

ARTICLE

**THE KASHMIR DISPUTE:
A PLAN FOR REGIONAL COOPERATION**

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INTRODUCTION

Since 1989, militant insurgency in Kashmir has been on the rise.¹ The Kashmir dispute² is not new, however. The fate of Kashmir has been in dispute since the British ended their colonial rule over India in 1947 and partitioned the empire, creating the two new independent states of Pakistan and India.³ The British plan for withdrawal did not settle the political future of the more than five

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1. In December 1989, Indian paramilitary troops opened fire on a peaceful Kashmiri demonstration for self-determination. Tim McGirk, *The Vicious Little War in India's Camelot*, INDEPENDENT, Sept. 17, 1991, at 7. This incident ignited the current military conflagration.

2. In this article, I use the phrase "the Kashmir dispute" to refer to the conflict over the entire area that used to be the princely state of "Jammu and Kashmir" under the British Indian Empire. Although the predominantly Muslim valley of Kashmir is the center of rebellion, the state of Jammu and Kashmir should not be confused with the valley of Kashmir. Jammu and Kashmir is the full name of the historically constituted princely state, which has five distinct areas: Jammu, Kashmir, Gilgit, Baltistan and Ladakh. Each area is separated from the others by rugged natural barriers. Because Gilgit, Baltistan and Ladakh were sparsely populated, the state is named after the more populated areas of Jammu and Kashmir. In fact, Kashmir is so prominent in the state that often the entire state is called Kashmir, injecting linguistic confusion into the discussion. Each area contains unique natural beauty and strategic value. Nonetheless, it is the fabled vale of Kashmir that sparks the imagination of poets, politicians and the people, and it is this area for which India and Pakistan have shed blood. "On a midsummer's day . . . pine-scented breezes cool the valley. Reflections of the snow-tipped Himalayas shimmer across Lake Dal. Quaint houseboats dot its shoreline Once the summer home of Mogul emperors and later a tourist haven, the Vale of Kashmir for centuries past has been extolled in song and verse as paradise on Earth. But over the past year, paradise has turned into hell." Robin Wright & Doyle McManus, *'Unconventional and Indiscriminate': The Changing Face of War*, L.A. TIMES, Dec. 18, 1990, at H5.

3. See *infra* notes 30-43 and accompanying text.

hundred semi-independent princely states,⁴ of which Jammu and Kashmir was one.⁵ From a legal viewpoint, these states had several options: they could accede to either India or Pakistan or they could become independent nation-states. Due to their geographic location and cultural and religious background, many states had no choice but to join India or Pakistan. Most did without much ado. Soon after partition, however, the question of the accession of Jammu and Kashmir became a source of serious conflict which remains unresolved. Both India and Pakistan claim the right to annex Kashmir, and each country has a significant military force occupying portions of Jammu and Kashmir, separated by an 870 mile "line of control."⁶

The Kashmir dispute is more than a conflict over territorial aggrandizement, however. Religion plays a critical role in shaping the dynamics of the dispute. The population of India is predominantly Hindu, and Pakistan is Muslim. Three major religions are represented in the state of Jammu and Kashmir. These religions are concentrated into groups that roughly correspond with the five distinct regions of Jammu and Kashmir.⁷ The vast majority of the people of Kashmir Valley and Gilgit are Muslim; Jammu is Hindu; Ladakh and Baltistan are Buddhist. Because the population of Kashmir exceeds the combined population of the other four areas, Muslims constitute a majority in the state as a whole.⁸ Based on the state's large Muslim population, Pakistan asserts a moral claim to Jammu and Kashmir. Muslims of Kashmir also demand independence from Hindu India, but Hindus of Jammu do not wish to join Muslim Pakistan.

4. These states, which I call "princely states," were part of the historic territory of India, but were ruled by independent royal houses. Even under British dominion, the rulers maintained autonomy over domestic affairs. See *infra* notes 30-35 and accompanying text.

5. See *supra* note 2 and accompanying text.

6. This line of control was established as a de facto border between India and Pakistan under the Simla Agreement. Agreement on Bilateral Relations, July 2, 1972, India-Pak., 858 U.N.T.S. 71. [hereinafter Simla Agreement].

7. See *supra* note 2 and accompanying text.

8. According to the 1941 census, the total population of the state of Jammu and Kashmir was about 4 million, of which 3 million were Muslim. See IAN STEPHENS, PAKISTAN 196, 204 (3d ed. 1967). According to Lord Birdwood, Muslims were in the majority in all provinces of the state. In the Jammu province, there were 1,215,676 Muslims and 765,757 non-Muslims (most Hindus were centered around the city of Jammu). In the Kashmir province, there were 1,615,478 Muslims and 113,227 non-Muslims. In the Frontier District, consisting of Ladakh, Baltistan and Gilgit Agency, there were 270,093 Muslims and 41,385 non-Muslims. See LORD BIRDWOOD, INDIA AND PAKISTAN 302 (1954). Soon after the partition of the Indian subcontinent in August 1947, hundreds of thousands of Muslims in the Jammu province died, fled to Pakistan or were killed by Hindus and Sikhs, thus turning Jammu into a predominantly Hindu province. See STEPHENS, *supra*, at 200.

The current crisis in Kashmir poses a serious threat to the peace and security of the region. Although India and Pakistan have officially been at peace since 1972,⁹ their troops confront each other across the "line of control," exchanging artillery fire almost daily. Whenever the conflict between Kashmiri insurgents and Indian security forces escalates, and border clashes become more frequent, a war psychosis grips the subcontinent.¹⁰ Both countries hide behind intricate legal arguments to support their respective positions on Kashmir. Their high officials do not hesitate to make daring statements. Often, this war of words employs explicit threats of the use of force.

India and Pakistan have already fought three intense but brief wars over Jammu and Kashmir.¹¹ Except for India's forceful sweep into East Pakistan, now Bangladesh, in 1971, most of the fighting affected only areas with low populations.¹² Any war in the future, however, is likely to be more vicious and widespread. Both India

9. See Simla Agreement, *supra* note 6.

10. In this article, I use the phrase "the Indian subcontinent" to refer to the three principal states of India, Pakistan and Bangladesh. Of course, the Indian subcontinent may be defined to also include Bhutan and Nepal, two geographically contiguous states which share the Indian cultural tradition.

11. The first war occurred in 1947. When the Maharajah requested assistance from India to repel an invasion by Pakistani tribesmen, Indian troops entered the State of Jammu and Kashmir. Fearing that India might absorb the entire state, the regular Pakistani army, with the help of private soldiers, occupied the northwestern portion of the state.

The second war occurred in 1965, when the Kashmir Valley was in a turmoil over the theft of a sacred hair from the Hazratbal mosque. Disguised as local tribesmen, Pakistani soldiers crossed the border to support the uprising in Kashmir. Later on, a full-fledged war broke out. Indian forces crossed the border not only in Kashmir but in other areas as well.

The third war occurred in 1971, when, due to the Pakistani military rule in East Pakistan, millions of Bengalis fled to India. India invaded East Pakistan in the name of humanitarian intervention. Although there was some fighting in Kashmir, the main battle ground remained in East Pakistan. India defeated Pakistan, and East Pakistan was severed from West Pakistan. East Pakistan became Bangladesh, and West Pakistan assumed the title of Pakistan. This war created the "line of control" that now divides the State of Jammu and Kashmir into two portions. The Indian-held portion of Jammu and Kashmir is the place of current controversy. The Pakistani-held portion of Jammu and Kashmir is further divided into two areas. The northern areas of Gilgit and Baltistan have been absorbed into Pakistan. The remaining territory, called Azad Kashmir, is also under Pakistani control. Azad Kashmir, however, has a separate government.

In every war with India, Pakistan was defeated. There is nonetheless a common belief among Pakistanis that they are better fighters than Hindus. Ironically, in the last war, on December 16, 1971, the Pakistani general surrendered his arms and men to three Indian generals—a Parsi, a Sikh, and a Jew—none of whom was a Hindu. See RICHARD SISSON & LEO E. ROSE, *WAR AND SECESSION: PAKISTAN, INDIA AND THE CREATION OF BANGLADESH* 5, 234 (1990)

12. Rodney W. Jones, *Old Quarrels and New Realities: Security in Southern Asia After the Cold War*, WASH. Q., Winter 1992, at 105, 118.

and Pakistan accumulated sophisticated weaponry in the 1980s.¹³ Internal secessionist threats in both countries place additional stress on military establishments to show convincing force.¹⁴ In view of the geo-political changes caused by the collapse of the Soviet Union, India might use any future war with Pakistan as an opportunity to establish its credentials as a regional superpower. In turn, Pakistan might overreact to the growing Indian domination in the region and fight a preemptive, all-out conventional war. Although a nuclear war

13. *Id.* at 120.

14. Although the Kashmir dispute is the most notable disturbance in relations between India and Pakistan, other secessionist movements also inflame hostility and mutual distrust. In East Punjab, for example, India accuses Pakistan of supporting the "terrorist activities" of Sikhs who have been disenchanted with India ever since the military bombed their holiest shrine, the Golden Temple. The Sikhs now demand a separate homeland. See Ben Tierney, *Khalistan: A Cause and Its Terrible Effects: Punjab Now Land of Fear for 20 Million*, VANCOUVER SUN, Feb. 25, 1992, at B14 (reporting how some Sikh groups favor an independent state, called Khalistan).

Pakistan blames India for the secession of East Pakistan, now Bangladesh, even though the Pakistani military was probably to blame for the defection of the people of the region. See *Letter Dated Dec. 12 1971 from the Representative of India to the Secretary General*, U.N. SCOR, 26th Sess., Agenda Item 102, at 2, U.N. Doc. S/10445 (1971) (reporting that 10 million refugees from East Pakistan (Bangladesh) have sought shelter in India to escape death and dishonor at the hands of the West Pakistani Army); see also RICHARD B. LILLICH, *INTERNATIONAL HUMAN RIGHTS* 566-67 (2d ed. 1991). There was international opposition to India's humanitarian intervention in Bangladesh even though they intervened in response to "gross violations of human rights committed by Pakistani army in East Pakistan." *Id.* at 572. India is also accused of training criminal elements in the Pakistani province of Sindh, where robbery, abduction and murder are commonplace.

In addition to these separatist movements, a general pattern of violence has developed on the subcontinent. Numerous political leaders have been assassinated. Diplomats, foreign consultants and tourists have been kidnapped to extort ransom, and some have been murdered. Javed A. Malik, *Pakistani Army Moves Against Sindh Bandits*, *Nikkei Wkly.*, June 13, 1992, available in LEXIS, Nexis Library, Nikkei File (reporting that ransom was paid to obtain the release of Japanese students abducted by bandits in Pakistan; reporting also the abduction of prominent industrialists and executives of multinational companies); see also Tim McGirk, *India Train Massacre Caps Year of Violence*, *INDEPENDENT*, Dec. 29, 1991, at 12 (reporting the massacre of Hindus committed by Sikhs).

In this context of violence and mutual suspicion, India and Pakistan are set on a collision course. Rather than devoting their energies to alleviate the wretched condition of a billion people living on the subcontinent, the governments of India and Pakistan pursue the same irrational policy: they aggravate each other's internal difficulties but hold each other responsible even for problems of their own making. See Mushahid Hussain, *Pakistan: Passion over Kashmir Clouds Ties with India*, *Inter Press Service*, Jan. 31, 1990, available in LEXIS, Nexis Library, Inpres File; see also *Pakistan Parliament Debates Troop Deployment in Sindh*, *Agence France Presse*, May 26, 1992, available in LEXIS, Nexis Library, AFP File (reporting that Pakistan accuses the Research and Analysis Wing (RAW), India's national intelligence agency, of providing funds along with moral and material support to nationalist and terrorist organizations); *Pakistan Says Indian Spies Aiding Sabotage*, *Reuter Library Report*, May 26, 1992, available in LEXIS, Nexis Library, Lbyrpt File (reporting that Pakistani Interior Minister "had proof" that RAW was fueling sabotage and terrorism in Sindh).

between India and Pakistan is highly unlikely, the Kashmir dispute could escalate into such a catastrophe.

The situation is complicated by the existence of Kashmiri separatist groups,¹⁵ who have mounted a violent campaign to force India to grant them self-determination.¹⁶ Since Muslim Kashmir is likely to choose either accession to Muslim Pakistan or independence, India is unwilling to acquiesce and instead remains determined to hold on to Kashmir at all costs. India dismisses the uprising as "state-sponsored terrorism" and blames Pakistan for fostering mischief in the area.¹⁷ Although Pakistan denies giving arms to Kashmiri extremists, it has launched a spirited diplomatic offensive to condemn India in every available international forum for denying Kashmiris their right of self-determination.¹⁸ Some Islamic groups in Pakistan propose radical strategies to "free" Kashmir. They offer the example of the Afghan victory against the Soviet Union to argue that a militant Islamic resistance can eventually defeat the occupier.¹⁹ At

15. There are about six primary Kashmiri separatist groups, with about 45,000 armed fighters, most of whom are Muslim. McGirk, *supra* note 1, at 7.

16. "[T]he Kashmiris' demands for self-determination boiled to the surface in December 1989, when [Indian] paramilitary troops opened fire on a peaceful demonstration, killing many women and children." *Id.*

17. See Selig Harrison, *Sparks of War in Kashmir*, WASH. POST, Apr. 23, 1990, at A11 ("With Hindu revivalism growing, successive Indian leaders have been afraid to make the concessions that would have been necessary to defuse the growth of separatism."); see also K.K. Sharma, *Indian Premier Charges Pakistan with 'State Terrorism'*, FIN. TIMES, Jan. 2, 1992, at 3 (reporting that the Indian premier accused Pakistan of supporting terrorists in Punjab and Kashmir); *United Nations: India, Pakistan in Verbal Bout*, Inter Press Service, Sept. 30, 1991, available in LEXIS, Nexis Library, Inpres File (the Indian envoy accusing Pakistan of "state-sponsored terrorism" and "open interference in India's internal affairs.").

18. Pakistan has raised the Kashmir issue in the United Nations as well as in the Organization of Islamic Conference (OIC). It has also asked many countries, including the United States, Saudi Arabia and Iran, to mediate the dispute. See *India Rules Out Islamic Nations' Mediation on Kashmir*, Reuter Library Report, Dec. 4, 1991, available in LEXIS, Nexis Library, Lbyrpt File (reporting that India rejected the question of accepting any good officers, or fact finding or mediation missions from the OIC); see also Mir A.A. Khan, *India Bars OIC Team to Kashmir*, Middle East News Network, Nov. 29, 1991, available in LEXIS, Nexis Library, Menn File (reporting that the OIC passed a resolution to send a fact finding mission to get first hand information on the situation in Kashmir, but India would not allow the commission to enter Kashmir); *Pakistan Welcomes Iranian Offer of Mediation in Kashmir*, Reuter Library Report, Nov. 12, 1991, available in LEXIS, Nexis Library, Lbyrpt File (reporting that the Iranian President offered to mediate the Kashmir dispute); *Pakistani President Urges U.S. to Help Resolve Kashmir Dispute*, Agence France Presse, Sept. 14, 1993, available in LEXIS, Nexis Library, AFP File.

19. In December 1979, Soviet troops invaded and occupied Afghanistan. Afghan resistance forces, popularly known as the Mujahidin, were headquartered in Pakistan. With assistance from the United States and other countries, the Mujahidin launched a protracted attack against the Soviet forces as well as the Afghan government supported by the U.S.S.R.

the same time, Hindu fundamentalists pressure the Indian government to crack down on Kashmiri separatists.²⁰ India's paramilitary forces are employed to maintain law and order in the region, and their conduct has drawn extensive international attention.²¹ For example, their suppression of Kashmiri rebels is widely reported in the world media.²² Human rights watch groups criticize India's policy of not

Hailed as a war of liberation in the West, and as a holy war (jihad) among Muslims, the Afghan resistance was broadly supported by the international community. One commentator argued that under international law, (a) Mujahidin were entitled to fight against the Soviet Union, (b) they were entitled to seek support from third states, and (c) third states were under an obligation to provide such help to the Mujahidin. W. Michael Reisman, *Comment: The Resistance in Afghanistan Is Engaged in a War of National Liberation*, 81 AM. J. INT'L L. 906, 909 (1987).

Sometimes the difference between freedom fighters and terrorists depends on the perception of the observer. A supportive state may characterize an armed struggle as a war of liberation while a suppressive state may label the same armed struggle terrorism. Ali Khan, *A Legal Theory of International Terrorism*, 19 CONN. L. REV. 945, 945-47. In Kashmir, for example, India labels the Kashmiri resistance as terrorism supported by Pakistan, whereas Pakistan considers the Kashmiri armed resistance as a war of liberation, suppressed by India. Since such conflicts constitute a dispute under Article 33 of the U.N. Charter, supportive and suppressive states are under a legal obligation to resolve the dispute by peaceful means. *Id.* at 967-71.

20. The Bhartiya Janata party (BJP) is the main political organization representing Hindu fundamentalism. In December 1991, the President of the BJP left the southern tip of India leading a long march of 9,375 miles to hoist the Indian flag in Kashmir as a gesture to show that Kashmir is an integral part of India. This pilgrimage was designed to recreate the 1990 trip taken to the holy city of Ayodha, the birthplace of Lord Rama, to construct a Hindu temple in place of an existing mosque built during the Muslim rule. The temple trip helped the BJP win many more seats in the 1991 general elections in which the BJP emerged as the main opposition party. See T.S.K. Lingam, *Hindu Pilgrimage Prompts Violence, Threats*, UPI, Jan. 25, 1992, available in LEXIS, Nexis Library, UPI File. In December, 1992, the mosque was demolished by a Hindu mob. See Edward Gargan, *Savage Intolerance: Fundamentalism in South Asia Isn't All Islam*, N.Y. TIMES, Dec. 4, 1992, § 4, at 1 (reporting the events and sociopolitical factors leading to the demolition of the mosque).

21. See Barbara Crossette, *Two Reports Find Wide Abuses by India in Kashmir*, N.Y. TIMES, Nov. 8, 1992, at A12 (reporting that American human rights organizations, such as Asia Watch and Physicians for Human Rights, cite human rights violations in Kashmir, which has been under martial law since 1990, with all civil rights suspended and troops empowered to shoot on sight during curfews); see also Wright & McManus, *supra* note 2, at H5.

22. The most infamous report is the Kunan rape story: the shocking disclosure of mass rape by Indian soldiers in the village of Kunan Poshpora on the Kashmir Valley's northern border with Pakistan which is used for infiltration. Rajiv Tiwari, *India: Controversial Human Rights Campaigns in Kashmir*, Inter Press Service, July 26, 1991, available in LEXIS, Nexis Library, Inpres file. The Kunan story was covered in newspapers like *The New York Times* and followed closely by human rights groups such as Amnesty International and Asia Watch. *Id.* But the Press Council, India's independent media, found the Kunan rape story "baseless." Many human rights activists charge the Press Council with hiding the truth in Kashmir. *Id.* Since 1990, at least 12,000 people, mostly civilians, have been killed in Indian-held Kashmir. *Carnage in Kashmir*, TIMES, Aug. 12, 1993, at 17.

allowing Amnesty International into the territory.²³ The United States Congress and the European Parliament also have expressed their concern over human rights abuses by Indian security forces.²⁴

This article examines the failure of India and Pakistan over the past forty-five years to resolve the Kashmir dispute. It lays out the legal history of the conflict over the territory to provide a basis for a new solution derived from the principles of self-determination and regional cooperation. Part I explores the nature of the dispute, highlighting India and Pakistan's inconsistent approaches to the princely states' right of self-determination, which led to decades of hostility and confrontation.

Part II describes the United Nations Security Council's legal positions in its attempts to settle the dispute over Jammu and Kashmir. It discusses how India and Pakistan failed to implement the Security Council resolutions or to cooperate fully with the United Nations officials appointed to mediate the dispute. This section also explains why the Security Council proved ineffective in settling the Kashmir dispute, and why India and Pakistan embarked upon the course of mutual hostility and attrition that continues to exist to this day.

Part III analyzes the existing bilateral regime of the 1972 Simla Agreement as a means for resolving the dispute. It shows that bilateralism has produced few, if any, positive results—negotiations start and stall without making progress towards any solution of the Kashmir dispute. This section also points out that bilateralism has become an excuse for delay and a new source of stalemate since it mandates the settlement of all disputes through consensual methods, but does not provide any specific mechanism for such dispute resolution.

23. Astri Ghosh, *India Defends Human Rights Record*, Inter Press Service, Aug. 12, 1991, available in LEXIS, Nexis Library, Inpres File (the Indian government has argued that foreign organizations like Amnesty are not accountable to the people of India, but the Indian government is).

24. See *Pakistan Welcomes European Resolution on Kashmir* (BBC radio broadcast, Mar. 21, 1992) (reporting that Pakistan described the resolution as a very significant event); Olivia Ward, *India Rejects US Reprimand on Human Rights*, TORONTO STAR, June 27, 1991, at A21 (rejecting the reprimand of the U.S. congress); see also *EEC/Pakistan: European Parliament Delegation Pays a Visit*, European Report, Nov. 13, 1991, available in LEXIS, Nexis Library, Eurprt File (the European Parliament delegation condemned the flagrant violations of human rights in the India-held Kashmir). But see *Indian Commentary on "Strange Manner" of European Parliamentary Resolution* (BBC radio broadcast, Mar. 20, 1992) (reporting that the resolution was adopted by 12 votes in favor, 2 against and 169 abstained).

Part IV outlines a new solution for India and Pakistan's dispute over Kashmir. This solution consists of two concrete proposals. The first proposal divides Jammu and Kashmir between India and Pakistan in accordance with the right to self-determination, and in such a way as to avoid any major dislocation of the people living in Jammu and Kashmir. The second proposal recognizes the benefits of regional cooperation, as shown by the global trend toward such efforts,²⁵ and highlights the work of the South Asian Association for Regional Cooperation (SAARC), a regional community in the Indian subcontinent. It suggests that India and Pakistan can resolve the Kashmir dispute more easily through a system of regional cooperation.

I. THE NATURE AND ORIGIN OF THE KASHMIR DISPUTE

The genesis of the Kashmir dispute cannot easily be traced back to a single time or event. Often the manner in which a dispute is defined determines its historical origin. If the Kashmir dispute, for example, is simply about whether the territory should be allocated to India or Pakistan, then the 1947 partition of historic India provides its origin.²⁶ If the dispute is viewed primarily as a religious or cultural conflict, it began to take shape when Kashmiri Hindus were converted

25. See generally Ali Khan, *The Extinction of Nation-States*, 7 AM. U. J. INT'L L. & POL'Y 197 (1992) (arguing that nation-states are in the process of possible extinction and that regional communities will replace nation-states).

26. When the British decided to withdraw from India, the threat of a civil war between Hindus and Muslims and the concomitant cleavage between Hindu and Muslim leadership made it clear that the two communities could no longer live together in a united country. On June 2, 1947, Lord Mountbatten announced the plan to partition British India into two states, India and Pakistan. Contiguous Muslim-majority areas under the direct rule of the British crown would become Pakistan. Punjab and Bengal were the most critical provinces because their division would determine the final contours of India and Pakistan. According to the plan, the Legislative Assemblies of the provinces of Punjab and Bengal voted to partition their respective provinces. Subsequently, a Boundary Commission demarcated the boundaries of the two parts of Punjab by ascertaining the contiguous areas of Muslims and non-Muslims. East Punjab, predominantly inhabited by Sikhs and Hindus, became part of India. West Punjab, predominantly inhabited by Muslims joined West Pakistan. A similar boundary was demarcated in the province of Bengal, separating the predominantly Hindu portion of West Bengal from the predominantly Muslim portion of East Bengal, which along with other areas constituted East Pakistan (now Bangladesh). On July 15, the British House of Commons passed the Indian Independence Act, and British India was divided into two independent states, India and Pakistan. LORD BIRDWOOD, *INDIA AND PAKISTAN* 33-36 (1954). For a detailed discussion of the controversy and events surrounding the partition of India, see generally H.V. HODSON, *THE GREAT DIVIDE* 266-355 (1985).

to Islam, long before the 1947 partition.²⁷ If it is a question of self-determination and a people's right to choose their political future, the continuation of the dispute might be legitimized by the contemporary human rights movement. Perhaps all of these views are legitimate and the concomitant historical context is relevant and ought to be considered. In the final analysis, however, the resolution of any international conflict demands that parties break out of the web of historical explanations and explore new and bold solutions. The Kashmir dispute requires such action.

A key question lying at the core of the Kashmir dispute is whether the people of Jammu and Kashmir have an internationally affirmed right of self-determination. Moreover, the meaning of self-determination is a critical point of contention between India and Pakistan. Theoretically, if such a right is indeed available, the people of Jammu and Kashmir should be free to accede to either country or to opt for a completely independent nation-state.

Neither India nor Pakistan have adopted a consistent approach to the issue of self-determination. Instead, both countries apply whichever legal principle will suit their interests in the particular accession dispute.²⁸ India argues that Jammu and Kashmir is an integral part of historic India. In contrast, Pakistan supports the right of self-determination, which would give the predominantly Muslim

27. Over the centuries, the state has undergone major transformations. Even though Hindu Kings ruled Jammu and Kashmir for over 2,000 years, most historians begin the history of the region with the reign of Asoka in the third century B.C. For many centuries, Jammu and Kashmir remained Hindu in its religio-cultural orientation. In the fourteenth century A.D., however, Kashmir was brought under Muslim rule, and in succeeding centuries an overwhelming majority of inhabitants embraced Islam.

For a few decades around the nineteenth century, Sikhs ruled Kashmir until they were overthrown by the British. In March 1846, the British government executed the Treaty of Amritsar which transferred the internal sovereignty over Jammu and Kashmir to the Dogra dynasty (Hindu) for a consideration of 7.5 million rupees. See LORD BIRDWOOD, *TWO NATIONS AND KASHMIR* at 207 (1956). In matters of defense and external relations, however, the state remained under the British control. Thus, Jammu and Kashmir became a princely state governed by Hindu princes belonging to the Dogra dynasty.

In 1850, the Dogra Maharajah sought to encourage the idea that Kashmiris return to the faith of their forefathers through an en masse reconversion to Hinduism, but the high Hindu priests refused to support his plan. The Dogra dynasty nevertheless imposed on Kashmiri Muslims stiff laws based on Hindu principles. For example, it was a capital offense to kill a cow, and special taxes were levied on the sacrifice of animals during Islamic festivals. Hindus who converted to Islam were legally obliged to forfeit their property. In April 1946, almost a hundred years after the signing of the Amritsar Treaty, the Muslim leadership in Kashmir launched a "Quit Kashmir" movement against the British Raj and condemned the treaty as a "Sale Deed." MICHAEL BRECHER, *THE STRUGGLE FOR KASHMIR* 14 (1953).

28. See *infra* text accompanying notes 32-40.

population of Jammu and Kashmir the option to accede to Pakistan. Neither country, however, recognizes that the people of Jammu and Kashmir have an inherent right to establish a separate nation-state. Both India and Pakistan view the Kashmir dispute from a nationalistic viewpoint, and claim the disputed territory on a theory of accession.²⁹ This restrictive notion of self-determination, under which the people may choose accession but not independence, is derived from the unique legal status that the princely states, including Jammu and Kashmir, had acquired in historic India.

Under British rule,³⁰ the geographical entity known as India contained 9 provinces and 584 princely states.³¹ The provinces constituted British India, and their internal and external affairs were under the control of the Crown.³² In contrast, the princely states retained their internal sovereignty, and their rulers, the Nawabs and

29. Over the years, India has expressed no desire to support an independent Jammu and Kashmir. In fact, it argues that the people of Jammu and Kashmir have already acceded to India. See *infra* text accompanying notes 59-60. Pakistan refuses to support secession movements such as the Jammu and Kashmir Liberation Front, a political organization advocating the independence of Kashmir from both India and Pakistan. See Edward A. Gargan, *Where Violence has Silenced Verse*, N.Y. TIMES, Nov. 22, 1992, §6, at 46, 50 (the majority of Kashmiris support the Jammu and Kashmir Liberation Front).

30. The British colonization of India began in the eighteenth century with the trade activity of the East India Company. HODSON, *supra* note 26, at 22. Before the eighteenth century, Muslims had been in control of India for several centuries beginning in A.D. 1018 when the first Muslim conqueror annexed Punjab. *Id.* at 9. The East India Company gradually began to assert its military and territorial control, precipitating the fall of the Muslim (Mogul) Empire. The Charter Act of 1833 abolished the Company's trading function and vested the power to assume the government of India in the Company. *Id.* at 23. In 1857, soon after the annexation of the Muslim kingdom of Oudh, "a sickening blow to Muslim pride," a part of the Indian army staged a "Mutiny" to expel the British from India. *Id.* Many princely states sided with the British in quelling the Indian rebellion. *Id.* at 24. In 1858, the Crown directly assumed the authority over India, officially establishing the British Empire. But Queen Victoria's proclamation of 1858 preserved the "dignity and honour of Native Princes" and their right of autonomy within the princely states. *Id.*

31. These princely states emerged over the centuries for varied reasons. Some began as estates that Muslim Kings granted to certain individuals or families, while others were ancient hereditary fiefdoms. Some princely states came into existence more recently under the British Raj. DURGA D. BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 43 (9th ed. 1982). These haphazardly created princely states were scattered over the subcontinent, covering more than 45% of its surface. Some were small, occupying only a few acres of land, while some, including Jammu and Kashmir, were almost as large as the United Kingdom. Hyderabad and Kashmir, for example, were large states. Each occupied more than 80,000 square miles and each contained more land than England. See ALASTAIR LAMB, THE KASHMIR PROBLEM at 3 (1954).

32. BASU, *supra* note 31, at 43.

Maharajahs,³³ enjoyed considerable independence in running the domestic affairs of their states. These states were, however, subject to the "paramountcy of the Crown" for their external relations and defense.³⁴ This paramountcy relationship prevented the states from being the sovereign subjects of international law.³⁵

When colonial rule was lifted from the subcontinent in 1947, the provinces of British India were divided between the two new countries of India and Pakistan in accordance with the population-majority formula.³⁶ The trauma of carving two different nation-states out of the same historic land left deep scars on the divided peoples of the subcontinent. Since Pakistan "broke away" from the mainland, it became overly-protective of its separateness; since India was "divided," it resented the very idea of partition. Thus set in opposition, India and Pakistan became mutually suspicious and alienated, and each country embarked upon an arbitrary course of protecting its national interests.

The princely states, however, were exempt from any division under the British plan. The British Crown revoked the power of paramountcy, declaring that "all the rights surrendered by the states to the paramount power will return to the states."³⁷ There was a general consensus in British legal circles that the revocation of paramountcy conferred upon the states the juridical authority to choose their future.³⁸

The new states of India and Pakistan adopted different positions on the "sovereignty" of princely states. India considered princely

33. The Muslim prince assumed the title of Nawab; the Hindu prince preferred the title of Maharajah. Some princes shared little ethnic, religious or historical background with their subjects. Junagadh and Kashmir, for example, presented a vivid contrast. A Muslim Nawab ruled Junagadh, a predominantly Hindu state, whereas a Hindu Maharajah ruled Jammu and Kashmir, an overwhelmingly Muslim state.

34. Article 9 of the 1846 Treaty of Amritsar, for example, provides that the British government "will give its aid to Maharajah Gulab Singh in protecting his territories from external enemies." See BIRDWOOD, *supra* note 27, at 208.

35. In order for any state to be the subject of international law, it must satisfy four criteria: population, territory, effective government and the capacity to enter into international relations. Since Indian states had surrendered their foreign relations authority to the British Crown, they had no status in international law. However, the technical question remains whether these states regained sovereignty when the Crown revoked its power of paramountcy over them.

36. Those states with a predominantly Hindu population and a Hindu dynasty were compelled to accede to India, whereas predominantly Muslim states were virtually forced to join Pakistan. See BRECHER, *supra* note 27, at 21-22.

37. *Id.* at 18.

38. *Id.* at 19.

states as integral parts of a large and falsely divided motherland. Long before the 1947 Partition, the Indian leadership had rejected the idea of having princely states within a state. In 1936, Jawaharlal Nehru declared that India could "never admit the right of Indian States to continue as feudal and autocratic monarchies. They have long survived their day . . . and have become the strangest anomalies in a changing world."³⁹ Nehru's opinion had a profound moral appeal⁴⁰ since most princes were anachronistic relics of the feudal order who consumed the resources of their states for their own luxury and opulence without much regard to the pressing needs of their people.⁴¹

Pakistan agreed with the British view that all princely states had the sovereign right to choose their future as they pleased. This concept made sense to Pakistan, since it owed its own existence to the idea of self-determination.⁴² Moreover, Pakistan spurned the over-inclusive generalization that all princely states were historical anomalies or that their people had lost the right to self-determination simply because they had bad princes.⁴³

39. SISIR GUPTA, *KASHMIR: A STUDY IN INDIA-PAKISTAN RELATIONS* 36 (1966) (quoting Nehru's presidential address to the Lucknow Congress in April 1935).

40. See GUPTA, *supra* note 39, at 33. Not every Indian leader, however, shared Nehru's vision of an indivisible country. *Id.* at 34-36.

41. Jawaharlal Nehru complained that princely "states were probably the extremist type of autocracy existing in the world." See JAWAHARLAL NEHRU, *AN AUTOBIOGRAPHY* 530-31 (1989).

42. When the British decided to withdraw from India, the Indian political leaders offered two competing visions. Led by Jawaharlal Nehru, one political leadership, including both Hindus and Muslims, argued for a united country in which religious, linguistic and ethnic difference would coexist under a strong secular state. In contrast, the other vision emphasized the fundamental difference between Hindus and Muslims. Led by Mohammed Ali Jinnah, these political leaders, almost all of them Muslim, realized that in a united country, Hindus would constitute a majority, and, Muslims of India would become a permanent minority. Moreover, there was a growing sentiment among millions of Muslims that they could better protect their heritage in a separate homeland. The creation of Pakistan incorporated this vision of difference and the right of self-determination. Still, even after the creation of Pakistan, many millions of Muslims who lived in predominantly Hindu areas were left behind in India. Thus today, Muslims in India constitute a substantial minority and there is an uneasy coexistence between Hindus and Muslims, often erupting into violent clashes.

43. Pakistan did not take a consistent view on the accession of princely states. With respect to Jammu and Kashmir, however, Pakistan's views were clear. Geographically, historically, linguistically and culturally, Kashmir is a natural extension of Pakistan. Moreover, Pakistan's three important rivers—the Indus, the Jhelum and the Chenab—flow down from the state to Pakistan. JOSEF KORBEL, *DANGER IN KASHMIR* 139 (1954). The letter "K" in Pakistan stands for Kashmir, as almost every other letter also stands for a specific province of Pakistan ("P" for Punjab, "S" for Sindh, etc.). Kashmir also connects Pakistan with Afghanistan and other Central Asian Muslim areas of the former Soviet Union.

The future of princely states, therefore, presented profound legal and moral questions. If all princely states were merely historical fragments of an indivisible country, India was justified in demanding reunification. Such a sweeping generalization failed to acknowledge that some princely states had indeed separated from the parent society. Pakistan's position that the princely states must be given the right to choose their destiny was clearly defensible. In reality, most princely states could not survive on their own, and had little choice but to accede to either India or Pakistan. Most states acceded; however, three important states—Hyderabad, Jammu and Kashmir, and Junagadh—refused to join either country. Consequently, on August 15, 1947, the day when the Crown officially terminated its colonial Raj over India, the question remained whether the non-committed princely states had retained the right to decide their status.⁴⁴ Despite India's aversion to the anachronistic status of princely states, it did not reject the right of princely states to choose accession. Instead, it pursued a complex policy of territorial aggrandizement, often switching its position to justify the appropriation of a princely state reluctant to join India.

Pakistan also lacked a coherent policy on the issue of self-determination. Even though Pakistan supported the principle of self-determination in general, it overlooked the critical question of who should exercise the right of self-determination—the people of the princely state or the ruler. As events unfolded, India mobilized its military force to annex the non-committed princely states, including Jammu and Kashmir. Pakistan was too weak to counter India.

The first accession controversy arose when the Nawab of Junagadh, a Muslim, announced his decision, contrary to the opinions expressed by the citizens, who were predominantly Hindu, to accede to Pakistan.⁴⁵ When Pakistan notified India that it had accepted the accession, India protested on the legal grounds that a Muslim ruler could not decide the accession of his state contrary to the expressed will of his Hindu subjects, especially when far removed from the borders of Pakistan.⁴⁶ Instead, India advocated the alternative rule that the people of the princely state had the inherent right to express their preference for the country they wished to join. The Indian army subsequently entered Junagadh, and a referendum was held. As

Without Kashmir, Pakistan feels it is incomplete.

44. GUPTA, *supra* note 39, at 47.

45. *Id.* at 79-84.

46. *Id.* at 80-81.

expected, the people of Junagadh overwhelmingly voted for India.⁴⁷ India thereby established the principle that, in the case of a conflict between the people and the ruler of a princely state, the people, not the ruler, had the right to choose accession. In contrast, Pakistan seemed to defend the right of the ruler to opt for accession, even if the ruler acted contrary to the wishes of the people.

The legal debate surrounding the question of accession acquired new complexity when the Maharajah of Jammu and Kashmir requested accession to India.⁴⁸ India accepted the request contrary to its previous position that the ruler had no legal standing to decide the question of accession.⁴⁹ On October 22, 1947, armed tribesmen (private soldiers) from northwest Pakistan entered Jammu and Kashmir, and besieged many important towns.⁵⁰ Fearing the imminent fall of Srinagar, the capital of Kashmir, and holding Pakistan directly responsible for the mischief, the Maharajah requested immediate assistance from Lord Mountbatten, then Governor-General of India, and dispatched the instrument of accession.⁵¹

Although India recognized that the ruler of Jammu and Kashmir could make a valid accession, India did not go so far as to reject the principle of popular will as the basis for final accession. The Maharajah's accession was thus considered no more than a *temporary legal mechanism* that assigned India the legal authority to repulse the

47. *Id.* at 82-83 (seeing the writing on the wall, the Nawab of Junagadh and his family fled to Pakistan).

48. Letter from Maharajah Sir Hari Singh to Lord Mountbatten (Oct. 26, 1947), in BIRDWOOD, *supra* note 27, at 214.

49. See Letter from Lord Mountbatten to Maharajah Sir Hari Singh (Oct. 27, 1947), in BIRDWOOD, *supra* note 27, at 214.

50. The whole state burst into flame and the communal slaughter turned vicious: Sikhs and Hindus murdered Kashmiri Muslims; Kashmiri Muslims and armed tribesmen killed Sikhs and Hindus. BIRDWOOD, *supra* note 27, at 62; see BRECHER, *supra* note 27, at 149.

51. The Maharajah vowed not "to leave my State and the people to freebooters . . . so long as I am the ruler of the State and I have life to defend my country." Letter from Maharajah Sir Hari Singh to Lord Mountbatten (Oct. 26, 1947), in BIRDWOOD, *supra* note 27, at 214. The next day, on October 27, India accepted the accession of the state and sent troops to restore law and order in Kashmir and have "its soil cleared of the invader." *Id.* Lord Mountbatten assured the Maharajah that Indian troops would "defend your territory and . . . protect the lives, property and honour of your people." Letter from Lord Mountbatten to Maharajah Sir Hari Singh (Oct. 27, 1947), in BIRDWOOD, *supra* note 27, at 214. Ironically, however, the Maharajah had left Kashmir on October 26 with all his relatives and property, never to return. The Maharajah turned out to be no better savior of his people than the Nawab of Junagadh. BIRDWOOD, *supra* note 27, at 62.

unlawful incursion of foreign tribesmen.⁵² In accepting the accession of the Maharajah, Lord Mountbatten referred to the "special circumstances [of private aggression]," and added that "as soon as law and order have been restored . . . the question of the State's accession should be settled by a reference to the people."⁵³ Mountbatten introduced the principle of restrictive self-determination into the moral and legal debate surrounding the accession of princely states. This concept did not address the people's right to establish an independent nation-state. It only authorized socially approved accession. Accordingly, Mountbatten maintained "that in the case of *any state* where the issue of accession has been the subject of dispute, the question of accession should be decided in accordance with the wishes of the people of the state"⁵⁴

Pakistan then faced a dilemma. If the ruler of the princely state had the exclusive right to choose accession, as Pakistan argued in the case of Junagadh, the Maharajah's accession to India would be lawful under Pakistan's own legal view. On the other hand, if the Maharajah's accession to India was to be challenged, Pakistan might have to abandon its previous interpretation of self-determination, which would weaken its claim to Junagadh. Of course, Pakistan chose to argue that the Maharajah could not lawfully accede to India without the approval of the people. This ironic twist of events in Jammu and Kashmir forced Pakistan to reverse its morally inconsistent position on the right of self-determination in Junagadh, and champion the opposite view, that the people of the princely state, and not the ruler, had the preemptive right to decide the question of final accession. Regardless of the strength of the legal justifications on each side, India succeeded in appropriating Junagadh as well as Jammu and Kashmir because of its superior military strength. India's proclivity

52. India did not use the Maharajah's request for accession as a definitive legal basis to annex Jammu and Kashmir, but rather used it as a legal cover to send troops to the state to counter the private invasion by Pakistani tribesmen. This temporary accession was not supposed to last for long because India promised to settle the final question of accession by a reference to the people of Jammu and Kashmir. See *infra* text accompanying notes 54-55.

53. Letter from Lord Mountbatten to Maharajah Sir Hari Singh (Oct. 27, 1947), in BIRDWOOD, *supra* note 27, at 214. Mountbatten's letter was of course written with the approval of the Indian leadership, including Nehru. A referendum to settle the controversial accession of Junagadh was actually held about four months after Mountbatten's letter to the Maharajah. This further bolstered the impression that India's declared intention to enforce the principle of referendum in Jammu and Kashmir was a serious legal commitment, and not merely a tactical pretext to divert international attention from its military occupation. Note that Mountbatten was appointed as the first Governor-General of an independent India, and the letter repeatedly referred to the Dominion of India as "my Government." *Id.*

54. *Id.* (emphasis added).

for using force became conspicuous when India sent its troops to acquire the third non-committed princely state, Hyderabad.⁵⁵

Some critics accuse India of bringing about the forced merger of recalcitrant princely states.⁵⁶ India's policies toward Junagadh, Jammu and Kashmir, and Hyderabad were legally inconsistent. In theory, the issue of accession should be resolved on some uniform basis. One might argue that India employed situational morality. In Junagadh, for example, the referendum for accession underscored the principle of restrictive self-determination. In Jammu and Kashmir, the Maharajah's accession furnished India with a legal basis to defend the state. In Hyderabad, where no official referendum was held and where the ruler did not accede, the "forced accession" to India brought about by troops was presumed to have the tacit approval of the predominantly Hindu population. In each annexation there was a different rationale, but a similar goal, namely, merger with the mainland.⁵⁷

The use of military force provided the only consistency in India's policy. India's situational morality, however, made sense to those who aspired to weld together the historically fragmented territories of the Indian subcontinent into a new nation-state. Some would say that India superimposed a moral layer over this policy of nationalistic aggrandizement, designed perhaps for the international audience in order to create India's image as a progressive state in which all religious communities could live together under a secular

55. Seeing the fate of Junagadh and Kashmir, the Nizam, the Muslim ruler of Hyderabad, sought to remain independent. He proposed to enter into an association treaty with India in matters of defense, foreign affairs and communication. India rejected the idea of association. Located in the heart of mainland India, an internally sovereign Hyderabad would have entrenched "a state within a state"—a concept that Nehru had firmly rejected. *See supra* notes 40-41 and accompanying text. The Nizam sent a delegation to the United Nations Security Council requesting arbitration with India. This move to internationalize the issue annoyed the Indian officials. Muslim insurgents (Razakars) in Hyderabad intensified their campaign to prevent any forced accession to India. Citing a deteriorating law and order situation in Hyderabad, Indian troops forced their way into the state, and a Military Governor was installed. The Muslim insurgents were arrested, and the Nizam dethroned. *See GUPTA, supra* note 39, at 88. Since the population of Hyderabad was largely Hindu, India assumed, without the benefit of a vote, that the majority had indeed opted for merging with the mainland.

56. *See* Thomas Franck, *Of Gnats and Camels: Is There a Double Standard at the United Nations?*, 78 AM. J. INT'L L. 811, 815 (1984) (arguing that India has repeatedly chosen to take law into its own hands in Hyderabad, Kashmir, Goa and Bangladesh). *See also* Thomas Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 745 (1988) (asserting that India denied self-determination to the princely state of Kashmir).

57. LAMB, *supra* note 31, at 10, 15.

democratic system.⁵⁸ Hindus, Sikhs and many Muslims shared the idealistic goal to unite, rather than divide, the historic land. This shared enthusiasm has dwindled in the past few years, at least for Sikhs in East Punjab and Muslims in Kashmir, who feel threatened by Indian security forces and a powerful Hindu fundamentalist movement.

To this day, the terms of the ideological debate over the question of accession, especially in Kashmir, have not changed. Pakistan still argues that India is bound to fulfill its promise to resolve the question of Jammu and Kashmir's accession according to the wishes of the people. As the discussion in the next section shows, the Kashmir dispute became an international issue when India referred it to the United Nations Security Council. Even though the Security Council failed to resolve the dispute, it passed some important resolutions bearing upon the future of Jammu and Kashmir.⁵⁹ One resolution directed the parties to hold an internationally supervised plebiscite in Jammu and Kashmir to resolve the question of final accession.⁶⁰ Pakistan maintains that these resolutions are still valid and binding on India. India, however, no longer seems interested in these resolutions, and makes complex legal and moral arguments that the people of Jammu and Kashmir have already expressed their wishes to join India.

Over the succeeding decades, when all international efforts to demilitarize the Kashmir region failed, the dispute underwent a fundamental transformation. Initially, the dispute was over whether the State of Jammu and Kashmir in its entirety belonged to India or Pakistan. There is some evidence to show that both countries gradually began to accept the idea that the historical State of Jammu and Kashmir was a divisible entity. To this day, the official rhetoric on both sides still refers to Jammu and Kashmir as if it were a monolithic entity.⁶¹

In reality, the State of Jammu and Kashmir has been partitioned between India and Pakistan. India occupies about two-thirds of the

58. KORBEL, *supra* note 43, at 25-43.

59. On April 21, 1948, the Security Council passed an important resolution that became the principal term of reference for subsequent international efforts to solve the Kashmir dispute. See S.C. Res. 47, U.N. SCOR, 3d Sess., Supp. for Apr. 1948, at 8, U.N. Doc. S/726 (1948).

60. *Id.* at 3.

61. See *supra* note 2.

territory, while Pakistan and China occupy the rest.⁶² In fact, the existing apportionment of the four regions of the state—Gilgit, Baltistan, Ladakh and Jammu—seems to have occurred close to the fault lines of religion.⁶³ The Kashmir Valley is now the main focus of the dispute because it is a Muslim region occupied in large part by Hindu India.

II. INTERNATIONAL EFFORTS TO MEDIATE THE KASHMIR DISPUTE

A. *From Security Council Resolutions to Territorial Stalemate*

For many years, the United Nations Security Council played an active role in mediating the Kashmir dispute between India and Pakistan.⁶⁴ The Security Council assumed jurisdiction over the dispute when India lodged a complaint under Chapter Six of the United Nations Charter against Pakistan for its alleged assistance to the private soldiers who had invaded Jammu and Kashmir.⁶⁵ In its complaint, India promised to settle the question of final accession of Jammu and Kashmir in accordance with the wishes of the people, but only after the invaders had been evicted from the state and normal

62. The total area of Jammu and Kashmir is 222,236 square kilometers. Pakistan occupies 78,932 square kilometers and China occupies 42,735 square kilometers. STATESMAN'S YEARBOOK 1990-91, at 665 (John Paxton ed.). India and China fought a war in 1962 which led to the Chinese annexation of Aksai Chin, a strategic region in the Indian held portion of Jammu and Kashmir. In 1963, Pakistan ceded to China a portion of Pakistani controlled Jammu and Kashmir. These areas of Jammu and Kashmir enabled China to link its two remote provinces of Tibet and Xinjiang and build the strategic Karakoram Highway to Pakistan. See Brahma Chellaney, *China Presents New Proposal to Resolve Border Dispute with India*, UPI, Nov. 3, 1992, available in LEXIS, Nexis Library, UPI File. China and Pakistan are linked by the Karakoram Highway through the Pakistani occupied portion of Jammu and Kashmir. "The glacier is near the Chinese border in the Baltistan area of the [portion of Jammu and Kashmir occupied by Pakistan]." Gregory Copley, *Pakistan on the Brink*, DEFENSE & FOREIGN AFF., Apr. 1989, at 4, 29. India may use the conflict over the Glacier to cut off "this link between Pakistan and her principal strategic ally," China. *Id.*

63. The sparsely inhabited provinces of Baltistan and Ladakh did not pose any serious problem because their Buddhist population fell outside the Hindu-Muslim conflict. Gilgit, a predominantly Muslim region, fell under Pakistani control, while Jammu, a predominantly Hindu region is occupied by India. See Gargan, *supra* note 29, at 50 (reporting that Kashmiri militant groups "insist that India cede all of Jammu and Kashmir State, including Jammu, which is predominantly Hindu, and Ladakh, which is largely Buddhist").

64. In fact, the Kashmir dispute was one of the first two disputes (the other is the Palestinian question) submitted to the U.N. Security Council after the United Nations was established in 1945.

65. Letter from the Representative of India to the President of the Security Council, (Jan. 1, 1948), U.N. Doc. S/628 (1948), in Annex 28, at 139, *Interim Report of the United Nations Commission for India and Pakistan*, U.N. SCOR, 3d Sess., Supp. for Nov. 1948, at 17, U.N. Doc. S/1100 (1948) [hereinafter Indian Complaint].

conditions restored.⁶⁶ In its counter-complaint Pakistan challenged the validity of Kashmir's temporary accession to India,⁶⁷ and protested the dispatch of Indian troops to Jammu and Kashmir. Pakistan's argument was premised on the notion that the presence of Indian armed forces in Kashmir would vitiate the conditions of freedom necessary for the people to express their will.⁶⁸

Pursuant to Article 34 of the U.N. Charter,⁶⁹ the Security Council established a Commission on India and Pakistan (UNCIP) which would, among other things, investigate the facts and exercise its mediatory influence to smooth away difficulties.⁷⁰ The Security Council then passed Resolution 47, which became the principal point of reference for subsequent international efforts to solve the Kashmir dispute.⁷¹ Most significantly, Resolution 47 supported restrictive self-determination and recognized "that the question of accession of Jammu and Kashmir to India or Pakistan should be decided through the democratic method of a free and impartial plebiscite."⁷² In addition, Resolution 47 outlined the procedure by which a plebiscite would be held in Jammu and Kashmir. A Plebiscite Administrator appointed by the United Nations Secretary General⁷³ would supervise the election, and the U.N. Commission was required to certify that the plebiscite was "really free and impartial."⁷⁴ Resolution 47 established a simple guiding principle that the final accession of Jammu and Kashmir should be decided in accordance with the wishes of the people, confirmed through an internationally supervised referendum.

66. *Id.* at 141.

67. Letter from the Minister for Foreign Affairs of Pakistan to the Secretary General (Jan. 15, 1948), U.N. Doc S/646 & Corr. 1 (1948), in Annex 6 at 67, *Interim Report of the United Nations Commission for India and Pakistan*, U.N. SCOR, 3d Sess., Supp. for Nov. 1948, at 17, U.N. Doc. S/1100 (1948) [hereinafter Pakistani Reply].

68. *Id.* at 72.

69. U.N. CHARTER art. 34 ("The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security").

70. S.C. Res. 39, U.N. SCOR, 3d Sess., at 2, U.N. Doc. S/654 (1948). The Commission gave itself the name United Nations Commission on India and Pakistan. The Commission was initially comprised of three representatives. Later the Security Council increased its membership to five. See S.C. Res. 47, *supra* note 59, at 3.

71. S.C. Res. 47, *supra* note 59, at 3, 4.

72. *Id.* at 2.

73. *Id.* at 3.

74. *Id.* at 15.

A free and impartial plebiscite, however, could not be held in the presence of Indian and Pakistani armed soldiers. To guarantee that the plebiscite would be held without any fear or coercion, Resolution 47 called upon Pakistan to secure the withdrawal of its private soldiers from Jammu and Kashmir.⁷⁵ It also called on India to reduce its armed forces to the minimum strength required for the maintenance of law and order. In theory, Resolution 47 was founded on a morally defensible principle that a free and fair plebiscite could not be held in an occupied territory, and that, therefore, all occupying forces must withdraw from Jammu and Kashmir.⁷⁶ The implementation of this theory, however, posed difficult practical problems. For example, India rejected the proposal of simultaneous withdrawal and insisted that all Pakistani private soldiers should leave Jammu and Kashmir *before* any Indian troops were withdrawn.⁷⁷

The question of demilitarization became more complex when Pakistan, without notifying the Security Council,⁷⁸ assembled its regular troops behind the armed tribesmen, called the Azad (Free) forces.⁷⁹ This major new development changed the essence of the Kashmir dispute. From that point on, the idea of plebiscite was entangled with the intricate question of demilitarization. India maintained that no plebiscite would be held unless the Azad forces and Pakistani troops withdrew unconditionally from all occupied areas

75. *Id.* at 4.

76. The withdrawal plan proposed in Resolution 47 required Indian forces to withdraw in stages once the U.N. Commission was satisfied that the "[Pakistani] tribesmen are withdrawing." *Id.* at 2. India rejected the Resolution as "unreasonable" and refused cooperation in any implementation of the Resolution. KORBEL, *supra* note 43, at 112. India, however, left open the possibility of conferring with the U.N. Commission. Corrigendum to the Letter Dated 5 May 1948 from the Representative in India to the President of the Security Council, S/734/Corr. 1.

77. KORBEL, *supra* note 43, at 112.

78. According to S.C. Res. 38, U.N. SCOR, 3d Sess., at 1, U.N. Doc. S/651 (1948), Pakistan and India were obligated to inform the Security Council of "any material change in the situation." *Id.* Pakistan sent three brigades to Kashmir without notifying the Security Council. See *Interim Report of the United Nations Commission for India and Pakistan*, U.N. SCOR, 3d Sess., Supp. for Nov. 1948, at 18, 25, 30, U.N. Doc. S/1100 (1948) [hereinafter 1948 UNCIP Report].

79. Although Pakistani private tribesmen began the invasion of Jammu and Kashmir, Pakistan's civil and military officials became actively involved in the organization and the management of the campaign of these private soldiers, called the Azad (Free) forces. When the Indian Army began to retake areas conquered by Azad forces, a large number of Kashmiri Muslims fled over the border to Pakistan. Provoked by the inflow of refugees, frightened by the advancing Indian army, and fascinated by the territorial fruits of private invasion, Pakistan's regular troops occupied portions of Jammu and Kashmir. See KORBEL, *supra* note 43, at 93; BIRDWOOD, *supra* note 27, at 67-78; BRECHER, *supra* note 27, at 27-33.

in the state.⁸⁰ Pakistan insisted that, since no plebiscite would be fair and impartial in the presence of Indian troops, the withdrawal of Pakistani forces should be synchronized, both in timing and number, with the withdrawal of Indian forces.⁸¹

Perhaps to break the political impasse, the rival armed forces poised against each other began to fight, initiating the first war between India and Pakistan in 1947.⁸² The U.N. Commission obtained a cease-fire agreement,⁸³ but failed to design a formula acceptable to both parties for the withdrawal of their armed forces from the region.⁸⁴ Displaying a profound mutual suspicion,⁸⁵ India

80. Indian Complaint, *supra* note 65, at 141 (once the soil of the State of Jammu and Kashmir was made clear of invasion, its people would be free to decide their own future).

81. Pakistani Reply, *supra* note 67, at 80, para. 15.

82. *See supra* note 11.

83. On January 1, 1949, Pakistan and India signed the cease-fire agreement. Seven months later, they reached an agreement on the demarcation of the cease-fire line. *See Agreement Regarding the Establishment of Cease-Fire Line in the State of Jammu and Kashmir*, July 27, 1949, 81 U.N.T.S. 273. The UNCIP commended India and Pakistan "for their prompt action in ordering cease-fire . . ." *See Resolution of the U.N. Commission for India and Pakistan (Jan. 5, 1949)*, U.N. SCOR, 4th Sess., Supp. No. 4, at 25, 27, U.N. Doc. S/1430 (1949). Soon thereafter, the first U.N. Military Observer Group was posted to supervise the cease-fire line in the state. The Security Council later authorized the continued supervision of U.N. troops. *See S.C. Res. 91*, U.N. SCOR, 6th Sess., at 1, U.N. Doc. S/2017/Rev. 1 (1951). A de facto partition of the state thus began to assume a quasi-legal status.

84. *See Resolution of the UN Commission for India and Pakistan (August 13, 1948)*, U.N. SCOR, 3rd Sess., Supp. for Nov. 1948, at 32-34, U.N. Doc. S/1100 (1948). This resolution proposed a withdrawal strategy in which Pakistan would use its best efforts to secure the withdrawal of tribesmen and other Pakistani private soldiers. After the tribesmen and private soldiers had withdrawn and while the Pakistan forces were being withdrawn, India would begin to withdraw the "bulk of its forces" in stages subject to the UNCIP's approval. The territory evacuated by the Pakistani troops would be administered by "local authorities." India, however, was allowed to retain the minimum forces necessary to maintain law and order. The resolution further proposed that, upon acceptance of the truce agreement, India and Pakistan would enter into consultations with the UNCIP to determine fair and equitable conditions to hold a plebiscite. *Id.*

India was relatively pleased with the resolution. Pakistan, however, attached so many reservations, qualifications and assumptions to its acceptance that the UNCIP regarded it "as tantamount to rejection." KORBEL, *supra* note 33, at 145. Posing many objections to the soundness of the resolution, Pakistan distinguished itself from Azad Kashmir (the territory that the tribesmen and private soldiers had conquered), and argued that the UNCIP had failed to recognize Azad Kashmir as a necessary party to the dispute. Moreover, Pakistan objected to the uneven arrangement under which all of its troops were required to withdraw from the occupied lands while a portion of Indian armed forces would continue to operate in the state. The language used in the resolution was also problematic. Ambiguous phrases such as "bulk of Indian troops" and "local authorities" were almost certain to create new frictions in the subcontinent which had, over the centuries, nurtured a tradition of linguistic nit-picking.

and Pakistan both remained determined to hold on to their territorial gains, thus creating a baffling stalemate. In several successive resolutions the Security Council reiterated that the question of accession should be decided "through the democratic method of a free and impartial plebiscite."⁸⁶ The U.N. Commission, as well as individual mediators appointed by the Security Council, failed to negotiate the demilitarization of the occupied State of Jammu and Kashmir, and the deadlock persisted.⁸⁷

Further rebuffing the expressed will of the Security Council, India gradually shifted away from its commitment to hold a plebiscite in Jammu and Kashmir. Several factors contributed to India's reversal on the question of the state's right to self-determination including the de facto partition of the state, the cold war, the state's proximity to the Soviet Union and China, the United Nations' failure to mediate, the political developments within Jammu and Kashmir and India's resolve to retain the territories under its control. India sensed that an internationally supervised plebiscite was risky since it would have no choice but to give up the occupied territories if the outcome was unfavorable. A flat refusal to hold a plebiscite was equally unattractive because it would diminish India's credibility in the international community.

85. Gilgit, one of five areas of the state, had already acceded to Pakistan and was under the control of the Pakistan Army. Using Gilgit as its base, Pakistani armed forces further advanced into the Northern Area of the state and occupied the strategic regions of Baltistan, Skardu, Kargil and Dras. As the year closed, Pakistan had occupied part of Kashmir, Gilgit, Baltistan, and a portion of Ladakh. India remained in control of most of Kashmir, Jammu and a substantial segment of Ladakh. Thus, the State of Jammu and Kashmir—consisting of the five distinct areas of Kashmir, Jammu, Gilgit, Baltistan and Ladakh—was partitioned between India and Pakistan. The rival armed forces on both sides engaged in daily skirmishes and in frequently serious battles. Three days after the Indian troops recaptured Dras and Kargil, two strategic locations in the Ladakh Valley, Pakistan was prepared to sign an immediate cease-fire.

86. S.C. Res. 47, *supra* note 59, at 8; *see also* G.A. Res. 80, U.N. GAOR, 5th Sess., Supp. No. 2, at 13, U.N. Doc. S/1469 (1950); S.C. Res. 91, U.N. SCOR, 6th Sess., Supp. for Jan.-Mar. 1951, at 26, U.N. Doc. S/2017/Rev. 1 (1951); S.C. Res. 96, U.N. SCOR, 7th Sess., Spec. Supp. No. 1, at 12, U.N. Doc. S/2392 (1951); S.C. Res. 98, U.N. SCOR, 7th Sess., Supp. for Oct.-Dec. 1952, at 66, U.N. Doc. S/2883 (1952); S.C. Res. 122, U.N. SCOR, Supp., 12th Sess., Jan.-Mar. 1957, at 4, U.N. Doc. S/3779 (1957); S.C. Res. 126, U.N. SCOR, 12th Sess., Supp. for Oct.-Dec. 1957, at 21, U.N. Doc. S/3922 (1957).

87. Frank Graham, the U.N. mediator, concluded in his reports that one of the main obstacles was the difference over the number and character of forces to be left on each side at the end of the period of demilitarization. *See Third Report to the Security Council of the United Nations Representative for India and Pakistan*, U.N. SCOR, 7th Sess., Spec. Supp. No. 2, at 15, UN Doc. S/2611 (1952); *Fourth Report to the Security Council of the United Nations Representative for India and Pakistan*, U.N. SCOR, 7th Sess., Spec. Supp. No. 2, at 33, UN Doc. S/2783 (1952).

To join these incompatible concerns into a new moral paradigm, the Indian Constitution provided a legal formula to incorporate the Indian-held Jammu and Kashmir into the Dominion of India.⁸⁸ Accordingly, India invented the idea of the State Constituent Assembly as a "legitimate" mechanism through which the people of Jammu and Kashmir could express their will. The circumstances under which the Jammu and Kashmir Constituent Assembly acceded the occupied territories to India were dubious. First, it was "elected" without any actual balloting.⁸⁹ Second, since India had substantial

88. Article 370 of the Indian Constitution conferred a degree of internal autonomy. It limited the National Parliament's power to make laws for the State of Jammu and Kashmir. The National Parliament could make laws only with respect to matters specified in the instrument of accession. On any other matter, the Parliament had no vested power to legislate without concurrence of the Government of Jammu and Kashmir. Article 370 further contemplated that a Constituent Assembly would be convened for the purpose of framing the Constitution of the State. This right to frame a constitution was conferred only on the people of Jammu and Kashmir, and not the people of any other princely state. Furthermore, the President of India could not modify or abrogate Article 370 without the approval of the Constituent Assembly of Jammu and Kashmir. Thus, Article 370 vested in the Constituent Assembly the power to preserve the internal autonomy of the state. See INDIA CONST. art. 370.

Official explanations were duplicitous in clarifying the purpose of Article 370. One official view reiterated India's international position that the accession of Jammu and Kashmir was subject to confirmation of the people of the state. BIRDWOOD, *supra* note 27, at 178. The other projected that "in due course Jammu and Kashmir will become ripe for the same sort of integration as has taken place in the case of other States." KORBEL, *supra* note 43, at 220. Article 370 itself is couched in a language designed to appease both domestic and international concerns. The Article, for example, is presented as a "temporary" measure. See INDIA CONST. art. 370. The label "temporary" served a dual purpose. Domestically, it referred to a transitional period after which the state would be fully incorporated into the Union. Internationally, it alluded to the state's temporary accession to India suggesting thereby that India was not reneging on its promise to consider the wishes of the people. The people of Jammu and Kashmir, however, were now required to express their wishes through a Constituent Assembly, not a plebiscite.

89. To legitimize the process, the Indian leadership sought the support of local politicians in Indian-held Jammu and Kashmir. Just like the Muslims of the subcontinent, the Muslims in Indian-held Jammu and Kashmir were split into two distinct groups. The All Jammu and Kashmir *National* Conference, a political organization of secular forces under the leadership of Sheikh Abdullah, sided with India embracing the concept of a "secular democracy based upon justice, freedom and equality for all without distinction." See THE HON'BLE SHEIKH MOHAMMED ABDULLAH, JAMMU AND KASHMIR CONSTITUENT ASSEMBLY, OPENING ADDRESS (Nov. 5, 1951), reprinted in GUPTA, *supra* note 39, at 367. The All Jammu and Kashmir *Muslim* Conference, a rival political organization, focused upon Islamic identity rejecting promises of the Hindu majority that all religious and political groups would have equal protection under the laws.

The Indian leadership, of course, encouraged political consolidation of the National Conference. In October 1947, for example, when the Maharajah fled to India, Pundit Nehru appointed Sheikh Abdullah of the National Conference to be the head of an interim government in Jammu and Kashmir. As a quid pro quo, Sheikh Abdullah dismissed Pakistan as a "feudal state" and argued that accession to Pakistan would not serve the political and

control over the constitutional process, as well as the final constitutional draft, the Assembly was no more than a convenient surrogate. Third, as the Constituent Assembly began its deliberations, complex communal forces were unleashed, revealing that the historically constituted territories of Jammu and Kashmir shared little in common. Separatist movements in Hindu Jammu and Buddhist Ladakh began to challenge the legitimacy of the local state government which was drawn primarily from Muslim Kashmir.

Arguing that Kashmiri Muslims could not rely on Indian promises and that the communal riots in Indian-held Jammu and Kashmir were financed by India, the existing local government drifted away from the idea of final accession to India.⁹⁰ Nonetheless, the pro-Indian Constituent Assembly adopted a state constitution under which the State of Jammu and Kashmir became an integral part of the Union of India.⁹¹ Over the years, however, whenever the elected

economic interests of Jammu and Kashmir. The elections to the Constituent Assembly were scheduled to be held in October 1951. The pro-India National Conference nominated its candidates for all seventy-five seats. Opposition parties, including the Muslim Conference, refused to participate in the elections. On election day, however, no voting took place. The National Conference "won" all seventy-five seats: seventy-three candidates were declared "winners" because they ran unopposed; the opposition candidates for the remaining two seats dropped out before the polling began. Thus, the Constituent Assembly of Jammu and Kashmir came into existence without balloting. Pakistan condemned the elections as a "farce." See GUPTA, *supra* note 39, at 366; KORBEL, *supra* note 43, at 222.

90. See Sheikh Abdullah, *Kashmir, India and Pakistan*, 43 FOREIGN AFF. 530, 533-34 (1965). Branded as a supporter of foreign powers (Pakistan, Britain and the United States), Abdullah was finally overthrown and arrested. The National Conference, however, remained in power and the new leadership vowed to maintain indissoluble links with India. See KORBEL, *supra* note 43, at 241-42. A few months later, the Constituent Assembly ratified the state's final accession to India.

Soon thereafter, India expanded the powers of its President to assert more authority in the affairs of occupied territories and to bring about their final assimilation into the Union. In 1954, the President of India in consultation with the government of the Indian-held Jammu and Kashmir (in accordance with Article 370(1)(b)(i) of the Indian Constitution) passed a law to expand the jurisdiction of the Union that was previously restricted to only three subjects: defense, foreign affairs and communications. See BASU, *supra* note 31, at 5. Moreover, the President was authorized to bring occupied territories under federal control if their constitutional machinery failed to operate. In other words, if the people of the occupied territories engage in massive demonstrations to protest for their right of self-determination or if the local government, either through collusion or incompetence, fails to maintain law and order, the President may suspend the local government and bring the occupied territories under his direct rule. The President also has the option to place the territories under the direct control of the state's governor. *Id.* at 24. Both mechanisms have been used to quell local demonstrations.

91. In November 1956, the Constituent Assembly adopted a constitution for the entire State of Jammu and Kashmir. The State Constitution came into force in January 1957. But a few constitutional provisions, including Sections 3 and 5 (providing that the state is an integral part of India), "came into force at once." See JAMMU AND KASHMIR CONST. § 2.

local government in the Indian-held Jammu and Kashmir showed any direct or indirect support for the idea of self-determination, India suspended the local government and brought the occupied territories under its direct rule.⁹²

The idea of the Constituent Assembly as an alternative to a plebiscite failed to persuade the world that the people in the Indian-held Jammu and Kashmir were engaged in a process of self-determination.⁹³ At the outset, the Security Council passed a resolution that

Sections 3 and 4 of the Constitution, which were immediately implemented, reaffirm the state's accession to India. Section 3 declares that the State of Jammu and Kashmir "is" and "shall be" an integral part of the Union of India. Section 4 states that the state shall comprise all the territories which were under the sovereignty of the Ruler (Maharajah) on August 15, 1947. This means that Pakistani-held territories belong to the State of Jammu and Kashmir.

At one level of interpretation, Section 4 defines the state as an indivisible whole and rejects the de facto partition by which certain territories had fallen under Pakistani control. One might argue that Sections 3 and 4 contemplate that the territories under Pakistani control shall be retrieved and the state would be made whole again. Thus, not only the Indian-held territories, but the entire State of Jammu and Kashmir shall be an integral part of India. At another level of interpretation, however, one might suggest that the Jammu and Kashmir Constitution contains the flexibility to accommodate the partition of the state between India and Pakistan. This flexibility is present in substantive restrictions placed on future amendments to the Constitution. Apparently to rule out the possibility of acceding the entire state to Pakistan, the State Constitution provides that no amendment shall be introduced to change the provision of Section 3. This implies that the State of Jammu and Kashmir in some shape and form shall always remain an integral part of India. The Constitution, however, does not preclude an amendment to Section 4, which describes the territory of the state. If the state were legally partitioned between India and Pakistan, Section 4 could be amended to redefine the territory allotted to India. Any such territories described in the amended Section 4 would constitute the State of Jammu and Kashmir. As such there would be no need to amend Section 3. By allowing a possible amendment to Section 4 but not to Section 3, it appears that the drafters of the State Constitution interpolated into its provisions the possibility of a future partition of the state.

The Assembly also functioned as the legislature of the state. In November 1951, the Assembly passed a law to reaffirm the state's autonomy in all affairs except defense, foreign affairs and communications. The law drastically curtailed the authority of the Maharajah, making him accountable to the Assembly.

92. See *South Asia: India, Pakistan Step up Vigil on Tense Border*, Inter Press Service, Apr. 5, 1993, available in LEXIS, Nexis Library, Inpres File (reporting that Kashmir has been under the central rule since 1990 when the elected government was dismissed for not being able to restore law and order); see also *India Extends Kashmir Rule*, N.Y. TIMES, Mar. 2, 1993, at A13, (reporting that India's parliament extended the direct rule over the state of Jammu and Kashmir).

93. The Soviet Union, however, began to reject the idea of holding a plebiscite under international supervision and argued that the Constituent Assembly of Indian-held Jammu and Kashmir was a legitimate mechanism to solve the Kashmir problem. For over four years, the Soviet Union had abstained from voting on Security Council resolutions regarding the Kashmir dispute. But in the wake of the cold war, the Soviet Union altered its politics of abstention and accused the United States and the United Kingdom of using the conflict in Kashmir to advance their geopolitical designs. See KORBEL, *supra* note 43, at 255-56.

rejected the legal authority of the Assembly⁹⁴ by holding that any action taken by the Constituent Assembly to determine the future shape and affiliation of Jammu and Kashmir would fail to satisfy the principle of plebiscite.⁹⁵ Moreover, the Security Council observed that the area from which the Constituent Assembly would be elected was only a part of the entire territory of Jammu and Kashmir,⁹⁶ since substantial parts of the State of Jammu and Kashmir had come under Pakistani control. Any Constituent Assembly, even if it were genuinely elected in the Indian-held territories, would not represent all the people of the State of Jammu and Kashmir. Consistent with its previous resolutions, the Security Council reaffirmed that the final accession of Jammu and Kashmir would have to be decided by an internationally supervised free and impartial plebiscite.

B. From the Security Council's Disengagement to the Tashkent Declaration

When the United Nations mediators failed to create the necessary conditions to hold a plebiscite, the Kashmir dispute faded away into the more pressing dynamics of the cold war. India was not anxious to alter the status quo, perhaps because it accepted the existing partition of Jammu and Kashmir. Pakistan, on the other hand, was unsatisfied, primarily because Kashmir, the predominantly Muslim province of Jammu and Kashmir, was on the Indian side of the dividing line. In view of widespread discord between the United States and the Soviet Union, the Security Council was unable to reach a new consensus for resolving the Kashmir dispute. In the absence of United Nations involvement, the Kashmir dispute mutated from a territorial deadlock, in which both sides refused to withdraw their occupying forces, to an international stalemate characterized by the inability of the international legal system to end the forced partition of Jammu and Kashmir. This international indifference towards the Kashmir dispute increased the probability of another war between India and Pakistan.

Frustrated over the failure to resolve the dispute through international institutions, Pakistan embarked upon a course of forcing India out of Kashmir without adequately calculating the potential

94. S.C. Res. 91, *supra* note 86, at 1.

95. *Id.*

96. *Id.*

harm in this policy.⁹⁷ Pakistan's strategy was to foment a massive uprising in Kashmir against Indian occupation and then drive out the Indian troops with military force. Pakistan assumed that it could generate and sustain a massive uprising in Kashmir against India, that its armed forces could defeat the Indian forces, and that the fighting would be confined to the State of Jammu and Kashmir because India would not dare to violate the international border between India and Pakistan.⁹⁸ In reality, events did not unfold according to the Pakistani script. The people in Kashmir did rise against India, but their rioting was lukewarm.⁹⁹ When the Pakistani armed forces violated the cease-fire line in Jammu and Kashmir, the Indian forces marched into Pakistan and threatened to take over important Pakistani cities.¹⁰⁰ Although Pakistani forces made slight territorial gains across the cease-fire line, they could not liberate Jammu and Kashmir.

The United Nations Security Council intervened and passed several resolutions designed to restore the status quo ante bellum. These resolutions, however, did not address the problem of ending the conflict. Resolutions 210 and 211 demanded a cease fire and called upon the two governments to withdraw promptly all armed personnel back to the positions held before initiation of the war.¹⁰¹ The Security Council retained the authority to consider "what steps could

97. Pakistan's frustration over the status quo was perhaps legitimate. But whether this frustration provided Pakistan with a legitimate excuse to go to war is a separate question. The logic of war is not derived simply from legitimate grievances. Weaker states often tolerate the excesses of a mighty foe to preserve themselves against greater harm. Pakistan lost the war.

In the years preceding the 1965 war, Pakistan's internal political system had become increasingly suppressive. While democracy flourished in India, it failed in Pakistan. In 1958, Pakistan experienced the first military coup d'etat, and it remained essentially under the rule of a bureaucratic-military axis for the next several decades. The military rule often suspended the fundamental rights of the citizens. Pakistan began to acquire a new image rooted in the undemocratic tradition of the Middle East, becoming yet another state that does not take democracy seriously. Furthermore, it began to lose its moral credentials in the fight for self-determination in Kashmir. A country that diminishes rights of its own citizens surrenders the moral high ground to speak for the freedom of others. Indifferent to Pakistan's militaristic image in the eyes of the people of the subcontinent and the international community, the bureaucratic-military axis brought Pakistan almost to the brink of extinction. See generally AYESHA JALAL, *THE STATE OF MARTIAL RULE* 295-328 (1990).

98. M. ASGHAR KHAN, *THE FIRST ROUND: INDO-PAKISTAN WAR 1965, 75-76* (1979).

99. See Sumit Ganguly, *Avoiding War In Kashmir*, *FOREIGN AFF.*, Winter 1990-91, at 57, 60-61.

100. The military pressure on Lahore, the intellectual center of Pakistan, served to demoralize the ruling bureaucratic-military axis. The potential attack on Sialkot located a few miles from Jammu reminded Pakistani military planners that a straight march into Jammu and Kashmir would not be easy.

101. S.C. Res. 210, U.N. SCOR, 20th Sess., 1238th mtg. at 20, U.N. Doc. S/6662 (1965).

be taken to assist towards a settlement of the political problem underlying the present conflict."¹⁰² These resolutions did not require the holding of a plebiscite. Moreover, neither resolution invoked prior resolutions requiring a plebiscite in Jammu and Kashmir. Instead, Resolution 211 called upon the two governments to utilize all peaceful means listed in Article 33 of the UN Charter, such as negotiation and mediation, to resolve the Kashmir dispute.¹⁰³

Accordingly, India and Pakistan accepted the Soviet Union as a mediator,¹⁰⁴ and negotiated the Tashkent Declaration.¹⁰⁵ The Tashkent Declaration established a legal regime which explicitly reaffirmed the de facto partition of the state. The Declaration required the rival armed forces to withdraw to the positions they had held prior to the initiation of war,¹⁰⁶ thus neutralizing all territorial gains. In addition, both parties agreed to observe the cease-fire line in the State of Jammu and Kashmir.¹⁰⁷ Recognizing that the interests of their peoples were not served by continuing the tension between them,¹⁰⁸ India and Pakistan promised to discourage the use of harmful propaganda¹⁰⁹ and to work to prevent the exodus of people from the region.¹¹⁰ Finally, they decided to meet to discuss all matters of direct concern to both countries as they arose in the future.¹¹¹ Thus, both parties acknowledged the existence of the Kashmir dispute by agreeing to disagree and by setting forth their respective positions, rather than ignoring the possibility that the other side might have a valid claim.¹¹²

The Declaration is also notable for what it did not contain. After losing the war, Pakistan was in no position to demand the

102. *Id.*

103. U.N. CHARTER art. 33, ¶1 (parties to any dispute shall seek a solution by "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."); S.C. Res. 211, U.N. SCOR, 20th Sess., 1242d mtg. at 13, U.N. Doc. S/6694 (1965).

104. SUMIT GANGULY, *THE ORIGINS OF WAR IN SOUTH ASIA* 91 (1986).

105. Tashkent Declaration, Jan. 10, 1966, India-Pak., 560 U.N.T.S. 39.

106. *Id.* art. II, at 40.

107. *Id.*

108. *Id.* art. IV, at 40.

109. *Id.* art. IV, at 40-41.

110. *Id.* art. VIII, at 42.

111. *Id.* art. IX, at 42.

112. *See id.* art. I, at 40. Each party set forth its respective position on Kashmir, but both reaffirmed their obligation under the U.N. Charter not to resort to force and to settle their disputes through peaceful means.

inclusion of a specific recognition of Jammu and Kashmir's right to self-determination in the text of the Tashkent Declaration. Nonetheless, the Declaration did not explicitly repudiate the idea of a plebiscite either.

The military withdrawal provision of the Tashkent Declaration had theoretical as well as practical significance. Since the rival troops had crossed both the previously marked cease-fire line in Jammu and Kashmir and the international border in Sind and Punjab, the withdrawal provision sought to restore both borders.¹¹³ By requiring the restoration of both borders, the Tashkent Declaration had the effect of reaffirming the partition of Jammu and Kashmir between India and Pakistan. Moreover, the Declaration did not distinguish between the two categories of boundaries, implying that they must both be treated with equal respect. This equal treatment of the international border and the cease-fire line was a legal victory for India because the *de facto* partition of the state had acquired a legal status. For Pakistan, the Kashmir Valley was still in dispute.¹¹⁴

III. THE FAILURE OF BILATERALISM

Less than seven years following the signing of the Tashkent Declaration, the Kashmir dispute entered into a new stage that endures today. This phase originated under the Simla Agreement,¹¹⁵ which India and Pakistan signed at the end of their third armed conflict—the war in Bangladesh.¹¹⁶ The Simla Agreement

113. *Id.* art. II, at 40.

114. Under the Tashkent Declaration, India and Pakistan renounced the use of force and agreed to settle their disputes through peaceful means. This provision deprived Pakistan of the military option that India had effectively used in the princely states of Junagadh and Hyderabad. Furthermore, the Declaration upheld the principles of territorial integrity and non-interference prohibiting India and Pakistan from meddling into the internal affairs of each other. The principle of non-interference prevented Pakistan from supporting any subversive elements in the Indian-held Jammu and Kashmir. Pakistan could perhaps still morally support any movement for the liberation of Kashmir. Any material support to Kashmiri rebels, however, would violate the Tashkent Declaration.

115. Simla Agreement, *supra* note 6, at 71 (the Agreement deals, among other things, with the development of friendly relations, the resumption of communications including postal, telegraphic and air links, promotion of travel facilities, trade, and cultural exchange).

116. The events in East Pakistan produced a situation of flawless irony. What the Pakistani leadership wished to have happen against India in Kashmir began to occur against Pakistan in its Eastern wing. In what would become Bangladesh, a massive movement surged against the injustices perpetrated by the bureaucratic-military-political axis in Islamabad. The people in the East were determined to sever their relationship with Pakistan. Huge caravans of refugees from East Pakistan flowed into India. Highlighting the alarming burden of "ten million refugees," India went on a diplomatic crusade to censure Pakistani

embodies India's longstanding position that the subcontinent would be better off if India and Pakistan settled their disputes through bilateral means.

Complex factors have motivated India to seek a comprehensive bilateral system. For example, India has mistrusted the West, including the United States, for what it calls its neocolonialism.¹¹⁷ Since Pakistan has adopted essentially a pro-West policy (and until recently has been a major recipient of U.S. aid), India assumes that foreign powers are willing to use Pakistan to further their own interests.¹¹⁸ To minimize any outside influence, therefore, India prefers to settle its disputes through a bilateral system. Moreover, India considers itself to be the regional superpower, and resents the "equal treatment" that India and Pakistan would receive if their differences were presented to a third party, including an international organization. This "superpower status" is less threatened if countries in the region are willing to negotiate directly with India. Bilateral contacts assure India a dominant position in the region, international

armed action as well as to prepare a favorable international opinion for its own military intervention in East Pakistan. SISSON & ROSE, *supra* note 11, at 177-187.

As the Indian troops entered Bangladesh to assert direct control, the United Nations Chief Military Observer reported that, in violation of the 1949 cease-fire line agreement, both India and Pakistan were laying minefields, constructing unauthorized positions and deploying their forces for another military showdown in Jammu and Kashmir. *Report of the Secretary General on the Situation along the Cease-Fire Line in Kashmir*, U.N. SCOR, 26th Sess., Supp. for Oct.-Dec., at 87, U.N. Doc. S/10412 (1971). Soon thereafter, Pakistani troops crossed the cease-fire line in many locations and Indian planes made air attacks on the Pakistan side. The war raged unabated for several days. The United Nations General Assembly intervened and called on India and Pakistan to institute a cease-fire and to withdraw troops from each other's territory. G.A. Res. 2793, U.N. GAOR, 26th Sess., Supp. No. 29, at 3 (1971). After a rapid and humiliating defeat, Pakistani soldiers in East Pakistan surrendered to Indian generals. Perhaps due to prodding by the United States, India did not vigorously pursue the war in West Pakistan. See BARRY M. BELCHMAN & STEPHEN S. KAPLAN, *FORCE WITHOUT WAR* 179 (1978). Cf. ROGER MORRIS, *UNCERTAIN GREATNESS* 223 (1977).

117. Opposing the American-led war against Iraq, India's closest friend in the Muslim world, Indian intellectuals led a condemnation of American "neocolonialism." In addition, to counter American influence in the region, India extended its 1971 treaty of friendship with the Soviet Union. See Barbara Crossette, *India Seeks to Extend Treaty with Soviets*, N.Y. TIMES, Mar. 24, 1991, § 1, at 11.

With the collapse of the Soviet Union, the world seems to have changed. The cold war dynamics that drove India toward Moscow and Pakistan toward Washington have lost their force. In the new world, India's cold war mistrust of Washington may be allayed if the United States is willing to play a more even-handed but effective role in persuading India and Pakistan to resolve the Kashmir dispute.

118. Pakistan, for example, provided a stiff opposition to the Soviet invasion of Afghanistan. It became the major conduit to deliver Western aid to Afghan fighters. As an ally of the Soviet Union and the Communist regime of Afghanistan, India resented Pakistan's role.

prestige and perhaps a stronger bargaining position in resolving outstanding disputes.

Instead of providing a reliable mechanism to resolve the Kashmir dispute, the Simla Agreement has become a new source of conflict between India and Pakistan. Whenever Pakistan requests that third parties, including international organizations, intervene to help resolve the Kashmir dispute, India argues that the bilateral regime of the Simla Agreement is the only valid mechanism to resolve the Kashmir dispute. Theoretically, India has a powerful legal position because the text of the Simla Agreement precludes all non-consensual methods of dispute resolution.¹¹⁹ Nonetheless, as discussed below, India's insistence upon strict bilateralism has borne no fruit.

The notion of bilateralism incorporated in the Simla Agreement transforms the nature of the Kashmir dispute in important ways. For example, it solidifies the existing status quo, prohibiting any unilateral changes with respect to the Kashmir dispute. Article 1(ii) of the Simla Agreement states: "Pending the final settlement of any of the problems between the two countries, neither side shall unilaterally alter the situation"¹²⁰ In order to freeze the Kashmir dispute as it is, the Simla Agreement introduces the concept of "the line of control."¹²¹ This line of control is not the same as "the cease-fire line" because many areas previously located on the Pakistani side of the cease-fire line are now under Indian control.¹²² The line of

119. The Simla Agreement states "[t]hat the two countries are resolved to settle their differences by peaceful means through bilateral negotiations or by any other peaceful means mutually agreed upon between them. Pending the final settlement of any of the problems between the two countries, neither side shall unilaterally alter the situation and both shall prevent the organization, assistance or encouragement of any acts detrimental to the maintenance of peaceful and harmonious relations." Simla Agreement, *supra* note 6, art. 1(ii), at 72. This language may be interpreted to assert that only consensual methods may be used to solve any bilateral issue between India and Pakistan. I argue, however, that such a rigid interpretation creates stalemate rather than solutions. See *infra* text accompanying notes 140-44.

120. Simla Agreement, *supra* note 6, art 1(ii), at 72.

121. *Id.* art. 4(ii), at 73. Although the line of control divides almost all regions of Jammu and Kashmir, it ends in "no man's land" just southwest of the Siachen Glacier, which is about 40 miles long and about 20,000 feet high. Indian and Pakistani armies clash frequently for control of the ridges that overlook positions held by India, Pakistan and China. Bilateral talks between India and Pakistan to demarcate the line of control in the Siachen Glacier have often failed. See *Pakistan Blames India for Failure of Talks*, Reuter Library Report, Nov. 11, 1992, available in LEXIS, Nexis Library, Lbyrpt File.

122. In the 1965 war, India had seized some strategic areas but then returned them to Pakistan under the Tashkent Declaration. This time India was determined to retain the prize—and it did. An important distinction may be noted. Under the Tashkent Declaration, all armed personnel of both countries withdrew to the positions held before the initiation of

control is the actual line that partitions the territories of Jammu and Kashmir between India and Pakistan. For all practical and legal purposes, the line of control, and not the cease-fire line, is the de facto border between Pakistani and Indian territories. The Simla Agreement mandates that neither India nor Pakistan shall try to alter the line of control unilaterally, such as through force or the threat of the use of force.¹²³

If India and Pakistan mean what they say in the Simla Agreement, one would think that force will not be used to alter the line of control. In fact, any such use of force would violate not only the Simla Agreement, but also a fundamental principle of the United Nations Charter.¹²⁴ Article 2, paragraph 4 of the U.N. Charter specifically requires that "[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity and political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."¹²⁵ The Simla Agreement twice refers to the U.N. Charter, thereby invoking the full force of contemporary international law. It first states "[t]hat the principles and purposes of the Charter of the United Nations shall govern the relations between the two countries."¹²⁶ It then specifically restates the text of Article 2, paragraph 4, mandating that India and Pakistan "refrain from the threat or use of force against the territorial integrity and political independence of each other."¹²⁷

The Simla Agreement further states that no mutual differences or legal interpretations may be invoked to justify any revision of the line of control.¹²⁸ For example, if the parties fail to settle their

hostilities. This provision neutralized any territorial gains the parties had made during the 1965 war, both across the international border as well as across the cease-fire line in Jammu and Kashmir. The Simla Agreement required the parties to withdraw forces to their side of the international border. In the State of Jammu and Kashmir, however, the parties agreed to respect "the line of control resulting from the cease-fire of December 17, 1971." The Simla Agreement did not require the parties to remove forces to their side of the cease-fire line. The "line of control" thus replaces the "cease-fire line" as the de facto border in Jammu and Kashmir between India and Pakistan. This modification of the 1949 cease-fire line was incorporated in the Simla Agreement to acknowledge the territorial gains that India had made during the 1971 war and its reluctance to yield them back to Pakistan.

123. Simla Agreement, *supra* note 6, art. 4(ii), at 73.

124. It is commonly accepted that Article 2, paragraph 4 has become a principle of customary international law and has the character of *jus cogens*.

125. U.N. CHARTER art. 2, ¶4.

126. Simla Agreement, *supra* note 6, art. 1(i), at 72.

127. *Id.* art. 1(vi), at 72.

128. *Id.* art. 4(ii), at 73.

mutual differences on the future fate of Jammu and Kashmir, the mere fact of stalemate may not be used as a basis to discard the line of control. Likewise, no party may argue against the existing line of control on legal grounds. Pakistan, for example, may not assert that the line of control is incompatible with the cease-fire line established in the 1949 cease-fire agreement.¹²⁹ The Simla Agreement has lawfully and effectively superseded the 1949 cease-fire line agreement.¹³⁰ The reinforcements built around the line of control are designed to preempt any imaginative interpretations that a party may conceive to challenge the validity of the new partition line.

Although the Simla Agreement stabilizes the situation in Kashmir, it does not purport to resolve the Kashmir dispute.¹³¹ First, the establishment of the line of control is "without prejudice to the recognized position of either side."¹³² Pakistan has not waived its claim to any territory in Jammu and Kashmir, including the strategic sections surrendered in the 1971 war. Similarly, India may still insist that the territory on the Pakistani side of the line of control has been unlawfully occupied. Second, the Simla Agreement recognizes that "a final settlement of Jammu and Kashmir" remains to be reached.¹³³ This acknowledgement that a mutually respected line of control is not the final solution to the problem further distinguishes the Simla Agreement from the Tashkent Declaration, in which no such stipulation was made. A separate and distinct clause of the Simla Agreement emphasizes the need to resolve "the basic issues and causes of conflict which have bedevilled the relations between the two countries" since the 1947 Partition.¹³⁴ Of course,

129. Agreement Regarding the Establishment of Cease-Fire Line in the State of Jammu and Kashmir, *supra* note 83, at 273.

130. See Vienna Convention On the Law of Treaties, May 23, 1969, art. 39-41, U.N. Doc. A/Conf. 39/27 (1969), reprinted in 63 AM. J. INT'L L. 875 (1969) and in 8 I.L.M. 679 (1969) [hereinafter Vienna Convention].

131. See Simla Agreement, *supra* note 6, art. 6, at 73. (India and Pakistan will meet at all levels to discuss modalities and arrangements towards a final settlement of Jammu and Kashmir). Despite India's strong bargaining power during the Simla negotiations, India did not impose a final solution of Jammu and Kashmir on Pakistan.

Several reasons might have influenced India's decision not to do so. Any forced solution would have brought more political and communal unrest in the subcontinent. A mortally wounded Pakistan was likely to be more dangerous in its desperate efforts to stand up to India. An unresolved Kashmir dispute might provide India with a future opportunity to retake the entire State of Jammu and Kashmir, particularly if Pakistan starts another war and then loses it.

132. *Id.* art. 4 (ii), at 73.

133. See *id.* art. 6, at 73.

134. *Id.* art. 1 (iv), at 72.

the Kashmir dispute has been the main issue that has frustrated the mutual aspirations of India and Pakistan to "devote their resources and energies to the pressing task of advancing the welfare of their peoples."¹³⁵

The greatest flaw of the Simla Agreement is its failure to provide any mandatory methodology or specific machinery to settle the outstanding disputes between the parties. The Agreement generally refers to future meetings between the "Heads" and "the representatives of the two sides" to discuss modalities and arrangements for solving disputes, including the question of a final settlement of Jammu and Kashmir.¹³⁶ Since the conclusion of the Simla Agreement more than twenty years ago, Indian and Pakistani representatives have initiated a bilateral process of negotiations that frequently runs into trouble and is often discontinued.¹³⁷ Even though the "Heads" have met a few times, no serious effort has yet been made to solve the Kashmir dispute.

In addition to direct negotiation, the Simla Agreement establishes a bilateral regime under which the parties shall "settle their differences . . . by any other peaceful means mutually agreed upon between them,"¹³⁸ thus precluding all non-consensual methods of dispute resolution. India and Pakistan, acting jointly, may settle the Kashmir dispute, but neither country, acting individually, may force the other to reach a settlement. This bilateralism controls not only the substantive issues surrounding the Kashmir dispute, but also limits the methods by which these issues may be resolved. Consequently, a final settlement of the Kashmir dispute must be acceptable to both

135. *Id.* art. 1, at 72.

136. *Id.* art. 6, at 73. Even the Tashkent Declaration envisaged bilateral "meetings both at the highest and at other levels on matters of direct concern." See Tashkent Declaration, *supra* note 105, art. IX, at 40. But the Tashkent bilateralism failed to prevent another war.

137. In August 1992, the Indian and Pakistani foreign secretaries met to sign agreements banning the use of chemical weapons and establishing a code of conduct on the treatment of diplomats. See *India, Pakistan Ink Accords, Kashmir Talks Inconclusive*, Agence France Presse, Aug. 19, 1992, available in LEXIS, Nexis Library, AFP File. At a recent Commonwealth conference in Cyprus, the foreign secretaries of India and Pakistan met to discuss the Kashmir conflict. See *Indian, Pakistani Foreign Secretaries Meet on Kashmir*, Agence France Presse, Oct. 25, 1993, available in LEXIS, Nexis Library, AFP File. Commenting upon India's offer to hold talks on Kashmir, Benazir Bhutto, the Prime Minister of Pakistan, said, "Every time there is violence it spoils the atmosphere. We feel a little cynical about if the offer for talks is for real." See Angus MacSwan, *Bhutto Says Kashmir Violence Mars Peace Moves*, Reuter Library Report, Oct. 22, 1993, available in LEXIS, Nexis Library, Lbyrpt File.

138. Simla Agreement, *supra* note 6, art. 1(ii), at 72.

parties and such a settlement must be achieved through a mutually agreed upon method.

The strict interpretation of bilateralism prevents a settlement as long as one side refuses to negotiate. Each time the rebel groups in Indian-held Kashmir protest against Indian occupation and the excesses of the Indian security forces, India breaks off direct negotiations on the ground that Pakistan is fomenting trouble and engaging in "state-sponsored terrorism."¹³⁹ Occasionally, the skirmishes across the line of control create a near-war situation,¹⁴⁰ but even when law and order is restored in the Indian occupied Kashmir, the process of negotiation drags on without producing any concrete results. Under a strict consensual approach, Pakistan is completely dependant upon India's willingness to cooperate in negotiation. If India is determined to hold on to the occupied territories without a negotiated solution, the bilateral process will produce no solution unless Pakistan as well as the people of the Kashmir Valley abandon their demand for a plebiscite and submit to India's domination.

India's interests are also harmed by this exclusive bilateralism. The Simla Agreement places an affirmative obligation on the parties to "prevent the organization, assistance or encouragement of any acts detrimental to the maintenance of peaceful and harmonious relations."¹⁴¹ India repeatedly accuses Pakistan of giving "assistance and encouragement" to local Kashmiri groups that commit acts of terrorism against Indian security forces. India further claims that

139. See *India and Pakistan Agree to Resume Peace Talks*, UPI, Oct. 25, 1993, available in LEXIS, Nexis Library, UPI File (reporting that after a gap of more than a year, the two countries have agreed to resume talks, which were broken off because of India's insistence that Pakistan should first halt aid to underground militants in India). India accuses Pakistan of financing and arming the Kashmiri militants. *India Wants Pakistan Declared Terrorist State*, Reuter Library Report, May 14, 1993, available in LEXIS, Nexis Library, Lbyrpt File (reporting that India would like other countries to declare Pakistan a terrorist state). Even the United States threatened to put Pakistan on a blacklist of countries that sponsor terrorism. See John Moore, *Violence Besets Jammu-Kashmir*, CHICAGO TRIB., July 1, 1993, at 8. But see *Don't Blacklist Pakistan as a Terrorist Nation*, NEWSDAY, Apr. 29, 1993, at 58; *State Department Briefings*, Fed. News Service, July 13, 1993, available in LEXIS, Nexis Library, Fednew File (reporting that the Secretary of State determined that available information does not warrant a finding that Pakistan should be declared a terrorist state).

140. See Anwar Iqbal, *India, Pakistan Near Another Clash on Kashmir*, UPI, Oct. 12, 1992, available in LEXIS, Nexis Library, UPI File.

141. Simla Agreement, *supra* note 6, art. 1(ii), at 72.

these rebel groups are, in fact, being trained in Pakistan.¹⁴² Pakistan, of course, denies these charges, but it does not deny providing "moral" support to "freedom fighters" in the Indian-occupied Jammu and Kashmir. The question of Pakistan's relationship to rebel groups would constitute a dispute under the Simla Agreement. Under the terms of the Simla Agreement, however, India may not unilaterally complain to any international forum even if there is reliable evidence that Pakistan is providing financial or military assistance to the rebel groups.

In any event, it is not clear whether mere moral support to the people demanding independence in Kashmir would constitute a detrimental act forbidden under the Simla Agreement.¹⁴³ A strict interpretation that precludes even moral support to Kashmiri rebels would compel Pakistan to remain a silent spectator even if suppression by Indian security forces in Jammu and Kashmir violates international norms of behavior, including the law of human rights. If strict bilateralism is taken to its logical conclusion, any interpretative conflict arising from a provision of the Simla Agreement could never be resolved unless the parties wish to resolve it through some mutually agreed upon bilateral method.

It seems as if the earlier military deadlock in Jammu and Kashmir has now resurfaced in the form of dysfunctional bilateralism. Strict bilateralism might be useful if India and Pakistan could only resolve their disputes in good faith without unnecessary delay. If the bilateral regime is used merely to exclude the role of outsiders in resolving the Kashmir dispute or to entrench the status quo, the Simla Agreement will lose its efficacy and perhaps its continued legal validity.

The Simla Agreement recognizes the need for a final settlement of Jammu and Kashmir.¹⁴⁴ The bilateral clause in the Simla Agreement is intended to resolve the Kashmir dispute and not to frustrate or delay its final settlement. It would therefore defeat the purpose of the Agreement if bilateralism is invoked to merely cut off the Kashmir dispute from international fora that can contribute to ending

142. According to India, Pakistan's policy of providing funds and guns to separatist groups is not restricted to Kashmir. Pakistan is blamed for supporting the revolt in East Punjab where Sikhs have launched a spirited and bloody campaign to demand more autonomy and possibly an independent state. But on the subcontinent, there is always a tit for a tat. Pakistan blames India for aiding secessionist elements in the Pakistani province of Sindh.

143. Simla Agreement, *supra* note 6, art. 1(ii), at 72.

144. *Id.* art. 6, at 73.

it. Furthermore, it would be unlawful to use the bilateral clause to postpone indefinitely the final settlement of the dispute, with the intention to freeze the status quo. Any willful laches in solving the Kashmir dispute would provide a good basis to argue that the procrastinating party has violated a fundamental principle of the law of treaties, which mandates that every agreement must be performed in good faith.¹⁴⁵

IV. A NEW APPROACH: PARTITION CONSISTENT WITH SELF-DETERMINATION AND REGIONAL COOPERATION

The momentous changes in global affairs of the past few years have created new opportunities to resolve the Kashmir dispute. In view of the apparent failure of bilateralism under the Simla Agreement, I propose an alternative, workable solution to the dispute, consisting of two concrete proposals. The first proposal divides Jammu and Kashmir between India and Pakistan in accordance with the right of self-determination and in such a way as to cause minimal population displacement.¹⁴⁶ The second reinforces the concept of regional community and brings together the peoples of the subcontinent, including those of Jammu and Kashmir, into a new and productive relationship. The new approach derives its conceptual integrity and pragmatic power from the historical example of France and Germany, who fought several wars over the disputed territory of Alsace and Lorraine, but are now united with free borders in a regional community. Unlike France and Germany, India and Pakistan were united in historic India for centuries. A reunited subcontinent in the form of a regional community, therefore, is a sensible goal.

145. Vienna Convention, *supra* note 130, art. 26, at 14. Clear violations of the U.N. Charter and the Tashkent Declaration cast doubts on whether India and Pakistan entered into the Tashkent agreement in good faith—a legal and moral foundation for all international treaties. Note, however, that the U.N. Charter is not a new discovery for India and Pakistan. They both had become parties to the Charter before India used force to annex Junagadh and Hyderabad and before Pakistan quietly supported the private invasion of Kashmir. Similarly, India's intervention into East Pakistan violated the principles of noninterference and territorial integrity incorporated in the U.N. Charter as well as in the Tashkent Declaration.

146. Under the Tashkent Declaration, India and Pakistan agreed to "create conditions which will prevent the exodus of people." *See* Tashkent Declaration, *supra* note 105, art. VIII, at 42. Although the Simla Agreement does not contain a similar provision, a good case may be made for invoking the Tashkent Declaration to argue that from both practical and legal viewpoints, any partition of Jammu and Kashmir that creates a massive dislocation of the people of the state should be rejected.

A. *Partition & Plebiscite*

The idea of partitioning Jammu and Kashmir is not new.¹⁴⁷ It received international attention when Sir Owen Dixon, the U.N. Representative, proposed it as a possible alternative solution.¹⁴⁸ The historically constituted princely State of Jammu and Kashmir, Dixon pointed out, is not a single ethnic, demographic or cultural unit. It was "an agglomeration of territories brought under the political power of one Maharajah."¹⁴⁹ Any allocation of the entire state based on the outcome of an over-all plebiscite, wrote Dixon, would create a massive refugee problem. To avoid this problem, as well as to achieve a more permanent solution, all factors "point to the wisdom of adopting partition as the principle of settlement . . ."¹⁵⁰ Dixon did not propose an outright partition. Such an idea would have divided the entire State of Jammu and Kashmir, including the Kashmir Valley, between India and Pakistan, without holding any plebiscite anywhere in its five distinct regions. Dixon had a profound insight when he said that "[p]artition of the whole state between the two countries is of course an obvious alternative. But unfortunately

147. As early as July 1948, Nehru told members of the U.N. Commission that he would support the idea of dividing the state. To one member, Nehru even displayed a map showing such a possible division. Partitioning the state was a beneficial choice for India. It assured India some portions of the state, but an over-all plebiscite in favor of Pakistan did not. Moreover, Pakistan's three important rivers—the Indus, Jhelum and Chenab—flow through the state. Any partition plan that would vest in India exclusive control of any of these rivers would have precipitated Pakistan's quick economic death. Finally, the entire state's accession to Pakistan would furnish Pakistan with strategic, geopolitical benefits not only with respect to India, but also with respect to Afghanistan and the Soviet Union (now Asian Muslim States) in the West and China in the North. Perhaps, these and other practical concerns persuaded Pakistan not to give up areas already under its control—without accepting the idea of legal partition.

148. *Report to the Security Council of Sir Owen Dixon, United Nations Representative For India and Pakistan*, U.N. SCOR, 5th Sess., Supp. 5 at 24, U.N. Doc. S/1791/Add.1 (1950) [hereinafter *Dixon Report*]. As the UN Commission failed to break the deadlock between India and Pakistan, the Security Council appointed Owen Dixon as the U.N. Representative to pave the way for demilitarization and a subsequent plebiscite. The Security Council further authorized Dixon to place before the parties "any suggestions which in his opinion would be likely to contribute to the expeditious and enduring solution of the dispute . . ." *Id.* Given the irreconcilable positions that India and Pakistan had taken in regard to withdrawal of their forces from the state, Dixon's mediation to create conditions for the holding of a plebiscite was destined to fail. When Dixon realized that an over-all plebiscite for the entire state was no longer a workable solution, he presented the alternative concept of dividing the state between India and Pakistan. *Id.* at 45.

149. *Id.* at 45.

150. *Id.* at 45-46.

the Valley of Kashmir cannot itself be partitioned and it is an area claimed by each side."¹⁵¹

Accordingly, I propose a formula under which a plebiscite should only be held in the Kashmir Valley.¹⁵² The remainder of the state would be partitioned through a negotiated settlement.¹⁵³ Historical evidence shows that India and Pakistan were generally willing to consider partition of most provinces of Jammu and Kashmir. Moreover, they both agreed that the Kashmir Valley should not be divided.¹⁵⁴ Pakistan initially opposed partition of Jammu and Kashmir both for moral and pragmatic reasons. Morally, it would be inconsistent to partition the State of Jammu and Kashmir when all other princely states had been treated as indivisible political units. Pragmatically, Pakistan was quite certain that the outcome of a plebiscite would be in its favor. Pakistan later expressed its willingness to consider partition of the state, provided it took the

151. *Id.* at 44.

152. *Id.* at 45. Dixon rightly observed that "no method of allocating the Valley to one or other of the contending parties is available except a poll of the inhabitants." *Id.* India has failed to persuade the people of the valley of Kashmir that they should remain within the Dominion of India. Democratically elected local governments are often dissolved and a direct rule from New Delhi is imposed to counter the local movement for the liberation of Kashmir.

153. *Id.* at 37-38 (Dixon's discussion of India suggested concessions and possibilities for negotiation). It is important to keep in mind the formula under which India offered to partition Jammu and Kashmir. The areas of the state certain to vote for India should go to India without a plebiscite. Similarly, areas certain to vote for Pakistan should go to Pakistan without a plebiscite. Plebiscite should be limited to those areas where the outcome of voting is doubtful and the demarcation should have due regard to geographical features and the requirements of an international boundary. *Id.* at 59. Except for the valley of Kashmir, the existing partition reflected by the line of control is to a large extent consistent with the Indian formula. For example, Jammu, certain to vote for India, is under Indian control. Gilgit, certain to vote for Pakistan, is under Pakistani control.

154. Even for India and Pakistan, the state was divisible provided that Kashmir remained intact. But to partition the state, each party made demands that the other party rejected. Pakistan demanded Kashmir without a vote, a proposal with which India did not agree. *Id.* at 39. India sought key Northern areas that Pakistan would not relinquish. Moreover, India refused to place the Valley under a United Nations administrative body that would assure a fair and impartial plebiscite. *Id.* at 41. This approach of making a proposal that the other party would most certainly reject was now fully entrenched in the subcontinent—not only with respect to demilitarization, but to almost any solution that the international community would offer. In this exchange of intransigence, the world press criticized India more than Pakistan, perhaps because in the wake of decolonization the idea of self-determination was powerful and the examples of Junagadh and Hyderabad were still fresh in people's memory. Moral questions aside, India was not about to agree to any formula that would hand over to Pakistan the strategic and beautiful territory of Kashmir—the land of Pundit Nehru's forefathers. For Pakistan, Kashmir was the source of its rivers and the ancestral home of Islam's great modern poet, Sir Muhammad Iqbal—the man who invented the very concept of a country called Pakistan.

Kashmir Valley.¹⁵⁵ India agreed to consider a plebiscite in the Kashmir Valley only if certain regions were conceded to it without a vote.¹⁵⁶

These historical facts provide a foundation for my proposal that combines the ideas of plebiscite and partition. Presently, the Kashmir Valley is divided between India and Pakistan. The main portion of the Valley, however, is under the Indian control. I propose that the *entire* Kashmir Valley should accede according to the wishes of its people. This can be accomplished by holding an internationally supervised plebiscite in the Valley. The existing line of control has, to a large extent, solved the problem of partition, and it should be converted into an international border.

To forge a workable solution, India and Pakistan must discard their rigid positions with respect to partition and plebiscite in Jammu and Kashmir. Specifically, Pakistan must modify its current demand for a direct implementation of Security Council resolutions calling for a single plebiscite for the entire State of Jammu and Kashmir. The last resolution calling for such a plebiscite was passed in 1957.¹⁵⁷ In the past thirty-six years, the Council has not enforced this resolution. This long inaction might be construed to mean that prior resolutions on Jammu and Kashmir have lost their legal force.¹⁵⁸ It is bad jurisprudence, however, to construe a resolution as invalid simply because the state to which it was directed could for decades successfully defy the will of the Security Council. A Security Council resolution remains legally binding until it is repealed, either directly or through a subsequent incompatible resolution. Mere non-enforcement of a resolution over a long period is not a sufficient basis to challenge its continued validity. Pakistan argues, persuasively, that the Security Council resolutions calling for a state-wide plebiscite should be enforced. From a practical viewpoint, it is highly unlikely that India would allow the entire state to accede in accordance with the outcome of such a plebiscite, because the chances are great that it will choose to accede to Pakistan.

155. *Id.* at 39.

156. *Id.* at 38.

157. S.C. Res. 126, U.N. SCOR, 12th Sess., Supp. for Oct.-Dec., at 21, U.N. Doc. S/3922 (1957).

158. See Hurd Says U.N. Resolutions on Kashmir "Only Background", Kyodo News Int'l, Inc., Oct. 3, 1992 (British foreign minister Douglas Hurd asked Pakistan to resolve the Kashmir dispute bilaterally and the German foreign minister said that the U.N. resolutions had become outdated).

Moreover, an over-all plebiscite that would result in the accession of the entire state to Pakistan is incompatible with the substantive provision of the Tashkent Declaration, which is still a valid treaty between the two countries. Article VIII of the Declaration states that "both sides will create conditions which will prevent the exodus of people."¹⁵⁹ A massive exodus will result if the entire state of Jammu and Kashmir accedes to either country. For example, if Indian-held Jammu, a predominantly Hindu province of the state, were to become part of Pakistan, its Hindu population would most likely migrate to India, creating an enormous refugee problem—a condition contrary to the Declaration. Likewise, the Muslim population of Kashmir would try to migrate to Pakistan if the state of Jammu and Kashmir became part of India. Any negotiated partition of the state should be designed to avoid the displacement of populations. With the exception of the Kashmir Valley, the existing line of control has not produced any significant migration. As such, the proposed transformation of the line of control into an international border will be consistent with Article VIII of the Tashkent Declaration.

If Pakistan is to abandon its demand for an over-all plebiscite, India must relinquish its policy of entrenching the status quo with the dysfunctional bilateralism of the Simla Agreement. The people of the Kashmir Valley do not accept the existing line of control running through their ancient province, nor are they likely to accept minor territorial concessions as a *quid pro quo* for converting the line of control into an international border. A solution to the Kashmir dispute is possible even if India retains the predominantly Hindu areas of the state such as Jammu and demands that the existing line of control in the northern areas be turned into a permanent international border. The dispute probably will not be resolved if India insists on maintaining the status quo, ignoring the wishes of the people of the Kashmir Valley.

For legal, moral and pragmatic reasons, India should accept its obligation to settle the Kashmir dispute. Legally, India is still bound by Security Council resolutions and is under a continuing obligation to settle the Kashmir dispute in accordance with the wishes of the people of the state. Even under the Tashkent Declaration, India acknowledges the Kashmir dispute and recognizes that the "interests of the peoples of India and Pakistan were not served by the continu-

159. Tashkent Declaration, *supra* note 105, art. VIII, at 42.

ance of tension between the two countries."¹⁶⁰ Under the Simla Agreement, India continues to acknowledge the existence of the dispute and assumes a clear obligation to reach "a final settlement of Jammu and Kashmir."¹⁶¹ These consecutive international obligations, which India has freely assumed, place a formidable legal burden on India to reject the policy of stagnation and make a bold move to settle the basic conflict that has for so long "bedevilled the relations between the two countries."¹⁶²

India also has a moral obligation to grant the people of Kashmir the right to choose their political future. Having absorbed the princely states of Junagadh and Hyderabad on the basis of the people's right of self-determination, India exposes the flaw in its moral position when it refuses to allow a similar right to the Kashmir Valley. As the largest democracy in the world, India cannot justify imposing martial law on Kashmir. India's world image as a secular democracy is tarnished when the world media reports the gross human rights violations perpetrated by Indian security forces in Kashmir.¹⁶³ India cannot justify its suppression in Kashmir as a legitimate law and order response to Pakistan-sponsored terrorism, nor can India appease the international community by labelling the struggle in Kashmir as yet another unlawful secessionist movement. The people of Kashmir demand the fulfillment of their right to self-determination, a right that India has repeatedly acknowledged. They are entitled to challenge the oppressive status quo that India cannot justifiably defend.

Pragmatically, a final settlement of the Kashmir dispute consistent with my proposal is in India's best interests. India will lawfully retain the important province of Jammu and other areas on India's side of the line of control. Even though it is highly unlikely

160. Tashkent Declaration, *supra* note 105, art. I, at 40.

161. Simla Agreement, *supra* note 6, art. 6, at 73.

162. *Id.* art. 1(iv), at 72.

163. On March 16, 1993, a delegation of Kashmiri women presented a memorandum to the United Nations Security Council requesting U.N. intervention into the "atrocities being perpetrated by the Indian authorities against the civilian population of Kashmir." See *United Nations: Kashmiri Women Petition the Security Council*, Inter Press Service, Mar. 16, 1993, available in LEXIS, Nexis Library, Inpres File; *India Police Beat Up Separatists in Kashmir*, N.Y. TIMES, Oct. 20, 1993, at A14 (reporting that the Indian police beat Kashmiri leaders protesting an Army siege of Kashmir's holiest mosque, Hazratbal, which reputedly contains a hair of Prophet Mohammed, the founder of Islam); see also Tim McGirk, *Troops Kill 29 in Kashmir*, INDEPENDENT, Oct. 23, 1993, at 15; *Police in India Open Fire on Protesters at Shrine*, ORLANDO SENTINEL, Oct. 23, 1993, at A14; Gill Tudor, *India Orders Judicial Probe into Kashmir Killings*, Reuter Library Report, Oct. 23, 1993, available in LEXIS, Nexis Library, Lbyrpt File.

that the people of Kashmir will choose to accede to India, the possibility remains that they might do so. Even if the province of Kashmir accedes to Pakistan, and the dispute is finally settled, India will reap substantial benefits. A harmonious relationship with Muslim Pakistan will be conducive to ending the domestic Hindu-Muslim conflict in India. Once the Kashmir dispute is resolved, India will gain international respect, especially the respect of the Islamic community, and its aspiration to become a permanent member of the Security Council will be greatly enhanced.

India and Pakistan could enforce the proposed solution through the bilateral regime of the Simla Agreement, but I argue that this method would be unsuccessful. A failed regime of bilateralism achieves nothing, and simply entrenches the status quo. India and Pakistan may either directly negotiate or request third-party mediation in order to reach a final settlement of Jammu and Kashmir along the lines I propose. Third-party conciliation and mediation are allowed under the Simla Agreement provided that both parties agree to such methods of dispute resolution. In fact, the Simla Agreement allows the parties to select any mutually agreed upon means to settle their differences. Despite Pakistan's repeated requests for third-party mediation, India insists upon bilateral negotiations.

In view of India's persistent refusal to explore any consensual method other than fruitless bilateral negotiations, I argue that the proposed solution should be implemented through the Security Council, which has now gained unprecedented effectiveness and prestige. One might question whether the Security Council may continue to exercise its jurisdiction. Several arguments support the Security Council's authority to reassert jurisdiction over the Kashmir dispute.

Under Article 36 of the U.N. Charter, the Security Council may *sua sponte* assume jurisdiction,¹⁶⁴ since the Kashmir dispute is an Article 33 dispute.¹⁶⁵ An Article 33 dispute is any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, and the parties to which seek a solution by any peaceful means including negotiation, mediation, conciliation, resort to regional agencies or any other peaceful means of their own choice.¹⁶⁶ Article 33 authorizes the Security Council to call upon the parties, when it deems necessary, to settle their

164. U.N. CHARTER art. 36.

165. *See id.* art. 33.

166. *Id.* art. 33, ¶ 1.

dispute by such means.¹⁶⁷ Recall that the Security Council first assumed jurisdiction over the dispute under Chapter Six of the U.N. Charter, which covers peaceful settlement of disputes, and of which Article 33 is an integral part.¹⁶⁸ The Security Council reaffirmed the Article 33 status of the Kashmir dispute when, in its Resolution 211, it called upon India and Pakistan to utilize all peaceful means, including those listed in Article 33, to resolve the Kashmir dispute.¹⁶⁹ Accordingly, India and Pakistan sought mediation from the Soviet Union, a method of dispute resolution listed in Article 33, and produced the Tashkent Declaration. The Kashmir dispute remains an Article 33 dispute even under the Simla Agreement, because India and Pakistan agreed to reach a final settlement of Jammu and Kashmir "through bilateral negotiations or by any other peaceful means mutually agreed upon between them"—a language consistent with the letter and spirit of Article 33.

One might question whether Resolution 211 and the bilateral clause of the Simla Agreement have forever precluded the jurisdiction of the Security Council. By advising the parties to resolve their dispute by methods listed in Article 33, the Security Council wishes to expand the means by which that dispute might be settled. If an Article 33 procedure fails to resolve a dispute, such an initial failure does not prevent the Security Council from reasserting its jurisdiction. Article 36 authorizes the Security Council to intervene at any stage of an Article 33 dispute and to recommend appropriate procedures or methods of adjustment.¹⁷⁰ In exercising this authority, Article 36 further states, the Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.¹⁷¹ Under Article 36, therefore, the Security Council may lawfully intervene and recommend to India and Pakistan an appropriate procedure or method of adjustment for a final settlement of the Kashmir dispute.

Since the bilateral approach of the Simla Agreement has proved dysfunctional, the Security Council should not recommend direct negotiation as the appropriate procedure or the method of adjustment, even though this is the only method that India accepts. Of course, the Security Council under Article 36 should take the methods of

167. *Id.* art. 33, ¶ 2.

168. *See supra* text accompanying notes 64-68.

169. S.C. Res. 211, *supra* note 103, at 1.

170. U.N. CHARTER art. 36, ¶ 1.

171. *Id.* art. 36, ¶ 2.

dispute resolution incorporated in the Simla Agreement into consideration. The Security Council's authority to recommend appropriate procedures or methods of adjustment cannot be limited by the language of the Simla Agreement. The Security Council will lose substantial authority to intervene and resolve disputes if its jurisdiction to recommend appropriate procedures and methods of adjustment is confined to the procedures adopted by the parties. Moreover, international law cannot condone a policy that would encourage a party to a dispute to resort to an Article 33 procedure, particularly direct negotiation, with the intention to stall the bilateral process and cause laches. Similarly, the Security Council's jurisdiction to resolve any dispute cannot be precluded forever even if the parties have agreed to resolve their disputes only through mutually agreed upon procedures. Article 36 confers upon the Security Council a *sua sponte* jurisdiction. It does not require mutual consent of the parties as a precondition for Security Council's jurisdiction. To propel India and Pakistan out of their current deadlock, therefore, the Security Council cannot confine itself to the stalled procedures of the Simla Agreement. It will have to recommend some effective and workable procedure for a final settlement. Any argument, therefore, that the Simla Agreement has forever ousted the jurisdiction of the Security Council over the Kashmir dispute is without substance.

Article 37 states that if the parties to an Article 33 dispute fail to settle it by peaceful means including bilateralism, "they shall refer the dispute to the Security Council."¹⁷² Although Article 37 does not state the standard to measure the failure to settle, some important guidelines may be derived from the text and the context of relevant provisions of the U.N. Charter. Since an Article 33 dispute is by definition threatening to the maintenance of international peace and security, the parties would be under a legal obligation to refer the dispute to the Security Council if their failure to settle the dispute threatens the peace between the parties or endangers the security of the region. Moreover, the protection of human rights, self-determination of peoples and solving international problems of an economic and social character are the stated purposes of the United Nations Charter. If the failure to settle a dispute results in gross violations of human rights, denial of self-determination or unnecessary economic hardship, the parties should refer the dispute to the Security Council. If the party perpetrating human rights abuses or denying a recognized right to self-determination has lost its commitment to resolve the dispute and wishes to entrench the status quo, any other party should

172. *Id.* art. 37, ¶ 1.

refer the dispute to the Security Council. A protracted stalemate over the dispute that compels the parties to shift their scarce resources from economic and social programs to military build-up constitutes an additional basis for the parties to refer the dispute to the Security Council.

Having failed to reach a settlement for the past twenty years, India and Pakistan have now entered into an ominous phase of weapons development, which tragically shifts their scarce resources away from needed socio-economic development. After all of this time and expense, no concrete mechanism is in place to solve the Kashmir dispute any time in the foreseeable future. The risk of nuclear war between India and Pakistan prompted by the Kashmir conflict threatens the peace and security of the region, and perhaps the world. Gross human rights abuses occur in Kashmir, resulting in the loss of life as well as liberty. Kashmiri groups on both sides frequently attempt to cross forcibly the line of control causing countless deaths,¹⁷³ thus threatening to spark another war between India and Pakistan. All of these factors indicate that India and Pakistan have a legal obligation to resubmit the dispute to the Security Council.

It would be preferable if India and Pakistan made a joint referral; however, the consent of both parties is not needed to invoke the jurisdiction of the Security Council—either party acting alone can request its intervention.¹⁷⁴ India might want to refer the dispute to the Security Council, especially if it has secured reliable evidence that Pakistan is supporting terrorism in the Indian-held Jammu and Kashmir. Likewise, Pakistan may be able to refer the dispute to the

173. See Anwar Iqbal, *India, Pakistan Near Another Clash on Kashmir*, UPI, Oct. 12, 1992, available in LEXIS, Nexis Library, UPI File (reporting the marches across the line of control in Jammu and Kashmir); see also *One Killed, 86 Held as Troops Disperse Marchers*, Agence France Presse, Oct. 25, 1992, available in LEXIS, Nexis Library, AFP File (reporting that the Multi-party Jammu and Kashmir Democratic Alliance called for the cross border march).

174. Article 37, paragraph 1 cannot be construed to argue that the consent of both India and Pakistan is required to refer the dispute to the Security Council. Such an interpretation gives unreasonable power to the non-consenting party. Article 35 allows "[a]ny Member" of the United Nations to invoke the jurisdiction of the Security Council if a dispute is likely to endanger the maintenance of international peace and security. U.N. CHARTER art. 35, ¶1. Article 37 must be read in a way consistent with Article 35. For example, Article 37 cannot prohibit what Article 35 allows. If a member of the United Nations may individually bring any situation which might lead to a dispute to the attention of the Security Council, Article 37 cannot take away this discretion simply because that member is now a party to the dispute. Such an inference is counter-intuitive and limits both the jurisdiction of the Security Council as well as the discretion of a member of the United Nations to involve the Security Council in peaceful resolutions of disputes.

Security Council on the grounds that India has lost interest in obtaining a final settlement and is using the Simla Agreement in bad faith.

When the Security Council intervenes and assumes jurisdiction by invoking Article 37, it may "recommend such terms of settlement as it may consider appropriate."¹⁷⁵ If India or Pakistan refers the Kashmir dispute to the Security Council, or if the Security Council assumes jurisdiction on its own authority, the question remains what terms of settlement would be appropriate to resolve the dispute. I suggest that my substantive proposal of partition and plebiscite is an appropriate way for the Security Council to bring the parties toward a final settlement.

The involvement of the Security Council will offer several advantages. It will bring a powerful international pressure to resolve the Kashmir dispute to bear upon India and Pakistan. If the Kashmir Valley is allocated according to the outcome of an internationally mandated and supervised plebiscite, and if the existing line of control in other regions of the state, with or without minor modifications, is converted into a permanent international border, the respective governments of India and Pakistan will have a strong international cover to accept the solution. A similar solution achieved through bilateral negotiations may be more difficult to sell to domestic political opposition in each country. Moreover, if the Security Council adopts a new formula to settle the Kashmir dispute, its prior resolutions requiring an over-all plebiscite in the entire state would be automatically modified—thus establishing a coherent jurisprudence under which Security Council resolutions remain valid and enforceable until repealed or modified.

Influential countries, particularly the United States, are now in a position to persuade the parties to submit the dispute to the Security Council. The United States, for example, has shown a serious interest in halting the proliferation of nuclear weapons in the Indian subcontinent.¹⁷⁶ Although denuclearization of the subcontinent poses

175. *Id.* art. 37, ¶ 2.

176. The United States has entered into the Treaty on the Non-Proliferation of Nuclear Weapons. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT]. Although the United States has pressed India and Pakistan to sign the NPT, they have yet to sign the treaty. Pakistan will sign the treaty only if India does. India argues that the NPT discriminates in favor of established nuclear powers, creating nuclear haves and have-nots. See K.K. Sharma, *U.S. Presses India on Nuclear Curbs*, FIN. TIMES, June 19, 1992 at 4. In 1991, Pakistan proposed a five-nation conference consisting of the United States, the (former) Soviet Union, China, India and Pakistan to declare South Asia a nuclear-free zone. All but India welcomed the

difficult geopolitical questions, the Kashmir dispute has always been closely linked to the arms race between India and Pakistan. Any non-proliferation arrangement achieved without settling the Kashmir dispute is, therefore, unstable and even dangerous. It would be unstable because the unresolved Kashmir dispute would put tremendous pressure on both India and Pakistan to remain distrustful of each other. This distrust has prevented either country from signing the Treaty on the Non-Proliferation of Nuclear Weapons.¹⁷⁷ It would be dangerous because fundamentalists in both countries may coerce their respective governments to resolve the Kashmir dispute through a decisive war. In proposing a comprehensive non-proliferation regime for the subcontinent, therefore, the United States must play the leading role, both inside and outside the Security Council, to nudge the parties towards a final settlement of the Kashmir dispute.

B. *Border-Free Regional Community*

The proposed partition and a plebiscite in the Kashmir Valley becomes more attractive if accomplished in the context of a regional community. Spirited steps towards regional cooperation and eventually towards a border-free regional community will hopefully change the political atmosphere as well as the psycho-social dynamics among the peoples of the subcontinent. Any permanent and lawful division of Jammu and Kashmir without a robust and functional regional community will replay the trauma of the 1947 partition. It would disappoint the Hindus of India who oppose any further fragmentation of the motherland, and it would exasperate the Muslims of Pakistan who argue that Pakistan is entitled to the entire State of Jammu and Kashmir. The resolution of the Kashmir dispute within the fold of a powerful regional community minimizes the impact of partition for all sides as it reincarnates the historical memory of coexistence, offering new possibilities to reunite the peoples of historic India into vigorous cultural and economic relationships.

The Kashmir dispute is the product of an international system, bolstered by decolonization, under which many historic regions have been divided into nation-states. The nation-state, a relatively new social construct, has partitioned many populations of the world in an irrational and senseless manner. For centuries, historic India was almost a mythical entity, a spiritual being, containing distinctive but

proposal. See *Pakistan Says India again Rejects Offer of Nuclear Test Ban*, Agence France Presse, July 28, 1993, available in LEXIS, Nexis Library, AFP File.

177. See NPT, *supra* note 176, 21 U.S.T. at 538-66, 729 U.N.T.S. at 169-70.

contiguous geographical areas in which diverse groups lived together. India was a land of immigrants and foreigners where Aryans, Arabs, Afghans, Greeks, British, Portuguese and many other peoples from all over the world came—some to conquer, some to colonize and some to settle, creating an unprecedented fusion of races, colors, national origins, languages and religions. Historic India was of course never a paradise in which all lived in harmony; it had its share of human conflicts and suffering. Nor was the subcontinent ever a monolithic unity. The populations in many regions spoke different languages, lived under local rulers and preserved their distinctive cultural heritage. Nonetheless, historic India under both native and foreign rulers, from Hindus to Muslims to the British, always retained a poetic unity that was now and then translated into a concrete political reality, such as the Indian Empire of Asoka, Akbar or Queen Victoria.

The 1947 partition of historic India based upon religion and the creation of two separate nation-states, India and Pakistan, and later the conversion of the western wing of Pakistan into a new nation-state, Bangladesh, have introduced among peoples of the subcontinent a new and powerful divisive force. Remote areas located on the physical fringes of historic India such as Nepal, Bhutan and Sri Lanka, which share the Hindu, Buddhist and Islamic traditions of the mainland, have now become separate nation-states. Even newly-created nation-states on the subcontinent show signs of internal fractures. The popular Hindu fundamentalist movement that aspires to turn India into the exclusive kingdom of Hindus has alienated Sikhs and Muslims, some of whom fought against the idea of the 1947 partition. In the past few years, the Sikhs, disenchanted with the policies of the Indian government, have resorted to an armed struggle in the hope of establishing their own separate nation-state. Similarly, Pakistan, a country created in the name of religion, faces a serious challenge to hold together its Muslim but ethnically diverse populations within the same nation-state. In this context of the fragmentation of historic India, the Kashmir dispute is not simply a territorial conflict between two intransigent regional powers. It represents the larger pathology of a region in which the very concept of the nation-state has grafted discord and discontent.

The concept of the nation-state might be an alien idea, superimposed over the historically border-free subcontinent. Nonetheless the existing partition of historic India is a reality. Historic India cannot be restored and the nations of the subcontinent will have to live in the prevailing international context. Given the nuclear capability that both India and Pakistan now possess, it is unlikely that any forced attempt would be made to incorporate India

and Pakistan into a new and larger nation-state. A permanent hostility between India and Pakistan, however, can be overcome by weakening the socio-psychological compulsion within the concept of the nation-state and strengthening instead the alternative idea of regional cooperation. A measured and steady course towards creating conditions conducive to the dismantling of physical and psychological borders will be a distant goal. But the process of building regional cooperation would generate a new consciousness reminding the people that only a few decades ago they lived together in the same subcontinent. This reorientation will focus on cooperation, not confrontation.

Some skeptics would argue that vigorous regional cooperation will not become fully operational unless the Kashmir dispute is first settled.¹⁷⁸ Some tacticians might insist that it would be easier to resolve the Kashmir dispute after exuberant regional institutions of cooperation have been established. A more productive approach would be to simultaneously work toward achieving both goals. The solution I propose is by no means easy to enforce. There are many pitfalls. Nothing good will be achieved if, for example, India continues to perceive Pakistan as an illegitimate country created by colonists, which must be dismantled even if force is necessary. Similarly, the idea of fruitful regional cooperation will remain an absurd hypothetical if Pakistan continues to believe that Hindus and Muslims are forever condemned to live on opposite sides of a great religious divide. If these attitudes persist and if the Kashmir dispute remains unresolved, the subcontinent might be heading towards another armed conflict, possibly a dangerous one.¹⁷⁹

To head off such a tragedy and to create regional cooperation in the subcontinent that would deemphasize the divisive nature of the nation-state, the following policies are appropriate. First, both India and Pakistan must jointly discourage all secessionist movements on the subcontinent. India must cease to support the rebels in Pakistani Sindh. Likewise, Pakistan must withdraw all moral and material support to secessionist elements in the Indian Punjab. In fact, under the Tashkent Declaration and the Simla Agreement, India and

178. *But see India Disputes will not Harm SAARC—Premadasa*, Reuter Library Report, Oct. 5, 1992, available in LEXIS, Nexis Library, Lbyrpt File (Sri Lanka's President, Ranasinghe Premadasa, the former chairman of SAARC, said that the bilateral disputes between India and other SAARC members including Sri Lanka and Pakistan would not overshadow the spirit of SAARC).

179. Douglas Johnston, *Anticipating Instability in the Asia-Pacific Region*, WASH. Q., Summer 1992, at 103, 104 (arguing that Kashmir poses a serious and dangerous threat to South Asia because of the nuclear capability of India and Pakistan).

Pakistan have assumed an explicit obligation not to interfere in each other's internal affairs.¹⁸⁰ If these treaties are implemented in good faith, both countries would cease to encourage separatist groups. Furthermore, India and Pakistan should announce a new policy statement that would highlight their commitment to the preservation of the subcontinent against any further fragmentation. Such a policy statement would be consistent with the Simla Agreement that encourages "the dissemination of such information as would promote the development of friendly relations between them."¹⁸¹

With respect to Jammu and Kashmir, India and Pakistan already reject the idea of creating an independent nation-state within the disputed area. Pakistan, for example, does not support any militant Kashmiri groups advocating the independence of Jammu and Kashmir from both India and Pakistan. Similarly, India has shown no interest in creating an independent Jammu and Kashmir. Advocates of the right of self-determination might object to a policy that denies the people of Jammu and Kashmir the choice of complete independence. In view of their diverse ethnic and religious backgrounds, the populations of Jammu and Kashmir have shown no shared aspiration to build a separate nation-state.¹⁸² Only the Muslims of the Kashmir Valley demand that their divided province be united and that they be given the option to decide the question of their final accession. If India and Pakistan seriously work towards building regional cooperation and downplaying segregative nationalism, most secessionist movements, including the one in Jammu and Kashmir, will lose their momentum.

Second, India and Pakistan should begin to create regional institutions for economic cooperation. The main problem facing the peoples of the subcontinent is their wretched standard of living. Both India and Pakistan realize that the ever-increasing cost of defense in

180. Tashkent Declaration, *supra* note 105, art. III, at 36. Simla Agreement, *supra* note 6, art. 1(iii), at 39.

181. Simla Agreement, *supra* note 6, art. 2, at 39.

182. The predominantly Hindu population located in the Indian occupied Jammu province prefer the existing status quo and would like to remain within the Union of India. In August 1993, Muslim militants ambushed an inter-city bus in the Hindu-majority Jammu region and massacred Hindu passengers. See *Indian Lawmakers Call for Tougher Action Against Kashmir Rebels*, UPI, Aug. 16, 1993, available in LEXIS, Nexis Library, UPI File. In May 1993, when the pro-Pakistani Al-Jehad group called for a strike in the Indian-held Jammu and Kashmir, the businesses, offices, stores, banks and road transportation in Muslim Kashmir were shut, but the call evoked no response in Hindu Jammu. See *Activity Crippled in Guerilla-Sponsored General Strike*, UPI, May 22, 1993, available in LEXIS, Nexis Library, UPI File.

each country has caused serious damage to their economies by diverting already scarce resources from meeting the primary needs of their peoples to armaments.¹⁸³ Even though the Indian and Pakistani economies have done well in the past few years,¹⁸⁴ the subcontinent remains poor and millions of people in both countries do not have the basic necessities of life such as clean water, garbage disposal systems or even adequate food and medicine. It is clear that economic backwardness is the most serious regional problem, yet an interminable animosity between India and Pakistan diverts their scarce resources from social programs to military build-ups. It also establishes a climate of mutual mistrust that aggravates communal tension between diverse ethnic and religious groups.

The idea that India and Pakistan should jointly work for the welfare of peoples of the subcontinent has legal roots. The Tashkent Declaration recognizes in its opening paragraph that "the welfare of the 600 million people" (now a billion) is of "vital importance."¹⁸⁵ It further states that the "interests of peace in their region" are not served by a perpetual conflict between the two countries.¹⁸⁶ Similarly, the Simla Agreement proclaims that a durable peace in the subcontinent is required "so that both countries may . . . devote their resources and energies to the pressing task of advancing the welfare of their peoples."¹⁸⁷ Despite these moral and legal undertakings, Indian and Pakistani governments in the past twenty-five years have shown only lukewarm commitment to the idea of building an economically successful subcontinent. They have often exploited the Kashmir problem to hide their failure to solve the economic problems of their peoples. Even if India and Pakistan cooperate in raising their standards of living, the solutions will not be easy. Nonetheless, a true commitment to regional welfare will vest in the people a new confidence that their efforts will not be wasted in war.

The process of regional cooperation has already begun in many regions of the world, including the subcontinent. The concept of the nation-state that divided historic India and that originated in intellectual and political events of Europe is losing its continued significance in the formation of the European Community. The North America Free Trade Agreement among the United States, Canada and Mexico

183. Simla Agreement, *supra* note 6, art. 1, at 73.

184. See Charles H. Percy, *South Asia's Take Off*, FOREIGN AFF., Winter 1992-93, at 166, 171.

185. See Tashkent Declaration, *supra* note 105, Preamble, at 36.

186. *Id.* art. I, at 40.

187. Simla Agreement, *supra* note 6, art. 1, at 72.

signifies a new hope of cooperation even among developed and developing nations. India and Pakistan can most certainly learn from the example of the European Community built upon the dynamics of economic interdependence and fundamental human rights, with the long-term goal of dismantling internal barriers within the Community for the free flow of goods, services and even people. In view of their ancient history, India and Pakistan possess a tested capacity to borrow and adapt ideas from other cultures and civilizations.¹⁸⁸ Learning from successful regional communities in other parts of the world, the peoples of the subcontinent will welcome the idea of useful regional cooperation. More trade among businesses of the region, more freedom of movement for the people to visit historical and religious places located beyond national borders, exchanges in the field of science and culture, a united region spared from the constant threat of war, and perhaps a better standard of living for all—these are some of the benefits that will flow from vigorous regional cooperation. As a modest but hopeful beginning, India and Pakistan along with other nations of the region have indeed moved towards building a regional community, called the South Asian Association for Regional Cooperation.¹⁸⁹

The South Asian Association for Regional Cooperation (SAARC) is becoming progressively active in bringing together nations of the region.¹⁹⁰ Representing about one billion people, one-fifth of the world's population, SAARC is taking small steps towards building a regional community. For example, it has drafted a regional trade treaty to lower tariff barriers and pave the way for future free trade within the borders of the South Asian community.¹⁹¹ A full-fledged secretariat has been established to facilitate contact and cooperation among political parties of SAARC countries.¹⁹² To counter the pressure of the International Monetary Fund

188. Both India and Pakistan, for example, have accepted innumerable concepts of common law into their legal systems.

189. Charter of the South Asian Association for Regional Cooperation, Dec. 8, 1985, art. 1 (on file with the *Columbia Journal of Transnational Law*).

190. The SAARC, founded in 1985, is composed of India, Pakistan, Bangladesh, Bhutan, Nepal, Sri Lanka and Maldives.

191. Agreement on SAARC Preferential Trading Agreement (SAPTA), Apr. 11, 1993 (on file with the *Columbia Journal of Transnational Law*); see also *Uncertainty About SAARC Over: Nepalese Prime Minister*, Xinhua General Oversees News Service, Dec. 23, 1991, available in LEXIS, Nexis Library, Xinhua File.

192. Memorandum of Understanding on the Establishment of the Secretariat, Nov. 17, 1986 (on file with the *Columbia Journal of Transnational Law*). The Secretariat is located in Kathmandu, Nepal. The role of the Secretariat is to coordinate and monitor the implementation of SAARC activities and to service the meetings of the Association. See Lin

and the World Bank to scale down welfare spending, SAARC countries have established a commission to adopt a common strategy.¹⁹³ Member states are bringing together their agriculture experts for pooling information on technologies used in developing the agriculture sector.¹⁹⁴ The first SAARC stock exchanges conference is planned to explore the possibility of cross border securities trading and to join the capital markets in member countries.¹⁹⁵ In 1987, SAARC member states signed two agreements—a regional convention dealing with the suppression of terrorism¹⁹⁶ and an agreement establishing a regional food security reserve for emergencies.¹⁹⁷ With the resolution of the Kashmir dispute by plebiscite and a new impetus towards regional cooperation, these modest beginnings of the SAARC will bring the peoples of the subcontinent into a new cooperative network.

Although the establishment of SAARC is an important step in the right direction, a powerful regional community depends largely upon a simultaneous commitment among member states to resolve their bilateral disputes that impede the growth of cooperative ties. The SAARC framework prohibits any discussion of bilateral or contentious issues.¹⁹⁸ Consequently, the SAARC sessions simmer with mutual suspicions and muted grievances—an atmosphere not conducive to solving the problems of the region. The 1993 SAARC session, for example, was held when tensions between India and Pakistan had been seriously aggravated by the destruction of an ancient mosque by Hindus in India, bombings in Bombay allegedly done by Muslims who later fled to Pakistan, and new killings by the

Zhenxi, *SAARC Poised to Shift from Symbolism to Substance*, Xinhua General Oversees News Service, Dec. 7, 1992, available in LEXIS, Nexis Library, Xinhua File.

193. See *South Asia Heads for Showdown with World Lenders*, Agence France Press, Nov. 2, 1992, available in LEXIS, Nexis Library, AFP File.

194. See *SAARC Plans to Integrate Agricultural Research Activities*, Xinhua General Oversees News Service, Oct. 22, 1992, available in LEXIS, Nexis Library, Xinhua File.

195. See *India Suggests Regional Stock Trading*, Xinhua General Oversees News Service, Sept. 7, 1992, available in LEXIS, Nexis Library, Xinhua File.

196. SAARC Regional Convention on Suppression of Terrorism, Nov. 4, 1987, SAARC; see Thalif Deen, *South Asia: SAARC Survives Ongoing Regional Disputes*, Inter Press Service, Nov. 4, 1991, available in LEXIS, Nexis Library, Inpres File.

197. Agreement on Establishing the SAARC Food Security Reserve, Nov. 4, 1987, SAARC; see also Deen, *supra* note 196.

198. Charter of the South Asian Association for Regional Cooperation, *supra* note 189, art. X(2). (Bilateral and contentious issues shall be excluded from deliberations); see Deen, *supra* note 196 (reporting that leaders of member states are increasingly willing to discuss bilateral issues when they meet for SAARC negotiations).

Indian security forces in the Indian-held Kashmir.¹⁹⁹ Instead of exploring ways to combat ethnic violence in India and stop killings in Kashmir, the Indian Prime Minister at first refused to meet his Pakistani counterpart, to highlight the point that Pakistan was promoting terrorism in India. But when the two prime ministers met, they made no serious breakthrough.²⁰⁰ Furthermore, India reiterated its position that member states should not use the SAARC forum for any discussion of contentious issues that divide the region.²⁰¹

India's position is defensible to the extent that contention breeds discord, but contentious issues cannot be solved by ignoring them. A total ban on any discussion of bilateral disputes is counter-productive. The member states should use the SAARC meetings as natural opportunities to discuss issues that obstruct the way to a vigorous regional community. The President of Sri Lanka correctly pointed out: "If problems confront us, we cannot end them by evading them."²⁰² He further remarked that "SAARC could be strengthened if contentious issues were tackled head on."²⁰³ SAARC will become a powerful regional community only when the underlying antagonistic disputes between member states have been successfully resolved. As the most powerful member of the organization, India should play a leading role in resolving bilateral issues that inhibit regional cooperation. It seems unrealistic to hope that SAARC would prosper into an "economic powerhouse," as India envisions it to be,²⁰⁴ by side-stepping key disputes affecting relations between member states. Accordingly, member states should build a mechanism within the SAARC framework for not only discussing bilateral issues such as the Kashmir dispute, but resolving them.

In any event, SAARC should be preserved and strengthened, and the process of regional cooperation must never be reversed. If SAARC can recreate a subcontinent in which commercial and

199. See Stefan Wagstyl, *Pakistan Urged to Help Find Bombers*, FIN. TIMES, Apr. 13, 1993, at 4.

200. See Atiqul Alam, *South Asian Countries Try to Mask Tensions*, Reuter Library Report, Apr. 12, 1993, available in LEXIS, Nexis Library, Lbyrpt File. One diplomat noted: "The so-called meeting is simply cosmetic, underpinned by strong suspicions of each other's intentions." *Id.*

201. Atiqul Alam, *India, Sri Lanka Differ on Contentious Summit Topics*, Reuter Library Report, Apr. 10, 1993, available in LEXIS, Nexis Library, Lbyrpt File.

202. *Id.*

203. *Id.*

204. Atiqul Alam, *South Asia Summit Ends with Major Trade Pact*, Reuter Library Report, Apr. 11, 1993, available in LEXIS, Nexis Library, Lbyrpt Report File (reporting that the Indian Prime Minister said that SAARC could become an economic powerhouse).

physical borders would become increasingly fluid, as they were in historic India, the line of control in Jammu and Kashmir will become less ominous. A plebiscite in the Kashmir Valley would validate a new commitment to the protection of human rights, underscoring the willingness of regional governments to minimize waste of resources in fighting long wars of mutual attrition. Given its natural splendor and beauty, the Kashmir Valley, whether it accedes to India or Pakistan, could possibly become the permanent headquarters for some of the SAARC undertakings. India and Pakistan, as a token of regional solidarity and new friendship, may launch cooperative ventures to alleviate poverty in Jammu and Kashmir and to restore its eminent place in the international tourist industry.

CONCLUSION

The Simla Agreement mandates that the parties use a bilateral regime to reach a final settlement in Jammu and Kashmir. So far, the bilateral system has not worked. India and Pakistan may now be under a legal obligation to resubmit the dispute to the United Nations Security Council. Regardless of the method that the parties may use for the resolution of the Kashmir dispute, the idea of a plebiscite for the entire State of Jammu and Kashmir is no longer viable. Accordingly, India and Pakistan should consider a general partition of the state accompanied by a plebiscite in the Kashmir Valley. They should negotiate to convert the existing line of control into a permanent international border, and hold an internationally supervised plebiscite in the Kashmir Valley to grant the people the right of restrictive self-determination. This solution is more appealing in the context of building a regional community. India and Pakistan seem to have realized the usefulness of regional cooperation. If the idea of regional community is seriously implemented, the Kashmir dispute would acquire a new meaning. Instead of fighting over it, India and Pakistan may designate Kashmir as the first cooperative zone in the new subcontinent. This move from confrontation to cooperation will hopefully reverse the process of mutual attrition that has caused unnecessary adversity and allow the peoples of the subcontinent for the first time in the last forty-five years to see beyond the Kashmir dispute.