

Subsequent events, culminating in China's recourse to violence against India, however, were to show that while India took the five principles seriously as a code of international conduct, to China they meant a code of temporizing tactics—a temporary device to lull India into a sense of security until China's military capabilities were adequate for implementing its postulated goals of territorial expansion.<sup>9</sup>

From the dawn of civilization, the Himalayas, the highest mountain ranges on earth, have stood as an inviolable boundary line between India and China. On both sides of these mountain ranges flourished two of the oldest civilizations in the world. So ancient and rich is the history of contacts between these two countries that it is not possible to record it in full here.<sup>10</sup> Suffice it to say that there is a long and continuous record of amity and friendliness between them for over 2,000 years, and the towering Himalayas have witnessed the flow of wealth and culture and exchange of many other important values between the two countries.

Contemporarily, when, after a revolution, the People's

Republic of China declared herself to be an established State on 1 October 1949, the Government of India, on 30 December of the same year, promptly extended official recognition and set up diplomatic relations with her on 1 April 1950. With this, the continuing historic links of goodwill that had prevailed between the two countries for centuries moved further, and a fresh flow of friendly intercourse began,<sup>11</sup> though not destined to last for very long.

For many years after the establishment of the People's Republic, there was no reason to believe that there was any serious border dispute between the two countries, nor that the Chinese Government was either unaware of the traditional border or disputed its location. There is strong evidence to show that as early as 1950, the Chinese Government expressed gratification over the Indian Government's desire "to stabilize the Chinese-Indian border."<sup>12</sup> The Government of India replied that "the recognized boundary between India and Tibet should remain inviolate."<sup>13</sup> The Chinese Government gave no indication of any question as to the location or recognition of the existing boundary between the two countries. The 1954 India-China Agreement on Tibet embodied a provision referring to maintenance of border passes.<sup>14</sup> At that time all outstanding problems between them were fully considered, and the Peking Communique, accepting this fact, declared, "both parties discussed fully relations between China and India."<sup>15</sup> Yet China chose to remain quiet on her claims over vast Indian territory, which she was soon to assert.<sup>16</sup> Subsequently, when at the end of 1956, Premier Chou En-lai and Nehru held talks in New Delhi, the former categorically stated that though he did not think the McMahon Line, i.e., the boundary between India and Tibet in the Eastern Sector, a fair line, nevertheless, because it was an accomplished fact, "the Chinese Government were of the opinion that they should give recognition to this . . . Line."<sup>17</sup>

The seriousness of the border dispute did not become apparent until early 1959 when on the heels of the cap-

ture of Tibet, the Chinese Government came out with direct and extensive claims over some 50,000 square miles of Indian territory. During these five years, between 1954 and 1959, incidents of increasing seriousness occurred on the India-China border. Since the Indian Government wishfully believed that through negotiations it could come to a peaceful settlement with China, these incidents had little real effect upon India-China relations. Nevertheless, they were the initial stages of a process of coercion, which eventually developed into a full scale invasion of northern India on 20 October 1962.<sup>18</sup>

The Chinese, during these five years, conducted a great deal of border activity. Certain maps were published in China showing boundary alignments which included within China over 50,000 square miles of the Indian territory in the North East Frontier Agency (NEFA) and in Ladakh. When the Indian Government protested against the discrepancies between Indian and Chinese maps, the Chinese Government shrugged off these objections on the assertion that the maps were really reproductions of old maps drawn before 1949 and the Chinese Government had yet no time to revise them.<sup>19</sup> The Indian Government was probably inclined to rely upon the Chinese assurance since official Indian maps showing the Indian version of boundary alignment were not in dispute.

Similarly, when the Chinese Government in July 1934 protested the presence of Indian troops in the Barahoti (Wu-je, as named by the Chinese) area in the Uttar Pradesh, the Indian Government did not more than simply refute the Chinese claim on the assumption that the claim to Barahoti was made by the Chinese in ignorance.<sup>20</sup>

But subsequent Chinese intrusions into Indian territory were brutal and provocative. In June 1955, Chinese troops conducted an unauthorized incursion into Barahoti,<sup>21</sup> and in September they even proceeded ten miles south of Niti Pass to Damzan in Uttar Pradesh.<sup>22</sup> In April 1956, an armed Chinese party intruded into Nilang-Jadhang area,<sup>23</sup> and in September, twice crossed the Shipki Pass.<sup>24</sup> The Indian Government lodged a strong protest against each of

these 1955-1956 encroachments into the Central Sector of the Sino-Indian border. During 1957, Chinese incursions continued, and a road running for about a hundred miles across India's Aksai Chin area was completed.<sup>25</sup> In July 1958, the Khurnak Fort in Ladakh was forcefully occupied by Chinese soldiers.<sup>26</sup> In September, they arrested an Indian party on routine patrol duty in the northern part of Aksai Chin.<sup>27</sup> The Indians were detained and ill treated for nearly five weeks.<sup>28</sup> Subsequently, there were intrusions by the Chinese into the Lohit Frontier Division of NEFA<sup>29</sup> and Laphal and Sangchamalla in Uttar Pradesh.<sup>30</sup>

Year after year China thus carried out military incursions until 1959, when the Chinese Government unmasked itself and laid explicit claims over 50,000 square miles of Indian territory. Maps which had previously been asserted to be erroneous or inconsequential, or which the busy People's Republic had not time to revise, now became the authentic records of extensive Chinese territorial claims. In the light of these Chinese claims, the continuing border incidents could no longer be cloaked as accidental. The newer incidents, expressing the mounting scale of force employed by the Chinese, were unprecedented. In July 1959, a Chinese armed detachment intruded into the region of the Western Pangong Lake in Ladakh, arrested six Indian policemen and established a camp at Spanggur.<sup>31</sup> Later, in early August, an armed Chinese patrol crossed into Khinzemane in the Eastern Sector and pushed back an Indian patrol.<sup>32</sup> On 25 August, Chinese troops forcefully seized Longju, an important Indian frontier post in the Eastern Sector, after opening fire on a small Indian garrison killing three Indian guards.<sup>33</sup> The incidents of 20 and 21 October were even more alarming. Chinese military forces advanced some fifty miles inside Indian territory in the Chang Chenmo Vally of Southern Ladakh, and when confronted by an Indian patrol near the Kongka Pass, inflicted severe casualties upon the patrol, killing nine Indian police guards.<sup>34</sup> The captured Indian guards were viciously mistreated.<sup>35</sup> It is also reported that confessions were extorted from the captured

men before their release.<sup>36</sup> The Indian protest was categorically dismissed by the Chinese Government with a warning that the situs of the incident was "indisputably Chinese territory."<sup>37</sup>

Thus, by the end of 1959, the border situation was worsening. The Prime Ministers of India and China met in New Delhi in April 1960, in an effort to explore avenues which might lead to a peaceful settlement. The sole outcome of their talks was a decision that officials of the two governments should meet to examine all relevant documents in support of their respective stands and draw up a report for submission to the two governments. Meanwhile, it was agreed that steps would be taken to avoid friction and clashes in the border areas.<sup>38</sup> Officials of the two governments accordingly met and held three sessions at Peking, Delhi, and Rangoon between June and December 1960, in fulfilment of their assigned task.<sup>39</sup> The Chinese Government took no steps however, to reduce the tension either during or after the talks. On the contrary, the Chinese forces, in disregard of the understanding of the two Prime Ministers, continued to violate Indian territory.

In June 1960, the Chinese troops intruded into Taksang Gompa in the Eastern Sector<sup>40</sup>; in September they crossed into Sikkim near Jeltpla Pass,<sup>41</sup> and in October they went up to Hot Spring in Ladakh.<sup>42</sup> In May 1961, there was an intrusion into Indian territory near Chushul in the Western Sector,<sup>43</sup> and in July a Chinese patrol crossed the Eastern Sector in the Kemang Frontier Division of NEFA.<sup>44</sup> In August 1961, Chinese forces established three new check-posts in Ladakh, off Nyagzu and near Dambuguru.<sup>45</sup>

The year 1962 was marked by a dramatic intensification of Chinese coercion which was variously characterized by observers as a "Yellow invasion of India" and was compared with the invasions of Holaku, Tamburlein and Genghis Khan.<sup>46</sup> "No excuse can be found," said one source, "for one Asian nation invading another for [a] mere border dispute" in an "era of democracy, peaceful co-existence and the Bandung treaty."<sup>47</sup>

Chinese forces during 1962 made spectacular advances deep into Indian territory, constructed new roads and military bases, and finally staged a full-fledged military invasion in both the Eastern and Western Sectors of the India-China border. In January 1962, some Chinese civil and military personnel crossed the border in the Eastern Sector near Longju and proceeded to Roi village half a mile within India.<sup>48</sup> In April and May, patrols were carried out by Chinese forces in the Chip Chap area of Ladakh.<sup>49</sup> On 30 April, they issued a threat that they would extend such patrolling to the entire boundary.<sup>50</sup> In July they encircled an Indian Post in Galwan Valley,<sup>51</sup> and on 14 August, attacked Yula Post in the Pangong Lake area.<sup>52</sup> Finally on 8 September, a Chinese force intruded into Indian territory in the north-western corner of the Eastern Sector across the Thagla Ridge.<sup>53</sup> This was the first major instance of Chinese forces crossing the established boundary in the Eastern Sector and intruding into NEFA. Ironically, this crossing took place at a time when the Indian Government was seeking the co-operation of the Chinese Government on the holding of preliminary discussions to reduce tensions and to consider the boundary question on the basis of the Report of the officials of the two governments.<sup>54</sup>

In spite of the fresh violation of India's northern border on 8 September, India did not abandon efforts for restoring peace. In a note of 6 October 1962, the Government of India expressed its willingness to hold further discussions to restore the *status quo*.<sup>55</sup>

Their military activities had already secured to the Chinese a sizeable area of 12,000 square miles in the Western Sector,<sup>56</sup> but the quest for expansion continued. Beginning on 20 October 1962, Chinese activities took a new turn and suddenly flared into a massive military invasion of India's northern frontier, from Ladakh in the West to NEFA in the East.<sup>57</sup> The attack continued for approximately one month, with the Chinese forces getting it pretty much their own way throughout the undeclared war, seizing an additional 6,000 square kilo-

metres in the Western Sector and some 20,000 square kilometres in the Eastern Sector.<sup>58</sup> The fighting was suspended on 21 November 1962 when, to the bewilderment of many observers, the Chinese Government declared her intention to cease-fire and withdraw unilaterally from midnight of 21/22 November.<sup>59</sup>

For thousands of years India had nestled behind the security of the Himalayas. In historical periods there were invasions from the north-west or north-east, but at no time was there an invasion from over the impregnable Himalayas. But the Chinese forces which swarmed over the Himalayas and descended on the Indian plains exploded the centuries-old myth of Himalayan impregnability. This moved one commentator to write:

A border, dormant for centuries, has suddenly come alive. It is bristling with soldiers where no soldiers ever lived.<sup>60</sup>

... CHARACTERIZING THE RECOURSE TO FORCE.  
THE ISSUE OF LAWFULNESS

In light of this factual background, the main issue for consideration is: Whatever the eventual settlement of the border dispute, how may the Chinese resort to force, under the circumstances, be characterized in terms of lawfulness? In support of its actions, the Chinese Government invokes considerations of authority which are most economically expressed in its unilateral cease-fire declaration:

In the past two years, first in the western and then in the eastern sector of the Sino-Indian border, Indian troops crossed the line of actual control between China and India, nibbled Chinese territory, set up strong points for aggression and provoked a number of border clashes. Relying on the advantageous military positions they had occupied and having made full preparations, the Indian troops eventually launched massive armed at-



tacks all along the line on the Chinese-frontier guards on 20 October 1962. . . . The Chinese frontier guards all along maintained maximum self-restraint and forbearance in order to avert any border conflict. However, all these efforts by China proved of no avail, and the Indian acts of aggression steadily increased. Pressed beyond the limits of endurance and left with no room for retreat, the Chinese frontier guards finally had no choice but to strike back resolutely in self-defence.<sup>61</sup>

Even the most cursory survey of facts does not support this contention. While asserting a claim of self-defence, the Chinese Government has not, it is submitted, been able to sustain such claim in respect of its seizure of 20,000 square kilometres by the use of force in the Eastern Sector nor in respect of its capture of some 15,000 square miles of Indian territory in the Western Sector.<sup>62</sup>

Clearly, the unilateral, self-convincing Chinese claims need to be appraised in terms of something other than themselves. Review of the Chinese assertions in the light of general community perspectives would require a systematic and disciplined appraisal of the major features of the total context of the Chinese claims. A mode of analysis developed elsewhere is here sought to be employed in examining contextual features.

### *The Characteristics of the Participants*

The character and constitution of participants in the process of international coercion, especially the power and strength of the initiator-state in relation to that of the target, have great relevance for determining the lawfulness or unlawfulness of coercion. Any inquiry into these factors is highly suggestive of the real, as distinguished from the proclaimed objectives of each participant, the kind of public order each projects in the international arena, the capacity and likelihood of a state undertaking an arbitrary resort to force, the intensity of coercion applied by each, and the impact of coercion on the

expectation structure of the target-state.<sup>63</sup>

In the present controversy, India and China are the two immediately contending participants. A brief survey of past experience indicates that India and China "have always represented two opposite methods of organizing the energies and purposes of man in society."<sup>64</sup> The transition of old historical trends into the modern era is appropriately depicted by Barbara Ward, a British economist :

Modern China, like ancient China, would be practical, forceful, centralized and authoritarian. India would remain, or attempt to remain, plural, decentralized, tolerant and permissive.<sup>65</sup>

The respective performances of the two countries in their border confrontation would seem a manifestation of this basic divergence.

Between themselves, China and India represent a fantastic 1,200,000,000 people i.e., well over one-third of the world's population. While China's population is roughly 50 per cent larger than India's, this disparity has not proved to be as decisive and threatening as the factor of the management of her base values, as we shall discuss in detail later, which makes the Chinese army a formidable war machine. China had for years maintained an army of four million men, representing perhaps eight times the size of the Indian army.<sup>66</sup> In the fight on the north-east and north-west fronts, the Indians insisted that China's sheer numbers played a more important part than their fire-power.<sup>67</sup> Moreover, the Chinese army was well armed, well trained and commanded, and had the decided advantage of having been battle-tested on numerous occasions. In contrast, the Indian army was inferior in numbers, and its training had not been the best. Headlines in papers revealed the army's dismal lack of preparation for conducting a war in high Himalayan terrain. Perhaps most tragic of all, the front line Indian fighting men had, at least until recently, only antiquated weapons with which to carry

out their task.<sup>68</sup>

A good many writers have suggested that there is a close relation between internal value systems and external policies of states.<sup>69</sup> One distinguished scholar, for instance, submits that "a nation organized as a political democracy is more inclined to cooperate peacefully with other nations, and is less prone to resort to violence and war, than one organized as an autocracy."<sup>70</sup> In his opinion, "a government which has come to power and must maintain itself by internal violence cannot be expected to behave peacefully towards other countries."<sup>71</sup> It is not at all revolutionary to suggest that internally, China is a totalitarian state.<sup>72</sup> It is ruled by a monolithic government which permits no dissent and demands unflinching obedience from its populous masses. At the head of the highly centralized system is the mighty and unchallenged Communist Party, led in the orthodox Marxist tradition by Mao Tse-tung.

The present ruling elites established their control in China by bloody revolution. Since 1949, the show and use of naked force by the Chinese Reds has characterized the course of their short history.<sup>73</sup> Domestically, the government has ruthlessly offended all traditions of human rights in its attempt to enforce individual and group conformity and obedience.<sup>74</sup> From the very outset, basic freedoms such as speech, press and religion were non-existent. Human life has characteristically been considered an expendable commodity by a ruling group which unswervingly pursues its national and international policy with reckless abandon.<sup>75</sup>

In striking contrast, India represents a singularly uncoercive society.<sup>76</sup> Both in formal principle and effective practice, it is a democratic state, firmly dedicated to the objectives of political democracy and economic justice.

A complete realization of these ideals is still far off, yet a large measure of credit must be given to a nation which, since its independence, has continuously sought to give more complete effect to the democratic principles proclai-

med by its Constitution.<sup>77</sup> India's leaders are the last to deny the existing weaknesses in their social and economic progress.<sup>78</sup> Difficulties are not unexpected in a nation rooted in thousands of years of tradition. Under the pressure of the Chinese invasion, India was compelled to revert temporarily to a state of emergency in the interests of national security.

Despite these and many other shortcomings, mostly born of inexperience and poverty, India has continued to seek implementation of its political ideals through a parliamentary system and more especially through adult, free suffrage.<sup>79</sup> The Indian opinion, it may be submitted, was not far off the mark in the following self-appraisal:

The methods adopted by India and the institutions it seeks to establish for achieving economic and social development are part of its ideal of a free and democratic society which aims at rapid and continuous economic progress with the largest possible measure of social justice.<sup>80</sup>

Turning to the external structure of identifications that each participant projects, it is common knowledge that China propounds rigid adherence to Marx's messianic philosophy and aspires for a complete revolutionary reconstruction of the world community.<sup>81</sup> The highly publicized ideological rift with Moscow, it may be emphasized, does not change their shared long-term goals.<sup>82</sup> This common ground with Soviet thinking enabled Communist China to obtain considerable economic and military assistance from the USSR.<sup>83</sup> It is because of the substantial Soviet help that the Chinese army, already the largest in the world, can boast of its modern fighting equipment.

Events over the last thirteen years have evidenced time and again the utter disregard and contempt, both in doctrine and behaviour, which the present Chinese regime holds for a world order whose paramount concern is respect of human dignity. Ideological manoeuvres have been executed as ruthlessly as military ventures, and on more

than one occasion China has earned the resentment and just indignation of the world.<sup>84</sup>

In ironic contrast, India has emerged, over the years, as the defender of Chinese actions. In accordance with her policy of friendly and peaceful relations with China, India has gone out of her way to support China's claims in international organizations. At a time when a great many nations were suspicious of China, India alone tirelessly sought to enhance her neighbour's prestige and to obtain for China a rightful place in the community of nations.<sup>85</sup> That China should have turned around and attacked its staunchest non-Communist apologist and vindicator is thus, for Indians as for the rest of the world, most difficult to understand.

Likewise, in its external identifications, India has throughout maintained a posture far different from that of China. In its foreign relations, India has insisted all along on the policy of "non-alignment," summarized by Prime Minister Nehru as a policy of "friendship toward all nations, uncompromised by adherence to any military pacts."<sup>86</sup> Based on this policy, India's external behaviour throughout these years has been deeply marked by efforts for securing and maintaining a peaceful world, as the *sine qua non* of everything else. Until the sudden massive Chinese attack, India had continually refused grants of military aid from either of the two major blocs, and rejected any political conditions on the large scale non-military aid she received from both sides. Whatever arms she considered necessary, she bought from both sides.

Thus, while China has all along clearly identified itself with one of the antagonists in the world-wide struggle and has consequently benefited from close association with a relatively developed nation, the same cannot be said of India.<sup>87</sup> The shock of the surprise Chinese military attacks, the sad unpreparedness of the Indian army, the Indian miscalculation of China's good faith, and the realization that the arms essential for survival could mainly be acquired from the West, are some of the factors which may be expected to affect the probable future course of India's

foreign policy. But whatever policy changes may follow, one point is clear. India has finally and rudely been awakened to the malignant nature of her northern neighbour. Prime Minister Nehru himself candidly expressed the traumatic shock of an embittered nation when he said: "We were living in an artificial atmosphere of our creation."<sup>88</sup>

### *The Objectives Sought by the Participants*

In characterizing particular coercion as permissible or non-permissible, the objectives of participants must be examined and appraised. The realistic ascertainment of the purposes of a participant necessarily calls for distinguishing between professed objectives from the objectives which are sought in fact, as the latter can appropriately be "inferred acts and the effects of acts, the totality of a participant's operations, verbal and non-verbal, considered in detailed context."<sup>89</sup>

The publicly repeated issue between India and China centres around the contrasting claims of rightful ownership to some 50,000 square miles of territory along the 2,500-mile border separating the two nations. While it is widely acknowledged that the Chinese had avowed intentions of eventually securing most of these territorial claims by force, it is equally clear that China's objectives presented a complex pattern of goals ranging from military to political, and from short-term to long-term and definitely went well beyond the basic issue of identifying a remote border in the Himalayas.

Most important and least speculative of the objectives of the Chinese invasion was China's relatively limited aim of militarily consolidating and securing its territorial claims in Ladakh (the Western Sector).<sup>90</sup> Since virtually all of this 15,000 square mile area seemed, in terms of wealth of resources and people, relatively inconsequential, it was clear that neither the size nor wealth of the region sufficiently explained the magnitude of China's efforts. Probably of greater attraction to China were the numerous mountain passes and the roads that would help

to consolidate and protect the border between the Indian territory of Ladakh and Chinese dominated Tibet. This explains the building of the Aksai Chin road across the corner of India's territory in Ladakh which made direct access possible from the province of Sinkiang to Tibet.

Besides the Ladakh claim, the other major Chinese territorial demand related to the North East Frontier Agency (NEFA), located in the Eastern Sector. For the Indians, this region is constitutionally part of the fertile province of Assam.

The Chinese objectives here were, at first, less clear than in Ladakh. The central question raised is the validity of the so-called McMahon Line, which the Chinese deny.<sup>91</sup> But while Peking was making noises about the "imperialist" nature of this line for a number of years, armed incursions were not launched along this sector of the border until relatively late in the dispute.

While it was theorized by some, at an earlier stage, that the rapid Chinese advances of 20 October 1962 and thereafter, were intended to cut off the entire province of Assam from India, the present and more widely accepted theory speculates that the Chinese, though eventually intent on the capture of this area too, did not have *immediate* intentions to seize and hold the entire Eastern Sector (as they did have in the Western Sector).<sup>92</sup>

Thus, one convincing explanation for the Chinese behaviour on the Indian border was that they intended to dominate the whole Himalayan belt stretching from Ladakh through Nepal to Sikkim and Tibet, to India's North East Frontier Agency.<sup>93</sup> With this accomplished, it was stated by certain observers, China would be "in possession of a geographically strategic area"<sup>94</sup> and would appear "as a power looking down on the plains of India."<sup>95</sup>

From this we move to China's remote and long-term territorial aims. A great many observers and experts are of the opinion that the continued violation and occupation of Indian territory was an essential part of the Chinese long-term goals of expanding Chinese boundaries. One commentator, for instance, states:

Pure and simple, it is an attempt to set the Chinese boundary in such a manner as to include all the areas over which Imperial China exercised some sort of control at one time or another. It is not only the question of . . . Indian territory . . . but of the entire region of South East Asia, the Nanyang.<sup>96</sup>

If further evidence is needed, this proposition could be documented by a Chinese textbook, published by a government-controlled agency, which contained a map showing "Chinese territories" allegedly seized by "Imperialists" between 1840 and 1919.<sup>97</sup> Quite ambitiously, these territories included large chunks of the Soviet Republics of Kazakstan, Kirghiz and Tajikistan, Nepal, Bhutan, India, Pakistan, Burma, Malaya, Thailand, North and South Vietnam, Laos, Cambodia, and a sizeable area of Soviet Siberia.

Notwithstanding the comprehensiveness of China's objectives of territorial expansion—immediate or remote, short-term or long-term—it is clear that the long-term considerations in the context of ideological expansion must have played (and are still playing) a very important role. The Chinese Government, like any other Communist Government, is committed to an unrelenting effort at spreading the cult of Marxism across state lines. That China's rigid interpretation of Marxist doctrine leads to a less discreet and more militant pursuit of an expansionist policy only facilitates, for third party observers, a realistic assessment of China's objectives.

By any method of analysis, it is difficult to avoid the conclusion that China's objectives included her competition with India for leadership in Asia.<sup>98</sup> For many years, the world has been watching the progress of the largest functioning democracy and has made comparisons unflattering to totalitarian China. The progress thus far achieved by India in the domestic and international planes were interpreted by China as obstacles in the way of its ambition of undisputed leadership in Asia. By resorting to military force, therefore, China sought to make it



patent to the other developing states that India was an essentially weak power unworthy of leadership. China would demonstrate that non-alignment as a policy was futile and should not be adopted by other nation states.<sup>99</sup> Beyond strengthening its image as the "nation of the future" on the Asian continent, the Chinese objective in bringing the border dispute to such a stage of destructive violence was to divert India's limited resources from peaceful and democratic economic development to military expenditures, thus detracting from the unflattering comparison between China's economy and the economy of India. This diversion probably might also have been planned, at least to some extent, to draw the attention of her unhappy hundreds of millions from the failure of internal policies of quick industrialization and social change which have created inner tensions, pressures, and discontent.

The nature of the objectives or purposes that are prescribed by the international community are expressed in terms of the prohibition of the threat or use of force "against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations."<sup>100</sup> These highly generalized formulations would present no difficulty for determination of the impermissibility of coercion if a participant publicly declared its intention to destroy the "territorial integrity" or "political independence" of its opponent. China, however, had not so candidly expressed its purposes in launching its attack on India. On the contrary, it has blamed India for aggression. But analysis of China's operations and acts leaves little doubt as to the real nature and scope of its objectives. In sharp opposition to the basic community policy of peaceful change, is the Chinese objective of pursuing expansion of its value resources at the expense of others. The power and depth of the Chinese penetration into the Indian Continent clearly reveals the expansionist nature of Chinese objectives.

On the other hand, India aimed at exhibiting a pattern quite different from that of China. Throughout the bor-

der dispute, India's behaviour indicated that her concern was with the conservation and protection of her values against Chinese expansion. Consistent with her basic policy of promoting peace and international cooperation, India exhibited only the most friendly intentions toward her powerful northern neighbour. Ever since the initiation of Chinese coercion, India has shown considerable self-restraint. Despite the forceful Chinese seizure of 12,000 square miles of Indian territory in Ladakh before the recent Chinese military invasion of India, India continued its efforts to secure a peaceful settlement. When Chinese coercion reached its climax in October 1962, India was compelled to respond with force to protect its territorial integrity and political independence; its responding measures were conspicuously unsuccessful. India sought to have recourse to certain established community procedure, e.g., acceptance of the Colombo proposals as a basis for further talks with China on the merits of the frontier question, and a willingness to submit the dispute to the International Court of Justice or to arbitration.<sup>101</sup>

### *Situations: The Setting of Specific Confrontations*

Among the situational factors that affect determinations about international coercion, the spatial location of events, their timing, the institutionalization of the arenas of interactions, and crisis level are specially relevant.

From the general geographic standpoint, the most important factor is that the Chinese crossed what hitherto had been regarded by all (including themselves) as the Sino-Indian boundary, and advanced deep into Indian territory.

The spatial location of events bears particular attention. It may be recalled that the Sino-Indian military confrontation occurred in unusually mountainous terrain with an average altitude of 13,000 feet. An important geographic factor is the existence of numerous passes along the world's most rugged frontier at a height of 19,000 feet. Given the problems that must arise in conducting

a war at the top of the world, there could be little doubt that China's position, in terms of strategic advantages in terrain and supply routes, as well as in numbers, was a markedly favourable one. In the Ladakh sector, the Chinese occupied the high ground, and their supply routes across the Tibetan plateaus were relatively close to their front lines.<sup>102</sup> Perhaps the greatest handicaps of India were inadequate supply routes and disadvantageous terrain, specially in Ladakh.<sup>103</sup> In the Eastern Sector, although the Indians had the advantage of shorter and better supply routes, the Chinese apparently continued to occupy important passes and had more transport aircraft to push their supplies to the front lines.

The significance of the time factor relates to the sequence of events in the total context. We have already stated at length that by early 1959 the continuing Chinese coercion had taken on a new seriousness. By that time China had established its absolute control over Tibet and completed preparation for extending military operations into Indian territory. With this careful planning, the military operations moved on more swiftly; 20 October 1962 marked the culmination of years of continuing Chinese coercion.<sup>104</sup>

The timing of the October invasion was perhaps explainable in terms of the desirability of a quick and impressive military advance just before heavy winter conditions could set in. A unilateral cease-fire during the winter months could then make a virtue out of a necessity.

That the attack should have been launched in 1962 was undoubtedly due to numerous considerations. One of these must have been the increasing success of India's democracy and non-alignment policy and the damaging comparison which could be made with China's totalitarian system. Another weighty consideration must have related to the mounting Chinese concern over "revisionist" tendencies within its own Communist family.<sup>105</sup> Much to China's chagrin, the Soviet Union refused to view a nuclear-armed West as a "Paper Tiger." The so-called

"Soviet retreat" in Cuba no doubt served to further embitter the polemics. It was perhaps felt that now, before "revisionism" became respectable, was a good time to prove the thesis that the United States and British imperialists were still no more than paper tigers, and that it was high time for the Soviet Union to follow China's "tough line" in relations with the West in all troubled corners of the world.

Undoubtedly, there was the added consideration of relatively low probabilities of an effective community intervention. A number of factors which prevented capable U.N. intervention,<sup>106</sup> proved the Chinese assessment in this respect correct. Despite the high crisis level, the organized world community, as a body, has paradoxically remained aloof from the question. Despite the efforts of the Colombo powers to secure acceptance of an interim plan for further talks between India and China—efforts thwarted by China's intransigent attitude—the arena of the India-China confrontation is so unorganized that unilateral action has so far appeared to be the only available remedy.

### *The Base Values Available to the Participants*

The differing access of States to base values—fundamental components of state power—is a basic condition that determines the coerciveness of their relations. The unique character of a particular asset or a unique location of a particular resource base for instance, may create possibilities in coercion and confer special advantages on a state not open to its opponent.

While the aggregate population of India and China indicates that both had a fantastic wealth of manpower from which to draw for military needs, China's traditional militaristic inclinations,<sup>107</sup> plus its careful preparation for the invasion of Indian territory, gave the Chinese a striking numerical advantage—a factor which was most decisive in their attack by "human waves."

Although the recent developments in the technology of

automation have reduced the significance of some of the geographic resource bases, the richness and the efficiency of their management are still important elements of power which determine a state's capability for conducting coercion. Despite the dramatic transformation of China's "great leap forward" into a considerable jump backward, authorities state that China enjoyed a distinctive advantage in economic productivity.<sup>108</sup> It is also observed that the Chinese leaders had extracted a rate of saving from their people of about 25 per cent of the national income and some 70 per cent of this saving goes into heavy industry.<sup>109</sup> One major outcome of this trend was that the military machine of China consisted of a standing army of 4,000,000 men, including an air force of 100,000 men with 3,000 aircraft (most of them jets)—some of which were armed with air-to-air missiles.<sup>110</sup>

The rate of saving in India, on the other hand, because of the limitations of democratic methods, had not yet reached 1 per cent of its national income.<sup>111</sup> Agricultural and industrial potential had no doubt increased steadily, but it was not hard to discover severe bottlenecks in transport and industries. The pattern in economic potential had a great impact on India's military position. India had only a standing army of some 500,000 men with trained reserve of 20,000. Only a few units were trained to fight at high altitudes or in extreme cold. Her air force, having some 500 aircraft, was not equipped with modern weapons.<sup>112</sup>

It is impossible for any serious student of the political, legal and social institutions prevailing within China to fail to note the totalitarian practices of discipline and mobilization which enabled the ruling elites of China to maintain efficient armed forces at a level far above that of India. Of course, while modernization under total government control proceeded at a hectic pace, little concern was shown for the hundreds of millions of peasants who were driven in a machine-like fashion. India, on the other hand, did not enjoy the freedom of action of a totalitarian government, and any material progress it hoped to accom-

plish must be secured by persuasion rather than coercion of the people.

With respect to external institutional practices, the factors of freedom from external interference and the degree of support coming from allies were important. It should not be a surprise to find that China had all along relied on some degree of support from the Soviet Union. That the U.S.S.R. had courted the friendship of India and the other non-aligned nation-states and had given them a good amount of economic aid, and that there existed clashing interpretations of the correct Marxist line, should not conceal the fact that whatever differences there might have been between the Soviet Union and China as to the appropriate means to be employed, their shared goals did not change and Russia, in a final showdown, was to be expected to throw in its lot with China rather than with India.

Whether expected or not, after retreat and severe setbacks, India had been able to find an appreciable degree of support from outside to meet future needs of defence, though within the limits set by its policy of non-alignment.<sup>113</sup> India's defence potential was expected to be further augmented by a diversion of a greater ratio of its national resources to the defence effort.

The above discussion indicates that China had obviously employed considerable base values to achieve its objective of extending its territorial domain deep into Indian territory. Moreover, the above estimates of differing access to base values by China and India clearly established that China's ability to deploy human and material resources effectively in the Himalayan region had given, and probably will continue to give for some time, a significant strategic advantage over India.

### *The Instruments of Policy Utilized*

The methods by which participants seek to attain their contemplated goals include a set of strategies or instruments—diplomatic, ideological, economic, and military—

employed singly or in combination with any or all of the others.<sup>114</sup> The strategies employed in whatever combination or sequence indicates the level of coercion being utilized, the relative proportionality of the response in coercion and the nature and extent of the participant's subjectivities.<sup>115</sup> In the existing context, it appeared that China had deliberately employed the military instruments in conjunction with other instruments of policy.

### *Diplomacy*

There has been a wide and varied resort by the Chinese to diplomacy. Early in its development, the Peoples' Republic of China secured diplomatic recognition from India as well as India's affirmation of China's "special position" vis-a-vis Tibet. Urged on by India, China at first declared its willingness to rectify the unsettled conditions in Tibet by peaceful negotiations.<sup>116</sup> Later, however, China resorted to military action. This called for objection by New Delhi which China answered by criticizing the Government of India" as having been affected by foreign influences hostile to China in Tibet.<sup>117</sup>

Following developments in Tibet, China entered into negotiations with India on the latter's initiative, to discuss and settle any outstanding issues (especially regarding Indo-Tibetan relations) and to foster between the two nations a stronger bond of friendship and co-operation.

The resulting Sino-Indian Treaty of 29 April 1954, purporting to settle "all outstanding issues over Tibet," gave India the false assurance that no question would ever be raised in the future regarding the stability of its established northern frontier. This proved to be a gross illusion. In the hindsight of history, the Five Principles of Peaceful Co-existence which formed the preamble to this treaty, as well as the principles adopted subsequently at the 1955 Bandung Conference, merely signified the improving finesse of Chinese diplomatic manoeuvring.

As a result of the 1954 Treaty, India gave up all extra-territorial rights and privileges enjoyed in Tibet by the

British Government of India and recognized Tibet as a part of China.<sup>118</sup> The Bandung Conference in 1955 made possible a Chinese rapprochement to a large number of countries of Asia and Africa and the securing by China of a strategic foothold in their councils.<sup>119</sup> China's prestige soared to an all-time high as Prime Minister Chou En-lai sought to impress the Afro-Asian nations in his role as a moderator whose only mission was the securing of lasting peace.

For the Indians, this euphoric state of affairs was not to be long-lived. The coming years marked a clear toughening of Chinese policy and a new diplomatic confrontation with India was in the making. Even before China had finally crushed the Tibetan revolt in 1959, India was violently criticized for the harbouring of Tibetan "bandits" in its Kalimpong area. Notwithstanding Indian denials of such charges, China's rage was nonetheless directed against the "subversive and disruptive activities against China's Tibetan region under the instigation and direction of the U.S. and the Chiang Kai-Shek clique and in collusion with local reactionaries in Kalimpong."<sup>120</sup>

One of the biggest diplomatic bombs, however, was dropped on 23 January 1959, when a letter from the Chinese Prime Minister informed India for the first time that China considered the Sino-Indian boundary as never formally delimited.<sup>121</sup> Following numerous successful penetrations in various sections of the border, Prime Minister Chou En-lai proceeded in his letter of 7 November 1959, to ensure the "tranquility of the border regions" and to create a "favourable atmosphere for talks" by proposing that each side "withdraw 20 kilometres at once from the so-called McMahon Line in the east, and from the line up to which each side exercises actual control in the west."<sup>122</sup> This was obviously a veiled attempt at impressing the non-aligned nations and putting India on the spot, since China had already forcefully occupied some 3,000 square miles of India's territory and could hardly have expected the latter to accept the proposal.



In this context, the coercive nature of Chinese diplomacy was apparent in the threat which accompanied the impossible proposal:

...I am afraid that, if no fully appropriate solution is worked out by the two Governments, border clashes which both sides do not want to see may again occur in the future.<sup>123</sup>

Seeing that India refused to submit to her dictates, China embarked upon a new diplomatic offensive to cut down the rival image of India as a countervailing force in Asia and, at the same time, to solidify its own military capabilities for launching new offensives in the future. Driven by these impulses, China entered into a series of border agreements and treaties of friendship and non-aggression with the peripheral states, principally with Burma, Nepal, and Pakistan.<sup>124</sup> By and large, in each case China confirmed her traditional boundaries with her neighbours and secured from them a tacit admission of the emerging reality of Chinese power.<sup>125</sup> With Burma, it accepted the McMahon Line, running for about 120 miles, as a valid boundary between their two countries but, as part of the Sino-Indian frontier, it was and still remains the Chinese view that the McMahon Line was the product of a policy of aggression and could not be considered legal on any basis. In the case of Nepal, the traditional boundary along the watershed was not only agreed to by China, but was revised by it in certain sectors to favour Nepal. In the case of the Sino-Indian frontier, however, China virtually disregarded the significance of watersheds as indices of community expectations, and raised the question:

Could there possibly be any more untenable argument in the world for the seizure of 20,000 square kilometres of territory from China and by describing a watershed as the boundary between China and India, just because there happens to be a watershed there?<sup>126</sup>

This paradox, in the words of an observer, "can only be explained by China's political intentions towards India."<sup>127</sup>

Diplomatic offensives continued to mark China's policy towards India, culminating on 20 October 1962, with a full-scale invasion of India's northern frontier. Four days after this, the Chinese Government fired the first shot in a new phase of its peace offensive. On 24 October 1962, Prime Minister Chou En-lai launched his three point proposal ostensibly to seek a way to stop border clashes, reopen peace negotiations and reach settlement on the India-China boundary question.<sup>128</sup> The main suggestion stated that both sides should respect the "line of actual control" between the two sides along the entire India-China border and the armed forces of each side should withdraw 20 kilometres (12-1/2 miles) from this line and disengage. Later, the Chinese Prime Minister in his letter of 4 November 1962, clarified the "line of actual control" as "basically still the line of actual control as existed between the Chinese and the Indian sides on 7 November 1959."<sup>129</sup> As against this proposal, the Prime Minister of India demanded the restoration of the position as obtaining prior to 8 September 1962, before China's latest aggression, as a preliminary step to any peaceful settlement.<sup>130</sup> The sceptic might wonder why China's magnanimous proposal should not have been eagerly accepted by India, since the offer apparently even surpassed the Indian demand, in that it proposed a line of withdrawal to positions of control dating back three years, to 1959. However, the deceptive nature of the proposal emerged conspicuously when China proceeded to clarify its "line of actual control" as of 7 November 1959. This line, which China described as "traditional and customary," in reality corresponded to the line of control which it established following the invasion of 20 October 1962. Remaining faithful to familiar temporizing tactics, the three-point proposal glibly suggested that "China will keep what it has secured by this further invasion and is prepared to negotiate on the rest."<sup>131</sup>

A more spectacular diplomatic shot was fired by the

Chinese Government on 21 November 1962. It issued a unilateral cease-fire declaration proclaiming that it would implement unilaterally its three-point proposal which India had not accepted.<sup>132</sup> This was another attempt to retain under cover of preliminary ceasefire arrangements, physical possession over territory to which China had made claims, and also to secure what she seized as a result of massive military attacks since 20 October 1962. Moreover, by no stretch of imagination could it be called a "truce offer"; indeed, it was a threat of grievous deprivations. The Chinese declaration unilaterally outlined a lengthy catalogue of specified areas and places and threatened India with resumption of hostilities, if Indian forces should violate these arbitrarily imposed arrangements.<sup>133</sup> The declaration read:

The Chinese Government solemnly declares that, should the above eventualities occur, China reserves the right to strike back in self-defence, and the Indian Government will be held completely responsible for all the grave consequences arising therefrom.<sup>134</sup>

On 28 November 1962, in another ultimatum, India was notified:

In case the Indian side should refuse to cooperate, even the cease-fire which has been effected is liable to be upset.<sup>135</sup>

The above analysis, in short, demonstrates China's resort to a complex diplomatic strategy designed to isolate India from third states, to induce third states to accept China's aggression, and to coerce India by threat of grievous deprivations.

*Ideology and Propaganda.* The Sino-Indian confrontation amply showed keen utilization by the Chinese of ideological strategy. The vigour and versatility with which this instrument had been employed demonstrated that Chinese propagandists were master manipulators of symbols.

The Chinese ideological strategy, geared to the attainment of Peking's ambition of altering the patterns of identifications, demands, and expectations of mass Asian audiences so as to induce political support for China while isolating India, started very early and had through the years developed an unmistakable character. While earlier Chinese statements reproached India's position with the West and rejected any suggestion of Indian neutrality,<sup>136</sup> the tempo of the invective had picked up to a point where Nehru was painted as an extension of Western imperialism in Asia and a betrayer of the cause of Asian brotherhood.<sup>137</sup>

While India's recognition of the Peking Government hardly earned any gratitude from Chinese elites, India's entreaty that China avoid the use of force in its Tibetan operations was assailed as Indian meddling in the internal affairs of China.<sup>138</sup>

Very early in Sino-India relations, India gave Peking notice that the "recognized boundary between India and Tibet should remain inviolate."<sup>139</sup> The more discreet thing to do at the time was for China to avoid an immediate conflict over this question.<sup>140</sup> In fact India was reassured that no territorial dispute existed between the two countries and that China's great concern was to safeguard India's interest in Tibet.<sup>141</sup> While the next few years witnessed relatively cordial relations between the two neighbours, a deteriorating turn of events ensued from the moment China set out to crush the last Tibetan uprising (end of 1958 and beginning of 1959). Throughout its Tibetan campaign, as stated earlier,<sup>142</sup> China directed violent attacks at India alleging that Indian territory served as headquarters for Tibetan rebels, and that the Tibetan rebellion had been carried out in collusion with American imperialists and Chiang Kai-shek.

While the 1964 Sino-Indian Trade Agreement relating to Tibet had ostensibly settled all outstanding Sino-Indian problems over Tibet left over by history, there was now flippant insistence that boundary maps and records (hitherto declared erroneous and inconsequential) evidenced

"wanton Indian intrusions into Chinese territory."

When the Chinese troops were penetrating a number of border areas (especially in the Western Sector), the Chinese Government initiated a formidable barrage of propaganda, including charges of "armed Indian intrusion," India's unreasonable insistence on recognition of the "imperialist McMahon Line" (in reference to the Eastern Sector) and India's blatant refusal to negotiate a "just settlement of the problem."<sup>143</sup>

The fierce large-scale fighting which broke out on 20 October 1962 was preceded by Chinese Information communiques declaring China's intention of defending its territory if India insisted on intensifying aggressive activities (which there was reason to expect), and at the same time, reiterating that the Chinese Government was sincerely working for the peaceful settlement of the border problem.<sup>144</sup>

Following a month of military advances by her forces, China proceeded to take yet another initiative by announcing to the world that its desire for peaceful relations drove her unilaterally to cease-fire. Outlining the plan of unilateral cease-fire, the Chinese declaration stated:

These measures taken by the Chinese Government on its own initiative demonstrates its great sincerity for stopping the border conflict and settling the Sino-Indian boundary question peacefully.<sup>145</sup>

But this was not all; the Chinese Government, in the same statement, solemnly declared that if India were to violate the terms of the Chinese cease-fire plan, China would strike back in self-defence. An ideological bomb was then added:

The people of the world will then see even more clearly who is peace-loving and who is bellicose, who upholds friendship between the Chinese and Indian peoples and Asian-African solidarity and who is undermining them,

who is protecting the common interests of the Asian and African peoples in their struggle against imperialism and colonialism and who is violating and damaging these common interests.<sup>146</sup>

In the wake of such "propaganda of the deed," China also employed new ideological offensives exemplified by intense accusations. Indian leaders were charged with "the barbarous prosecution" of Chinese nationals in India,<sup>147</sup> with the conduct of a malicious campaign to induce war hysteria in an unwilling people. It was likewise charged that the Indian populace had been coerced to contribute to the National Defence Fund, and that solicitation of Western military aid exploded any illusions of alleged Indian non-alignment and places India squarely in the camp of "imperialism."<sup>148</sup> The peaceful Chinese border settlements with third states and the "charitable" release of Indian prisoners-of-war were dramatized.

*Economics.* To the extent that the economic strategy was useful in the implementation of its coercive goals, China fully utilized this instrument of policy. The destruction of the bothersome image of rising Indian national prosperity in a democratic and neutral setting ranked high among Chinese objectives.

The most obvious economic coercion employed by China was to force the diversion of India's resources to the defence effort. Indian economic progress suffered a heavy blow, thereby affecting the pattern of comparisons between Indian and Chinese economics.

With no less dramatic an impact, the economic instrument had been employed in the past by the Chinese. Brushing aside commitments under the Sino-Indian Trade and Intercourse Agreement of 1954 which lapsed on 3 June 1962, China failed to provide the co-operation necessary for the implementation of the agreement on its side of the border. Moreover, it repeatedly resorted to various means of obstructing India's enjoyment of its rights and privileges under the 1954 Treaty. Reconstruction of India's trade agency buildings in Tibet was bloc-

ked for a number of years by the delay in the issuance of construction and repair permits.<sup>149</sup> When the Chinese Government finally permitted reconstruction, other obstacles were placed to impede the work.<sup>150</sup> Indian traders, officials, pilgrims and nationals were also deprived of many economic and cultural facilities granted under the above agreement,<sup>151</sup> The free passage of diplomatic couriers servicing the Indian trade agencies became uncertain. This failure to guarantee safety of the official mails led to lengthy suspension of communications.<sup>152</sup> Over the years numerous arbitrary measures were adopted to cut traditional trade and intercourse between India and Tibet, and to undermine the foundations of the 1954 Agreement.

These measures, in general, included all the known methods of economic warfare.<sup>153</sup> China took steps to control trade. It imposed new taxes and arbitrary levies, introduced monetary measures calculated to bring disaster to Indian traders, obstructed the recovery of previous debts and trade dues, blocked and froze Indian trade assets in Tibet, imposed restrictions on the usual export of Tibetan merchandise to India; put barriers against direct barter of goods between petty traders of India and Tibet, and so on.<sup>154</sup> With the expiration of the 1954 Agreement on 3 June 1962, the Trade Agencies established under it were withdrawn, but the Indian Trade Agencies in Tibet were harassed by local authorities resulting in vexatious delay in their withdrawal.<sup>155</sup> Even the Indian Consulates General at Lhasa and Sanghai were subjected to grievous restrictions, which were intensified when the Chinese military invasion of India began. Members of the Indian Consulate staff were virtually denied any contact outside, communications were cut off, and supplies of essential commodities were stopped. In the light of these circumstances the Indian Government notified the Chinese Government of the withdrawal of the Indian Consulates General from Tibet.<sup>156</sup>

Finally, peeved with the fact that India's economic advances were in part attributable to Soviet foreign aid,

China contemplated realizing its objective by launching its massive October invasion. True to Chinese expectations, China's military actions led the Soviets to doubt the wisdom of continuing its economic aid to India. In the Communist scheme of things, the Soviet Union probably had no choice but to stand beside her Marxist partner, and China could pride herself in the disruption of the friendship and economic ties budding between the two large states on its borders.<sup>157</sup>

*Military Force.* Experience and contemporary conditions show that while substantial coercion may be achieved by the skilled manipulation of non-military instruments or strategies, "the attainment of the maximum intensity coercion normally requires the supplementation of such instruments with military force."<sup>158</sup> A survey of China's coercive activities against India in the past years shows that China had employed extensive military force to secure a wide spectrum of degrees of destruction.

A glance over China's activities since 1949 reveals at the same time the Chinese belief in a strategy of violence and differing applications of the military instrument according to the expediencies of the hour. China's power elites stand responsible not only for the Sino-Indian situation but also for a series of other acts pursued in total disregard of world community aspirations for a state of minimum public order. The territorial integrity and political independence of neighbouring states had been jeopardized in various degrees by the use of military force even before the Sino-Indian confrontation. The threat still obtains today.<sup>159</sup>

China's acts in Korea and Tibet had earned it the invective of world public opinion and formal condemnation by responsible international bodies.<sup>160</sup>

India's first experience with China's external sweep was a border violation in August 1954, when some Chinese officials illegally attempted to cross into Barahoti, situated in the Central Sector of the Sino-Indian boundary.<sup>161</sup> The following year saw a recurrence of border incidents when Chinese troops intruded ten miles deep into



India.<sup>162</sup> And the months and years to follow saw a stepping up of Chinese incursions all along the boundary resulting in a forceful seizure of sizable areas of Indian territory.

In 1958, having deplored the arrest by Chinese soldiers of an Indian patrol party in the Aksai Chin corner of India's Ladakh,<sup>163</sup> the Indian Government lodged a strong but unavailing protest against the construction by China of a road which clearly cut across India's Aksai Chin.<sup>164</sup>

Coincidentally, the lull on the frontier came to an end with the Chinese "liberation" of the Tibetan people. In August 1959, the Chinese troops captured the Longju garrison in the Northeast Sector.<sup>165</sup> In the Western Sector, the Chinese troops seized thousands of square miles of Indian territory. Again, in October 1959, an Indian patrol party was ambushed by the Chinese forces at Kongka La.<sup>166</sup> The Indians taken prisoners in this clash were subjected to harsh interrogation, extreme mental and physical torture, not to mention denial of food and shelter. Between 1960 and 1961, the Chinese forces advanced further into Indian territory. The factual details of the massive military attacks in 1962 by Chinese forces simultaneously along the Western and Eastern sectors of the Indian border are too elaborate to present in full here.<sup>167</sup> Suffice it to say that in the Western Sector, well before this massive invasion took place, the Chinese had progressively intruded into Indian territory, constructed new military bases, extended the military posts already set up and connected these by roads with bases at the rear. This extensive network of roads facilitated the Chinese attacks commencing on 20 October 1962. In the Eastern Sector, Chinese forces which accumulated since 8 September 1962, launched fierce attacks with machine guns and heavy mortar fire, extending to four out of five Frontier Divisions of the North Eastern Frontier Agency of India. A noteworthy factor in this invasion of India was size of the force which the Chinese threw into the battle—it involved several divisions, each division consisting of around 12,000 soldiers. Such was the numerical strength of the "human waves" flowing over the Himala-

yas toward the Indian forces, that Prime Minister Nehru was moved to say, "Even the question of whose arms were better did not arise."<sup>168</sup>

The incredible ease with which the Chinese armed forces, for over a month, advanced deep into India speaks of the extensiveness of the Chinese military preparations preceding the successful onslaught. The assertion by Peking that it was simply involved in a "defensive" counter-attack became particularly unbelievable when, as most Communist Chinese guns came to silence on 21 November 1962, their "fruits of aggression" comprised far greater areas of India than they had ever secured before. When the smoke had cleared, China could have announced a total military victory.

### *The Impact of the Recourse to Force*

The outcome or the immediate results of the process of coercion refer to the varying types and degrees of intensity in coercion—its consequences upon the values of the target state—actually achieved.<sup>169</sup> The relevance of a continuum of degrees of coercion to the appraisal of the lawfulness of coercion is obvious. Fundamental community policy does not prohibit all coercion, recourse to force in self-defence, or community enforcement measures being permitted. Therefore the problem of characterizing as impermissible, coercion with a certain degree of intensity and magnitude sometimes requires detailed analysis. However, the open and extensive employment of military force inflicting substantial destruction of the bases of power of the target state presents no difficulty, since it clearly represents prohibited coercion and justifies war in self-defence on the part of the target state.<sup>170</sup> But those cases where the accelerating coercion has not reached the stage of open and extensive violence present numerous difficulties in appraisal. Certain international law writers have, therefore, suggested a "sufficiently flexible test" that considered the impact of coercion upon the expectation structure of the target state. This test holds that any coercion,

by whatever instrument, which is so intense that it creates in the target state reasonable expectations, as those expectations may be reviewed by third-party observers, that it must forthwith resort to military instrument to defend its "territorial integrity" and "political independence" may be characterized as impermissible.<sup>171</sup>

The intensities of the coercion actually achieved by China may now be appraised in terms of its impact upon the value processes of the target state, India, and may be related to the reasonableness of the expectations created in India about the need for the protection of such important bases of power as "territorial integrity" and "political independence."

The preceding discussion demonstrates how China, in order to achieve its comprehensive objectives, had employed violence. The military coercion along the Sino-Indian border which began at a relatively low level, attained the highest dimensions in October 1962, when Chinese forces launched a massive military invasion in India. Open and extensive military violence inflicted substantial destruction upon both peoples and resources of India, thus striking at the principal components of its power. Equally destructive was the impact of Chinese attacks on the institutional arrangements of authority and control, customarily described as "political independence." In terms of forceful territorial occupation, the Chinese troops seized some 15,000 square miles of Indian territory in the Western Sector. In the Eastern Sector, the Chinese forces seized over 20,000 square kilometres of Indian territory before the unilateral cease-fire was announced.<sup>172</sup>

The Indian army lost thousands of men. The same was true with the Chinese army.<sup>173</sup> The lot of the Indian prisoners of war was a sad one in view of ill-treatment and the refusal by the Chinese Government to allow representatives of the International Red Cross to visit prisoners of war camps.<sup>174</sup>

Armed participants are seldom the only victims of war. Civilians in the border areas were forced to flee to avoid being caught in crossfire and eventual subjugation by

the advancing Chinese forces. Estimates indicate how Chinese troops looted and destroyed the property of the civilians in the occupied areas.<sup>175</sup>

By forcing India to divert her scant resources to defence, China succeeded in inflicting a disastrous blow upon Indian economic development to the detriment of the Indian people.

These and other sufferings inflicted by Chinese violence brought about an increasing demand of the Indian people to meet coercion with coercion. The recurrent Chinese attacks had engendered national fear and insecurity in India. However, in view of the fact that the Chinese threats and attacks were assessed as falling short of full-scale invasion, Indian defence arrangements had been scanty and limited. The massive military invasion of October 1962 was unexpected. Suddenly awakened from dormancy, both the common people and their leaders were heard to demand a determined national effort in throwing out the trespassers whatever the cost might be. The Indian Parliament in a unanimous resolution on 14 November 1962, called for a renewed "flame of liberty and sacrifice" and "a fresh dedication" to the cause of India's freedom and integrity and affirmed the strong resolve of the Indian people "to drive out the aggressor from the sacred soil of India, however long and hard the struggle may be."<sup>176</sup> The reaction of the Indian Government to public pressure and demand was firm and determined. Outlining the war with China as a "game of life and death" for the nation, Prime Minister Nehru reaffirmed the nation's dedication:

I want to take a pledge now and here that we shall see this matter to the end and the end will have to be victory for India.<sup>177</sup>

These and other similar statements, reflecting the Indian public opinion, not only announced the breakdown of Sino-Indian peaceful coexistence, but also clarified expectations in India of the felt necessity of resort to effec-

tive coercion to protect its political independence and territorial integrity. Behind this verbalization stood a national effort to fight the Chinese menace.<sup>178</sup> Volunteers for the armed services were so many that the Government had to turn down thousands of them. The Prime Minister's call for all citizens to help finance the defence efforts brought in hundreds of thousands of individual contributions. The people gladly gave money, gold and jewellery to the Government with a request to buy arms, or speed up defence arrangements. In short, narrow loyalties and parochial differences completely vanished and the Indian nation stood united to repulse the invader.

Outside India as well, India's urgent plea for weapons and equipment elicited quick response from Western democracies. The sympathy of a shocked world went to India, and the peoples and governments of numerous nation states extended their help.<sup>179</sup>

In the light of the above exposure of the consequentiality of the achieved coercion, reflecting India's expectations about the need to respond with military force to maintain its consequential values, there are strong grounds to conclude that China was the aggressor and that the coercion it employed to achieve its objectives was impermissible.<sup>180</sup>

### *Response to Community Procedures*

Another factor in determining the lawfulness of coercion is the relative willingness of the participants to accept community procedures for the cessation of hostilities and the peaceful settlement of the underlying dispute.<sup>181</sup> Disregard of provisional measures is not, of course, conclusive of the unlawful character of a participant's objective, but it offers important indication about its real, as distinguished from the ostensible objectives. Refusal to implement arrangements prescribed for both participants for the cessation of hostilities negates the alleged defensive purpose of a participant. On the other hand, a willingness to accept plans for the cessation of hostilities indicates a

ground for believing its objective to be lawful defence.

The current Sino-Indian confrontation, as stated earlier, occurred in an unorganized arena, with very low expectations of intervention by the organized community.<sup>182</sup> Moreover, there was no regional machinery to which both India and China were associated, and which had peace enforcement authority. The absence of these institutional arrangements created a vacuum which could only be filled by the voluntary efforts of some other countries. In view of the fact that China's resort to unilateral cease-fire—in order to confuse world opinion and, at the same time, compel India to accept interim arrangements dictated by China for the cessation of hostilities—had been unacceptable to India, the voluntary efforts of other nation states of Asia and Africa assumed special significance.

It is in this context that the Colombo proposals should be appraised.<sup>183</sup> The Colombo Conference attended by six non-aligned countries—Ceylon, Burma, Cambodia, Indonesia, the United Arab Republic and Ghana—convened on 10 December 1962 in an effort to lay down certain proposals for cease-fire and withdrawal as a prelude to a peaceful settlement of the Sino-Indian conflict. The specific proposals of the conference were later clarified in order to remove any ambiguity or doubt.<sup>184</sup> When these proposals and clarification were presented to the Governments of China and India, India accepted them in toto while China did not, and instead denounced them as "vague and contradictory in parts," and containing "ambiguities" and "inconsistencies." The non-acceptance by China was evident from Premier Chou En-lai's letter to the Prime Minister of Ceylon on 19 January 1963, in which he subjected the Colombo proposals to interpretations of his own which threw cold water on the proposals.<sup>185</sup> On 12 February 1963, the Chairman of the People's Republic, Liu Shao-chi, was also heard to say at a banquet for Prince Sihanouk, that the Colombo proposals were coming in the way of direct negotiations between India and China, and that India was making use of the Colombo proposals to block the road to direct negotiations and to place the six friendly countries in

the difficult position of arbitrators.<sup>186</sup> It was never China's serious intention to refer its international conflicts to the decision of third-party observers, disinterested as they might be. China claimed to accord primordial importance to the opinion of the Afro-Asians while, at the same time, it asserted its determination to resist the establishment of an inclusive public order. Even before the Colombo proposals were announced, these inconsistencies were skillfully blended into a web of propaganda. On 15 November 1962, for example, Chou En-lai declared:

The Chinese Government considers that in dealing with such boundary questions we should clearly discern that these are issues between Asian and African countries which are not the same as issues between Asian-African countries and imperialist powers. We should be on guard lest we be taken in by the imperialist attempt to sow discord amongst us.... It is only through direct negotiations between China and India that mutually satisfactory settlement of the boundary question can be secured.<sup>87</sup>

Such utterances spoke of the characteristic duplicity with which China conducted itself. Hardly any official utterance ever came from the Chinese Government which did not invoke symbols of peaceful coexistence between India and China, Afro-Asian solidarity, Asian peace, world peace, and so on. Throughout the official communications of the Chinese Government, there were recurring references to the significance it attached to the expectations of Afro-Asian nations regarding the peaceful settlement of the Sino-Indian dispute and historic Chinese concern to honour them in practice. As recently as 4 November 1962, Premier Chou En-lai wrote to Nehru.

Respected Mr Prime Minister, since the unfortunate Sino-Indian border clashes began, many Asian and African countries have appealed to our two countries, expressing the hope that we may stop the clashes and

resume negotiations. . . . I am convinced that their intentions are good and their viewpoint is correct. We should not disappoint their eager expectations.<sup>188</sup>

But when these very nation-states, following a thorough appraisal of the India-China confrontation, suggested a reasonable interim plan for ceasing hostilities, the Chinese Government found it convenient to shrug it off. The refusal of the Chinese Government to accept the Colombo Plan, as well as its refusal to agree to other community procedures, notably submission of the dispute to the International Court of Justice or to arbitration,<sup>189</sup> should indicate the real nature of China's objectives.

*The Nature of Responding Coercion—  
"Necessity" and "Proportionality"*

The preceding analysis of the more salient features of Chinese coercion put into sharp focus India's legal rights. Under international law India had a right to exercise proportionate responding coercion against the initiating coercion by China in order to protect her bases of power and other values. This right is the most fundamental one of self-defence, established in customary international law and incorporated by reference in the United Nations Charter.<sup>190</sup> In a world arena where expectations about the effective capability of the general community to protect its individual members are low, this right has been regarded as indispensable to the maintenance of minimum order. The right of self-defence, broadly speaking, is limited to necessary and proportionate responses to initiating coercion that is so intense as to create in the target-state reasonable expectations, that it must forthwith employ military force to protect its territorial integrity and political independence.<sup>191</sup>

Even an impressionistic recapitulation of the aggregate impact of the coercion applied by China upon the expectation structure of India, would establish the required degree of necessity to use intense responding coercion in self-



defence. The subjectivities of China in initiating and continuing attacks on India were clearly expansionistic. China's internal structures of authority and its external identifications likewise cast doubts upon China's supposed dedication to the basic general community policy, namely, that violence and coercion are not appropriate instruments for seeking expansion across state lines. The operations of China, involving intense use of military force and, at all times, accompanied by diplomatic, ideological, and economic instruments, had produced in India a high intensity of coercion reflected in the continuing efforts of unanimity, swiftness, and effectiveness to meet the Chinese threat.

On the other hand, a review of India's subjectivities and operations suggested that the measures it took were clearly limited in intensity and magnitude, nay, even inadequate to that which was necessary for self-defence.<sup>192</sup> Thus the manifest aim of India was defensive—to secure the protection of its bases of power against Chinese threat and attacks. The generally democratic structures of authority in India, and the pluralistic world order it sought to secure did not suggest that its objectives were expansionist. The specific operations of India, involving as limited a use of military force as could have been designed, were hardly adequate even to protect its territorial integrity and independence against Chinese attack. This leads to the conclusion that the actions taken by India against the initiating coercive activities of China were in accord with the twin requirements of authority: necessity and proportionality. World public opinion fully supported this finding.

#### PROBABLE EFFECTS AND SOME REFLECTIONS

Effects refer to the long-term consequences of a resort to coercion and go well beyond the immediate destructive results.

Perhaps the most dramatic long-term consequence of the Sino-Indian confrontation concerns the patterns of future political alignments in Asia. Should the Chinese

succeed at any time in extending their borders to the fringes of the great central plain, they will have enhanced their power potential for future aggressive advances by military or more subtle forms of coercion, e.g., subversion. But if India is able to defend and protect its existing traditional border line, the southward march of Chinese power in a crucial sector of Asia will have been halted at the Himalayas and the movement of half of the human race toward a world public order of freedom, safety, and abundance will have been enhanced.<sup>193</sup>

The play and counterplay in this confrontation has also a critical bearing on the future course which shall be taken by India vis-a-vis its policy of "non-alignment"<sup>194</sup>—a policy which, in the words of Prime Minister Nehru, "is now an integral part of the international pattern and is widely conceded to be a comprehensible and legitimate policy, particularly for the emergent Afro-Asian states," and which has played a prominent role in maintaining world peace at "some critical moments in recent history."<sup>195</sup> The reckless Chinese campaign especially after October 1962, practically forced India to search friendly countries in the West for possible aid to meet Chinese aggression. China's strategy pressed Russia to abandon India in her hour of great need and to take side with the Chinese Communists in the border dispute. That China had succeeded neither in teaching the USSR that India's policy toward the non-aligned is wrong, nor in persuading India to abandon the policy of non-alignment, is significant. China's ruthlessness will inevitably leave its marks on the entire group of non-aligned nation states as well as other developing nation states. As one commentary aptly puts it:

India's experience with Red China should adequately demonstrate to the remaining "neutrals" and "uncommitted nations" the built-in dangers of trusting the Communists....<sup>195</sup>

As to the effect of the Chinese resort to coercion on India's future relations with her neighbour Pakistan, the

need for a final settlement in regard to Kashmir had never before been so vividly dramatized to both participants. That a strong impetus was given to this task is evidenced by fresh endeavors to reach a just settlement through negotiations. While Pakistan herself has appeared short-sighted on more than one occasion,<sup>197</sup> our long-term expectations are that common sense will prevail over emotions, and that the parties will realize that cooperation and agreement between them is indispensable if the aims of promoting economic and political stability, and of successfully resisting future Chinese expansion in the Asian continent are to be achieved.

The Chinese acts have also long-term impacts upon its relations with the USSR. On the heels of the recent military operations against India, China seemed to be serving notice to the Soviets that aggressive militancy is the only fruitful interpretation of Marxist ideology and that not only Asia but the rest of the non-European world, with the possible exception of the Middle East, should be left to the Chinese sphere of influence. This set of expectations, then, might have enlarged the so-called rift between China and the USSR, although its long range implications in the Eastern bloc can be accurately presented only by future historians.

The ruthlessness of Chinese action, the continued concentration of Chinese troops along the border and her refusal to accept any community procedure for the settlement of the dispute do not rule out the possibility of future attacks by China. However, the recent introduction of new factors in Sino-Indian relations have raised the hopes for a possible *detente*.<sup>198</sup> Observers state that India's China policy has been undergoing significant change as reflected in the present Prime Minister's statement at a New Year Day press conference in 1969, when she expressed her government's willingness to open a dialogue with China.<sup>199</sup> Militarily, India has built up an impressive defence structure which gives her confidence that the 1962 episode will not be repeated. Politically, India is adopting a flexible approach to normalize relations with China.<sup>200</sup>

There are also indications of China softening its policy towards the West<sup>201</sup> and India, in the wake of her recovery from the cultural revolution. It was reported that Chairman Mao remarked to the Indian Charge d'Affaires at the May Day reception in 1970, that China and India should restore friendship.

These small gestures raise a hope that a reasonable settlement of the boundary dispute is possible, especially when India does not seem to insist any longer that China should accept the Colombo proposals of 1963, or that they should constitute a pre-condition or basis of negotiations. The initiative, thus, now depends on China.

#### . NOTES

1. Authorities exist in abundance to support this basic formulation. Jones, for instance, states: "A boundary is much more than a line on a map. It is a functional, usually visible feature of the earth vitally related to the border region and an outgrowth of an historical process." *Boundary-making—A Handbook for Statesmen, Treaty Editors, and Boundary Commissioners*, 54 (1945). At another place he states that the general situation of a boundary—in particular the space, resources and manpower back of it—now seems more important than the strategic features of its site (*id.*, p. 4). Spykman, in "Frontiers' Security, and International Organization," 32 *Geographical Review* 444 (1942), notes that "Interest in the frontier is no longer in terms of the strategic value of the border zone but in terms of the power potential of the territory it surrounds." Boggs, in *International Boundaries* (1940) describes boundaries as "sharply defined lines fixed by nations like fences between their respective properties," and states (*id.*, p. 5) that "the significance of international boundary lines today is that they bound or delimit the territory within a single national jurisdiction." Similarly, Adami, in *National Frontiers In Relation to International Law* (translated by T. T. Behrens, 1927 p. 3), defines the "State frontier" as the "line which marks the limits of the region within which the State can exercise its own sovereign right." See also, Steiner, "The Problems of Political Frontiers," in *Frontiers of the Future*, six lectures delivered under the auspices of the Committee on

International Relations on the Los Angeles campus of the University of California (1940), 72 (1941).

2. See Art. 2 (6) of the U.N. Charter which states: "The Organization shall ensure that states which are not members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security." For a detailed discussion on the applicability of the U.N. principles to non-members, see Thomas and Thomas, *Non-Intervention* (1956), pp. 110-11, 157, 226, *et. seq.*

3. These prescriptions are variously related to following the boundary agreements, relying upon long established territorial possession as manifested in effective exercise of authority and control, conforming boundaries to the natural and geographic features, recognizing acquiescence to territorial sovereignty, and so forth (*supra* Chapter 1, note 2). Fundamental general community policy relating to the honouring of agreements especially demands the protection of genuinely shared expectations of the parties to the boundary agreement. See *Case Concerning the Temple of Preah Vihear, Cambodia Versus Thailand*, Merits (1962) I.C.J. Rep. 34 and 42. The underlying policy concerning territorial possession demands that stability of expectation created by long territorial custody and control should not be disrupted. The fundamental policy relating to "natural" or geographic frontiers is based upon community expectations derived from the traditional view that boundaries should conform to such geographic or "natural" features. The basic policy—recognizing acquiescence to territorial sovereignty, and therefore estoppel from subsequent claim to that territory — is directed toward maintaining the stability of expectations based on long and cooperative behaviour. These prescriptions and policies and their applicability to the issues of the current India-China border dispute are comprehensively surveyed by the author in Chapter I.

4. See Art. 51 of the U.N. Charter. Full exposition of the right of self-defence is offered in McDougal and Feliciano, *Law and Minimum World Public Order* (1961), Chapter 3. The extent of the author's reliance upon, and utilization of this text will be apparent throughout this Chapter. While McDougal and Feliciano have consented to this extensive borrowing, the responsibility for what is set out in this essay is the author's alone. See also Bowett, *Self-Defence in International Law* (1958); Brownlie, "The Use of Force in Self-Defence," 37 *Brit. Yr. Bk. Int. Law* 183(1961); McDougal, "The Soviet-Cuban Quarantine and Self-Defence," 57 *A.J.I.L.* 597 (1963).

5. The factual material in this part is largely derived from Government of India: *Notes, Memoranda and Letters Exchanged and agreements Signed Between the Governments of India and*

China, *White Paper I*, 1954-1959; *White Paper II*, September-November 1959; *White Paper III*, November 1960-March 1966; *White Paper IV*, March 1960-November 1960; *White Paper V*, November 1960-November 1961; *White Paper VI*, November 1961-July 1962; *White Paper VII* July 1962-October 1962; *White Paper VIII*, October 1962-January 1963, hereafter cited as *White Paper I. II et. seq.*

6. For the text of the treaty, see *White Paper I*, p. 98.

7. A great many people considered this Agreement as a monument of a peaceful *modus vivendi* between communism and democracy. See, e.g. Kirk, "The Sino-Indian Frontier Dispute—A Geographical Review," 76 *The Scottish Geographical Magazine*, 5 April 1960.

8. Lok Sabha Secretariat, Foreign policy of India—Texts of Documents—1947-1958, pp. 97-8 (1958).

9. Chou En-lai, in his letter of 23 January 1959 (*White Paper I*, p. 53), stated that the border question was not raised in 1954 when negotiations were being held between the Government of India and China because "conditions were not yet ripe for its settlement." This statement appraised in the light of (a) the earlier Chinese assurance in 1954 that all outstanding problems between the two countries had been fully discussed, and (b) the subsequent resort to most intense coercions against India, can only suggest that his government sought to raise the boundary question only when the military capabilities of China were ripe for unilateral, coercive alteration of the common border between India and China.

10. Excellent comprehensive accounts of these contacts are found in current literature; see e.g., *China's Betrayal of India—Background to the Invasion*, Publications Division, Ministry of Information and Broadcasting, Government of India, 5-7 (November 1962); Chandra Sekhar, *Red China—An Asian View*, p. 203 *et. seq.*

11. References to these frequent and friendly contacts appear with varying degrees of emphasis in current literature. See especially, K. M. Panikar, *India and China* (1957); V. P. Dutt, "China: Jealous Neighbour," 44 *Current History*, pp. 136-8, March 1963; Steiner, "Communist China in the World Community," *International Conciliation*, No. 533, pp. 421-2 May 1961; Chao-Kuo-Chun, "The Chinese Indian Controversy," 36 *Current History*, pp. 354-5, December 1959.

Even a cursory survey of current literature will show that India has gone out of her way to keep Chinese friendship. India's overriding concern for friendship with China is widely reflected in her many policy actions. India was one of the first countries to recognize the Communist regime in China. India has all along

taken the most active interest in enhancing China's prestige in the world community and trying to secure for her a place in the United Nations. Because of India's concern for friendship and goodwill, she voted against the 1951 General Assembly resolution characterizing China as aggressor in Korea. India refused to attend the Conference at San Francisco, where the Peace Treaty with Japan was signed by 49 nations, because China was not a party to it. At the time of signing the Agreement on Trade and Intercourse between Tibet and India in 1954, India gave up all territorial rights enjoyed by the British in Tibet. China was one of the participants at the Bandung Conference in 1955. Prime Minister Nehru strongly supported the right of the Peoples' Government to represent China, and his personal efforts were decisive in helping Chou En-lai to develop contacts with other participants from Asia and Africa. These activities may be summed up in Nehru's own words. "Friendly and peaceful relations with China have been our basic policy ever since India became independent. We have consistently followed this policy and gone out of our way to support China's case in the councils of the world." *Nehru writes to Head of States*, External Publicity Division, Ministry of External Affairs, Government of India, (December 1962) p. 3.

12. See *India-China Border Problem*, External Publicity Division, Ministry of External Affairs, Government of India 4, (November 1962).

13. *Ibid.*

14. See Art. 4 of the Agreement, *White Paper I*, p. 99.

15. *Op. cit.*, *supra*, note 8, p. 87.

16. The extensive Chinese claims over Indian territory were for the first time disclosed in Prime Minister Chou En-lai's letter to Prime Minister Nehru dated 8 September 1959. See *White Paper II*, p. 27.

17. For elaboration, see letter of Prime Minister of India to the Prime Minister of China, dated 14 December 1958, *White Paper I*, pp. 49-50.

18. For a summary of the coercion employed, see *China's Betrayal of India*, note 10; *Leading Events in India—China Relations 1947-1962*. Ministry of External Affairs, Government of India (July 1962); *Menace to India's Freedom*, Publications Division, Government of India (November 1962); *The Chinese Aggression—Some Facts About the India—China Border*, Ministry of Information and Broadcasting, Government of India (January 1963); *World Press on Chinese Aggression*, External Publicity Division, Ministry of External Affairs, Govt. of India (December 1962).

19. See Memorandum of the Chinese Government, November 1958, *White Paper I*. p. 47. See also Note of the Indian Govern-

ment, 21 August 1958, *id.*, p. 46, and letter of Prime Minister Nehru, 14 December 1958, *ibid.*, pp. 48-50, Letter of Prime Minister Nehru, 1 January 1963, *White Paper VIII*, p. 50.

20. For the Chinese complaint, see *White Paper I*, p. 1. For reference to Barahoti in subsequent notes of the Chinese Government see *id.*, pp. 5, 8, 13, 23 *et. seq.*, and *White Paper II*, p. 7. For India's assertions, see *White Paper I*, Pp. 3, 4, 6, 7, 9, 12, 20.

24. 30 *et. seq.*, and *White Paper I*. p. II.

During the negotiations in 1956 and 1958, however, it was agreed that pending the settlement of the dispute, both India and China would refrain from sending troops to Barahoti. But subsequent developments showed that this agreement was not honoured by the Chinese. For details, see *White Paper I*, pp. 30-31 *et. seq.* In 1958, the Indian Government repeatedly proposed that pending a settlement of dispute neither of the two governments should send its civil administrative personnel to Barahoti (see *White Paper II*, p. 11). Since the Chinese Government was not agreeable to this proposal, the Indian Government informed the Chinese Government that it "will continue as in previous years to send its civil personnel to exercise jurisdiction over an area which the Government of India have always considered as part of Indian territory" (*id.* p. 12). The Chinese Government did not object to this arrangement which had been continuing for some years. But recently the Chinese Government has denied the existence of any such specific understanding. See *White Paper VIII*, pp. 32-3, 43 etc.

21. See *White Paper 1*, p. 4.

22. *Id.*, p. 10

23. See Note of the Indian Government, 2 May 1956, *id.*, p. 11.

24. See *id.*, pp. 17 and 18. One 20 September, a Chinese patrol crossed the Shipki Pass and came four miles inside up to Hupsand Khud. When confronted with an Indian patrol party, the Chinese party threatened to use force. See *id.*, p. 18.

25. The Indian Government lodged a strong protest on 18 October 1958, against the construction of this road which it considered to be inside Indian territory. See *id.*, p. 26.

26. *Id.*, p. 22.

27. *Id.*, pp. 27 and 29.

28. *Id.*, p. 29.

29. See *id.*, p. 33.

30. See *id.*, p. 32.

31. The protest against the incident was made by the Indian Government on 30 July 1959. See *id.*, p. 38.

32. See note of the Indian Government, dated 11 August 1959, *id.*, p. 41.

33. See *id.* p. 44; *White Paper II*, p. 6, The Indian Government



contends that it was agreed between India and China not to occupy that village. *White Paper VII*, p. 30 37, 56 etc. In support thereof, it presents the statements of Chou En-lai (his letter of 17 December 1959, *White Paper III*, p. 52) to the effect of agreeing to "the non-stationing of the armed forces of both side at Longju." Disregarding this understanding the Chinese Government asserts that since the recovery of Longju from India in August 1959, it has been under its administrative control. *White Paper VIII*, p. 32 and 42.

34. A comprehensive account of these incidents is found in several Notes of the two Governments, e.g. see *White Paper II*, pp. 13-26; *White Paper III*, pp. 1-44; *White Paper IV*, pp. 1-2.

35. See *White Paper III*, pp. 4-5, 8-22.

36. See *id.*, pp. 35-44.

37. See Note of the Ministry of Foreign Affairs of China, 25 October 1959, *White Paper II*, p. 16.

38. At the end of the meeting of the two Prime Ministers, a joint communique, stating that their talks had ended in a deadlock, was issued. For text, see *N. Y. Times*, 26 April 1960, p. 6.

39. The Report submitted to the Indian Government was published in full on 14 February 1961. As for the Chinese rendition of this same report, it failed to appear till nearly a year after New Delhi's publication. There followed charges by each that the other had issued a twisted presentation of the meeting and the entire effort came to naught.

40. See *White Paper IV*, p. 3.

41. For details, see *id.*, p. 4. Such occurrences were repeated in 1961 also. *White Paper V*, p. 11.

42. See *id.*, p. 53. Mention may also be made of complaints by India, about air violations of the Indian territory by the Chinese in 1960. See especially *White Paper IV*, pp. 28-30.

43. See Note of the Indian Government, dated 31 October 1961 *White Paper V*, p. 53.

44. See *id.*, p. 54.

45. *Ibid.*

46. See e.g. *Dimashe Damascus*, 3 November 1962, quoted in *World Press on Chinese Aggression*, note 18. p. 27.

47. *Ibid.*

48. See Note of the Indian Government, dated 18 April 1962, *White Paper VI*, p. 27.

49. A protest note was sent by the Indian Government on 14 May 1962, *id.*, p. 41. In this note the Indian Government renewed its earlier proposal, as an interim measure, for the withdrawal of the Indian and Chinese forces in the Western Sector behind the alignment claimed by China and the traditional Indian alignment respectively. The Indian Government also expressed

its willingness to permit the use of the Aksai Chin road by Chinese civilian traffic. *Id.*, p. 43.

50. The Chinese threat stated that "...the Chinese Government, exercising its sacred right to defend China's territory and maintain the tranquility on the border, has ordered Chinese frontier guards to resume border patrols in the sector from Karakoram Pass to Kongka Pass...If India continues to invade and occupy China's territory...the Chinese Government will be compelled to consider the further step of resuming border patrols along the entire Sino-Indian boundary." *Id.*, p. 39

51. See *id.*, p. 81.

52. See Note of the Indian Government, dated 15 August 1962. *White Paper VII*, p. 24.

53. For detailed accounts, see mainly, Indian Notes of 17, 21, 25, 28 September, 6 October *et. seq.*, *id.* pp. 75, 83, 86, 100 *et. seq.* The Indian Note of 21 September 1962, described the incident of 20 September at Dhola Post (2½ miles south of the Thagla Ridge) which resulted in three Indian casualties, as an unprovoked aggression, *id.*, p. 83.

54. See *id.*, pp. 3, 4.

55. *Id.*, pp. 101-2.

56. There are ample references to prove that the Chinese had already seized 12,000 square miles of the Indian territory before 8 September 1962, e.g., the message sent by the Prime Minister of India to various Heads of Government on 27 October 1962. For text, see *Nehru Writes to Heads of States*, note 11, p. 3.

57. See *id.*, p. 2.

58. See letter from Prime Minister Nehru to the Prime Minister of China, dated 1 January 1963, *White Paper VIII*, p. 49.

59. The text of Chinese declaration is found in *id.*, p. 17.

60. Vohra, "A Peaceful Coexistence Shattered: India Prepares for War," *Herald Tribune, Sunday*, 24 June 1962, Section 2, p. 3. There were minor clashes between the forces of India and China at Nathu La and Cho La in 1967.

61. *White Paper VIII*, p. 17.

62. There are frequent references in the recent Chinese Notes and Memoranda to the effect that Chinese armed forces had advanced more than 20,000 square kilometres in the Eastern Sector, e.g. Memorandum of 8 December 1962, p. 35. Memorandum of 29 December 1962, *id.*, p. 45.

63. See McDougal and Feliciano note 4, p. 172.

64. Barbara Ward, "The Stake: Freedom for Half of Mankind," *N. Y. Times, Sunday*, 14 April 1963, Section 6 (Magazine) p. 19.

65. *Id.*, p. 114.

66. See *ibid.* See also, General Thimayya, "Adequate Insurance," 35 *Seminar* (The monthly symposium, Post Box 338, New

Delhi-1) p. 14 *et. seq.* (July 1962).

67. See note 168.

68. Need for the supply of more up-to-date weapons is appropriately emphasized in Baldwin, "Himalayan Warfare," *N.Y. Times*, 10 November 1962, p. 6.

69. For an excellent discussion on the relation between internal value systems and external policies of states, see Wright, *A Study of War*, 833-48, (1942).

70. Loewenstein, *Political Reconstruction* 86 (1946).

71. *Id.*, p. 90.

72. For a brief historical sketch, see Barbara Ward, note 64., pp. 19, 112-14.

73. Apparently admitting this broad premise, Prime Minister Nehru states: "They represent a way of life...that is anathema to the ruling ideologists in Peking, with their faith in power and violence as the instrument of benevolent change." Nehru, "Changing India," 41 *Foreign Affairs* 461 (1963). See also Ambassador Nehru's speech at the National Press Club luncheon on 21 November 1962, in Washington D.C., text in *India News*, Embassy of India, Washington D.C., 23 November 1962, p. 8.

74. Within months of its establishment, the People's Republic joined in North Korean aggression on South Korea which earned for itself the title of aggressor from the United Nations. The new regime celebrated its first anniversary by marching the "People's Liberation Army" into Tibet in October 1950, and eventually captured Tibet by force in 1959. Its coercive role, notably in the internal war in Vietnam and also in the internal matters of Nepal, Malaya, Thailand and countries of Africa, adds to its existing record.

75. See Durdin, "The Communist Record," 204 *The Atlantic Monthly* 41 *et. seq.* (December 1959); Alfred Fabre-Luce, "Chinese Journey," *id.*, pp. 44-7. See also Moreas. *The Revolt in Tibet* (1959). Ch. 7. On 25 November 1962, Rev. Gopal Sonam, Head of the Ladhak Buddhist Association, giving an eyewitness account of the Chinese atrocities in Tibet, stated that "if there was hell on earth it was in Tibet." His description included accounts of forced labour by the entire population of Tibet, including children and sick persons. See *India News*, Embassy of India, Washington D.C., 7 December 1962, p. 8.

76. Cf, Barbara Ward, note 64. Tracing past history of the Indian experience in democracy, the author states that from the earliest times India was decentralized in village councils and panchayats who carried on the administration. "Princes fought, dynasties rose and fell." She adds, "But at the base of the social order authority remained with the village," *id.*, p. 19. In conclusion, she states that in the new era as in the old, India would be plural,

decentralized, tolerant and permissive. *Id.*, p. 114.

77. The New Constitution of India, adopted in 1950, proclaims India to be a Sovereign Democratic Republic and aims at securing for all its citizens justice—social, economic and political, liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; fraternity assuring the dignity of the individual and the unity of the Nation. See Preamble to the Constitution of India.

78. See, e.g., Nehru note 73, pp. 454, 456, *et. seq.*

79. The role of fundamental rights and independent judiciary in the functioning of Indian democracy is also unique (Arts. 12-35 of the Constitution of India). Fundamental rights guaranteed by the Constitution are inviolable and no law, ordinance, customs, usage, or administrative order can abridge or take away any such rights (Art. 13 of the Indian Constitution). A law which violates any of the fundamental rights is void, and these rights are binding on both the legislature and the executive. An independent judiciary, under the Indian Constitution, is vested with adequate authority to enforce these rights. See Arts. 124-147 and 214-237 of the Constitution of India. For an excellent discussion, see Jain, *Indian Constitutional Law*, pp. 347-504 (1962); I, Basu, *Commentary on the Constitution of India*, pp. 121-688 (4th ed., 1961) and II, *id.*, pp. I-302.

80. V. T. Krishnamachari in Indian Planning Commission, *New India*, p. VII (1958).

81. For elaboration, see Steiner, note 11, pp. 390, 394 *et. seq.*

82. For authoritative opinions on this point, see generally, Brazezinski, "The Challenge of Change in the Soviet Block," 39 *Foreign Affairs* 434 (1961); Kaplan, "Bipolarity in a Revolutionary Stage," in *The Revolution in World Politics* (Kaplan ed. 1962), pp. 258-9; Halpern, "Communist China's Demands on the World," in *id.*, pp. 235-6; Steiner, note 11, pp. 407-10; Zagoria, *The Sino-Soviet Conflict 1956-61* (1962); Hudson, Lowenthal and MacFarquhar, *The Sino-Soviet Dispute* (1961).

83. A good discussion on the mutual arrangements between China and the USSR for aid is found in Steiner, note 11, pp. 403-5.

84. See note 74; see also note 160.

85. As early as 19 September 1950, the Indian delegation to the General Assembly of the United Nations urged that the People's Government should represent China in the United Nations. Since then India has constantly advocated the admission of People's Republic of China to the United Nations. Despite the border dispute and Chinese coercion, India has not abandoned its efforts to seek admission for the People's China in the United Nations. Ignoring these and other gestures of India, Maxwell, in a recent book, *India's China War*, has sought to prove that it was India and not China which took an intransigent position on the border problem from the

very beginning. His strictures are appropriately answered by Girilal Jain in "Sino-Indian Border War 1 and II." *Times of India*, 6 and 7 October 1970.

86. Note 73, p. 456.

87. In fact, India's posture of neutrality has appeared to some observers as more "neutral against the West" than neutral. A great many pronouncements on the international issues made by the Indian statesmen aroused antagonism that was loudly voiced in Western capitals. In this connection, mention may also be made of Congressional attempts, in 1962, to cut non-military aid to India. See *N. Y. Times*, 4 November 1962, Section 4 p. 2.

88. This remark was made before a Conference of State Information Ministers on 25 October 1962, *India News*, Embassy of India, Washington D.C., 3 November 1962, p. 2, col. 3.

89. McDougal and Feliciano, note 4, p. 176.

90. The limitedness of their military objective could be inferred from the fact that after the Chinese had taken over most of the area they claimed in Ladakh, they virtually ceased to press the offensive there and, after some time, they declared their intention to cease-fire unilaterally in conflict areas. Chinese strategic interest in Ladakh was also evident from the fact that their coercive exercises before 8 September 1962, were confined to the Ladakh Sector alone. Attack on the Eastern Sector of the Sino-Indian boundary came very late. For an elaboration of this analysis, see especially Rosenthal, "China's Goals Worry Indians," *N. Y. Times*, 11 November 1962, Section 4, p. 5; see also *N. Y. Times*, 28 October 1962, Section 4, p. 2.

91. For a comprehensive discussion on the initial and continuing validity of the McMahon Line which is the negotiated product of the explicit boundary agreement—the Simla Convention (1914)—between India, China and Tibet, see generally Appadorai, "Bases of India's Title on the North East Frontier," *International Studies* 362, et seq. (April 1960); K. Krishna Rao, "The Sino-Indian Boundary Question and International Law," 11 *Int. & Comp. L.Q.* p. 400 et seq. (April 1962); Sharma, "McMahan Line Upheld," *New York Times*, 18 November 1962, Section 4, p. 10; Purshottam Trikamdas, "China's Claims Disputed," *New York Times*, 2 December 1962, Section 4 p. 8 See also, note 3, and note 9.

92. In launching an attack in NEFA, what the Chinese probably had in mind was to let the Indian Government know that the Himalayas, in this region, were not an invulnerable barrier, as many Indian military strategists might have thought. This might have been contemplated to give China a leverage in its negotiations for border settlements. Dorothy Woodman, in her recent study, *Himalayan Frontiers*, wrote that China attacked NEFA not for purposes of annexation, but out of anxiety to remove a possi-

ble threat to China domination of Tibet.

93. In fact, Prime Minister Nehru, in his letter of 26 September 1959, to Chou En-lai, explicitly complained that some Chinese Officers in Tibet repeatedly proclaimed that "the Chinese authorities will before long take possession of Sikkim, Bhutan, Ladakh and North East Frontier Agency," *White Paper II*, p. 43; see also *White Paper IV*, p. 100.

94. Trumbull, "Behind India-China Dispute: Leadership of Asia," *N. Y. Times*, 29 October 1962, Section 4, p. 7.

95. Rosenthal, "Battle Between India and China Has Wide Impact," *N. Y. Times*, 4 November 1962, Section 4, p. 5.

96. Dinkar Sarkar, "Prefatory Remarks on Sino-India Border Dispute," 12 *United Asia* 111 (1960).

97. For text of the map see *Link* (Indian news magazine, New Delhi), 11 November 1962. Excellent discussion of Chinese goals of territorial expansion of found in Bernard B. Fall, "Red China's Aims in South Asia," 43 *Current History* 136 (1962); Mark Mancall, "What Red China Wants," *The New Republic*, 17 November 1962, p. 9; Chandra Sekhar, note 10, pp. 224-5; see also, Boud, *Communist China's Foreign Policy*, Ch. 8

98. See Werner Levi, "Chinese-Indian Competition in Asia," 38 *Current History* 65 (1960); Hamilton Armstrong, "Thoughts Along the Chinese border: Will Neutrality be Enough?" 38 *Foreign Affairs* 238 (1960); Barnet, "Red China's Impact on Asia," 304 *The Atlantic Monthly* 48 (1959); Trumbull, note 94; *ibid.*, "Communist Chinese Bringing Pressure of Bear on Many Fronts," *N.Y. Times*, 25 November 1962, Section 4, p. 3. See also statements of India's chief representative, B. N. Chakravarty, on the A.B.C. Television programme, *N. Y. Times*, 26 November 1962, p. 2.

99. Mao Tse tung seems to have stated: "To sit on the fence is impossible" and "neutrality is a camouflage and a third road does not exist," quoted by Mancall, note 97, p. 9. More recently, Peking stated that non-alignment is a mere signboard (see *People's Daily*, 23 December 1962). Prime Minister Nehru, in a brilliant analysis of Chinese views on non-alignment, states: "If the world is viewed as divided essentially between imperialists and communists, between whom war not only is inevitable in the end, but between whom tension in some form must be kept alive and even intensified as opportunity occurs, then there is indeed no place in it for the non-aligned." Note '73, p. 460.

100. Art. 2(4) of the United Nations Charter.

101. For elaboration, see Prime Minister Nehru's Letter of 1 May 1963, to Premier Chou En-lai; text in *India News*, Embassy of India, Washington D.C. 17 May 1963, p. 6.

102. The Chinese have built a network of roads connecting their front lines. In 1957 they completed a highway from Tibet to Sin-

kiang, running over 100 miles across India's Aksai Chin area. Since then they seem to have built up several roads linking their new check-posts in Ladakh with rear bases. For instance, in August 1961, Chinese established three new checkpoints in Ladakh and constructed roads connecting these posts with rear bases (see *supra*, note 45). Incidences of clearing new roads by China in Indian territory were reported during 1962 also. See e.g., *White Paper* VI, p. 66. Other roads have been built in Tibet paralleling some of the disputed areas, and connecting many Tibetan points into China. The Chinese Government is reported to have hewn several air fields out of the rough Tibetan plateau close to the border points. There are also some rough Chinese air strips in Lodenkh. For detailed information about these preparations, see Baldwin, "Mountain War in India," *N. Y. Times*, 27 October 1962, p. 2; *ibid.*, "The Himalayan Frontier," *N. Y. Times*, 20 April 1960, p. 9; *ibid.*, "News Analysis," *N.Y. Times* 22 December 1959, p. 5; "China Builds New Roads of Aggression," *India News*, Embassy of India, Washington D.C., 22 February 1963, p. 7.

103. The nearest Indian railhead to the disputed areas in Ladakh was about 100 miles away. From there to the border area, supply was carried through rough jeep trails, mule tracks, porters, or by turbine powered helicopters which have rough going in the high altitudes. However, roads, or jeep trails have been constructed from Leh to Chushul and from Chushul to Damchok. For elaboration see Baldwin, "Mountain War in India," *N.Y. Times*, 27 March, 1962, *op. cit.*, p. 2.

104. See *Part I, The Recourse to Force: a Summary Account, supra*.

105. For detailed analysis, see generally Trumbull, note 98, p. 3; Schwartz, "Growing Internal Problems Strain Communist Unity," *N. Y. Times*, 11 November 1962, Section 4, p. 3.

106. These reasons are elaborated in Jhabvala, "U.N. Peace Force in India-China Border Fight? Probably Not," *New York Herald Tribune*, 26 November 1962, p. 18. See also, Press Digest, *India News*, Embassy of India, Washington D.C., 14 December 1962, p. 2; Prime Minister Nehru's Statement in Parliament on 26 November 1962, *id.*, 30 November 1962, p. 1, Col. 2.

107. For an excellent discussion on Chinese Communist Military doctrine and evolution of armed forces, see Hilton, "Communist China's Military Posture," 43 *Current History* 150-52 (1962), and material cited therein.

108. See generally, Barbara Ward, "To Win the Fateful Duel in Asia," *N. Y. Times*, 8 November 1959, Section 6 (Magazine), p. 15. The author gives abundant facts and data to prove her conclusion that India is behind China in the race of economic advance. She states: "Communist development forges ahead under

the spur of totalitarian discipline. Free development hangs fire, fluctuates with the ups and downs of trade, waits uncertainly upon Western policies that are not agreed on or even formulated." *Id.*, p. 102. Another comprehensive work that arrives at similar conclusions is "India," *The Economist*, 26 March 1960, pp. 1263-85.

109. See Barbara Ward, note 64, at 114.

110. See *ibid.*, Mancall, note 91, p. 12; Hilton, note 107, p. 149. Chinese official sources reveal that its publicly disclosed defence expenditure exceeded an average of \$2,100 million (Rs 10,000 million or £ 750 million) annually, in some years going up to 8 per cent of its total national income. This excluded hidden expenditure stated under other heads. In India, the net defence expenditure had never, in any single year during the period 1951-52 to 1960-61, exceeded Rs 2,570 million (about \$500 million). Moreover, at no time during this period did it reach even the target of 2 per cent of India's national income. (The above figures about defence expenditures are based on the findings of Savyasachi. The author has derived the Chinese figures from the Chinese budget papers and other authoritative official sources. See Savyasachi, "China Spends Over Rs 10,000 millions Annually on Defence," ISI 4/29-2-1962).

111. See note 109.

112. See Mancall, note 97, p. 12; see also Baldwin, *The Himalayan Frontier*, note 102, p. 9.

113. The military aid which India had received in the current crisis was largely from the United States and Great Britain. A study team led by Averill Harriman was dispatched to India by President Kennedy. In conjunction with military advisers, a list of the urgent needs was drawn up and the committed countries proceeded to ship off most of these demands and decided to accept Indian rupees in payment. The US Government, it was reported, promised to provide India with long term military assistance to meet the threat of renewed attacks from China. For details, see *N. Y. Times*, 25 May 1963, p. 1, Col. 2, See also the arrangements under the Western Plan for the air defences of India against a possible Chinese air attack, *N. Y. Times*, 23 July 1963, p. 3.

114. The operational meanings of these strategies are offered in McDougal and Feliciano, note 4, pp. 27-33.

115. See *id.*, p. 196.

116. See the Official Communications of the Indian Government dated 13 August 1950, and of the Chinese Government dated 21 August 1950, referred in *Leading Events in India-China Relations, 1947-1962*, issued by Ministry of External Affairs, Government of India, pp. 1-2 (1962).

117. *Id.*, p. 2.



118. See the text of the treaty and notes exchanged between the signatories, *White Paper* 1, pp. 98-104.

119. The Conference met in April 1955 at Bandung in Indonesia, and was attended by 29 Afro-Asian nations. The sponsors of the Conference were Burma, Ceylon, India, Indonesia, and Pakistan. For detailed documentation of the proceedings, see Kahin, *The Asian-African Conference* (1956).

120. *White Paper* I, p. 60. For related matters, see *id.*, p. 60-9.

121. For text of the letter, see *White Paper* I, p. 52.

122. This note was communicated on 7 November, 1959; text in *White Paper* III, p. 45, 46.

123. *Ibid.*, p. 45.

124. See Boundary Treaty Between the People's Republic of China and the Union of Burma 1960 (text in *I Indian J. of Int. Law* 695, 1961). Boundary Treaty between the People's Republic of China and the Kingdom of Nepal, 1960 (text in *id.*, at 704); "Boundary Treaty Between People's Republic of China and Pakistan, 1963" [text in Ministry of External Affairs, Government of India, Sino-Pakistan 'Agreement'—Some Facts," p. 24 (1963)].

125. See Mancall, note 97, p. 10.

126. *Peking Review*, 15 September, 1959, p. 11.

127. Mancall, Note 97, p. 11.

128. See letter from Premier Chou En-lai to Prime Minister of India, 24 October 1962, *White Paper* VIII, p. 1. See also Statement of the Chinese Government on 24 October 1962, *id.*, p. 2.

129. *White Paper* VIII, p. 8. It was further added: "To put it concretely, in the Eastern Sector it coincides in the main with the so-called McMahon Line, and in the Western and Middle Sectors it coincides in the main with the traditional customary line which has been consistently pointed out by China."

130. See Letter of Nehru to the Prime Minister of China, 27 October 1962, *White Paper* VIII, p. 5.

131. Letter from the Prime Minister of India, to Premier Chou En-lai, 14 November 1962, *id.*, p. 11. A brief sector-by-sector analysis would show the deceptive nature of the Chinese proposals. In the Western Sector the Chinese claim that the "line of actual control" coincides "in the main" with what they call "the traditional and customary line." But actually, the Chinese "line of control" in November 1959, was not a consolidated line, but a few isolated Chinese posts on Indian territory, progressively established by force. If the Chinese proposals were accepted, this would mean that India would withdraw 20 kilometers (12-1/2 miles) farther from the line the Chinese held after the latest aggression, inside territory accepted by Chinese themselves as Indian. Chinese withdrawal, on the other hand, would be wholly inside the Indian territory. Thus, the implementation of the Chinese plan would leave

Chinese forces at least a hundred kilometers (62-1/2 miles) deep inside Indian territory in the Western Sector. In the Eastern Sector, according to the Chinese claims, the "line of actual control" coincides "in the main" with the McMahon Line, as understood in the light of their definition. The Chinese proposal, viewed realistically, would leave China in control of vital mountain passes leading into India, while India would be withdrawn 20 kilometers toward the south. This would provide China a foothold for future offensives. The application of the Chinese proposals to the Central Sector also suggests similar intentions of jeopardizing the Indian position.

According to Indian sources, there is a difference of some 8,500 square miles between the "line of actual control" as really existed on 7 November 1959, and what China now claims as the "line of actual control" of 7 November 1959. See *The Chinese Aggression—Some Facts About the India-China Border*, note 18, p. 6. See also Publications Division, Government of India, "China's Fraudulent Peace Offensive," 7-12 December 1962. Even as between the line of actual control immediately prior to 8 September, 1962, and that on 7 November 1959, as defined by the Chinese Government, there is a difference of 2,500 square miles of the Indian territory which China occupied after September 1962. See Memorandum of the Ministry of External Affairs, New Delhi, 19 December 1962, *White Paper VII*, p. 38.

132. The text of the Chinese declaration is found in *id.*, p. 17.

133. For elaboration, see *id.*, p. 20.

134. *Ibid.*

135. *Id.*, p. 25.

136. See Mancall note 97, p. 9. Nehru confirmed that the foreign policy of China left no room for non-alignment, and it sought to accentuate the polarization of world forces. China's multiple campaign against India was, therefore, in his opinion, "an exercise in *realpolitik* on these lines," note 73, p. 461.

137. See Mancall, note 97, p. 9.

138. See note 117, Note of the Chinese Government dated 3 March 1962, *White Paper VI*, p. 192; and Statement of the Chinese Ambassador to the Indian Foreign Secretary, *White Paper 1*, at 73.

139. See, communication of the Indian Government, dated 24 August 1950, note 116, p. 2.

140. The fact that China, having launched the "liberation" of Tibet, was also about to enter the Korean War, might have influenced Chinese expectations on the boundary question.

141. See Mancall, note 97, p. 11.

142. See note 120.

143. In fact these charges also constituted the dominating theme of the Chinese official communications.

144. This dual approach is reflected in each note of the Chinese Government, while massive preparations for the invasion of India were being made. Observe particularly the theme in Chinese notes after 8 September 1962, collected in *White Paper VII*.

145. *White Paper VIII*, p. 19.

146. *Id.*, p. 20.

147. The falsity of this charges evident from the fact that a team of officials of the International Red Cross, after visiting Deoli Camp, which contained about 2,000 Chinese interns, certified that they were treated excellently. It is also reported that a considerable number of these interns refused to return to China. For details see *India News*, Embassy of India, Washington D.C., 3 May 1963, p. 7.

148. A few months ago the *People's Daily* of Peking in an editorial falsely stated that "India and the United States concluded a military assistance agreement in the nature of a military treaty as early as 11 years ago," and that it was renewed in 1958. Reports were also circulated in China that India had secretly been a member of SEATO. For source reference to such techniques, see ISI 18/14-1-1963; ISI 10/21-1-1963.

149. See *White Paper I*, pp. 80-2.

150. For details, see *id.*, pp. 86-95, *White Paper II*, pp. 98-120; *White Paper III*, pp. 132-5; *White Paper VI*, pp. 219-21. With respect to Indian Trade Agency at Gyantse, as early as 1943, the British India Government concluded a lease valid up to 1971 with the owner of the property and the representative of the Tibetan Government for its housing. Paragraph 4 of the Notes exchanged on the occasion of the Sino-Indian Agreement of 1954 (see *White Paper I*, p. 102) specified that the Government of India might continue to lease the land within the Agency compound walls which was then being occupied by the Indian Agency. Following the floods in 1954 and the loss of Indian Agency buildings, the Indian Government notified its intention to retain the lease and commence new reconstruction of the Agency building on the old site. In total disregard of the provisions of the 1954 Agreement as well as the rights of a Successor State under International Law, the Chinese Government, in March 1958, asserted that it was not prepared to accept the continuing validity of the lease signed in 1943, because it was another product of British imperialism.

151. See especially, *White Paper I*, pp. 86-95; *White Paper II*, 114-22; *White Paper IV*, pp. 100-102.

152. Of the many reported incidents, see especially, *White Paper I*, p. 93; *White Paper II*, p. 110-13.

153. For comprehensive documentation, see McDougal and Feliciano, note 4, pp. 30-31.

154. See, *White Paper VI*, p. 217, also *White Paper II*, pp. 74-6;

*White Paper* IV, p. 101.

155. See, *White Paper* VI, pp. 201, 222; *White Paper* VII, 171-7 *et. seq.*

156. For Notes exchanged between India and China on the closure of Consulates General, see *White Paper* VIII, at 122-5.

157. Clearly uneasy over China's expansionist policies, the Soviets wriggled themselves out of a delicate situation following the Chinese invasion. Supporting China ran the risk of ruining the long courtship with the Indians but turning its back on Peking involved the far more serious prospect of ending the Marxist alliance. Skilfully evasive, Khrushchev advised India to accept Peking's cease-fire proposal of 24 October, yet applied no strong pressure on this point, and at the same time indicated to India that Russia would fulfil its agreement to deliver MiG jet fighters which had been promised earlier.

158. McDougal and Feliciano, note 4, p. 32.

159. Setting aside as a separate question the Chinese invasion of Tibet which began in October 1950, we may still note a number of Chinese border violations against her neighbours. On 2 April 1953, Foreign Minister Zafrullah Khan issued a protest of Chinese violation of Pakistan's border in Hunza State. On 31 July 1956, the Burmese Government reported clashes with Chinese troops who had occupied a one thousand square mile area in the Kachin and Wa States. In an incursion into Nepal on 25 June 1960, Chinese troops killed a Nepalese officer and captured a group of Nepalese soldiers. Peking vainly claimed that its sovereignty should lawfully extend over all of Mount Everest. For these and other events presented in chronology, see *India News*, Embassy of India, Washington D.C., 26 January 1963, pp. 7, 11.

160. On 30 January, 1951 the United Nations passed a Resolution branding Communist China as an aggressor in Korea, Resolution No. 498 (V) U.N. Gen. Ass. Off. Rec. 5th Sess. Supp. No. 20A(A/1775/Add. 1 (1951). In 1960, the Legal Inquiry Committee on Tibet, in its report to the International Commission of Jurists, found Communist China guilty of repeated acts of genocide in Tibet. See International Commission of Jurists, *Tibet and the People's Republic* (1960).

161. See Note of the Indian Government 27 August 1954, *White Paper* I, p. 3.

162. See note 22.

163. See note 27.

164. See *White Paper* I, p. 26.

165. See note 33.

166. See notes 34-37.

167. See notes 46-60.

168. Statement in the Indian Parliament on 14 November 1962

quoted in "We Accept China's Challenge," Publications Divn., Ministry of Information and Broadcasting, Government of India, 17 November 1962. On 9 November 1962, for instance, he stated that the Indian side had to face the Chinese army of some forty to fifty thousand men in a small corner of NEFA. *Prime Minister on Chinese Aggression*, External Publicity Division, Ministry of External Affairs Government of India (1963), p. 64.

169. The appraisal of the consequentiality of the achieved coercion calls for consideration of factors such as "the number and kinds of values of which the target state is deprived, the relative importance of these values to the target state, and the scope of value deprivations, including both the geographical range and temporal dimension of the damage." McDougal and Feliciano, note 4, p. 197.

170. See *id.*, pp. 198-9.

171. See *id.*, p. 200.

172. *Supra*, note 580.

173. Between 20 October 1962 and 10 December 1962 the casualties were reported as 197 killed, 291 wounded, and 5,174 unaccounted for up to 11 December 1962. See statement of the Indian Prime Minister in the Indian Parliament on 12 December 1962; *Prime Minister on Chinese Aggression*, note 168, p. 112. After the more recent repatriation of a large number of Indian soldiers, Indian official sources show about 800 men still unaccounted for. See *India News*, Embassy of India, Washington D.C., 26 July 1963, p. 7, col. 3.

174. For details, see *India News*, Embassy of India, Washington D.C., 12 April 1963, p. 8, cols. 1 and 2. See also *id.*, 3 May 1963, p. 3, cols. 4 and 5.

175. For instance, one official Indian source reveals that Chinese destroyed property worth about \$315,000 in and around Bombdila in Kameng division of NEFA. See *id.*, 8 February 1963, p. 4, col. 2.

176. The text of the Resolution appears in *We Accept China's Challenge*, note 168, 1-2.

177. *India News*, Embassy of India, Washington D.C., 22 November 1962, p. 1. This statement was made in a broadcast on 19 November 1962, from All India Radio.

178. Differences of all kinds vanished to meet the crisis. Political parties called off whatever agitation they were engaged in; State after State placed all its resources at the disposal of the Central Government; trade unions, employers, and employees all alike came forward to lend a helping hand to the Government; teachers and students, bidges and housewives, and even sadhus, patients and prisoners gave assurance of their fullest co-operation and services to meet the emergency. For a comprehensive review of this moving national demonstration consult *A Nation Aroused—*

*How India is Determined to Fight Chinese Aggression*, Publications Division, Government of India (November 1962). Some of the institutional measures taken by the Government, especially the formation of the National Defence Council and the National Defence Fund were outlined by the Indian Prime Minister before the meeting of the National Development Council on 4 November 1962. See *Prime Minister on Chinese Aggression*, note 168, pp. 30-47.

179. The countries of Asia and Africa who expressed their support to India are listed in *China Disregards the Colombo Proposals*, Publications Division, Ministry of Information and Broadcasting, Government of India (7 March 1963).

The unqualified support of the United States Government to India, not only in her effort to meet Chinese aggression, but also on the merits of the dispute is well known. As early as 27 October 1962, Ambassador Galbraith declared that the United States recognized the McMahon Line as the Northern border of the NEFA area. *India News* (special supplement), Embassy of India, Washington D.C., 30 October 1962, p. 1. Similarly, the governments and peoples all over the world reacted sharply against the Chinese action. Even the effective leaders in the Communist camp expressed their resentment against Chinese actions. For instance, the East German Communist Leader, Mr Ulbricht, is reported to have declared before the East German Communist Party Congress: "We were not consulted or informed by our Chinese comrades on the Indian border problem. We only wish they had pursued a policy in line with our agreement on co-existence." (Quoted in *Chinese Aggression and Non-Alignment*, ISI 11/25-1-1963).

For exhaustive documentation containing gleanings from the world press opinion condemning the Chinese aggression, see generally, *World Press on Chinese Aggression*, note 18.

180. One principle that may be considered in this connection is the "Stimson Doctrine" which urges that changes in the international distribution of values brought about by resort to coercion and violence (the "fruits of aggression") should not be recognized, "legitimized," nor given effect by the rest of the states. The strategy of non-recognition, however, if employed to the exclusion and in lieu of other specific sanctioning measures, can hardly muster a high degree of coercive effect against a powerful violator state like China. For this reason, and should the Chinese attack, it would be appropriate to invoke the machinery of the United Nations for suitable sanctioning measures. Both the Security Council under its primary responsibility for maintaining peace, and the General Assembly under the "Uniting for Peace Resolution" have authority to adopt measures, including the use of force, if necessary to prevent the consummation of prohibited

coercion. Meanwhile, India will have the right to rely on its own efforts and the support of other peace-loving nations in taking needful measures for self-defence, the repulsion of the aggressor, and the recovery of the lost territory. Fuller exposition and historical development of this principle is offered in Langer, *Seizure of Territory* (1947). See also Briggs, *The Law of Nations* (2nd ed. 1952) pp. 251-2; Bishop, *International Law* (2nd ed., 1962), pp. 365-6; McDougal and Feliciano, note 4, pp. 312-13; McMahon, *Conquest and Modern International Law* (1940).

181. See McDougal and Feliciano, note 4, pp. 203-6.

182. See note 106.

183. The text of the proposals is found in *India News*, Embassy of India, Washington, D.C., 26 January 1963, p. 1, cols. 4 and 5.

184. For text of clarifications, see *id.* The Chinese Government made an allegation that a different set of clarifications were given in Peking and Delhi. This allegation was explicitly refuted by the Prime Minister of Ceylon, Mrs Bandaranaike, on whose initiative the Colombo Conference was held, and who explained the Colombo proposals to the Government of China. For elaboration, see Prime Minister Nehru's letter of 1 May 1963 to Premier Chou En-lai, *India News*, Embassy of India, Washington D.C., 17 May 1963, p. 6.

185. Relevant parts of this letter are reproduced in *China Disregards the Colombo Proposals*, note 179, pp. 14-16.

186. See *id.*, pp. 17-18.

187. *Id.*, p. 9. This declaration was made in his letter addressed to the heads of governments of the Asian and African States.

188. *White Paper VIII*, p. 10.

189. In his letter of 20 April 1963, Premier Chou En-lai wrote to Nehru: "The Chinese Government has never agreed to refer the Sino-Indian boundary dispute to international arbitration nor will it ever do so."

Quoted by Nehru in his letter of 1 May 1963 to Premier Chou En-lai (*India News*, Embassy of India, Washington, D.C., 17 May 1963, p. 6 col. 4). See also report published in *People's Daily*, the Chinese Communist Party newspaper, summarized in *id.*, 15 March 1963, p. 7 cols. 4 and 5.

190. See material cited in note 4.

191. See McDougal, note 4, McDougal and Feliciano, note 4, p. 259.

192. For an excellent discussion on the permissible objectives of self-defence, see *id.*, pp. 222-8.

193. Such predictions are reflected in current literature with varying degrees of emphasis. For instance, Barbara Ward of *The Economist*, sees the Chinese threat not only in terms of India's security, but states that "the entire balance of power in Asia and

the pattern of political control that will dominate half the human race" is at stake. See note 64, p. 19. See also Trumbull, note 94, p. 7.

194. A good theoretical analysis on this aspect is found in Rosenthal, "Awakening for India—and the Non-Aligned," *N. Y. Times*, 18 November 1962, section 6 (magazine), p. 27.

195. Note 73 p. 457.

196. *N. Y. Times*, 2 December 1962, Section 4 pp. 9, 6, quoting *Oakland Tribune*.

197. As early as 8 December 1959, the Pakistani Government, in a letter addressed to the President of the Security Council (S4242), while referring to the Chinese aggression in Ladakh and India's attempts to get this vacated by peaceful methods, stated that "no positions taken or adjustments made by either of the parties to the present controversy between India and China or any similar controversy in the future shall be valid or affect the status of the territory of Jammu and Kashmir . . ." But later, paradoxical as well as contrasting though it may seem, it concluded a Boundary Agreement with China on 2 March 1963, which unlawfully ceded about 2,700 square miles of Indian territory to China. It will not be out of place to mention that this action of the Pakistan Government constituted a violation of Indian sovereignty and freedom of decision with respect to the territory of Jammu and Kashmir, as much as it was a unilateral alteration of the bases of Indian claims as recognized by the UN resolutions, especially of 17 January 1948, which was accepted by both the Governments of India and Pakistan. For a detailed account of these references, see letter handed over on 16 March 1963, to the President of the Security Council by Acting Permanent Representative of India to the United Nations. Text in *India News*, Embassy of India, Washington, D.C., 22 March 1963, p. 8. For related matters, see "*Sino-Pakistan 'Agreement'—Some Facts*," note 124.

From the broad community perspective, the greatest danger stemming from the Sino-Pakistan Agreement is the inherent disregard by Pakistan of the Chinese threat to the whole Indian subcontinent, which compellingly demand that the two neighbours—India and Pakistan—draw together.

198. Rahul, "*India's Changing Policy*," 6 *China Report* 16 (July-August 1970). See also Chopra, "Time for Rethinking on Sino-Indian Impasse," *The Statesman Weekly*, 12 February 1966.

199. *Hindu*, 2 January 1969.

200. Perhaps this flexibility is partly imposed by the emergence of China as a nuclear power, the convergence of Soviet-American interests in avoiding involvement in regional disputes, Pakistan's close friendship with China, the Soviet Union and the USA, and im-



provement in Sino-American relations. See Rahul, note 197, p. 17 ff.

201. *Id.*, p. 18.

## C H A P T E R III

# THE INDO-PAKISTAN BOUNDARY (EAST BENGAL) DISPUTE—CLAIMS ABOUT BOUNDARY ADJUSTMENT

### FACTUAL BACKGROUND

Following the partition, Pakistan and India were involved in a host of boundary disputes. On 30 June 1947, the Governor General appointed a Commission known as the Bengal Boundary Commission, in order to decide and demarcate a boundary line between India and East Bengal, now part of Pakistan. Sir Cyril Radcliffe, the Chairman of the Commission gave the decision on 12 August 1947. Subsequently, certain disputes arose out of this decision concerning its interpretation and implementation. A Committee was appointed in 1948 by an inter-dominion conference to report on the matter. This Committee recommended the establishment of a Tribunal known as the Indo-Pakistan Boundary Disputes Tribunal, with the Honourable Algot Bagge, an ex-member of the Supreme Court of Sweden, as the Chairman. The function of the Tribunal was to adjudge and finally settle the boundary disputes arising out of the interpretation of the Radcliffe Award and for demarcating the boundary. After making an on-the-spot examination of the area concerned and studying existing maps (local and governmental) it rendered its award which involved readjustment of the boundaries and exchange of enclaves. Further disputes arose between the two countries about the implementation of this Award. It is claimed by Pakistani sources

that of about 2,500 miles of frontier between India and the east wing of Pakistan (East Bengal), about 600 miles are yet to be demarcated, and the possibility of more border disputes and incidents arising from the Radcliffe Award cannot be ruled out.<sup>1</sup>

Among the matters referred to the Bagge Tribunal were the four areas, two on the western boundary and two on the eastern boundary of East Pakistan. In 1958 there was an agreement between India and Pakistan known as the Noon-Nehru Pact which provided ground rules to settle every dispute while demarcation work went on. This agreement also provided for exchange of enclaves. There are 74 East Pakistani enclaves in India and 123 Indian enclaves in East Pakistan. The agreement provided for the transfer of 4.37 miles of the Indian held Berubari Union in Jalpaiguri District of West Bengal to Pakistan. As legal disputes are pending in Indian Courts, the transfer of Berubari has not materialized. Following the Noon-Nehru agreement survey work began to demarcate the border between East Pakistan on one side, and West Bengal, Assam and Tripura on the other. The major disputes relate to the upper and lower reaches of the Fenny river in Tripura and to villages south of Patharia forest in Assam.<sup>2</sup> In 1965 there were serious border clashes between the two sides in Cooch Bihar District which involved several villages like Fulkabari, Fikabari, Bagdogra, Tinbigha, Kharkaria, Mekliganj Town, Hemkumari, Teesta Poyasthi etc. Between the West Bengal-East Pakistan boundary, the length of the international boundary is 1,350 miles. Of this boundary, about 95 miles are yet to be demarcated and determined. The differences relate to: (a) the boundary between Murshidabad (India) and Rajshahi (Pakistan); (b) the boundary in Berubari; (c) the boundary between 24 Parganas (India) and Jessore-Khulna (East Pakistan); (d) and the boundary along Hilli, the Chhit lands of old Cooch Bihar State, and Indian enclave in East Pakistan and Pakistani enclaves in India.

The dispute over the interpretation of the Nehru-Noon

agreement regarding 24 Parganas and the Jessore-Khulna border remains pending.<sup>3</sup> Pakistan has also laid claim to 20 acres in Nafarchandrapura village of Nadia District of West Bengal.<sup>4</sup> The length of the boundary between Sylhet (Pakistan) and Assam is 620 miles. The demarcation work on 430 miles was done jointly by the Directors of Land Records of Assam and East Pakistan, while that of 190 miles in the Mizo Hills bordering East Pakistan was done jointly by the Survey of India and East Pakistan Survey. The actual dispute relates to just a four mile area involving certain villages known as Putnigaon, Kar-khana, Bov Putnigaon, Lathitika and Danabari.<sup>5</sup> They are located in the Coohar Sylhet Sector of the Assam-East Pakistan border. The size of the boundary between Tripura and Sylhet (Pakistan), not covered by the Radcliffe Award, is 550 miles. There are conflicting claims over the line on the southern tip of Tripura. Pakistan claims the western branch of the Fenny river, while India claims the southern branch. Because of the changing course of the Mehuri river, there is a disagreement over a small area of Indian territory within Belonia town on the south bank of the Mehuri. The area involves (a) a small portion of the river line land on the left bank of the Mehru river to the north of Belonia town; (b) an area inside India in the south of the land frontiers between India and Pakistan. India has insisted upon the traditional midstream boundary.

#### CLAIMS AND COUNTER-CLAIMS

The dispute centres around the interpretation of the Radcliffe Award. India contends that under the Award, the line ran east of these villages in Assam, but in 1959 Pakistani armed men forcibly occupied these areas. India also contends certain divergence between the description of the boundary line in the Award and the attached map. Pakistan denies any such divergence. Thus the dispute refers to the content of the agreement being or not being of a certain described specification. There are also points

of disagreement over the interpretations of the Nehru-Noon Agreement and over the question of sovereignty over disputed lands in Tripura.

#### EVALUATION

It will be useful to quote the Radcliffe Award in order to know the intention of the Tribunal. It stated:

A line shall be drawn from the point where the boundary between the Thanas of Patharkandi and Kulaura meets the frontier of Tripura State, and shall run north along the boundary between those Thanas, then along the boundary between the Thanas of Patharkandi and Barlikha and then along the boundary between the Thanas of Karimganj and Beani Bajar to the point where that boundary meets the River Kusiya. The line shall then turn to the east taking the River Kushyara as the boundary and run to the point where that river meets the boundary between the Districts of Sylhet and Cachar. The centre line of the main stream or channel shall constitute the boundary. So much of the District of Sylhet as lies to the west and north of this line shall be detached from the province of Assam and transferred to the Province of East Bengal. No other part of the province of Assam shall be transferred.<sup>6</sup>

This text reveals that the disputed villages in Assam fell within the jurisdiction of India. The Award also provided that in the event of any divergence between the line as delineated on the map and as described in the text, the written description will prevail. The expectations of the decision makers leaves no doubt about the Indian ownership of the villages in Assam.

In the disputed area of the Indian territory within Belonia town, there is enough evidence to show that Indian villagers had been throughout the years cultivating and harvesting the land to the north of the Belonia

town as it is on the Indian side of the river. The same is true in respect of the area in the south of the land frontiers between India and Pakistan along the river.

NOTES

1. Shahabuddin, "State Succession," in *International Law Problems in Asia* (Shepherd ed., 1969), pp. 419-20.
2. Reheman, *id.*, p. 394.
3. *Tribune*, 26 December 1969.
4. *Times of India*, 9 August 1965.
5. *Hindu*, 18 February 1967.
6. Government of India "Decisions of Indo-Pakistan Boundary Disputes Tribunal 7" (1959).

## C H A P T E R I V

# THE KASHMIR DISPUTE

### FACTUAL BACKGROUND

The State of Jammu and Kashmir which was the largest of the princely states, has approximately 86,023 square miles of territory over which India and Pakistan have advanced conflicting claims. It is situated in the extreme north of India in the Himalayan region. It is bordered to the north by China (Sinkiang), the Soviet Union (Turkestan) and Afghanistan, on the west and slightly to the south by Pakistan, on the south by India and on the east by Tibet. In geographical terms, the territory of the State comprises the four broad natural regions: the northern areas of Gilgit, Chitral, and Baltistan with a predominantly Muslim population; the valley of Kashmir in the centre with a mixed population of Hindus and Muslims; the southern area consisting of Jammu with a predominantly Hindu population (Dogra community); and the province of Ladakh region located between the valley of Kashmir and Tibet with a Buddhist population.<sup>1</sup>

The Buddhist and Hindu dynasties ruled Kashmir until the 14th century.<sup>2</sup> Thereafter, the Muslim kings established their rule over it. In 1587, a distinguished Moghul Emperor, Akbar, invaded the territory, and until 1752 the Moghul kings held their sway. After their downfall, a Pathan regime, lasting till 1819, was established in Kashmir. This was followed by the Kashmiri conquest and annexation by Maharaja Ranjit Singh, the reputed Sikh warrior king. The Sikhs ruled Kashmir until 1846.

As for Jammu, Rana Ranjit Deo, a Dogra chief of Rajput descent established his rule in it in the latter half of the eighteenth century. After his death, Maharaja Ranjit Singh took advantage of the existing quarrel for succession over Jammu and subjected it to his rule in the beginning of the 19th century. During his regime, one of his generals, Gulab Singh (great-grand-nephew of Ranjit Deo), a Rajput belonging to the Hindu Dogra community, together with his two brothers rendered a distinguished service to the Maharaja. In return the Maharaja awarded them conferring upon Gulab Singh the principality of Jammu with the hereditary title of Raja.

By the time the first Sikh war began, the Sikhs had brought under their control the entire territory now comprising the State of Jammu and Kashmir. But Ranjit Singh died in 1839 and with it the Sikh rule was shaken. The war ended in 1846. Gulab Singh who was deputed to act as a mediator between the British and the Sikhs played a prominent role. A peace treaty was signed on 9 March 1846. By its terms, the Sikh Maharaja was called upon by the British to surrender all his mountain territories including Jammu and Kashmir and to pay an indemnity of one crore of rupees, later reduced to 75 lakhs, to the East India Company for the war expenses. As the Sikh ruler was unable to pay the high sum, Gulab Singh, who seemed eager to secure an indefeasible title to Jammu, offered to pay the war indemnity, apparently on the condition that he was made the ruler of Jammu and Kashmir. The British Government agreed to it, and a separate treaty was concluded between the British and Gulab Singh at Amritsar in March 1846 embodying these terms. Thus the legal title of Gulab Singh over Jammu and Kashmir was acquired through an act of purchase of the territory.<sup>3</sup> The late Maharaja Hari Singh and his son Sri Karan Singh, are the lineal descendents of Gulab Singh.

During the British rule, so called British India was under the direct sovereignty of Great Britain. The British crown also exercised suzerainty over the Indian States—about 565 in number—which were ruled by the



Indian princes and Chiefs. At the time of the withdrawal of British power from India, the British Parliament passed the Indian Independence Act on 16 July 1947, which formally terminated British power in India, effective from 15 August 1947. Under this Act, the new State of Pakistan was created.

As a result of this Act, Indian States were to "accede" either to India or to Pakistan. Lord Mountbatten, Viceroy of India and the Representative of the British crown, said in a statement to the Chamber of Princes on 25 July 1947:

....the States are theoretically free to link their future with whichever Dominion they may care. But when I say they are at liberty to link up with either of the Dominions, may I point out that there are certain geographical compulsions which cannot be evaded.<sup>4</sup>

On 15 August 1947, when India became independent, the Constitution in force was the Government of India Act 1935. It contained a provision for the accession of States, which declared that a ruler of a State by signing an Instrument of Accession submits to the jurisdiction of the Federal Government in respect of the subjects mentioned in the instrument. The said Constitution also provided that Indian States acceding in the above manner shall become an integral part of the Union of India. The Indian Independence Act 1947, incorporated in itself the above provision for accession of the Indian States. Almost all States acceded to India or Pakistan on various dates by signing the Instrument of Accession by the Rulers as required by the Government of India Act. However, the State of Jammu and Kashmir could not decide immediately on the issue of accession. Therefore, as an interim measure, on 15 August 1947, the Maharaja offered to enter into standstill agreements with the two dominions. Pakistan agreed to have a standstill agreement with regard to communications, supplies, and post and telegraph arrangements. The Government of India

requested the Maharaja to send a representative of his Government to negotiate and settle the terms of the standstill agreement and expressed its desire for the maintenance of "existing agreements and administrative arrangements." Such negotiations were prevented because of the invasion of the State by Pakistan. Nevertheless "existing agreements and administrative arrangements" continued.

Then began the story of aggression rather rapidly. Between 15 August and the end of October 1947, Pakistan in its determination to force the accession of Kashmir, brought to bear all kinds of pressures, including an economic blockade of Jammu and Kashmir. In October 1947, Muslim tribesmen from the frontiers of Kashmir and some from the borders of the North Western Province of Pakistan invaded Kashmir. These invaders which included Pakistani nationals were equipped with arms and ammunition supplied by the Government of Pakistan. This full scale military invasion brought pillage, death, and destruction to the population of the State. In the face of this situation, the Maharaja decided to accede to India and requested assistance to repel the invaders and to protect the State from destruction.<sup>5</sup> This decision of the ruler was fully supported by the National Conference which was the largest and the most popular political organization in the State. By the accession of the State, Jammu and Kashmir became part of the territory of India, and as India became responsible for the defence of the State against unlawful aggression, Indian forces entered the State. Even apart from the accession, which gave to the Government of India the right and which imposed upon it the duty of defending the territory of Kashmir and integrity of the Union of India, India had the right and the duty as successor to the British power to defend this territory against aggression.

The Government of India tried to persuade Pakistan to withdraw the raiders from Kashmir but it failed in its attempts. Pakistan persistently denied its involvement in the invasion of Kashmir. Under these circumstances

India might have taken strong military action against Pakistan to drive the invaders out of the country. But she preferred to avoid a war and took steps which aimed at solving the problem peacefully.

On 1 January 1948, the Indian Government submitted a formal complaint to the Security Council under Chapter VI of the Charter. It requested the Security Council "to call upon Pakistan to put an end immediately to the giving of such assistance, which is an act of aggression against India."<sup>6</sup> It further requested the Council to ask the Government of Pakistan: (1) to prevent Pakistan Government personnel, military and civil, from participating or assisting in the invasion of the Jammu and Kashmir State; (2) to call upon other Pakistani nationals to desist from taking any part in the fighting in the Jammu and Kashmir State; (3) to deny to the invaders, access to and use of its territory for operations against Kashmir, military and other supplies, and all other kinds of aid that might tend to prolong the present struggle.<sup>7</sup>

When the Security Council took up the matter for consideration, Pakistan emphatically denied that it had any part in the invasion of Jammu and Kashmir.<sup>8</sup> The first action taken by the Security Council was the adoption of a resolution on 17 January 1948, to the effect that both parties should take all measures calculated to improve the situation and refrain from taking any action that might aggravate the situation.<sup>9</sup> On 20 January 1948, the Council adopted another resolution which among other things established a commission and charged it to proceed to the spot immediately and investigate the claims of both India and Pakistan.<sup>10</sup>

When the Commission arrived in Karachi on 7 July 1948, it was surprised to learn from the Foreign Minister of Pakistan that regular units of the Pakistan Army were fighting against India in the State of Jammu and Kashmir. The Pakistan Foreign Minister had earlier declared before the Security Council that Pakistan had no part in the invasion of Jammu and Kashmir and had even denied the giving of assistance to the irregulars.

This assertion of Pakistan was thus exposed by the Commission in its first Interim Report.<sup>11</sup> One can imagine how grave should be the view which the U. N. Commission took of this concealment of vital information by Pakistan from the Security Council and of Pakistan's violations of the Security Council's Resolution of 17 January 1948.

After studying the situation in Kashmir and consulting the authorities of India and Pakistan, the U. N. Commission, on 13 August 1948, adopted a resolution calling for a cease-fire agreement between India and Pakistan.<sup>12</sup> Part I of the Resolution required a cease-fire, non-augmentation of military potential on either side and the maintenance of a peaceful atmosphere. Under Part II, Pakistan had to withdraw all its forces, regular and irregular, while India was required to keep sufficient troops for the security of the state including the observance of law and order. The resolution also contained a proposal for agreement. The following principles were laid down as a basis for the truce agreement. (i) The Government of Pakistan will withdraw its troops, and use its best endeavour to secure the withdrawal of tribesmen and Pakistani nationals not normally resident in the area. (ii) "Pending a final solution" the territory evacuated by Pakistani troops will be administered by the local authorities under the surveillance of the Commission. (iii) After the Commission notified the Government of India that tribesmen nationals had withdrawn, the Government of India would agree to withdraw the bulk of its forces from the State "in stages to be agreed upon with the Commission." (iv) The Government of India would maintain, "within lines existing at the moment of the cease-fire the minimum strength of its forces, which in agreement with the Commission," were considered necessary "to assist the local authorities in the observance of law and order." Part III of the Resolution provided that the future status of Jammu and Kashmir shall be determined in accordance with the will of the people.

It is not disputed and cannot be disputed that Part III of the resolution comes into focus of consideration only after Parts I and II have been fully implemented. Till that time Part III must remain dormant and is inoperative. The resolution of 5 January 1949, where both the Governments agreed to hold a plebiscite, is only subsidiary and supplementary to the resolution of 13 August 1948, and merely elaborates the principle contained in Part III and is of no practical utility till the resolution of 13 August 1948 has been fully implemented. While the word "plebiscite" does not occur in Part III of the resolution, it does occur in the 5 January resolution which, in the opinion of the Commission, is only subsidiary to the form. However, even at the time of the adoption of the resolution, a plebiscite was considered but one of the possible methods of ascertaining the will of the people and the Chairman of U.N.C.I.P. informed the Indian Prime Minister that if the plebiscite procedure was found to be impossible other alternative solutions would be considered. The United Nations Commission assured India that in the event of Pakistan not accepting the proposals contained in Part I and II or having accepted them, not implementing them, India's acceptance would not be regarded as in any way binding upon him.<sup>13</sup>

On 1 January 1949, a cease-fire was effected in terms of Part I of the Resolution of 13 August 1948. All subsequent negotiations, whether with the Commission or through the other United Nations representatives or directly between India and Pakistan, were aimed at the implementation of the two resolutions. As Pakistan refused to vacate the aggression and to withdraw its troops, regular or irregular, completely from the State as required by the resolutions, those negotiations proved unsuccessful. Meanwhile, the people in the State of Jammu and Kashmir decided to go ahead with the consolidation of democracy. The Government of Jammu and Kashmir arranged elections to a Constituent Assembly which drew up a State Constitution. In accordance with this Constitution Kashmir became a component unit of the Union

of India and fresh elections were held in 1959 and a new popular legislature was established.

In 1965 Kashmir was once again the scene of a military confrontation between India and Pakistan. Beginning on 5 August 1965, several thousands of infiltrators from Pakistan and Pakistan-occupied Kashmir crossed the cease-fire line. These men were fully armed with modern weapons, signal equipment, large quantities of ammunition and supplies and explosives. This was followed later by a massive attack launched along the international boundary between the State of Jammu and Kashmir and West Pakistan by the Pakistan army, supported by air bombing. India took measures to meet the Pakistani military invasion. The Security Council passed a resolution on 20 September 1965, demanding a cease-fire and subsequent withdrawal of armed personnel of both sides back to the positions held by them before 5 August 1965. Subsequently, at the initiative of the Soviet Prime Minister, the Prime Minister of India and the President of Pakistan met at Tashkent and discussed the existing relations between India and Pakistan. They signed a declaration on 10 January 1966, which is known as the Tashkent Declaration. The two statesmen expressed their firm resolve to restore normal and peaceful relations between their countries and to promote understanding and friendly relations between their peoples. They also reaffirmed their obligation under the United Nations Charter not to have recourse to force and to settle their disputes, including that of Kashmir, through peaceful means. The Tashkent Declaration is a legally significant document in as much as it sets the obligations of the two sides on the matters discussed. To resolve the dispute by peaceful means was the paramount objective of the Declaration.

#### CLAIMS AND COUNTER-CLAIMS

##### *Use of Coercion*

The principal argument of India against the Pakistanis is that the resort to force by Pakistan was absolutely un-

justified. India contends that by aiding the tribal invaders and by subsequently ordering her forces into Kashmir, Pakistan had committed an act of aggression contrary to the established rules of international law.<sup>14</sup> In the first place, giving material support to the raiders and allowing them to cross the boundary of Kashmir was itself an act unsupportable by law. In the second place, actual initiation and participation by armed troops of Pakistan in the conflict was an undisputed act of aggression. On the other hand, India defends its part in the conflict on the ground that from 26 October 1947, when Kashmir acceded to India, it assumed the responsibility of Kashmir's defence. It was in the discharge of this legal obligation, India contends, that it responded favourably to the Ruler of Kashmir's urgent appeal for military assistance.<sup>15</sup>

Pakistan bases its counter claim on the exercise of the right of self-defence.<sup>16</sup> In the first place, she denied any assistance and support to tribal raiders. In her view, the so-called "Azad Kashmir Movement" was indigenous and spontaneous, emanating from the misrule and repression by the government of the Maharaja, and so was the incursion of the tribesmen into Kashmir. In the second place, the intervention by the regular army of Pakistan, it contends, *inter alia*, was to forestall the imminent military attack against Pakistani territory, to check the flow of refugees pushed inside Pakistani territory by the armed forces of India, and to "prevent the Government of India from presenting the world with a *fait accompli* by taking possession of the whole of Kashmir territory by force."<sup>17</sup> Pakistan states that it has sufficient evidence to prove that military activities of India were designed to launch a general offensive in order to occupy all important parts of Jammu and Kashmir. This would have led to the economic and social disruption of Pakistan as a nation, and thus to the eventual end of the political independence and territorial sovereignty of Pakistan.<sup>18</sup> Pakistani action, it is contended, was undertaken as self-defence in anticipation.

As India charged Pakistan with committing aggression, it has demanded in the United Nations that both parties,

India and Pakistan, should not be put on an equal footing. Resting on the above stated defence, Pakistan claims to have an equal status and rights with the Government of India as a party to the dispute.<sup>19</sup>

### *Claims Concerning Formal Instruments*

(i) *Instrument of Accession*: These claims may be generalized in terms of the authority of the Instrument of Accession concluded between the Maharaja of Jammu and Kashmir and the Government of India on 26 October 1947, resulting in the accession of the State of Jammu and Kashmir to India.<sup>20</sup> India has consistently maintained that when the Indian Independence Act of 1947 came into force, the State of Jammu and Kashmir, like other states of India, was given the option of remaining independent or joining either of the two dominions. Using his legitimate right of option, the Maharaja decided to accede to the Indian Dominion and therefore signed the Instrument of Accession to that effect. By virtue of this formal act, the State of Jammu and Kashmir became a part of the Indian Union. Pakistan has always contested the Indian claims of formal authority. She has challenged the validity of the accession by the Maharaja of Kashmir on various grounds.

Pakistan contends that the Maharaja of Kashmir lacked the capacity to execute the Instrument of Accession. It advances the following reasons: first, the State of Jammu and Kashmir had executed a standstill agreement with Pakistan on 15 August 1947, which incapacitated the Maharaja to enter into any kind of negotiations or agreements with any other country.<sup>21</sup> Second, the people of Jammu and Kashmir had successfully revolted, and in consequence, the Government of the Maharaja was overthrown and he was compelled to flee from the capital. Third, the invasion of Kashmir and the *de facto* possession of a portion of its territory by the Pakistani invaders prohibited its *de jure* Ruler (the Maharaja) from executing the Instrument of Accession in favour of the Govern-



ment of India.<sup>22</sup>

Pakistan's objection to the Instrument of Accession also raises the question of methods employed to obtain it. She asserts that the accession was secured through fraud and violence and "duress of circumstances" and, therefore, it is invalid *ab initio*. As treaties brought about under duress are invalid, she states, the Instrument of Accession must also be treated as void.<sup>23</sup>

Finally, Pakistan contends that the accession was conditional, subject to the plebiscite. She states that the India Government accepted the Maharaja's offer of accession on the condition that as soon as law and order had been restored in Kashmir the accession would be confirmed by a plebiscite.<sup>24</sup> The significant question here is whether the Instrument of Accession concluded between the State of Jammu and Kashmir and India created certain rights in favour of the third party, Pakistan. If so, the next question will be to examine the nature and extent of any obligations on the part of the Indian Government.

In reply, the Indian Government has refuted the claims of Pakistan. According to her, the standstill agreement between Jammu and Kashmir State and Pakistan did not create any bar as to incapacitate the Maharaja to enter into negotiations or agreements with other States. It contends that the accession was voluntarily requested by Kashmir and no coercion was in fact applied by it. Also, she holds the view that the Maharaja applied for an unconditional merger.<sup>25</sup>

(ii) *Plebiscite*: Pakistan has, throughout the dispute, insisted upon the binding nature of the plebiscite declarations of India. Pakistan seems to assume that there was an offer by India of holding a plebiscite in Kashmir which was accepted by Pakistan. Therefore, in her opinion India has treaty obligations, and Pakistan, corresponding legal rights. For authority, Pakistan cites certain declarations of India and the United Nations Security Council resolutions.<sup>26</sup>

Refuting Pakistani claims, India in the first place, denies she in fact made any offer of plebiscite as such.<sup>27</sup>

She seems to believe that the content of Indian declarations was much misunderstood. Therefore there is no question of any treaty between India and Pakistan on this point. Of course, India does accept to have expressed its wish to consult the people of Kashmir on the fulfilment of certain conditions. But India refuses to call it a legal promise. Also, when such a wish was expressed, it received no acceptance from Pakistan. On the contrary, Pakistan made a counter-offer for the joint administration of the State.

Although India denies the binding nature of Security Council recommendations concerning plebiscite, it puts forth additional arguments in defence of seeking to prove that even if some contractual obligations emerged from the relevant resolutions of the Security Council (or the unilateral declaration of India for that purpose), they were conditional.<sup>28</sup> Those conditions related to the withdrawal of Pakistani troops from Jammu and Kashmir, conclusion of a truce agreement, and formulation of an agreement stating that fair and equitable conditions existed for holding plebiscite. Inasmuch as Pakistan failed to fulfil its part of the agreement, India was no longer bound to perform its part. Finally, India also pleads change of circumstances invalidating the initial agreement.<sup>29</sup>

### *Claims Concerning Implicit Consensus*

(i) *Self-determination*: Here the question requiring examination is whether India, being a member of the United Nations, is bound by the principles of self-determination contained in the Charter. Do any obligations arise under the Charter or in general international law, demanding from India a plebiscite in Kashmir and creating corresponding rights in favour of Pakistan? Is there any implicit consensus between the two countries concerning the application of self-determination in Kashmir.

(ii) Pakistan claims title to Kashmir on extra-legal grounds also.<sup>30</sup> Especially, she relies upon geographical contiguity, security, economic considerations and religion.

India does not insist upon making these grounds as bases of her title, which she believes is otherwise strong in terms of formal authority. Nevertheless she has stated that these grounds could equally be invoked in support of her title.<sup>31</sup>

#### CLARIFICATION OF POLICY

The Kashmir question raises matters of formal authority as well as effective control. Parties invoke principles concerning title to territory as well as certain non-legal considerations in traditional terms. The formal claims centre around the issues of aggression and self-defence, and the validity of the Instrument of Accession under which Kashmir acceded to India.

International law, as observed elsewhere in this book, recognizes that the possession of a land mass is fundamental to the bases of national power, and therefore prescribes rules for its protection.<sup>32</sup> The most authoritative rule is that prohibiting the use of coercion in reshaping boundaries. This rule is firmly laid down in the United Nations Charter and other authoritative instruments. This is the expectation of the general community of States. Legal policies require that states do not take recourse to force for solving territorial disputes, but rather make efforts to honour reasonable demands and expectations of other states concerning their political independence and territorial sovereignty.

One scholar has written that the Kashmir conflict is of a complex nature and cannot be decided on the strict legal issue whether one party is the aggressor and must therefore see all his claims fail as a result of that act.<sup>33</sup> This view is not in the interest of establishing a viable territorial organization of world community free from the unilateral imposition of territorial claims upon other states. It would be reasonable to say that the initial presumption of right or wrong, or the decision on the question of aggression, has an important bearing on the evaluation of other claims and considerations in a dis-

pute. This is the whole objective of placing the most authoritative prescription of the prohibition of the use of force in the centre of the United Nation Charter.

The rule prohibiting coercion presupposes the effective application of yet other prescriptions and policies. These prescriptions are related, among others, to honouring territorial agreements and relying upon established territorial possession as manifested in the effective exercise of sovereignty. World legal policies relating to the honouring of agreements require the protection of the genuinely shared expectations of the parties to the territorial treaty. The finality and continuing validity of the Instrument of Accession by which Kashmir acceded to India has to be considered in the light of this legal policy. The underlying policy concerning territorial possession requires that stability created by territorial custody and control over a long period of time should not be disrupted. This policy is directly relevant to the resolution of the Kashmir question.

#### TRENDS IN DECISION

##### *Use of Coercion*

The first point of contention between India and Pakistan concerns the prohibited use of force to satisfy their respective claims. According to the Indian view, the acts of Pakistan in allowing and assisting the raiders in their military operations in Kashmir, and sending Pakistani troops to participate in the military conflict amounted to aggression. India defends its own action as a matter of right flowing from the act of accession of the State of Jammu and Kashmir to the Indian Dominion. Pakistan denies these charges and invokes the rights of self-defence.

The engagement of Pakistani troops in armed hostilities is, of course, a serious matter entailing legal consequences. But even allowing raiders who intended to use, and actually used force to cross the international fron-

tier, and providing them with material assistance in the form of arms and ammunition, would appear to have been prohibited under international law. The Draft Declaration on Rights and Duties of States prepared in 1949 by the International Law Commission of the United Nations, obligates every state "to ensure that conditions prevailing in its territory do not menace international peace and order."<sup>34</sup> This rule serves as confirmation of customary law on the point. Several writers have expressed an opinion against using the territory of a state for hostile purposes directed against foreign states. De Visscher calls it an international duty of states "to repress those subversive activities of private persons which by their collective character constitute a particularly serious threat to the external or internal safety of foreign states (organization of hostile expeditions, etc)."<sup>35</sup> Quincy Wright states that the failure on the part of a government to prevent armed bands or insurgents from organizing within its territory to engage in hostilities across a frontier will make it responsible for aggression if such hostilities actually occur.<sup>36</sup> According to Jackson, support to armed bands formed in the territory of another State, or refusal, notwithstanding the request of the invaded state, to take in its own territory all the measures in its powers to deprive those bands of all assistance or protection.<sup>37</sup> International Courts have also lent their weight to confirm state responsibility in respects of the rights of foreign states. It may be recalled that in the *Corfu Channel Case*, the International Court of Justice, in holding that the Albanian authorities were under the obligation to notify and warn the approaching warships of the existence of a mine field in Albanian territorial waters, stated that the obligation rested on "certain general and well established principles."<sup>38</sup> The principles included "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."<sup>39</sup> Professor Starke has summed up the contemporary practice of the international courts and institutions:

There is one important qualification on the absolute independence and equality of states, which has found expression in the recent decisions of international courts and to some extent in the resolutions of international institutions. It is the principle...that a State should not permit the use of its territory for purposes injurious to the interest of other States. Thus in the United Nations deliberations on the situation in Greece (1946-49), it was implicitly recognized that whatever the true facts might be, Greece's neighbours Albania, Yugoslavia, and Bulgaria were under a duty to prevent their territory being used for hostile expeditions against the Greek Government. . . .<sup>40</sup>

The supplementary Report of the United Nations Committee on the Balkans, 16 September 1949, recommended that the attention of Albania and Bulgaria be again drawn to their obligation, in conformity with international law, to prevent use of their territories in any way against the security of the Greek State.<sup>41</sup>

We may now shift to the issue of the sending of military troops by Pakistan to the State of Jammu and Kashmir, and charges of aggression and self-defence among the disputant parties, India and Pakistan. The main point is, the eventual settlement of the territorial dispute apart, how may the Pakistani resort to force, under the circumstances, be characterized in terms of lawfulness?

International law prescribes various rules for the protection of boundaries, the most important being the prohibition of resort to force in reshaping international boundaries. Legal policies demand that there should be no unilateral alteration of extant boundary lines by application of unlawful coercion. Any armed aggression across international boundaries whereby the territorial integrity of the target state is affected, is, apart from self-defence, a gross violation of international law rules.<sup>42</sup>

The subjectivities of Pakistan in initiating attacks on Kashmir were clearly expansionist. In term of facts, it is incorrect to say that the so-called "Azad Kashmir"

movement was spontaneous and that the people of Kashmir had successfully revolted against the ruler. The fact that Pakistan at first insistently denied the use of force and participation by its military troops and then at a later stage was obliged to admit them, creates doubts about its intentions. When the Indian complaint of aggression was considered by the Security Council, Pakistan emphatically denied that it had given aid or assistance to the invaders or committed any act of aggression against India. The Pakistan Foreign Minister informed the Security Council:

...the Pakistan Government emphatically deny that they are giving aid and assistance to the so-called invaders or have committed any act of aggression against India. On the contrary and solely with the object of maintaining friendly relations between the two Dominions the Pakistan Government have continued to do all in their power to discourage the tribal movement by all means short of war.<sup>43</sup>

However, when in July 1948, the United Nations Commission, charged with the responsibility of investigating into India's complaint, arrived at Karachi, it noticed the presence of Pakistani army troops in Kashmir. Indeed, the Foreign Minister of Pakistan, who earlier denied aggression in the Security Council, informed the Commission that the regular units of the Pakistan Army were fighting against India. In its first Interim Report of 17 January 1948, the Commission noted:

In the course of this interview, the Foreign Minister (of Pakistan) informed the members of the Commission that the Pakistan Army had at the time three brigades of regular troops in Kashmir and that troops had been sent into the State during the first half of May 1948.<sup>44</sup>

What more, a well known jurist, Sir Owen Dixon, who

succeeded the Commission as U.N. Representative for India and Pakistan had this to say about Pakistan's aggression against India:

...without going into the causes or reasons why it happened...I was prepared to adopt the view...that when the frontier of the State of Jammu and Kashmir was crossed...by hostile elements, it was contrary to international law, and that when...units of the regular Pakistan forces moved into the territory of the State, that too was inconsistent with International Law.<sup>45</sup>

The operations of Pakistan involved intense use of military force and were at all times accompanied by diplomatic, ideological and economic methods of coercion. In violation of the standstill agreement, Pakistan applied economic and diplomatic pressures against Kashmir in order to secure its accession by force. When she did not succeed in this, she organized and staged an all-out invasion of Kashmir. Such open and extensive employment of military force inflicting substantial destruction of the bases of power of the target state clearly represents coercion and justifies war in self-defence on the part of the target state. The intense force used by Pakistan was reflected in efforts in India of unanimity, swiftness and effectiveness to protect its political independence and territorial integrity. In the light of this appraisal of consequentiality of the achieved coercion, there are strong grounds to conclude that Pakistan was the aggressor and that the coercion it employed to achieve was impermissible. There is ample support for this test in international law. McDougal and Feliciano have stated that any coercion, by whatever instrument, which is so intense that it creates in the target state reasonable expectations, as those expectations may be reviewed by third party observers, that it must forthwith resort to military instrument to defend its "territorial integrity" and "political independence" may be characterized as impermissible.<sup>46</sup>

A review of India's subjectivities and operations sug-



gests that the measures undertaken by her were limited in the intensity and scope permissible under the legitimate right of self-defence.<sup>47</sup> The objective of India was purely defensive to secure the protection of the bases of its power in Kashmir against Pakistani attack. India had the responsibility and right to defend Kashmir after the Maharaja of Kashmir signed the Instrument of Accession. Also, as successor to the British Government, India had certain rights in international law to secure against attacks from outside any part of the Indian territory "within which or in contiguity to which the territory and interests of any Indian State were previously situated."<sup>48</sup> The limited objective of India is evidenced from the fact that it made no attempt to cross the frontier and enter into Pakistan, much less to recover the Kashmiri territory occupied by Pakistan. The right of self-defence is broad enough to permit India, in the circumstances, to cross the border and push the enemy operations inside the Pakistani territory.<sup>49</sup> Moreover, the generally democratic structures of rule in India and the pluralistic world order it seeks to promote do not suggest that its objectives were pluralistic. The operations of India then in service were hardly enough even to protect Kashmir against Pakistani attack. The inescapable conclusion then is, that Indian measures against Pakistani attack fulfilled the twin requirements of self-defence — necessity and proportionality.

Pakistan's argument that it attacked Kashmir to prevent an imminent danger from the Indian side is without merits. Both in customary international law and the United Nations Charter, the limits of self-defence are that it should be necessary and proportional to the original wrong. Pakistan has not met these conditions. Preventive self-defence is permissible only if the danger of attack is clear and immediate. Interpreting the customary law, Professor Wright observes that preventive war, when the danger is in any degree speculative or remote, constitutes aggression.<sup>50</sup> The preventive action against a threatened attack permissible under customary inter-

national law has been further limited by the U.N. Charter. The exercise of that right is limited to the time before the Security Council has taken necessary measures to maintain peace.<sup>51</sup>

On facts, the Pakistani charge that India was planning an attack against Pakistan appears imaginary at the least. The fact that India, after the invasion of Kashmir by Pakistan, made offers of peaceful negotiations and appealed to her not to assist the raiders, indicate that it had no coercive intentions against Pakistan. It was again in search of peaceful solution that India, instead of resorting to self-help, referred the matter to the Security Council.

The argument in terms of self-defence is no more persuasive when made in another form. Pakistan's argument on the ground of self-defence having failed, it may resort to more imaginative arguments of self-preservation. We may consider that argument also. There is agreement among writers that apart from self-defence, self-preservation can have no meaning and that in as much as it is a violation of the target state's right in disguise of self-defence, it is impermissible.<sup>52</sup> Bowett states that it is doubtful whether self-preservation can have any meaning as a legal concept apart from a generic term for self-defence, self-help and necessity.<sup>53</sup> He states self-preservation etc. excuse all *prima facie* unlawful conduct against states which are not in breach of any duty under international law and adds:

That view, by which the whole of the duties of states are subordinated to the "right" of self-preservation or the "right" of necessity is destructive of the entire legal order . . . <sup>54</sup>

Eagleton has also warned against the use of self-defence, through abuse, as an excuse for aggrandizement. Because of the significance of his remarks, he may be quoted at length:

For whatever right of existence of self-preservation a state may have there is a corresponding responsibility. Each State owes to every other state the duty, correlative to the right, of respecting the other's right of self-preservation. It has the duty of preventing conspiracies, and perhaps propaganda, within its territories against other states with which it is on friendly terms. It must not allow its territory to be used as a base for espionage, or for the preparation of military or naval expeditions against other states... The State which does not restrain such acts injurious to another state cannot so readily complain if the latter state invades its territory to put down the danger with which it is menaced.<sup>55</sup>

Brierly has similarly condemned views making the right of self-preservation as absolute.<sup>56</sup> He stated that such systems would destroy the imperative character of any system of law of which they were true, for they make all obligation to observe the law merely conditional; and there is hardly any act of international lawlessness which, taken literally, they would not excuse. Observations of Schwarzenberger are also significant. He says that if self-preservation were an absolute and overriding right, the rest of international law would become optional, and its observance would depend on a self-denying ordinance, revocable at will by each State, not to invoke this formidable super right. On the other hand if self-preservation were a relative right then, he thinks, it is still harder to see why, in addition to self-defence, self-help, or necessity, such a notion was required. In conclusion he states that the mischievous notion of "self-preservation" is "overdue for elimination from the vocabulary of the international lawyer."<sup>57</sup>

It is of course true that the state pleading self-preservation cannot in advance determine the appropriate measures but that does not mean that recourse to unlawful measures may be taken with impunity. In such cases the world community would expect that the State, before

taking recourse to measures of self-preservation, exhausts all pacific and lawful means of protection and informs the Security Council about its plans and actions. Even if there are alarming military preparations by a neighbouring state, the United Nations Charter, as observed by Jessup, would justify a resort to the Security Council, but would not justify resort to anticipatory force by the state which believed itself threatened.<sup>58</sup> We have already stated that in the instant case the facts of threat posed by India, as asserted by Pakistan, were not true. In any case, the point of significance is that neither did Pakistan exhaust pacific and lawful means of settlement, nor did it inform the Security Council about the measures it took. On the contrary, it was India who approached the Security Council, and before that it approached Pakistan for amicable solutions which she later turned down. This proves that the Pakistani recourse to force was not for genuine self-preservation but for promoting its policies of expansion to annex Kashmir. This is clearly impermissible. As Bin Cheng has stated, "The principle of self-preservation does not permit recourse to unlawful acts and means, especially to violence, for the protection or enforcement of what are not a State's rights, but merely its interests and aspirations."<sup>59</sup>

### *Claims Concerning Formal Instruments*

(i) *Instrument of Accession*: The Indian Independence Act, as stated earlier, stipulated for the division of India into two dominions. In respect of the princely states, the partition plan was inapplicable, but the British Government made an explicit announcement that the Cabinet Mission's memorandum would continue to apply to them. The memorandum provided that a State could enter into federal relationship with the successor Government or Governments. Earlier, the Government of India Act, 1935, in force on 15 August 1947, authorized that a State could enter into federal relationship with either of the two Governments of India or Pakistan by executing an

Instrument of Accession. The result of the Independence Act was also to give the States the option of joining either Dominion, if they so wished. With the Maharaja of Kashmir signing the Instrument of Accession in 1947, and with the Governor-General of India's acceptance, Kashmir's accession to India became, in law, complete, authorized by both the Government of India Act 1935, and the Indian Independence Act. Pakistan has, however, denied the validity of Accession. We may discuss Pakistani objections in *seriatim*.

The first objection of Pakistan is that the Maharaja of Kashmir had no capacity to execute the Instrument of Accession. It argues that Pakistan and the State of Jammu and Kashmir had just concluded a standstill agreement which put a bar on the former to conclude or negotiate another agreement with any other State. As Pakistan is not a party to the Instrument of Accession, it has no *locus standi* to raise objection against it. But in any case the Pakistan plea based on the standstill agreement is not persuasive. This particular agreement was not intended to be permanent in duration, or to affect the Maharaja's conduct in internal or external affairs after the expiry of its short term agreement. The main purpose of the agreement was to maintain the status quo vis-a-vis both the dominions and to avoid an administrative vacuum after the lapse of paramountcy. By no stretch of imagination can this agreement be interpreted as to render Kashmir devoid of its sovereign status to incapacitate her to make decisions concerning its future status. If this were so, nation states would hesitate to make treaties with neighbours and to promote international co-operation. In the instant case, the agreement was to last for just a short while, between the coming into force of the Indian Independence Act and the final decision of the State of joining either of the Dominions or remaining independent. Moreover, the subject matter of the agreement included communications, supplies, post and telegraph arrangements.

Just because an entity had asked a neighbouring state

to look after her interests temporarily in a few commercial matters, it cannot be said that she was thereafter devoid of political power to make agreements with other states about her future status. Just as the State of Jammu and Kashmir in the exercise of its sovereign rights had the capacity to make a standstill agreement with Pakistan, it also had the capacity to make another agreement, of whatever nature, with India. This only proves that in 1947, Kashmir had the capacity to conclude treaties with neighbouring states. In addition to this, Kashmir's capacity to conclude the Instrument of Accession can be found in the 1935 Constitution and the Indian Independence Act, both passed by the British Parliament. Finally, the terms of the standstill agreement are so incompatible with the Instrument of Accession that they cannot be applied at the same time.

The abrogation of the standstill agreement results from the fact that not only the whole matter which formed the subject of this agreement, but the entire sovereignty over Kashmir, involving all sovereign functions and liberty in making internal and external matters was from then on governed by the new provisions of the Instrument of Accession.

Pakistan has contended that the Maharaja of Kashmir was incapacitated because his people had successfully revolted against him and he was compelled to flee from the capital. This does not seem to be the case. In fact, the people of the valley organized themselves into a national militia and spontaneously sought to stem the tide of Pakistani invasion. It is significant that the Indian Independence Act specifically vested the power to decide the status of the State in the ruler, and not the people. It was the ruler who could sign the Instrument of Accession. Monarchs have the capacity to represent their states and to conclude agreements. Oppenheim has stated: "In every monarchy the monarch appears as the representative of the sovereignty of the State, and thereby becomes a sovereign himself; and this fact is recognized in international law..." This was the legal requirement.<sup>60</sup>

For better appreciation of the legal status of the ruler in 1947, we briefly recall the historical background of the relations between the states and the paramount power during the British rule. During this period the relationship between the two was marked by the term *paramountcy*, representing "a whole complex of shifting relations."<sup>61</sup> By virtue of the paramountcy, the Crown, on the one hand, was bound to protect the rulers and their territories from external attack and internal revolt. At the same time, the Crown was supposed to refrain from interfering in the domestic matters of the States. On the other hand, the rulers acknowledged the suzerainty of the Crown, which in practice meant that the Crown had authority to conduct their foreign relations, requisition military forces, decide upon matters of state succession, intervene in their domestic affairs in instances of gross misrule. These are, of course, the matters which were vitally related to the personality of states and their surrender to the Crown meant the transfer of the ultimate sovereignty to the British power. Nevertheless it is significant that no British or British India authority could make laws for any state, nor had state's territories become British territories or their subjects British subjects.<sup>62</sup>

In many cases the mutual relations between the princely states, and the British Crown were regulated on the basis of treaties, *sanads*, and engagements whereas in other cases, especially in respect of small states, they were governed by usage. In both cases the result was that the Crown acted in theory as well as in practice as the sovereign and the states had no international status.<sup>63</sup>

The Indian Independence Act of 1947 created India and Pakistan and removed the suzerainty of the British Crown over the Indian States, as having lapsed.<sup>64</sup> The Act produced an immediate dilemma. The Act terminated the suzerainty of the British Crown without explicitly defining the new status of the Indian States. Because of this, the question arose whether the lapse of paramountcy restored to the states their former sovereign position, or

whether it devolved upon the successor to the British Government, namely, India and Pakistan. A variety of opinion has been expressed on the point.

Professor Chacko is of the opinion that India became the successor to the suzerainty and paramount power of the British Crown both in law and fact. In his view, the lapse of paramountcy in India upon India's independence could not, for the very reasons under which the British Crown had to evolve and assert it, deprive the independent Government of India of any or all of the powers that the British Crown used to exercise under paramountcy in relation to the Indian States. He adds that the grounds on which such paramountcy rests being natural factors of geography, politics, economics and history, social, religious, and cultural congruity,<sup>65</sup> the method of automatic succession that has taken place may be called "natural succession" in international law. Finally, inasmuch as those instruments can function only on the sub-continent of India, they have only a direct regional value.<sup>66</sup>

Much the same general opinion has been expressed by Rao. He states that with the coming into force of the Independence Act, the suzerainty of His Majesty over the Indian States lapsed; nevertheless, the fundamentals on which it rested, the essential defence and security requirements of the country and the compulsions of geography, did not cease to operate. His conclusion is that the Central Government in India which succeeded the British was unquestionably the paramount power in India, both *de facto* and *de jure*, and that Government alone was the only completely independent sovereign in India,<sup>67</sup> and that the Indian States including Kashmir, could not have attained sovereign independent status after the lapse of paramountcy. In support, he cites the proviso to sub-section 1 of Section 7 of the Indian Independence Act under which agreements relating to customs transit and communications, post and telegraph or other like matters, were kept intact and had to be given effect to until they were denounced by either of the



parties concerned or were superseded by subsequent agreements.

As far as specific consequences of the Indian Independence Act, Chacko states that although all the states may not have attained full sovereignty, in case of the Ruler of Jammu and Kashmir, the lapse of British paramountcy served as an unavoidable and immediate reversion to his full sovereignty in international law "devoid of all legal and political trammels. . . ." <sup>68</sup> Thus the State had all the attributes to be regarded as an international person under international law. On this ground, he concludes that the legal and political character of an international transaction such as the accession of the foreign monarch of Jammu and Kashmir to India is beyond any doubt, and is thoroughly conformable to all points of international law relevant in this context. <sup>69</sup> "If this act of accession is questioned on the ground of its possible illegality, then all accessions whether to India or Pakistan would be open to similar objections," he adds. <sup>70</sup>

Chacko's views that India was the natural successor of British paramountcy and yet that Kashmir was fully sovereign in international law seems contradictory. A state cannot be fully sovereign in its external and internal affairs and yet live under the paramountcy, of the coercive and imposing kind that the British Government designed and applied in relation to States, of some superior government. What is possible is that Kashmir had limited sovereignty to conclude treaties with other States in 1947, a sovereignty which it had exercised in the past also.

Professor Eagleton, in his review of the *Hyderabad Case*, also took the view that Indian States which reverted to full sovereignty as a consequence of the Indian Independence Act were perfectly justified to declare independence. He also denies any Indian right of succession to the paramount power. <sup>71</sup>

The above view reflects a difference of opinion among two groups of writers. The first group maintains that after the withdrawal of British power, all rights of "paramountcy" devolved upon the Indian Government, includ-

ing the exercise of internal and external affairs of the States. This is despite the Section 7(b) of the said Act, which stated that the paramountcy lapsed after the operation of the Indian Independence Act. In the light of this view, the signing and acceptance of the Instrument of Accession in the case of Kashmir and other States was purely a domestic matter. The second group maintains that as a consequence of the Independence Act, the "paramountcy" came to an end, and the States became fully sovereign in international law. In the light of this view, an accession was possible only if there was an international agreement. It is the author's view that both views permit the same conclusion as far as the capacity of the Maharaja of Jammu and Kashmir to enter into the Instrument of Accession is concerned. For our purposes, it is not as important to prove whether the Indian Government had rights of paramountcy as a successor of the British Government as the view whether the Maharaja of Kashmir had the capacity to conclude agreements with other States and cede his State's territory as a consequence.

It is hard to agree with Chacko and Eagleton that States got back full sovereignty to conduct foreign relations as a consequence of the Indian Independence Act. If these States did not have any such powers during the British rule or during periods before that, how could they have them now. The States in fact did not automatically become subjects of international law. What is a reasonable view is that those States which had the treaty-making capacity, regained it. Thus, Kashmir, in view of her past practice in the field of treaty-making, regained it as a consequence of the lapse of paramountcy<sup>72</sup> and *a fortiori*, her agreement with India to accede was a binding agreement. It need not be emphasized that a State has power to cede a part of its territory or to merge voluntarily into another.<sup>73</sup>

We may now shift to the next argument of Pakistan: whether the *de facto* possession of Kashmir's territory by the Pakistani invaders incapacitated its *de jure* owner, the Maharaja, to execute the Instrument of Accession in favour of India. In the first place, it is disputable if the invaders

were, in fact, in *de facto* possession of any Kashmiri territory at the time when the Maharaja signed the Instrument of Accession. What is indeed clear is that the invasion had taken place and fighting was going on. In any case, no third state had then, or until today, given recognition to the "Azad Kashmir Government." Moreover, it has been authoritatively stated that if a contracting state merely loses some of its territory by cession, annexation, or secession, "its international identity, and therefore its contractual capacity, are unaffected."<sup>74</sup>

The next objection of Pakistan to the Instrument of Accession is that India applied fraud and violence to obtain it and therefore it is void. The Pakistani argument is built upon the premise that her consent was necessary to the act of accession by the Maharaja, but if this premise is unacceptable, then Pakistan has no *locus standi* to raise the issue. In any case let us explore whether duress was applied by India against the Kashmiris. The then Maharaja of Kashmir wrote a letter on 16 October 1947, as the independent sovereign Ruler of his State, to the Governor-General of India informing him of the grave emergency that had arisen in his State and seeking immediate assistance. Then he stated that certain Pakistani persons whom he described as "Afridis, soldiers in plain clothes and desperadoes with modern weapons," had been allowed to infiltrate into his State causing the wanton destruction of life and property. "These enemies," he added, "were marching on with the aim of capturing Srinagar ... as a first step to overrunning the whole state." At the end, he wrote, "I have accordingly decided to do so (to accede to the Dominion of India) and I attach the Instrument of Accession for acceptance by your Government."<sup>75</sup> The Governor-General of India, Lord Mountbatten, replied the following day: "In the special circumstances mentioned by Your Highness, my government have decided to accept the accession of Kashmir State to the Dominion of India..."<sup>76</sup>

From this correspondence two facts seem clear: First, if there was any duress, it was applied by Pakistan and not India. Second, the above statements of agreements

were voluntary and deliberate, based on the sovereign authority of the two governments. The agreement reveals nothing that could be called duress against the Maharaja. Historically, as observed elsewhere, apart from obligation flowing from anti-war agreements, duress against a state has not been regarded as invalidating a treaty, only duress against the negotiator.<sup>77</sup>

The final objection of Pakistan against Kashmir's accession to India is that it was subject to the Indian promise of plebiscite. Two points are of immediate importance here. The Instrument of Accession, which was in the form of an offer, nowhere contained any condition that the Maharaja would accede to India only if the latter will subsequently hold a plebiscite.<sup>78</sup> Secondly, the acceptance letter sent by the Government of India did not employ the word "plebiscite," but just expressed the wish that "where the issue of accession has been the subject of dispute, "a reference will be made to the people, and it would be only "as soon as law and order have been restored in Kashmir and her soil cleared of the invaders."<sup>79</sup> Significantly, Kashmir State has never in the past disputed her accession to India. On the contrary, the Kashmir State did everything to approve the accession and to consolidate the Indian rule. The largest political party of the State led by Sheikh Abdullah approved the accession and pressed the Indian Government to accept it. Subsequently, the Kashmir Constituent Assembly which by and large represented the people of Kashmir, reaffirmed the accession of Jammu and Kashmir to India. Nor was Kashmir ever completely cleared of the invader.

There are of course other documents, especially the United Nations Security Council Resolutions, in which the term "plebiscite" has appeared.<sup>80</sup> But the point of urgent significance is that there is no document concerning the offer and acceptance of the Instrument of Accession, or its implementation, which indicates the existence of any focal or supplementary agreement between the Maharaja of Kashmir and the Indian Government on the issue of plebiscite. It also seems unlikely that the acceptor of the of-

fer of territory would initiate future limitations on his right of enjoyment of territory unless the offeror makes it a condition of agreement. In view of the clear competence of both the Maharaja of Kashmir and the Indian Government, the Instrument of Accession renders Kashmir's accession to India a complete legal act in itself, and any question of plebiscite, not part of the initial agreement, becomes a matter of domestic importance and internal policy of India. After the Instrument of Accession was accepted, Kashmir lost whatever international status it had. *A fortiori*, the State of Jammu and Kashmir, much less Pakistan, was not thereafter entitled to challenge the legal validity of accession or to subject it to the condition of plebiscite. It may be emphasized that Pakistan was not a party to the transaction and hence cannot claim a *locus standi* in the case. It will be too much to say that the alleged condition in the acceptance of the Instrument of Accession (a bilateral agreement between Kashmir and India) could create any right in favour of Pakistan or other countries.<sup>81</sup>

There is a universal rule that a treaty does not create rights for a third state.<sup>82</sup> The International Tribunals have laid down that a right cannot arise for a third state from a treaty which makes no provision for such a right. In the *Clipperton Island Arbitration*, it was held that Mexico was not entitled to invoke against France the provision of the Act of Berlin of 1885, requiring notification of occupations of territory *inter alia*, on the ground that Mexico was not a signatory to the Act.<sup>83</sup> In the *Forests of Central Rhodesia* case, the arbitrator remarked:

. . . until the entry into force of the treaty of Neuilly, the Greek Government, not being a signatory of the Treaty of Constantinople, had no legal grounds to set up a claim based upon the relevant stipulations of that Treaty.<sup>84</sup>

Also in the present instance, the focal (main) tax treaty for interpretation is the one which concerns itself with

Accession, and the Indian wish, contained in Mountbatten's letter of plebiscite, is just supplemental. But Pakistan and her supporters have treated the supplemental document as the main treaty expressing the common intention of the parties, as if the agreement about Accession of Kashmir never existed. This is not a correct approach to interpretation.<sup>85</sup> The only instance in which a right arises for a state from a provision of a treaty to which it is not a party is if the parties intend the provision to accord that right to the state in question or other states and the state assents thereto.<sup>86</sup> In the instant case, there is no provision in the treaty stipulating plebiscite to be held in Kashmir, much less any right in favour of Pakistan. Also, the review of the treaty provisions reveals no such intention on the part of the two signatories, India and Kashmir.

(ii) *Plebiscite*: It has been established above, that plebiscite was not the condition of the Accession Agreement concluded between Kashmir and India. The next question is whether there was any agreement between India and Pakistan concerning plebiscite in Kashmir which will be binding on India and could create corresponding legal rights in favour of Pakistan. Pakistan seems to assume the existence of such an agreement, which India denies. The source of the Pakistani claim is grounded in certain unilateral declarations of India and the Security Council Resolutions.

The oft cited Indian declaration was in the form of a letter of acceptance of the offer of accession by the Maharaja, written by the then Governor-General, Lord Mountbatten, to the Maharaja. The letter stated:

Consistently with their policy that in the case of any State where the issue of accession has been the subject of the 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 been restored in Kashmir and her soil cleared of the invader, the question of the State's accession should be settled by a reference to the peo-

ple.<sup>87</sup>

Then there are other documents wherein the term plebiscite has appeared. In the Memorandum on Kashmir submitted to the Security Council by the Government of India on 30 December 1947, the position taken by India in the above letter of Lord Mountbatten was reiterated. In the Resolution of 21 April 1948, the Security Council recommended certain measures "to bring about cessation of fighting and to create proper conditions for a free and impartial plebiscite to decide whether the State of Jammu and Kashmir is to accede to India or Pakistan."<sup>88</sup> The Resolution of 5 January, 1949, adopted by the United Nations Commission in the acceptance of the "cease-fire" terms stated that:

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The question of the accession of the State of Jammu and Kashmir to India or Pakistan will be decided through the democratic method of a free and impartial plebiscite.<sup>89</sup>

The above pronouncements and recommendations do not reveal any kind of binding bilateral agreement between India and Pakistan about plebiscite. The statement of Mountbatten and other similar unilateral declarations of India only contained a wish of the Indian Government, subject to certain conditions that always remained unfulfilled. Expression of good intention does not mean a legal promise. On the other hand, good faith demands reciprocity, which never came from the Pakistan side, inasmuch as the required conditions of plebiscite were never met by her. Thus, such views that "plebiscite declarations were unasked for, nor required by any treaty or agreement," and therefore, "once made, and noted by Pakistan and other countries likewise (they have) become more or less binding"<sup>90</sup> are not persuasive. The important point is that when the voluntary declarations were made they were not accepted by Pakistan (represented by Jinnah). This is evident from the fact that in-

stead of accepting the voluntary Indian gesture of plebiscite, the founder of Pakistan made a counter offer for the joint administration of the State. In the absence of requisite reciprocity on the part of Pakistan, the Indian voluntary offer should be deemed to have been terminated. One more point may be noted. If Pakistan proceeds from the assumption that the Instrument of Accession was void, then any agreement between India and Pakistan about plebiscite in Kashmir would not be binding inasmuch as Kashmir will be a third state, and according to a universally accepted rule of international law, treaties do not impose obligations upon third states.<sup>91</sup> This rule is based upon the general concept (*Pacta terris nec nocent nec prosunt*) of contract, and on sovereignty and independence of states. State practice, writings of jurists, and decisions of international courts and tribunals support it. In the *Island of Palmas* case,<sup>92</sup> for instance, dealing with a supposed recognition of Spain's title to the island in treaties concluded by the country with other states, Judge Huber said: "It appears further to be evident that Treaties concluded by Spain with third Powers recognizing her sovereignty over the Philippines could not be binding upon the Netherlands. . . ."<sup>93</sup>

Concerning the Resolutions of the Security Council of 13 August 1948, and 5 January 1949, wherein the term "plebiscite" appears, it may be stated that they do not represent any binding legal obligations. Enough has been already written to the effect that they were mere recommendations, and not binding decisions.<sup>94</sup> It may be recalled that the question of Kashmir was referred to the Security Council under Article 35, paragraph 1, and under this provision the Council has only the power of investigation under Article 34 and of recommendations under Article 36.<sup>95</sup> The International Court of Justice in the *Corfu Channel* case had an occasion to interpret Article 36, paragraph 3 of the Charter. The seven Judges and the National Judge appointed by the Albanian Government, in their separate opinion, rejected the view that a decision of the Security Council by which a recommendation is



made under this provision has a binding character.<sup>96</sup> It is also generally believed that decisions of the Security Council take on a binding quality only as they relate to the prevention or suppression of breaches of the peace, but with respect to the pacific settlement of disputes under Chapter VI, the Council has only the power of recommendation.<sup>97</sup>

The cumulative impact of the pronouncements concerning plebiscite would be at the most, as *Baines* has stated, "that India has voluntarily accepted certain obligations, but not necessarily legal ones, to hold a plebiscite within the context of the U.N. Resolutions."<sup>98</sup> But because of certain subsequent facts and legal consequences, those obligations do not have more than academic significance. It may be recalled that the Indian offer of plebiscite was subject to certain conditions, mainly that "law and order have been restored in Kashmir and her soil cleared of the invaders." The main condition of the U.N. Resolution was that before India begins to withdraw the bulk of her forces, the tribal invaders and Pakistani troops must vacate the territory. Before the provision of plebiscite assumed obligatory force, it was essential to implement demilitarization as spelled out in the resolutions.<sup>99</sup> The basic resolution was that of 13 August 1948, which was in three parts. Part I required a cease-fire, non-augmentation of military potential on either side and the maintenance of a peaceful atmosphere. Under Part II, Pakistan had to withdraw all its forces, regular and irregular, while India was required to keep sufficient troops for the security of the State including the observance of law and order. By not withdrawing its forces and by not fulfilling other conditions of Part I and II of the Resolution, Pakistan has committed the material breach of the provision essential to the accomplishment of the object of the Resolution and India is entitled to treat it as terminated.<sup>100</sup> It has been firmly laid down that a material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty.<sup>101</sup> Additional rule on the basis of which

the alleged agreement for plebiscite could be treated as terminated is that of *rebus sic stantibus* indicating the fundamental change of circumstances. This point has been aptly discussed by other scholars.<sup>102</sup> These circumstances include Pakistan's joining various pacts like the Baghdad Pact, the SEATO Pact, the U.S.-Pakistan Military Pact, thereby increasing the military potential on its side contrary to the U.N. Resolutions; the Pakistani agreement with Communist China to demarcate the international boundary between those portions of the territory of the State which are under her illegal occupation and the Sinkiang Province of the Republic of China; the reaffirmation of the accession of Kashmir by the Constituent Assembly of the State; domestic law position in India disallowing any State of the Union to secede; and the administration of India for several years. The changing circumstances were also stressed by the U.N. Commission itself and the representatives of the U.N. like Gunnar Jarring and Frank Graham.<sup>103</sup> This doctrine finds place in the recent Vienna Convention on the law of treaties,<sup>104</sup> and its applicability to the Kashmir case has been discussed in juristic writings on the subject.

### *Claims Concerning Implicit Consensus*

(i) *Self-determination*. Pakistan has invoked the principle of self-determination which, it asserts, should apply to the people of Kashmir. India has rejected it on the ground that this rule does not apply to cases of national sovereignty. Specifically, the question is whether India is obligated under any rule of international law, customary law or United Nations law, to hold a plebiscite in Kashmir.

Doubts have been expressed about the legal nature of the principle of self-determination. L. C. Green has stated that it is a political right. "It is not a right under international law. Customary law certainly does not recognize such a right, and, as yet, there are but few treaties that concede it."<sup>105</sup> With regard to the cession of ter-

ritory, Oppenheim states it is doubtful whether the law of nations will ever make it a condition of every cession that it must be ratified by a plebiscite.<sup>106</sup> In the United Nations practice also, although there is recognition of the principle in cases of territories that were previously under colonial rule, but states have not agreed to apply it to the parts of a sovereign state. This is based on a world policy of stability and certainty of the boundaries and territories. In the present instance, there is no treaty, as discussed above, which requires plebiscite.

Past practice indicates that the principle of self-determination was applied in only those instances of cession where this procedure was laid down in the treaty itself. Plebiscites held after the First World War were required, for instance, under the terms of the Treaty of Versailles.<sup>107</sup>

In a general way plebiscite is, like general elections, one of the forms of democratic processes for ascertaining the will of the people. The will of the people in Kashmir has been ascertained. The accession to India had been endorsed by the Constituent Assembly of the State of Jammu and Kashmir. It was reaffirmed in the State's Constitution adopted on 17 November 1956. In accordance with this Constitution, fresh elections were held in 1957 and subsequent periods; Kashmir's representatives also sat in the Indian Parliament.

(ii) Pakistan has invoked the authority of geographical contiguity, religion, and security and economic considerations in support of her title to Kashmir. Factually speaking, these factors are common to both countries and India could claim equal benefits. Regarding their weight in international law it may be stated that they are not conclusive in determining the question of title, but when coupled with other evidences, they have been regarded as significant.

The title based on geographical contiguity, it may be recalled, was rejected in the *Island of Palmas* case. The Arbitrator, Max Huber, remarked: "The title of contiguity, understood as a basis of territorial sovereignty, has no foundation in International Law."<sup>108</sup> Security, eco-

conomic considerations, and religion as grounds for claiming territory have no valid basis in international law.

On the other hand, the fact that free India has had effective control and administration in Kashmir (except the area illegally occupied by Pakistan) for over 20 years both as the successor of the British Government and by authority of the Instrument of Accession, strengthens her title to the territory.<sup>109</sup>

### CONCLUSIONS

All the relevant principles of contemporary international law would appear to confirm the continuing sovereignty of India in the State of Jammu and Kashmir.

The fact that Pakistan took recourse to force to satisfy its claim to Kashmir weakens its substantive claims to territory, in addition to the conclusion that it acted contrary to the most authoritative rule of prohibition of the use of force. Our discussion has shown that the agreement concerning the accession of Jammu and Kashmir to India was initially valid and final and that also makes the Pakistani invasion an act of aggression and violation of international law. We have also proved that India is not obligated in international law to hold a plebiscite in Kashmir. The offer of plebiscite was not an integral part of the local agreement, i.e., the Instrument of Accession. In any case, Pakistan as a third state had no rights. Nor was there any valid independent agreement between India and Pakistan about plebiscite in Kashmir. The authority of the United Nations Resolutions demanding plebiscite in Kashmir has been a matter of controversial interpretation. In any event, the failure on the part of Pakistan to fulfil her obligations under the relevant resolutions, and fundamental change in the circumstances, demand consideration of the question of Kashmir in a new light. India is in a happy position both that her claims have the backing of initial formal authority and control and that they are further substantiated by her effective possession and administration, by virtue of succession to the British rule

and by agreement of Accession, over a long period of time. On the other hand, the Pakistani title to "Azad Kashmir" acquired through use of force continues to remain disputable.

NOTES

1. Rao, *Legal Aspects of the Kashmir Problem* 9 (1967).
2. For a brief history of the State of Jammu and Kashmir, see generally, Government of India, "White Paper on Jammu and Kashmir;" Menon, *The Story of the Integration of States* (1956).
3. Chacko, "India's Contribution to the Field of International Law Concepts," 93 *Recueil des Cours* 206 (1958. 1).
4. Text is given in Rao, note 1. p. 190. This line is quoted at p. 191.
5. *White Paper on Jammu and Kashmir*, note 2, p. 46.
6. Letter from the Representative of India addressed to the President of the Security Council, dated 1 January 1948. Text in Rao, note 1, p. 195.
7. *Id.*, p. 200.
8. Government of India, *Kashmir and the United Nations* 6: S/646 and Corr. 1.
9. S/651.
10. Text in Rao, note 1, p. 202.
11. See *Kashmir and the United Nations*, note 8, pp. 6-8.
12. Text in S/1100.
13. Rao, note 1, p. 113; see also Khan, *Kashmir and the United Nations* (1969).
14. Note 6.
15. *Ibid.*
16. Pakistani contentions have been summed up in Dr Graham's *First and Second Reports to the Security Council*.
17. See Diwan, "Kashmir and the United Nations," 16 *The Law Review* 76 (1964).
18. See Syatauw, *Some Newly Established Asian States and the Development of International Law* 147 (1961).
19. See Diwan, note 17, p. 76.
20. For claims and counter-claims, see generally, the *Reports of the Proceedings of the Security Council*, 1948, especially of 8, 9, 10 February 1950, and 6, 7, and 9 March 1951.
21. See the Letter of 1 October 1949 of the Minister for Kash-

mir Affairs, to Chairman, United Nations Commission for India and Pakistan U.N.C.I.P., Report S/1430/Add. 1, Annex 42 para 5. For the Indian reply, see the letter of 21 November 1949, from the Secretary-General of the Ministry of External Affairs, Government of India, to the Chairman of the Commission U.N.C.I.P., Report, S/1430/Add. 1, Annex 43, paras. 4 and 5.

22. Note 1, p. 34.

23. Pakistani delegate's statement: U.N. S/PV 236, 28 January 1948, p. 274.

24. *Id.*, pp. 265-6.

25. Indian delegate's statement S/PV 763, 23 January 1957.

26. Letter of Prime Minister of Pakistan to Chairman U.N.C.I.P. of 19 August 1948.

27. See note 25, para. 110.

28. *Id.*, para. 151.

29. S/PV. 764, January 1957, paras. 26, 28, 31.

30. Sir Zafrulla Khan's speech at the Security Council on 8 February 1950 (SCOR, 464th Meeting 4-8). See also, Gupta "The Kashmir Question Today," *International Studies* 218 ff. (1965).

31. Nehru's speech in the Constituent Assembly on 25 November 1948. See also, Gupta, note 30.

32. *Supra*, Chapter 1.

33. Syatauw, note 18, p. 149.

34. Article 7; Report of the International Law Commission, 1 Sess. 1949 (A/925), 24 June 1949, pp. 7, 8; 1949 Year Book of International Law Commission, p. 288.

35. Visscher, *Theory and Reality in Public International Law* 243 (translated from French by P.E. Corbett, 1957).

36. Wright, "The Prevention of Aggression," *Am. Jr. Int. L.* 514, 524 (1956). He defines aggression as the use or threat to use of force across an *internationally recognized frontier*, for which a government *de facto* or *de jure* is responsible because of act or negligence.

37. Jackson, *The Nuremberg Case*, 86 (1947).

38. I.C.J. Rep. 1949, p. 4, 22.

39. *Ibid.*

40. Starke, *An Introduction to International Law* 82 (2nd ed., 1950).

41. U.N. Doc. A/981, September 1949.

42. *Supra*, Chapter 2.

43. Government of India, *Kashmir and the United Nations*, *supra*, p. 6.

44. *Id.*, p. 7.

45. Text is given in Rao, note 1, p. 237. This quote is found at x 242.

46. McDougal and Feliciano, *Law and Minimum World Public Order*, 200 (1963).

47. The right of self-defence is limited to necessary and proportionate responses to initiating coercion that is so intense as to create in the target state reasonable expectations, that it must forthwith employ force to protect its territorial integrity and political independence. See *id.*, at 259; also *supra*, Chapter 2.

48. Chacko, note 3, p. 197. This right was stressed by the Defence Minister of India, Mr Menon, before the Security Council 1958. He said that India is "the successor state—we are the legitimate successors of British authority in India. We have taken over all liabilities. We are bound by the treaties. . . . Even without any accession, we have the obligation to go to the rescue (of Kashmir). . . ." U.N. Security Council Document, 1958.

49. See McDougal and Feliciano, *op. cit.*, note 46.

50. Wright, "The Preventive Aggression," *Am. Jr. Int'l. L.* 514, p. 524.

51. Article 51.

52. I Lauterpacht, *Oppenheim's International Law* 297-9 (1955).

53. Bowett, *Self-Defence in International Law* 10 (1958).

54. *Ibid.*

55. Eagleton, *International Government* 81-2 (1957).

56. Brierly, *The Law of Nations* 316-7 (1955). He condemned the German attack on Belgian neutrality on 2 August 1914 on the pretext of self-preservation. Hall has also stated: "Even with individuals, living in well ordered communities the right of self-preservation is absolute in the last resort. *A fortiori*, it is so with states, which have in all cases to protect themselves." 5 Whiteman, *Digest of International Law* 971.

57. Schwarzenberger, "The Fundamental Principles of International Law," 87 *Recueil Des Cours* 195, 344-6 (1955, I).

58. Jessup, *A Modern Law of Nations* 165-6 (1948).

59. Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 99-101 (1953).

60 Just because the Maharaja, following the military invasion by Pakistan, left the capital temporarily, it cannot be maintained that he relinquished his legal status as a ruler or his sovereignty over the state. In law and fact, he was still the ruler.

61. Lumbay, *The Transfer of Power in India 1945-1947*, 20 (1954).

62. *Id.*, pp. 203-4.

63. For a comprehensive discussion on the status of states, see Chacko, note 3, p. 181-203; Palmer, *Sovereignty and Paramountcy* (1930).

64. Section 7(b) stated: "As from the appointed day August 15, 1947, the suzerainty of His Majesty over the Indian States

lapses, and with it, all treaties and arguments in force at the date of the passing of this Act between His Majesty and the Rulers of Indian States, all functions exercisable by His Majesty at that date with respect to Indian States, all obligations of His Majesty existing at that date, towards Indian States or the Rulers thereof, and all powers, rights, authority or jurisdiction exercisable by His Majesty at that date in or in relation to Indian States by treaty, grant, usage, sufferance or otherwise. "White Paper on Indian States, 45, p. 46.

65. Observe the statement of Mr Nehru in 1946 before the All India Congress Committee: "There is a certain inherent paramountcy in the Government of India which cannot lapse, an inherent Paramountcy in the Dominion State in India which must remain because of history, defence, etc., which gave rise to it when the British became the dominant power in India. If anybody thinks that it lapses, then those very reasons will give rise to it again." I Mitra, *the Indian Annual Register* 213 (1946).

66. Note 3, p. 202.

67. Rao, note 1, p. 21.

68. Chacko, note 3, pp. 206-7.

69. *Id.*, pp. 210-11.

70. *Id.*, p. 211.

71. He said: "India had, and could have, no jurisdiction or claim whatever over Hyderabad, for the simple reason that there was no India, as a state, before 1947. Hyderabad, was part of a geographical area known as India, but she was not part of a non-existent state of India: nor could the newly created state of India claim to have had rights or paramountcy over Hyderabad before India existed as a state; nor could India claim by right of succession rights which were not transferred to her by the previous ruler." Eagleton, "The Case of Hyderabad before the Security Council," 44 *Am. Jr. Int. L.* 281 (1950).

72. Kashmir had concluded the Amritsar Treaty with the British in 1846, and the Standstill Agreement with Pakistan in 1947.

73. *The Wimbledon case PCIJ, Series A/1 p. 25.*

74. O'Connell, *The Law of States Succession* 15 (1956).

75. Rao, note 1, p. 210.

76. *Id.*, p. 211.

77. *Supra*, Chapter 1.

78. The text of the letter of the Maharaja stated: "I have no option but to ask for help from the Indian Dominion. Naturally they (the Indian Dominion) 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." Note 76.

79. Note 77.



80. See *infra*.
81. Baines, *India's International Disputes — A Legal Study* 75 (1962).
82. See Article 30 of the Vienna Convention on the Law of Treaties.
83. U.N.R.I.A.A., Vol. 11, p. 1105.
84. Annual Digest 1933-194. Case No. 39, p. 92.
85. McDougal, Lasswell and Miller, in *Interpretation of Agreements and World Public Order* 290-295 (1967), have criticized the judgment of the International Court of Justice in the *Temple* case on similar grounds. The substance of this case concerned the question of sovereignty over the temple area between Thailand and Cambodia. The focal agreement in this case was concluded between the parties in 1904 which defined the boundary in the disputed area along the watershed, thus leaving the temple on the side of Thailand. At approximately the same time a map was drawn by the French (Cambodia) at Siam's (Thailand's) request which showed the temple to be located in Cambodia. The Court treated the map, a kind of supplemental agreement, conclusive and seemingly ignored the main treaty. This was an incorrect approach.
86. Art. 32 of the Vienna Convention.
87. Rao, note 1, p. 211.
88. Government of India, *Defending Kashmir* 178-80 (1949).
89. *Id.*, p. 185.
90. Potter, "Principal Legal and Political Problems Involved in the Kashmir Case," 44 *Am. Jr. Int. L.* 361 (1950).
91. Article 30 of the Vienna Convention.
92. U.N.R.I.A.A., Vol. II, p. 850.
93. *Ibid.*
94. Rao, note 1, pp. 104-6.
95. *Id.*, p. 105.
96. I.C.J. Rep. 1948, p. 26.
97. Kelsen, *The Law of the United Nations* 75 (1950).
98. Note 81, p. 79.
99. Rao, note 1, p. 88 ff.
100. This view is based on the assumption that Pakistan alleges the reference to plebiscite therein as an agreement between the two parties.
101. See Article 57 of the Vienna Convention.
102. See Rao, note 1, p. 107 ff.
103. *Kashmir and the United Nations*, note 8, pp. 21-2.
104. Article 59.
105. International Law Association, *Report of the Forty-Seventh Conference* 57, 58 (1956, Dubravnik).
106. Lauterpacht, note 52, pp. 551-2.

107. *Id.*, p. 552.

108. Green, *International Law Through the Cases*, 367 (1950).

109. Hereditary rule has been abolished in the State, and the Government has enlarged civil liberties, introduced land reforms, expanded education, health, transport services, develop irrigation, hydroelectric power supply and industries. The State has undertaken five year development plans in the same way as other constituent States of the Union of India.

## C H A P T E R V

# THE INDO-CEYLONESE DISPUTE OVER KACHCHATIVU ISLAND—LEGAL ASPECTS

### FACTUAL BACKGROUND

Kachchativu is composed of two words: *Kachch*, meaning, in Sanskrit, the sea coast and *Tivu*, denoting land. Kachchativu thus stands for "the sea coast of island."<sup>1</sup> It is situated nearly equidistant in the Palk Straits between Pamban on the southern coast of India and Delft island, off the northern coast of Ceylon.<sup>2</sup> In terms of size, the island is one mile long, some 300 yards wide at its widest point, and has an area of 3.75 square miles. Because of its tiny size, it is not spotted on any standard maps. It has very little of plant life except cacti. It is covered with thorny scrub, and is half coral encrusted and half, a sandy islet. There is not a drop of water on it, which prevents permanent human habitation.<sup>3</sup> It has no animal life except occasional snakes.

The island has a shrine, the only man-made edifice, which is dedicated to St Anthony. Every year a festival is held there in March when pilgrims from both India and Ceylon visit the church to celebrate the Feast of the saint. The island is also used by fishermen as a staging post, to dry nets and to dry the catch. Moreover, it is used for the grazing of goats and cattle by Indian farmers from the mainland.<sup>4</sup>

The controversy about the ownership of the island of Kachchativu has been going on since 1921, and both sides have made conflicting claims. In that year, a conference

between the Indian and Ceylonese colonial Governments took place in Colombo to negotiate on the demarcation line between the two countries in the Palk Straits and the Gulf of Mannar. The deliberations of this conference disclosed, in a telling manner, differences in regard to the title to Kachchativu. The issue was not pressed, however. The Agreement of 1921 also remained unratified by the Secretary of State for India.<sup>5</sup>

During the Second World War, Kachchativu seems to have been used by Ceylon as a venue for bombing practice. In 1949 India proposed to use the island for target practice during naval exercises. In reply, Ceylon asserted that Kachchativu was Ceylonese territory and India must seek prior permission from Ceylon. In 1955, Ceylon proposed to use the island for aerial practice and firing but India objected to it. In March 1956, Ceylon again proposed to use the island for firing and bombardment practices. Thereafter, the matter engaged the serious attention of public men in India. The matter was raised before the Indian Parliament in 1956 by some opposition members alleging that the Ceylon Government was "entering into and occupying the Indian territory of the strategic island of Kachchativu."<sup>6</sup> So that the matter may not generate unnecessary heat in the country, the Indian Government then took the plea that it did not have adequate information on the subject. However, India made a diplomatic protest to Ceylon asking the Ceylonese to postpone any decision to use the island for bombing and gunnery practice till the "question of the ownership was clarified."<sup>7</sup> In reply, the Ceylon Government stated that no decision had finally been taken regarding the proposed aerial exercises, but it insisted on its claim of sovereignty over the island.<sup>8</sup> These claims and counter-claims led to some negotiations, inconclusive though they were. Thereafter, the issue seemed almost forgotten.

The dispute again sparked off in 1968 on the basis of a Ceylonese newspaper report entitled: "*Ceylon Government takes over Kachchativu.*"<sup>9</sup> It raised a hue and cry in the Indian Parliament. Some opposition members

maintained that that as the island belonged to India, its unilateral occupation by Ceylon was a challenge to the sovereignty of India.<sup>10</sup> The newspaper report was later found to be inaccurate but it activated the controversy between India and Ceylon over the legal status of the island. Since then the two governments have started making more serious efforts towards evaluation of their respective claims and evidences and finding a solution.

It is commendable that the governments of both India and Ceylon have observed restraint in the matter thus leaving the doors open for acceptable solution. When the matter was revived in the Indian Parliament in 1956, Prime Minister Nehru stated that the Indian Government did not have "adequate" information on the subject and was inquiring from the Government of Madras about it.<sup>11</sup> Later in the same year he repeated that the records concerning the ownership of Kachchativu island were under examination.<sup>12</sup> He also expressed the view that there was no question of the Indian Government or the Ceylonese Government coming into conflict over the tiny islet. He added: "There is no national prestige involved in the matter, specially with our neighbour Ceylon."<sup>13</sup> In 1960, the Deputy Minister of External Affairs, Mrs Lakshmi Menon, stated in the Rajya Sabha that "the question of taking up our claims with the Government of Ceylon" was under consideration.<sup>14</sup> In 1963, again, the Indian Prime Minister Mrs Indira Gandhi, merely stated that the Centre was in touch with the Madras Government with a view to get the papers dealing with the claims of the Raja of Ramnad.<sup>15</sup>

Similarly, the government, public opinion and the opposition in Ceylon have also shown restraint on the subject. Former Premier Senanayake, while affirming the sovereignty of Ceylon over the island, stated that whatever be the differences between India and Ceylon on the subject, he was confident that they should be amicably settled through negotiations.<sup>16</sup>

The attempts on both sides to keep the controversy in "low key" facilitated negotiations. When the Ceylonese

Premier visited India in December 1968, he discussed the question with the Indian Prime Minister, Mrs Indira Gandhi. The Joint Communique said :

The two Prime Ministers exchanged views on matters of common interest in the Palk Bay and Gulf Mannar, including territorial waters, delineation of the median line, fishing rights, and sovereignty over Kachchativu. They informally explored possibilities for fruitful collaboration between two countries in this area and agreed that discussion of these matters should continue.<sup>17</sup>

The two governments, however, continue to have conflicting claims in respect of the ownership and title to the Kachchativu island. Whereas Ceylon rests its case on historic title, ecclesiastical jurisdiction, and the Agreement of 1921, India primarily relies upon the continuity of acts on jurisdiction and control throughout the historical times. The latest official Ceylonese maps show it as part of Ceylon, while the Government of India claims it as an offshore island of India.

#### CLAIMS AND COUNTER-CLAIMS

*Historic Possession.* The Indian claim is based primarily upon the acts of ownership of the Raja of Ramnad (now part of Tamilnad State) over the island, without protest from Ceylon. India asserts the island had always been a part of Ramnad Estate. The Raja of Ramnad had jurisdiction over the island until 1947, when it was taken over by the Madras Government, following the Zamindari Abolition Act.<sup>18</sup> The Indian Government further states that the Ramnad Estate agents had "since time immemorial" collected taxes from people who used to have cattle for grazing purposes on the island.<sup>19</sup> Ceylon also invokes history in support of her claim of ownership and sovereignty over the island. The former Ceylonese Premier, Dudley Senanayake, stated that Ceylon's position had always been that she had "exercised effective control"

over the island and that her claim was well founded in "terms of historical records."<sup>20</sup>

Ceylon further invokes the ecclesiastical jurisdiction of the Bishop of Jaffna (part of Ceylon) who organizes and controls the festival of St Anthony on the island. According to Ceylonese assertions, the festival has been run by the Jaffna Church for at least 55 years.<sup>21</sup> For further substantiation, Ceylon argues that the island lies in its territorial waters and that it had been "regulating" the entry of pilgrims and supervising illegal immigration from India.<sup>22</sup>

*Explicit Agreement.* In order to confirm her traditional title, and also, apparently, as an alternative argument, Ceylon cites an agreement concluded in 1921 with the Government of the Madras Presidency allegedly acknowledging that the island belonged to Ceylon. India has rejected this claim of Ceylon.<sup>23</sup>

*Territorial Waters.* Related to the Kachchativu controversy is the question of the territorial rights of India and Ceylon in the Palk Bay and Gulf of Mannar. India has laid down a 12 mile limit for its territorial waters, but Ceylon has set only a 6 mile limit. If Ceylon also adopts the 12 mile limit, in that case the question may arise with respect to the fixation of a line in those areas where these limits overlap. A further complication may arise if Kachchativu falls within the territorial waters of Ceylon without the ownership of Ceylon over that island having been established. The question also remains unresolved between the two countries about their respective fishing rights.

#### EVALUATION

*Historic Possession.* In view of the claims and counter-claims stated above, the territorial controversy between India and Ceylon over Kachchativu island is one in which opposing claims have been made with reliance upon conflicting testimony and a judgment would depend on the relative strength of cases of the two parties. The issue is

whether India performed acts in assertion of territorial sovereignty in respect of the disputed island which were of such a character as to be sufficient in law to have conferred title to the territory upon it; or conversely, whether the evidence of such an exercise of sovereignty on the part of Ceylon would instead operate to confer title on Ceylon to the territory in question.

Before turning to the examination of this issue, it is necessary to determine if there is any "critical date" which may have a decisive significance to the controversy. The fixation of a "critical date" has been considered as of utmost importance in past territorial disputes. The "critical date" has been defined as "the date after which the acts or omissions of the parties cannot affect the legal situation."<sup>24</sup> By fixing such a date, the decision makers exclude subsequent conduct and actions of the parties to the dispute which would upset the status quo prevailing at the time of the origin of the dispute and which might lead to the improvement in their respective positions. The legal process assumes that, as stated by Blum, "it is the situation that prevailed at that given moment which serves as the legal criterion and yardstick by which the merits of the conflicting parties' alleged rights are being measured."<sup>25</sup> Any modifications of that status quo, if caused by the acts and omissions of the parties, will be legally irrelevant.

The determination of the "critical date" has been the subject of much discussion among writers, lawyers and judges. It is accepted that the "critical date" cannot be chosen arbitrarily, but rather it should be selected according to legal principles. However, different criteria had been applied and discussed in the past decisions. According to the common notion, the "critical date" is a date on which the dispute is born. The celebrated award given by Judge Huber in the *Island of Palmas* case throws important light on the subject of "critical date."<sup>26</sup> Significantly, Judge Huber chose in favour of the date at which the dispute was "focused" rather than the date at which it was "born." The "critical date" in that case, according to him, was 1898, in which year Spain transferred her rights over



the Philippine archipelago to the United States. Strictly speaking, the dispute was born in 1648, being the date of the conclusion of the Treaty of Munster which was "the earliest treaty to define the relations between Spain and the Netherlands in the regions in question."<sup>27</sup> But it was only in 1898 that the dispute came into open whether the purported transfer of the title to the Island of Palmas from Spain to the United States under the Treaty of Paris was valid or not.

The next important case concerning the *Legal Status of Eastern Greenland*<sup>28</sup> arose between Denmark and Norway. The substance of the dispute was the question of the validity of a Norwegian Royal Decree of 10 July 1931, in which Norway had proclaimed her sovereignty over Eastern Greenland. The Permanent Court of International Justice again applied, in selecting the "critical date," the criterion of the date when the dispute was "focused." In this case such a date was July 1931. The Court did not select 1814 as the critical date, when the Union between the two came to an end, and which meant the origin of the dispute.<sup>29</sup>

The *Minquiers and Ecrehos* case<sup>30</sup> illustrates a situation which does not involve any instrument or event, like the ones in the above two cases which can focus the dispute and form the basis for the determination of the "critical date." The International Court of Justice was requested in this case to determine whether the sovereignty over the islets and rocks of the Minquiers and Ecrehos groups respectively belonged to the United Kingdom or the French Republic. In this case it was fairly known by both sides that mere manifestations of sovereign authority displayed by England, heavily outweighed those of France during the past century or so. Thus, if the events of the last hundred years alone were to decide the question of title, then that would be in favour of Great Britain. Therefore, France, in her written arguments, set the "critical date" as far as 1839, believing that the further this date could be put back, the stronger was the chance for her to succeed. The year 1839 was suitable to France because a Fishing

Convention was signed between the litigant parties in that year, whereby they defined and regulated the limits within which the general right of fishing was to be reserved henceforth for the subjects of Great Britain and France respectively. Against this, the United Kingdom asserted that the "critical date" was the year 1950, the date on which the dispute "crystallized" (meaning the date when the matter was submitted for the decision of the Court). The Counsel for the United Kingdom, Sir Gerald Fitzmaurice, explained that a dispute crystallizes into a concrete issue at the moment

when the parties are no longer negotiating, or protesting, or attempting to persuade one another. They have taken up position and are standing on their respective rights and when that occurs, the claims of the Parties must obviously be adjudged according to the facts as they stand at the moment...<sup>31</sup>

In its approach to the fixation of the critical date, the Court rejected the French submission to regard the 1839 Convention as the "critical date" on the ground that no dispute as to sovereignty over the Ecrehos and Minquiers groups had yet arisen and that previous disagreement with regard to the question of exclusive right to fish oysters was not linked with the question of sovereignty over the Ecrehos and the Minquiers. At the same time the Court did not express its views on the criterion of "crystallization."<sup>32</sup> However, the Court appeared to accept the date of the origin of the dispute as the "critical date." The Court stated that "a dispute as to sovereignty over the groups did not arise before the years 1886 and 1888, when France for the first time claimed sovereignty over the Ecrehos and the Minquiers respectively," thereby it seemingly accepted 1886 and 1888 as the critical dates as regards the Ecrehos and Minquiers, respectively.<sup>33</sup>

In the above cases, references were made to "origin," "focus" or "crystallization" as criteria for determining the "critical date." The Courts and Tribunals either did not

explicitly fix a critical date, or largely favoured the criteria of "origin" of the dispute or the factor of when the dispute was focused. However, one fact is clearly discernible in the above cases. Even in those cases where the "critical date" was fixed or implied, the Judges did not bar the consideration of evidence originating after that date. In fact, they did take into account such evidence to determine the question of sovereignty, though the weight of such evidence was not considered as of decisive importance and did not weigh as heavily with them as the evidence emanating prior to the "critical date."

For instance, in the *Minquiers and Ecrehos* case, the International Court of Justice, after fixing the "critical dates," as being 1886 and 1888, did, indeed, refer to acts and events which occurred as recently as 1950. According to the Court, consideration of subsequent acts was permissible, provided these acts were not performed with a view to improving the legal position of one of the parties to the detriment of the other, and on the condition that they merely constituted a continuation of an already accepted practice, carried out in a similar manner as before.<sup>34</sup> Sir Gerald Fitzmaurice, in his separate opinion in the *Temple of Preah Vihear* case, had this to say about the value of subsequent acts: "Similarly and very important in cases affecting territorial sovereignty—the existence of a state of fact, or of a situation, at a later date may furnish good presumptive evidence of its existence at an earlier date also, even where the later situation or state of affairs has in other respects to be excluded from consideration."<sup>35</sup> Indeed, in the *Island of Palmas* case, also, Judge Huber, having selected the year 1898 as the critical date, went on to refer to a subsequent visit of the American General Leonard Wood to the island in 1906 which marked the first contact by the American authorities with the island. The arbitrator regarded this event as the "origin of the dispute" between the United States and the Netherlands. Thus, this case is also an authority for the possibility of a distinction between the "critical date" and the "origin of the dispute," and also for the

"critical date" occurring prior to the "origin of the dispute" in specific instances. The Judge also laid down the rule that the events between these two dates "cannot in themselves serve to the legal situation of the island at the critical moment. . . . They are however indirectly of certain interest, owing to the light they throw on the period immediately preceding."<sup>36</sup>

In the India-Ceylon dispute over Kachchativu, there are certain dates which are critically important. The most important date is the year 1921 when the two sides made conflicting claims to the island at a conference in Colombo. This conference was designed to conclude an agreement on the demarcation line between the two countries in the Palk Straits and Gulf of Mannar. Since then Ceylon has asserted that India tacitly acknowledged the Ceylonese claim, while India denies it. The determination of the legal situation at the time of the conference would appear to be of decisive importance. This does not mean that the evidence adduced by the claimants concerning manifestation of sovereignty subsequent to 1921 is of no avail. On the contrary, inasmuch as the subsequent conduct is in continuity with the past conduct of either of the parties, it consolidates and crystallizes its sovereignty and hence is of particular relevance. The import of the decisions discussed above is that such evidence of subsequent conduct is permissible provided it does not consist of acts or omissions designed to improve the legal position of the parties.

The developments in 1968 also throw important light on the controversy. In this year, the dispute took a serious turn with the two sides making open assertions of their sovereignty and trying to negotiate a settlement. Since it is common ground between India and Ceylon that the dispute is old, it will be difficult to set any date later than the critical date, 1921, as revealing the time of the origin of dispute. However, in the light of the *Island of Palmas* case, it is quite feasible that the origin of the dispute comes later than the critical date.<sup>37</sup>

We may now turn to the question as to whose sover-

eighty prevailed in 1921 over the disputed island. As stated earlier, it would require an assessment of the relative weight of evidence adduced by the contestants. There are authoritative precedents illustrating the application of the test of assessment of the relative weight of evidences. The decision of the *Indo-Pakistan Western Boundary* case tribunal is representative.<sup>38</sup> The substance of the dispute was the question of sovereignty over the region of Kutch involving some 3,500 square miles of the Rann of Kutch. The disputants were India and Pakistan. The Chairman of the Tribunal stated:

... the territorial dispute which the tribunal is called upon to decide does not differ in essence from other like disputes in which opposing claims have been made in reliance upon conflicting testimony, and where a judgment has to be rendered on the relative strength of the cases made out by two parties.<sup>39</sup>

In fact, the tribunal concluded that neither side had proved continuous and effective jurisdiction over the whole of the disputed territory. After appraising the relative strength of the evidence of the two sides, it awarded ninety per cent of the disputed territory to India and ten per cent to Pakistan. In the *Minquiers and Ecrehos* case, the Court found the evidence of France inconclusive. The evidence of Britain was deemed conclusive, but part of it was disqualified and the remaining not very impressive. But the International Court of Justice deemed it sufficient to substantiate the British claim as, relatively, it was superior.<sup>40</sup>

The most crucial test relevant to the assessment of the relative weight of evidence, was laid down by Judge Huber in the *Island of Palmas* case, where the decision in favour of Dutch sovereignty over the island was founded upon "continuous and peaceful display of territorial sovereignty."<sup>41</sup> The finding of the continuous and peaceful display of sovereignty in favour of one party would prevail over a prior title put forward by the other state, not fol-

lowed by an actual display of state authority. The twin rules for proving continuous and peaceful display of sovereignty are, in the language of the *Eastern Greenland* case, "the intention and will to act as sovereign (*animus*), and some actual exercise or display of such authority."<sup>42</sup> Another proof of continuous and peaceful display of authority is the factor of effectiveness. In assessing effectiveness, the courts are interested in evidence which is directly related to the possession of the disputed territory, rather than in some abstract title acquired in ancient times.<sup>43</sup> The past decisions reveal that what amounts to peaceful and continuous display of sovereignty in particular instances is dependent upon many factors and circumstances, especially upon the unique features of the territory, conditions of time, presence of absence of competing claims and so on. "In many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other side could not make out a superior claim."<sup>44</sup> These criteria were followed in other cases also.<sup>45</sup>

India bases its possessory claims on Kachchativu island on a weighty historical fact and data seeking to prove that beyond enjoyment of notional possession, she has exercised jurisdiction and administered the island over a long period of time in accordance with the fullest reaches of sovereignty. In contrast, Ceylon has mostly relied upon broad assertions about administrative jurisdiction, without adducing concrete fact and data to prove its effective control and actual display and exercise of authority.

The strongest historical evidence of India lies in the archives of the Raja of Ramnad. The Raja, who was a zamindar in the Madurai district of Madras State, had jurisdiction over the island until 1947, when it was taken by Madras State following the Zamindari Abolition Act, owned not only this island but a long list of islands (over ten) off Cape Comorin. That was the reason he was called "Setupati" or "Lord of the Cape."<sup>46</sup>

Until 1822 the Raja used this island as a landing ground by divers hired by him for pearl fishing operations. The

East India Company took over these rights. Nevertheless, the same year the British recognized the rights of the Raja over the island under the "*Isthimirer Sanad*" Treaty. As a part of sovereign authority, the Raja performed various administrative acts. He collected taxes from those who used Kachchativu for fishing and grazing purposes. These taxes had been collected since times immemorial. Further proof of the Raja's prevailing sovereignty over the island is found in the fact that at times he leased his zamindari for a certain period.<sup>47</sup>

On 2 July 1880, Muthusamy Pillai and Mohommed Abdul Kadir Maricar entered into a lease with the Raja of Ramanathapuram, owner of fishing rights in 69 coastal villages and eight islands including the Kachchativu. This document was registered before the Madurai Special Assistant Collector, Deward Turner, who was in Ramnad. The lease deed, which became effective from 21 July 1880, stipulated a rent of Rs 175 per fasli and was fixed for five faslies from fasli 1290 to 1294. An advance of Rs 175 was accepted by the Raja of Ramnad. The lease deed stipulated penalty interest of 12 per cent for failure of payment of the rent. The deed written on seven-rupee stamp paper bears the register No. 510, first book 16th volume, pages 488-499.

After the expiry of the first deed, another lease deed was signed on December 1895 by Muthusamy Pillai alone for another five fasli period from fasli 1295 to fasli 1299 at Rs 212 rent per fasli. On behalf of the owner of the 69 coastal villages and eight islands including Kachchativu, the lease deed was signed by D. Raja Rama Rayar, Manager Ramanathapuram Palace, on behalf of the owner, the Raja of Ramanathapuram.

On 4 July 1913, an indenture was signed between the Raja of Ramanathapuram and the Secretary of State for India in Council for a period of 15 years. According to this a "premium or sum of Rs 60,000" was paid to the Raja of Ramanathapuram as owner of the 69 coastal villages and the nine islands including Kachchativu for "full, free and exclusive rights, liberty and authority to search

collect, take and carry away all or any chank shells from the chank shell beds." The particulars of the limits given out in the deed were: the Gulf of Mannar, all the chank shell beds lying off the mainland section of the Ramnad Zamindari together with those off the south coast of Rameswaram islands and those of the small islands belonging to the Zamindari, and in Palk Bay, all the chank shell beds off the mainland of the Zamindari together with those off Kachchativu island and off the northern and eastern coasts of Rameswaram.

The question at this stage may be raised whether the Raja was signing these deeds, acting as a Zamindar of the Ceylon Government. This appears improbable. It is significant that during the period when those lease deeds were concluded, there was no reference to the payment of any revenue by the Raja of Ramnad to the Government of Ceylon. On the other hand, there is far greater possibility that, as a zamindar he must have paid revenue to the Madras Government. It follows that Kachchativu, as part of the Zamindari of the Raja of Ramnad, was part of the territory of the Province of Madras.

For further substantiation of the sovereign control of the Raja over the island, we may refer to a proclamation issued during the reign of Queen Victoria defining the boundaries between India and Ceylon which excluded Kachchativu from Ceylon territory. Under the proclamation, the island was included under the dominion of the Raja of Ramnad. This has been confirmed by B. P. Pieris, former Secretary of the Cabinet of Ceylon. He stated :

I remember coming across this problem when I was an Assistant Legal Draftsman. I had to deal with a file for the purpose of verifying some of the boundaries of the Northern District. In the process of revising the Draft proclamation, I had to trace the history of the boundary back over many years. I remember coming across a proclamation issued, probably in the time of Queen Victoria, in which the island of Kachchativu is exclud-



ed from the Northern District as it belonged to the Raja of Ramnad.<sup>48</sup>

The above facts and data are enough to lead to the conclusion that the original title to the disputed island lay with India and it was adequately maintained until 1921, when the two sides developed differences, and also after 1921 through the continuum of effective control and exercise of sovereignty. Having regard to the topography of the territory and the desolate character of the island, India's presence through the Raja amounted to effective, peaceful, possession and display of Indian authority as may reasonably be expected in the circumstances. The exercise of sovereignty, as laid down in the judicial and arbitral decisions, discussed above, depends upon time and place, and political systems.

It has been pointed out in the *Kutch Award* that in an agricultural society, the governmental functions are limited to the imposition of custom duties and taxes on land and livestock and agricultural produce in the fiscal sphere and the maintenance of peace and order in the general public sphere. In a society like this, ownership of agricultural property could imply and carry with it such a measure of sovereignty over it as to include taxing authority and civil and criminal jurisdiction.<sup>49</sup> In the light of these authoritative precedents, the Raja of Ramnad's manifestations of sovereignty would suffice to establish India's claim over the island in 1921. Significantly, Ceylon raised no protest against these assertions. The factor of the absence of protest has been considered by historical decisions, material in the conferment of title through peaceful display of possession.<sup>50</sup>

India has also adduced evidence of peaceful display of sovereignty after 1921. Indeed, in December 1947, the late Mr Shanmuga Rajeswara Sethupathi, the Raja of Ramanathapuram and owner of Kachchativu, leased to V. Pannusamy Pillai and Janab K. S. Mohhamed Mirza Maraicar the chank collection rights on the Kachchativu island.<sup>51</sup> The lease was from fasli 1356 to fasli 1358. This

shows that as late as 1947—the year when following the Zamindari Abolition Act, the Ramnad Estate including Kachchativu island became part of Madras State—the Raja was exercising governmental functions. The value of this evidence for our purposes is, as stated before, that it throws light on the legal situation before 1921 and proves the continuity of that situation, i.e., the continuity of the rule of the Raja of Ramnad over the disputed island. Thus, this piece of evidence is not employed to establish an independent title in favour of India.

We may now examine the weight of claims asserted on behalf of Ceylon. Emphasis has been laid upon some cartographic evidence to show that Kachchativu was part of the Jaffna Peninsula (Ceylonese Province) as early as 1544. It is claimed that the Portuguese administered Yapapatonam (Jaffna) which also included Kachchativu. In a letter to the editor, a Ceylonese scholar (quoting the standard work on maps and surveys of Ceylon by R. L. Brohir) has concluded that the "English map No. 52 dated 1800-1802, obviously copied from the Dutch map No. 328 of 28.9.1719 by M. Uekusekam and No. 329 of 17.7.1753 by Balthazar Van Lier, definitely indicates that Kachchativu was within the administration of the commandment of Jaffnapatam."<sup>52</sup> Another Ceylonese scholar, Vimlaranda, elaborates this point further. He states that in 1796-1797 the British captured all the Dutch territories together with the islands in the Jaffna Peninsula. For some time afterwards, the districts were governed by the British Government at Madras and when it was directly placed under the Governor Friderick North, the Madras Government had not claimed any of these islands, claims the Ceylonese scholar.<sup>53</sup>

The cartographic evidence, in the absence of actual acts of jurisdiction, cannot be taken as conclusive, especially in the context of the preponderance of the evidence of the adversary who has produced superior evidence. In the first place, the authority of the above quoted surveys and maps is a matter of speculation. The courts have not accorded any decisive value to surveys and maps derived

from secondary sources. Courts generally, before accord- ing any great weight to maps and surveys, have sought to satisfy that they were accurate, clear, and consistent. Re- ference to one or two maps or surveys, unaccompanied by acts of jurisdiction, cannot be allowed to displace the sovereign title of the other side based on superior evi- dence.<sup>54</sup>

Similarly, Vimlananda's thesis, even if it constituted a remarkable scholarly achievement, is a secondary source of authority and cannot be deemed conclusive. In the second place, we may recall the precedent laid down in the *Minquieres and Ecrehos* case wherein the Court refus- ed to accept evidence concerning an abstract, ancient title.<sup>55</sup> The International Court of Justice, instead, attached deci- sive importance to the evidence which directly related to the possession of the disputed territory. Thus, the carto- graphic evidence of Ceylon seeking to prove an abstract, ancient title is of no value against the evidence of India directly related to the possession of Kachchativu island. In the third place, even if the cartographic evidence raises any initial assumption of title in favour of Ceylon—this is purely a hypothesis—it was lost or later displaced by India's consistent assertions of sovereignty in the form of acts of jurisdiction of the Raja of Ramnad over a long pe- riod of time, culminating in 1947, in signing a deed, with- out any protest from Ceylon.<sup>56</sup> If this was the situation, India's continuous and peaceful display of authority would prevail over Ceylon's abstract title.

Ceylon also bases its argument on an agreement signed by the officials of the Governments of Madras and Ceylon in 1921 on the demarcation line between the two countries in the Palk Straits and the Gulf of Mannar in which Kach- chativu was allegedly referred to as being on Ceylon's side.<sup>57</sup> This agreement was signed "without prejudice to the territorial claim which may be made by the government of India to the island of Kachchativu."

The validity of this agreement has been discussed else- where in this paper. Suffice it to say it here, that in the first place it is factually wrong to say that India acknow-

ledged that Kachchativu belonged to Ceylon. In fact, this agreement was not ratified later, seemingly because the Secretary of State for India, an authority superior than the Government of India, did not accept the plea that Kachchativu belonged to Ceylon. This attitude continued in 1921-23.<sup>58</sup> In the second place, the Government of Madras put a rider, as mentioned above. In the third place, at the same juncture of history, an acknowledgement by a British authority higher than British Government of India, to the effect that Kachchativu was Indian, appeared. It may be recalled that during the same period of time the Secretary of State, by signing an indenture with the Raja of Ramnad from 1913-1928, tacitly recognized that Kachchativu was part of India.<sup>59</sup> Finally, the significance of the alleged Indian recognition, in just tacit terms, is not greater than any other piece of evidence. The unratified Agreement of 1921 is not of such a character as to conclusively affect the case of India based on continuous and peaceful possession of the island both before and after 1921. Taken as a mere statement, if unaccompanied by any action to abandon the title to the island, the alleged Indian acknowledgement cannot weigh the evidence to the opposite effect upon which India's case rests, much less invalidate India's claim. Indeed, the subsequent actions of India were in the direction of consolidation of its historic title. This is evidenced by the fact that as late as 1947 the Raja of Ramnad was leasing his territory and earning some revenue. One more interesting point may be noted. If the island had been accepted as part of Ceylon as early as 1921, why should it be necessary for the Ceylonese proceeding to the St Anthony's festival every year in March-April to seek government permits? Surely, one does not normally require permit to go to a part of one's country.

Another Ceylonese argument is that the "Church" St Anthony on the island is under the control of the Catholic Church of Jaffna. According to the documents produced by the bishop, the island for quite some time, has been under the ecclesiastical jurisdiction of the diocese of Jaffna. The evidence of ecclesiastical jurisdiction has never been a

conclusive factor in proving sovereignty. Indeed, the International Court of Justice, in the *Temple of Preah Vihear* case, did not give any weight to such evidence adduced by both sides, Thailand and Cambodia, in claiming the Temple of Preah Vihear territory.<sup>60</sup>

Ceylon has relied on more recent measures also. During the Second World War, it is contended, Kachchativu was used as a venue for bombing practice by the order of the Governor of Ceylon under Defence Regulations. When these regulations lapsed, a bombardment range was established in the island by Ceylon under its Firing Range and Military Act No. 24 of 1951.<sup>61</sup> In 1949, India wanted to use Kachchativu as a bombardment target, which was objected to by Ceylon. Similarly, when in 1955 Ceylon wanted to use it for aerial practice and firing practice, India raised serious objection. Inasmuch as these activities took place after 1921—the “critical date”—it is hard to attach much weight to them. In any case, Ceylon cannot use these acts, subsequent to the critical date, to improve its legal position. They are insignificant and cannot override India's established legal rights.

More recently, Kachchativu has become important to Ceylon for an extra reason. Ceylon discovered that the island was being used as a smuggling centre specially in March-April every year, when the fishermen of both India and Ceylon met on the island to celebrate St Anthony's feast. Consequently, Ceylon has been sending officials to the island at the time of the festival. Ceylon also patrols near the island during these months to apprehend smugglers as well as illegal immigrants. Strictly speaking, these activities are related to the administration of Ceylon and not the disputed island. Moreover, in any case they are routine acts insufficient to disturb the title of India or to confer it on Ceylon. In fact, India allows them as a measure of courtesy as it had done in the past at the time of festival.

### *Agreement*

Ceylon has not yet stated whether it invokes the terms

of the 1921 Agreement as a mere proof of India's tacit admission of Ceylon's ownership of the Kachchativu island or also as an independent basis of her title to the island. We have already discussed the futility of the first argument. Here we may examine the validity of that treaty. The facts may be recalled. This agreement was signed in 1921 between the Governments of Madras and Ceylon regarding the demarcation line between the two countries in the Palk Straits and the Gulf of Mannar. Ceylon alleges that this agreement referred Kachchativu as being on Ceylon's side, and India thus tacitly admitted that the island belonged to Ceylon. India has denied this claim. Thus, there is a conflict in regard to the outcome of the agreement. In fact, the Madras Government added a rider to this treaty to the effect that the treaty was signed without prejudice to any territorial claim which may be made by the Government of India to the island. Having regard to the fact that by then India had already established its sovereignty through long and peaceful possession, it was quite understandable that this proviso was added.

In the face of such assertions of sovereignty, it is difficult to read any acknowledgement of Ceylon's claim by India under this agreement. This conclusion is further substantiated by the fact that the Secretary of State for India raised objection to the Ceylonese assertion that the island belonged to it. As a climax, the agreement was not ratified. Therefore, it is difficult to read in the agreement any intention on the part of India to acknowledge Ceylonese sovereignty over India, and furthermore, the agreement seems ineffective for want of ratification. In any case, when India extended its territorial jurisdiction from six to twelve miles, the earlier agreement was no longer operative.

### *Territorial Waters*

Another unresolved issue between India and Ceylon concerns the limits of their respective territorial rights in the Palk Bay and Gulf of Mannar. India has extended the

limits of its territorial waters to twelve miles, while Ceylon has set the limit of its territorial waters to six miles. If Ceylon also adopts the 12 mile limit, then the question arises how the new boundary based on the rule of median line, when agreed upon, will affect rights in respect of Kachchativu. According to one version, the island is only 11 miles from the Indian mainland and is thus within India's territorial waters.<sup>62</sup> But then Ceylon also claims that the island is eleven miles from its mainland. According to another version, if a median line is drawn, then the disputed island will fall within Ceylon's side.<sup>63</sup>

The 12 mile limit of territorial waters of the two countries will not result in any clash except for a few stretches where the distance between the Indian coast and Ceylon's is shorter than 24 miles. In case of any overlap, of course, the application of the normal practice of drawing a median line equidistance from their respective coastlines seems imminent. If, as a result of these negotiations, Kachchativu is declared to be within Ceylon's side of the line, it would still be necessary to determine the question of its actual title and ownership. Negotiations and new policies on the limits of territorial waters may change the future status of the island if both sides agree, but rights and title before there negotiations will remain unaffected.

#### CONCLUSION

All relevant principles of contemporary international law would appear to establish the continuing sovereignty of India over the Kachchativu island. The assessment, in the above discussion, of historic practices in regard to the long-term exercise of jurisdiction and effective control supports the Indian claim to sovereignty of the island.

#### NOTES

1. *Assam Tribune*, 16 March 1968.
2. It can be located North-West of Talaimannar, North-East of Rameswaram and is half way between Rameshwaram Peninsula and Ceylon's Delft Island in the Palk Straits.

3. *Times of India*, 2 April 1968, p. 7 col. 3.

4. *Keesings Contemporary Archives* 2313 I (11-18 January 1968). The island has also importance for Ceylon for reasons other than that the Ceylonese pilgrims visit the Church of St Anthony. It is known that till 1956 Great Britain, under an Agreement of 1948 with Ceylon, had its air-bases in Trincomalee and Katunayake. One wonders as to whether the proposal to use Kachchativu for aerial practice was not overtly meant to facilitate the aerial practice of the British air force in Ceylon. The British bases were withdrawn soon after Bandaranaike came to power in 1956 and after that year Ceylon did not seem to raise the question of using the island for aerial practice. The island then assumed importance for Ceylon for different reasons. It was discovered that the island was being used as a jumping off point for illegal immigrants to Ceylon. The pilgrimage to St Anthony Church in March-April was used for smuggling relatives and friends from India. Ceylon took some administrative measures to prevent this. For some years Ceylon Police officials have been going to the island at the time of the festival. The Ceylonese navy also patrols near the island during these months to apprehend smugglers as well as illegal immigrants; Phadnis, "Kachchativu: Background and Issues," *Economic and Political Weekly*, vol. III, No. 20, 18 May 1968, pp. 783-8.

5. For a factual background of the dispute, see generally *Assam Tribune*, 16 March 1968; Phadnis, note 4, pp. 783-8.

6. Phadnis, *id.*, p. 783.

7. *Lok Sabha Debates*, Part I, 1, 6 August 1956, col. 872.

8. Godikara, *Indo-Ceylon Relations Since Independence* 60 (1965).

9 See *Indian Express*, 29 February 1968.

10. *Id.*, 2 March 1968.

11. *Lok Sabha Debates*, Part II, 3, 28 March 1956, cols. 3593-4.

12. *Lok Sabha Debates*, Part 1, 5, 14 April 1956, col. 872.

13. *Lok Sabha Debate*, Part 1, 5, 14 April 1956, Col. 2222.

14. *Rajya Sabha Debates*, Part I, 1, 6 August 1956, col. 3049-50.

15. *Times of India*, 2 March 1968, p. 1, col. 1.

16. *Sun*, 9 March 1956.

17. *Times of India*, 5 December 1968, p. 1, col. 1.

18. See Statement of Dinesh Singh, Indian Minister, before the Indian Parliament on 7 May 1966, and on 5 March 1968; *Keesings Contemporary Archives*, 11-18 January 1969, col 23131.

19. *Ibid.*

20. *Sun*, 9 March 1968.

21. *Assam Tribune*, 16 March 1968; *Patriot*, 16 March 1968.

22. *Keesings Contemporary Archives*, 11-18 January 1969.

23. *Ibid.*



24. Johnson, "The Minquiers and Eirchose," 3 *Int. Comp. L. Q.* 208 (1954).
25. Blum, *Historic Titles in International Law* 209 (1965).
26. U.N.R.I.A.A., Vol II, p. 829.
27. *Id.*, pp. 844-5.
28. (1933), P.C.I.J., Series A/B, No. 53.
29. *Id.*, pp. 26, 45.
30. (1953) I.C.J. Rep., p. 47.
31. Annex to the United Kingdom Memorial, I.C.J., *Minquiers and Ecrehos case Pleadings, Oral Arguments, Documents*, vol. II, p. 68.
32. Blum, note 25, pp. 216-17.
33. (1953) I.C.J. Rep. p. 59.
34. *Id.*, pp. 59-60.
35. (1962) I.C.J. Rep., 61.
36. U.N.R.I.A.A., Vol II, p. 866.
37. *Ibid.*
38. Government of India, *The Indo-Pakistan Western Boundary Case Tribunal* (1968).
39. *Id.*, p. 108.
40. Verzijl, *The Jurisprudence of the World Court*, pp. 173-5.
41. U.N.R.I.A.A., vol. 2, p. 839.
42. Ser A/B, No. 53, p. 46 (1933).
43. *Minquiers and Ecrehos case* (1953) I.C.J. Rep. p. 47.
44. *The Eastern Greenland case*, Ser A/B, No. 53 p. 46 (1933).
45. See *Island of Palmas case* U.N.R.I.A.A., Vol. II, p. 840; *Clipperton Island Arbitration*, 26 *Am. Jr. Int. L.* 390 (1932); *The Minquiers and Ecrehos case* (1953) I.C.J. Rep, 53, 78, 98-99, *The case concerning Sovereignty Over Certain Frontier Land* (1959), I.C.J. Rep. p. 229.
46. *Assam Tribune*, 16 March 1968.
47. For the account of these deeds, see *Hindustan Times*, 25 March 1968, p. 6; *The Times of India*, 26 March 1968, p. 2.
48. *Statesman*, 10 May 1966.
49. *Op. cit.*, note 38, pp. 135-6.
50. See *Island of Palmas case*, *op. cit.*
51. *The Times of India*, 28 March 1968, p. 2, col. 6.
52. *Ceylon Daily News*, 10 March 1968.
53. T. Vimlananda, "Kachchativu — Desert Isle Drenched in History," *Sun*, 12 March 1968. See also Phadnis, note 4, p. 785.
54. See *Kutch Award*, note 38, p. 115 ff.
55. See note 43.
56. See *Island of Palmas case*, *supra*, see also Jennings, *Acquisition of Territory in International Law*, 100 (1963).
57. Kodikara, *Indo-Ceylon Relations Since Independence* (1965) 59-60.

58. Phadnis, note 4, p. 785.
59. *Id.*, p. 787.
60. (1962) I.C.J. Rep., p. 6.
61. Kodikara, note 56.
62. *Assam Tribune*, 16 March 1968.
63. *Ibid.*



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