

1-1-2003

The Role of International Law in the Kashmir Conflict

Brian Farrell

Follow this and additional works at: <https://elibrary.law.psu.edu/psilr>

 Part of the [International Law Commons](#)

Recommended Citation

Brian Farrell, *The Role of International Law in the Kashmir Conflict*, 21 *Penn St. Int'l L. Rev.* 293 (2003).

This Article is brought to you for free and open access by the Law Reviews and Journals at Penn State Law eLibrary. It has been accepted for inclusion in Penn State International Law Review by an authorized editor of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

The Role of International Law in the Kashmir Conflict

Brian Farrell*

- I. Introduction
- II. Historical Background of the Interstate Conflict
 - A. British India and the Partition
 - B. Kashmir's Status and the Accession
- III. Creation of the Stalemate
 - A. United Nations Involvement
 - B. India's Actions
 - C. Pakistan's Actions
 - D. Bilateralism
- IV. Legal Analysis of the Conflict
 - A. Partition as Trigger of the Conflict
 - B. Legality of Accession
 - C. Legal Force of United Nations Resolutions
 - D. Consequences of Domestic Law and Politics
 - E. Bilateral Stalemate
- V. The Role of International Law in Managing the Conflict
 - A. Self-determination
 - B. The Simla Agreement
 - C. United Nations Action
 - D. Interstate Cooperation
- VI. Conclusion

I. Introduction

Following the partition of India in 1947, the greatest source of tension between the new states of India and Pakistan was to be the future of the princely state of Jammu and Kashmir. Shortly after partition, fear

* B.A. 1995, Saint Ambrose University; J.D. 1998, University of Iowa College of Law; L.L.M., International Human Rights Law, 2002, National University of Ireland, Galway; member of the Iowa State Bar Association. The author wishes to thank Dr. Joshua Castellino of the Irish Centre for Human Rights for his contributions to this article.

was expressed that “the problem [of Kashmir] may well drag on for several years before a definitive solution is reached.”¹ Indeed, after nearly fifty years and three Indo-Pakistani wars, the Kashmir problem still exists and may once more lead to hostilities in the region.

There is no doubt that the roots of the conflict existed in British India prior to 1947, but there can also be no doubt that the direct trigger of the overt conflict was the manner by which the subcontinent was partitioned following the end of the Raj. This article will assert that conflict between India and Pakistan was not inevitable, but was triggered by the failure of Britain to make adequate provisions for the post-colonial order, particularly with regard to the future of the princely states. This article will further argue that although the legal claims to Kashmir put forth by both India and Pakistan since the partition have validity, they have been diluted by politics and the lack of international will to such an extent that they have lost much of their relevance. However, each party’s insistence on the legitimacy of its own arguments and intervening unilateral actions has created a stalemate in which neither has been willing or politically able to concede any ground. The conflict is now entrenched to such an extent that a strict legalistic approach is no longer workable and must be abandoned in favor of a more equitable approach to conflict resolution.

Part II of this article discusses the genesis of the Kashmir conflict, examining the historical background of British India, the circumstances surrounding its partition, and the accession of Kashmir to India. Part III traces the subsequent events that led to stalemate between India and Pakistan. Part IV analyzes the effects of subsequent actions by India, Pakistan, and the international community on the Kashmir issue. Part V examines the extent to which the conflict has become entrenched and proposes a new approach to the issue.

II. Historical Background of the Interstate Conflict

A. *British India and the Partition*

British rule in India began in the early nineteenth century with the assumption of governmental powers by the East India Company.² The Crown assumed direct control in 1858, and India was administered as nine provinces, which composed “British India,” and whose affairs were

1. Pitman B. Potter, *The Principal Legal and Political Problems Involved in the Kashmir Case*, 44 AM. J. INT’L L. 361 (1950).

2. The Company was vested with this power by the Charter Act of 1833. Ali Khan, *The Kashmir Dispute: A Plan for Regional Cooperation*, 31 COLUM. J. TRANSNAT’L L. 495, 504 (1994).

fully managed by the British.³ Under the doctrine of paramountcy, Britain also held responsibility for the defense and foreign relations of 584 princely states, which retained a great deal of autonomy in all other affairs.⁴

By the end of World War II, it became clear that Indian independence would be forthcoming. The form that independent India would take, however, was uncertain. The majority Indian National Congress advocated a unified, secular, multiethnic democracy.⁵ The All-India Muslim League, on the other hand, favored a “two-nation” theory, asserting that Hindus and Muslims constituted two separate nations.⁶ Under this plan, demanded by League leader Mohammed Ali Jinnah, the former British India would be divided into two states, one primarily Muslim and one primarily Hindu.⁷

The two-nation theory was a manifestation of Muslim apprehension at the idea of a unified independent India in which the Hindu population would constitute a significant majority. That the Congress, under the leadership of Jawaharlal Nehru and in the tradition of Mahondas Gandhi, sincerely believed in the idea of a unified India based on equality is not suspect. However, communal conflict and religious differences, nurtured by the Raj in order to maintain authority, could not be overcome.⁸ Thus, the British Cabinet Mission Plan of 1946, which advocated the “one-nation” theory of a confederated, unified India, was abandoned.⁹

Instead, the two-nation theory was adopted, and plans were made for the expedited partition of British India. The resulting Indian Independence Act was characterized as failing to provide for the division of finances, the military, foreign affairs, infrastructure, and numerous other complex matters.¹⁰ Nonetheless, the provinces of British India were hastily partitioned on August 15, 1947, creating the Dominion of

3. *Id.*

4. Damodar R. SarDesai, *The Origins of Kashmir's International and Legal Status*, in PERSPECTIVES ON KASHMIR: THE ROOTS OF CONFLICT IN SOUTH ASIA 81 (Raju G.C. Thomas, ed. 1992). It is explained that the favorable treatment afforded to the princely states was in part due to their support of the British during the Indian Army's mutiny of 1847. Khan, *supra* note 2, at 504.

5. Douglas C. Makeig, *War, No-War, and the India-Pakistan Negotiating Process*, 60 PAC. AFF. 271, 278 (1987).

6. Raju G.C. Thomas, *Reflections on the Kashmir Problem*, in PERSPECTIVES ON KASHMIR, *supra* note 4, at 11-12.

7. SarDesai, *supra* note 4, at 81.

8. IAN TALBOT, *INDIA & PAKISTAN* 21 (2000) (describing the use of ethnic tensions as a tool of the government).

9. Javaid Rehman, *Reviewing the Right of Self-Determination: Lessons from the Experience of the Indian Sub-Continent*, 29 ANGLO-AM. L. REV. 454, 462 (2000).

10. James Howley, *Alive and Kicking: The Kashmir Dispute Forty Years Later*, 9 DICK. J. INT'L L. 87, 87 (1991).

India and the Dominion of Pakistan.¹¹

The consequences of the partition were unimaginable. Approximately seven million Muslims migrated from the new Dominion of India into Pakistan, and approximately 5.5 million people migrated in the opposite direction.¹² It is estimated that as many as one million people were killed as a result of violence that occurred immediately following partition.¹³

The partition also had consequences for the national psyche of both dominions that would affect future relations between them. India viewed Pakistan as an illegitimate state carved out of the territory of the multiethnic, "traditional" India that encompassed the entire subcontinent. Meanwhile, Pakistan saw India as a threat to its very existence, bent on reclaiming the new state and subjugating the Muslim minority. These views would not only impact relations between India and Pakistan, but would also be the driving force behind many of their third-party relations.

The princely states, although certainly impacted by the partition, were not incorporated into either dominion. Rather, the Indian Independence Act provided that the Crown's paramountcy lapsed and all powers returned to the individual states.¹⁴ The effect of the Act, as understood by Britain and Pakistan, was that individual rulers would have the authority to determine their own state's future, while the Indian view was that these states were anomalies created from the territory of the greater nation and should be reincorporated.¹⁵ In any event, without British forces available for their defense, independence was not a real option for the princely states, many of which were quite small.¹⁶ The states were encouraged by then-Viceroy Lord Mountbatten to accede to one dominion or the other.¹⁷

Hence, almost all of the princely states acceded to become part of either Pakistan or India, generally depending on geography.¹⁸ Prior to

11. *Id.* The Dominion of Pakistan consisted of two geographically separate halves: West Pakistan (present-day Pakistan) and East Pakistan (present-day Bangladesh). A thousand miles of Indian territory separated the two parts of the dominion.

12. TALBOT, *supra* note 8, at 157.

13. *Id.*

14. Khan, *supra* note 2, at 505. See generally Indian Independence Act, 1947, § 7(1)(b).

15. Khan, *supra* note 2, at 506. Nehru declared that India would never recognize "the right of Indian States to continue as feudal and autocratic monarchies." *Id.* (quoting Nehru's 1935 presidential address).

16. SarDesai, *supra* note 4, at 83.

17. Thomas, *supra* note 6, at 19.

18. The British administration recommended that states with a majority Hindu population accede to India. Those with a majority Muslim population should accede to Pakistan, *but only if* the Muslim-majority state was contiguous to the territory of

partition, over 500 accessions were accepted by the incoming Indian and Pakistani governments.¹⁹ It is important to note that these accessions were effected by the ruler of the state simply executing an instrument of accession.²⁰ However, three major princely states, including the state of Jammu and Kashmir [hereinafter referred to as "Kashmir"] declined to accede to either dominion prior to partition.

B. *Kashmir's Status and the Accession*

Kashmir, the largest of the princely states, held a strategic geographic position between the new dominions, and also bordered China and the Soviet Union. In 1947, Kashmir was 80% Muslim, although Buddhists and Hindus constituted majorities in two of the state's five regions.²¹ Geographically and economically, Kashmir was viewed as being closely tied to the territory that would become Pakistan.²² Its main connections to the outside world were the Indus River and the Srinagar-Rawalpindi Road, both of which linked it to Pakistan.²³ Given these natural ties, Kashmir's accession to Pakistan would have been logical.

The princely ruler of Kashmir, however, was Maharaja Hari Singh, a Hindu.²⁴ Opposed to the idea of joining Pakistan, the Maharaja was equally reluctant to accede to India for fear of losing political power.²⁵ The Maharaja therefore entered into a Standstill Agreement with the new Pakistani government in August 1947 whereby Pakistan would administer the operation of communication and railroad services in Kashmir.²⁶ There is evidence that the Maharaja still considered the

Pakistan. *Id.*

19. SarDesai, *supra* note 4, at 82.

20. *Id.* It is significant that over 500 accessions were accepted as legally binding by the British, Indian, and Pakistani officials once signed by the ruler without requirement of a plebiscite or ratification. *Id.*

21. The religious compositions of the five regions were as follows: the regions of Vale of Kashmir and Poonch both held Muslim majorities of at least 90%; the Gilgit region also contained a Muslim majority; the Jammu region was 59% Hindu; and the region of Ladakh and Baltistan was predominantly Buddhist. Howley, *supra* note 10, at 88.

22. Potter, *supra* note 1, at 363.

23. Howley, *supra* note 10, at 88.

24. Shahid Javed Burki, PAKISTAN: THE CONTINUING SEARCH FOR NATIONHOOD 191 (1991). Kashmir was ceded by the British to Gublab Singh and his heirs under the 1846 Treaty of Amritsar in exchange for a sum of money. Riyaz Punjabi, *Kashmir: The Bruised Identity, in PERSPECTIVES ON KASHMIR*, *supra* note 4, at 132.

25. SarDesai, *supra* note 4, at 83 (describing the Maharaja's fear of dominance by the National Conference of Kashmir, which was closely linked to Nehru's Congress Party).

26. Howley, *supra* note 10, at 89.

option of an independent Kashmir at that time.²⁷

The idea of independence did not last, though, as the state began experiencing unrest. A Muslim revolt in the Poonch region and subsequent inter-communal violence resulted in the invasion of Kashmir by Pathan tribesmen from Pakistan on October 22, 1947.²⁸ At the same time, Kashmir accused the Pakistani government of severing lines of supply into Kashmir.²⁹ Eager to maintain his hold on power, the Maharaja turned to India for help.

On October 26, the Maharaja appealed to the Governor-General of India, Lord Mountbatten, for military intervention, and on the same day executed the Instrument of Accession.³⁰ The following day, Mountbatten formally accepted the accession, declaring in writing, "I hereby accept this Instrument of Accession."³¹ Mountbatten also replied to the Maharaja in a personal letter, stating that:

[M]y Government has decided to accept the accession of Kashmir State to the Dominion of India. Consistently with their policy that, in the case of any State where the issue of accession has been the subject of dispute, the question of accession should be decided in accordance with the wishes of the people of the State. It is my Government's wish that as soon as law and order have been restored in Kashmir and its soil cleared of the invader, the question of the State's accession should be settled by a reference to the people.³²

Indian troops were quickly dispatched to Kashmir and regained control of all but the border areas of the state.

III. Creation of the Stalemate

A. *United Nations Involvement*

Kashmir's accession to India was soon complicated by the parties' unilateral actions and the involvement of the international community. Just months after assuming British India's position in the United Nations,

27. BURKI, *supra* note 24, 191. It has been speculated that both China and the U.S.S.R. would have viewed Kashmiri independence as favorable to their own interests. *Id.* It is also asserted that the Maharaja had already made plans to accede to India, and that evidence exists to support this claim. See Pervaiz Iqbal Cheema, *Pakistan, India, and Kashmir: A Historical Review*, in PERSPECTIVES ON KASHMIR, *supra* note 4, at 96-97.

28. Howley, *supra* note 10, at 89-90. The violence resulted in the massacres of over 200,000 Muslims.

29. SarDesai, *supra* note 4, at 84.

30. *Id.*

31. Howley, *supra* note 10, at 94.

32. Letter from Lord Mountbatten to Maharaja Hari Singh (Oct. 27, 1947), in CHRISTOPHER B. BIRDWOOD, *TWO NATIONS AND KASHMIR* 207 (1956).

India brought the issue of Pakistani interference in Kashmir before the U.N. Security Council on January 1, 1948.³³ Pursuant to Article 35 of the U.N. Charter, India alleged that Pakistan had assisted in the invasion of Kashmir by providing military equipment, training and supplies to the Pathan warriors.³⁴

Denying any participation in the invasion, Pakistan leveled counter-charges, accusing India of involvement in the massacres of Muslims in Kashmir, aggression against Pakistan, and questioning the validity of the Maharaja's accession to India.³⁵ Pakistan requested that the Security Council appoint a commission to secure a cease-fire, ensure withdrawal of outside forces, and conduct a plebiscite to determine Kashmir's future.³⁶ Without addressing the original complaint lodged by India, the Security Council adopted a resolution establishing the United Nations Commission on India and Pakistan [UNCIP].³⁷ The stated purpose of the Commission was to make findings of fact pursuant to Article 34 and to act as a mediating influence.³⁸

Shortly thereafter, the Security Council adopted another resolution, this time voicing its support for Kashmiri self-determination and recognizing the need for a plebiscite.³⁹ The plebiscite would be conducted under the supervision of an administrator appointed by the U.N. Secretary General and certified as fair by UNCIP.⁴⁰ The resolution also called for withdrawal of armed Pakistani tribesmen and a reduction of Indian forces to the minimum necessary.⁴¹

Both parties balked at the terms of the resolution, fearing that the other party would gain a strategic advantage. The situation was complicated by the revelation that regular Pakistani troops were already inside the borders of Kashmir and that the tribal invasion and Indian intervention had evolved into a state of war between India and Pakistan by the time UNCIP arrived. Upon its arrival in Karachi on July 7, 1948, the Commission was informed by Pakistan's foreign minister that three brigades had already been deployed in clear disregard of the Security Council's resolutions, and contradictory to Pakistan's own statements.⁴²

33. SarDesai, *supra* note 4, at 85.

34. Letter from the Representative of India to the President of the Security Council (Jan 1, 1948), U.N. Doc. S/628 (1948). In its complaint, India indicated that it would resolve the accession issue once conditions in Kashmir allowed. *Id.*

35. Letter from the Minister of Foreign Affairs of Pakistan to the Secretary General (Jan. 15, 1948), U.N. Doc. S/646/Corr. 1 (1948).

36. *Id.*

37. S.C. Res. 39, U.N. Doc. S/654 (1948).

38. *Id.*

39. S.C. Res. 47, U.N. SCOR, 3d Sess., 286th Mtg., U.N. Doc. S/726 (1948).

40. *Id.*

41. *Id.*

42. Josef Korbel, *The Kashmir Dispute and the United Nations*, 3 INT'L ORG. 278,

The Pakistani forces were stationed in support of the tribesmen, now assembled as the Azad Kashmir movement, and fighting continued.

On August 13, 1948, UNCIP adopted a significant resolution, which contained a three part proposed agreement. Part I called for a cease-fire between the opposing forces.⁴³ Part II required Pakistan to withdraw its troops and use its best efforts to secure the withdrawal of armed tribesmen, and provided that the evacuated territory would be administered by local authorities.⁴⁴ Upon withdrawal of Pakistani forces and tribesmen, India was to withdraw the bulk of its forces.⁴⁵ Finally, Part III restated the principle that the future of Kashmir should be determined by a vote of its people.⁴⁶

A cease-fire was negotiated and signed on January 1, 1949.⁴⁷ Shortly thereafter, the Commission clarified the August 13 resolution, stating that the issue of Kashmir's accession should be determined by a plebiscite after the requirements of Parts I and II of the resolution were fulfilled.⁴⁸ The proposals contained in the August 13 resolution were eventually accepted by India and Pakistan; however, Pakistan placed such conditions on its acceptance that UNCIP was forced to consider it "tantamount to rejection."⁴⁹ In any event, no withdrawal of Pakistani forces or tribesmen occurred, although later that same year, a cease-fire line was agreed upon,⁵⁰ and a U.N. Military Observer Group was eventually dispatched to supervise the line.⁵¹

Despite its efforts, the Commission was disbanded in favor of individual U.N. Representatives.⁵² From 1949 until 1953, these Representatives worked to negotiate a plebiscite in Kashmir but with no success.⁵³ The U.N. remained active in the Kashmir issue for many years, and the Security Council frequently renewed its call for a

280 (1949). Korbelt, from Czechoslovakia, was one of the members of the Commission.

43. *Resolution for a Cease-Fire Order and Truce Agreement Adopted by the United Nations Commission on Indian and Pakistan*, U.N. SCOR, 3d Sess., at 3, U.N. Doc. S/995 (1948).

44. *Id.* at 3-5.

45. *Id.* at 4.

46. *Id.* at 5.

47. Khan, *supra* note 2, at 515.

48. *Resolution of the United Nations Commission on India and Pakistan*, U.N. SCOR, 4th Sess., 399th Mtg. at 4-7, U.N. Doc. S/1196 (1949).

49. Korbelt, *supra* note 42, at 282-83.

50. *Agreement Between Military Representatives of India and Pakistan Regarding the Establishment of a Cease-fire Line in the State of Jammu and Kashmir*, July 27, 1949, India-Pak., 81 U.N.T.S. 273.

51. *See* S.C. Res. 91, U.N. SCOR, 6th Sess., 539th Mtg., U.N. Doc S/2017/Rev.1 (1951).

52. *See* S.C. Res. 80, U.N. SCOR, 5th Sess., 470th Mtg., U.N. Doc. S/1469 (1950).

53. SarDesai, *supra* note 4, at 89. Among the Representatives were General A.G.L. McNaughton, Sir Owen Dixon, Admiral Chester Nimitz, and Dr. Frank Graham. *Id.*

plebiscite.⁵⁴

B. *India's Actions*

The new Indian Constitution specifically dealt with the Kashmir issue. Article 370 limited the authority of the Indian National Parliament to pass legislation for the State of Jammu and Kashmir, granting some degree of autonomy to the state.⁵⁵ It also created a State Constituent Assembly that would frame the constitution of the state and adopt legislation.⁵⁶ No modification of Article 370 could be made without the concurrence of this Constituent Assembly.⁵⁷

A Constituent Assembly was subsequently convened and a state constitution was adopted in 1956.⁵⁸ This Constitution reaffirmed the Maharaja's accession and provided that the state was an integral part of India.⁵⁹ In addition, it confirmed that the state consisted of all territory under the sovereignty of the Maharaja on the date of the partition.⁶⁰ By doing so, the Constitution claimed all territory occupied by Pakistan to be a part of the state.

India suffered great criticism for the manner in which the Constituent Assembly was established. The Assembly was viewed as a means of legitimizing Indian control over Kashmir while avoiding a plebiscite on the question of accession. India would, it was speculated, ensure the victory of Sheik Abdullah's All Jammu and Kashmir National Conference. Thus, the election of its Assembly members in 1951 was boycotted by the All Jammu and Kashmir Muslim Conference, resulting in National Conference candidates being declared victorious without any balloting.⁶¹ The election was labeled a farce by Pakistan,⁶² and the Security Council declared that action by the Assembly would not satisfy its call for a plebiscite.⁶³

In 1953, three years prior to adoption of the state constitution, the

54. See, e.g., S.C. Res. 91, U.N. SCOR, 6th Sess., 539th Mtg., U.N. Doc. S/2017/Rev.1 (1951); S.C. Res. 96, U.N. SCOR, 6th Sess., 566th Mtg., U.N. Doc. S/2392 (1951); S.C. Res. 98, U.N. SCOR, 7th Sess., 611th Mtg., U.N. Doc. S/2883 (1952); S.C. Res. 122, U.N. SCOR, 12th Sess., 765th Mtg., U.N. Doc. S/3779 (1957); S.C. Res. 126, U.N. SCOR, 12th Sess., 808th Mtg., U.N. Doc. S/3922 (1957).

55. INDIA CONST. art. 370.

56. *Id.*

57. *Id.*

58. Khan, *supra* note 2, at 518.

59. JAMMU AND KASHMIR CONST. § 3. No amendments to this section are permitted under the constitution.

60. *Id.* § 4.

61. Khan, *supra* note 2, at 517.

62. *Id.*

63. S.C. Res. 91, U.N. SCOR, 6th Sess., 539th Mtg., U.N. Doc. S/2017/Rev.1 (1951).

Working Group of the National Conference considered several alternatives for Kashmir's future. After deliberations, the committee unanimously decided that Kashmir should opt for independence, with joint Indo-Pakistani control over foreign affairs.⁶⁴ Sheikh Abdullah was promptly dismissed by Indian authorities and arrested.⁶⁵ The creation of the Assembly was viewed by many as a means of foregoing a true opportunity for Kashmiri self-determination. This interpretation is somewhat suspect, as India still appeared willing to consider a plebiscite. That willingness, however, evaporated in mid-1954, due to Pakistan's foreign relations, as discussed in the next section.

From that time on, the autonomy granted by Article 370 was slowly abrogated. Many constitutional provisions previously not applicable to Kashmir were made applicable by amendment of Article 370, with approval of the Constituent Assembly. The powers of the Indian president vis-à-vis Kashmir were drastically increased,⁶⁶ as were those of the central government.⁶⁷

C. *Pakistan's Actions*

Despite India's actions in creating the Constituent Assembly, its leaders did not appear to be excluding the possibility of negotiations with Pakistan regarding Kashmir. It is clear that Prime Minister Nehru was truly committed to a pacific resolution of the dispute. After the dismissal of Abdullah, it seems that Nehru reconsidered his position. In 1953, Nehru met with Pakistan's leader, Mohammed Ali Bogra, and offered to agree to Pakistan's long-standing demand: a plebiscite for Kashmir in its entirety.⁶⁸ Significantly, Nehru's offer "was not made under any external or internal pressure, but from a genuine conviction that India must not hold Kashmir against the wishes of its people."⁶⁹

Pakistan, however, failed to seize this opportunity. Although the world will never know with certainty, it is speculated that this inaction resulted from the ambitions of Pakistan's military leaders, among them future ruler Ayub Khan.⁷⁰ Khan desired to maintain a state of conflict with India in order to support his military role and facilitate his seizure of

64. Reeta Chowdhari Tremblay, *Nation Identity and the Intervening Role of the State: A Study of the Secessionist Movement in Kashmir*, 69 PAC. AFF. 471, 483 (1996).

65. *Id.*

66. INDIA CONST. arts. 356 and 357.

67. *Id.* arts. 248, 249, 250.

68. Gowher Rizvi, *India, Pakistan, and the Kashmir Problem, 1947 - 1972*, in PERSPECTIVES ON KASHMIR, *supra* note 4, at 58.

69. *Id.*

70. *Id.* at 59.

power as the Muslim League crumbled.⁷¹

What made Nehru's offer truly a golden moment was the fact that Pakistan was about to depart on a course of international diplomacy that would eventually divide the two countries even further. Unable to complete his self-serving military build-up alone, Khan turned to foreign countries. In the post-war years, the United States, obsessed with the containment of communism, preferred the idea of alliance with India. However, India's policy of cold war neutrality and commitment to the nonaligned movement was a thorn in the American side. Thus, Pakistan entered into negotiations with the U.S.

India resented the introduction of external power into the subcontinent and warned Pakistan of the consequences of its actions. Nehru clearly indicated that military partnership with the U.S. would damage Indo-Pakistani relations and cause withdrawal of the plebiscite offer.⁷² Nevertheless, Pakistan entered into a mutual assistance pact with the U.S. in 1954.⁷³ Although technically use of the U.S. supplied arms was limited to defense against communism, this use was perceived by India as a direct threat. In addition to the increased military threat from Pakistan, India perceived the pact as pressure from the U.S. to abandon its nonaligned policy. The offer of a plebiscite for Kashmir was promptly taken off the table and whatever goodwill had developed quickly evaporated.

D. *Bilateralism*

India and Pakistan engaged in two more wars in the second half of the twentieth century. The first, in 1965, resulted from the infiltration of thousands of Pakistani-supported armed freedom fighters, known as mujahideen, from Pakistan into Indian-held Kashmir. Their purpose was to incite a popular uprising in Kashmir against Indian rule. The uprising did not materialize, however, and once it was established that the incursion had been engineered in Pakistan, India declared war. The seventeen-day war essentially resulted in a stalemate.⁷⁴

The Security Council's attempts to end the 1965 war were

71. *Id.*

72. *Id.* at 60.

73. This pact was reinforced by Pakistan's subsequent entry into the Central Treaty Organization (CENTO) and the South East Asian Treaty Organization (SEATO).

74. BURKI, *supra* note 24, at 192. It has been observed that the Pakistani government "proceeded under the naïve assumption that India would somehow respect the difference between the cease-fire line in Kashmir and the international border between the two countries. Whereas the mujahideen could cross the cease-fire line, Indian armed forces were not expected to cross the international border." *Id.* A U.S. embargo on arms sales to the subcontinent is seen as having hastened the end of the war. Rizvi, *supra* note 68, at 70.

essentially aimed at ending hostilities and restoring the status quo prior to conflict.⁷⁵ Interestingly, the Security Council did not renew its call for a plebiscite, although perhaps this can be explained by India's post-1954 refusal to consider the option. Rather, it requested that India and Pakistan engage in negotiation and mediation in an attempt to settle the underlying dispute.⁷⁶

At the urging of the Soviet Union, negotiators from both countries met in the Soviet city of Tashkent.⁷⁷ While India offered numerous proposals aimed at the resumption of diplomatic relations and implementation of peace, it would not negotiate on the status of Kashmir; Pakistan, meanwhile, was only interested in discussing Kashmir.⁷⁸ The Tashkent Declaration required withdrawal of armed forces to their pre-war positions, reaffirmed observance of the existing cease-fire line, committed the parties to discourage hostile propaganda, and set forth the positions of the parties.⁷⁹

Despite third-party mediation, the countries were unable to make headway. Contrary to hopes, the Tashkent Declaration merely reestablished the status quo. Reversion to the status quo, though, was significant in that it not only affirmed the 1949 cease-fire line, but it treated the line in the same manner as Pakistan's international border with India. Thus, it has been argued that the cease-fire line began to acquire a greater legal significance.⁸⁰

The Tashkent meeting was an opportunity for constructive dialogue between India and Pakistan. This opportunity was, lamentably, passed by. The outcome of the Tashkent Declaration marked another failure in resolving the Kashmir issue. Again, inflexibility on the part of both countries essentially revealed an unwillingness to make concessions in the interests of long-term peace.

War broke out again in 1971 when Indian forces entered the territory of East Pakistan on the basis of humanitarian intervention. Although the majority of fighting took place in East Pakistan, Indian forces in Kashmir also took the advantage. Although West Pakistan itself was vulnerable, India declared a unilateral cease-fire, ending the war. The Indian victory resulted not only in the secession of East Pakistan, which became Bangladesh, but also in territorial gains in Kashmir.⁸¹

75. S.C. Res. 210, U.N. SCOR, 20th Sess., 1238th Mtg., U.N. Doc. S/6662 (1965).

76. S.C. Res. 211, U.N. SCOR, 20th Sess., 1242nd Mtg., U.N. Doc. S/6694 (1965).

77. Khan, *supra* note 2, at 522.

78. Rizvi, *supra* note 68, at 70.

79. Tashkent Declaration, Jan. 10, 1966, 560 U.N.T.S. 39.

80. Khan, *supra* note 2, at 523.

81. RICHARD SISSON & LEO ROSE, WAR AND SECESSION: PAKISTAN, INDIA AND THE

Pakistan came to the postwar negotiating table in a weak position, having lost half of its territory and population. With its superior negotiating stance, India wished to settle its perennial tension with Pakistan, yet also wanted to ensure the continued existence of the first democratic government in Pakistan since 1958.⁸² More importantly, India wished to eliminate the intrusion of outsiders and establish itself as a regional superpower by negotiating a strictly bilateral agreement with Pakistan.

The Simla Agreement was reached on July 2, 1972, and established a bilateral system for resolution of conflict between the countries.⁸³ It required the countries to "settle differences by peaceful means through bilateral negotiations" and prohibited either country from unilaterally altering the situation.⁸⁴ In addition, the 1949 Kashmir cease-fire line was replaced by a line of control that took into account India's territorial gains in the 1971 war.⁸⁵ This line of control was to be honored by both sides unless altered by mutual agreement.⁸⁶ Finally, the agreement was recognized as being temporary, with a provision that a "final settlement" had yet to be reached.⁸⁷

An attitude of relative cooperation and optimism, the so-called "spirit of Simla," lasted for several months after the conference. During this time, relations were normalized to an extent and progress toward a resolution appeared to be possible. Unfortunately, this spirit did not endure, and by 1974, relations had returned to their usual dismal state.

Since the 1970s, the stalemate has been accompanied by saber-rattling, diplomatic posturing, and internal unrest, but no significant change in the territorial positions of the parties. As former Indian Foreign Secretary Jagat Mehta commented, "for some years, one could privately observe that Kashmir as an India-Pakistan problem had been solved with a *de facto* division along the ceasefire line."⁸⁸ Even internal

CREATION OF BANGLADESH 234 (1990).

82. Rizvi, *supra* note 68, at 72.

83. Simla Agreement on Bilateral Relations, 858 U.N.T.S. 71 (1972) [hereinafter Simla Agreement].

84. *Id.* art. II(ii). The provision that neither party may take unilateral action that alters the situation raises issues regarding the relationship of each party to areas of Kashmir under its control. For example, in 1975, India entered into an agreement with the Kashmir government whereby Kashmir reaffirmed that it was a "constituent unit of the Union of India" and requiring approval by the Indian government for changes to the state constitution. Kashmir Accord (1974). Whether this was a measure of internal administration or a unilateral action altering the situation is debatable.

85. Simla Agreement, art. IV(ii).

86. *Id.*

87. *Id.* art. VI.

88. Jagat S. Mehta, *Resolving Kashmir in the International Context of the 1990s*, in PERSPECTIVES ON KASHMIR, *supra* note 4, at 393.

conditions within Kashmir were described as content in the late 1970s and early 1980s.⁸⁹

This relative tranquility was soon lost as Kashmir again descended into a chaotic state of terrorism, counter-insurgency and repression in 1989-90.⁹⁰ Negotiations have continued, and the bilateral scheme of the Simla Agreement was reaffirmed in 1997.⁹¹ Despite these efforts, continual guerrilla warfare has marked the region.⁹² Blaming Pakistan for supporting guerrillas, India threatened invasion in November, 2001,⁹³ and the countries neared the brink of war again in the summer of 2002.

Perhaps the most alarming complication in Indo-Pakistani relations since the Simla Agreement has been the development of nuclear weapons technology by both sides. India first tested a nuclear device in 1974, although its nuclear weapons program subsequently appeared to be dormant.⁹⁴ However, both nations conducted nuclear tests in May 1998 to the surprise of the international community.⁹⁵ While the development and use of nuclear weapons present separate legal issues that are not addressed in this paper, the dangers presented are obvious.⁹⁶ Future conflict between India and Pakistan could yield dire consequences.

IV. Legal Analysis of the Conflict

It is unfair – and perhaps simplistic – to say that it is the failure of the international legal regime that has prevented resolution of the Kashmir dispute. It has, however, provided fuel for the continued

89. TALBOT, *supra* note 8, at 274.

90. See Mehta, *supra* note 88, at 393-95; TALBOT, *supra* note 8, at 277-80.

91. See India-Pakistan Accord (1997).

92. Although this paper is concerned with the international legal issues that have arisen in the Indo-Pakistani relationship, an understanding of the internal dynamics in Kashmir is also important. For a discussion of underlying cultural tensions and secessionist movements, see generally Anthony Chase, "Pakistan or the Cemetery!": Muslim Minority Rights in Contemporary India, 34 B.C. THIRD WORLD L.J. 35 (1996); Punjabi, *supra* note 24; Tremblay, *supra* note 64; TALBOT, *supra* note 8, ch. 10; Ashutosh Varshney, *Three Compromised Nationalisms: Why Kashmir Has Been a Problem*, in PERSPECTIVES ON KASHMIR, *supra* note 4, at 191.

93. See Rory Carroll, *India Warns of Kashmir War*, THE GUARDIAN, November 1, 2001.

94. Grant Guthrie, *Nuclear Testing Rocks the Sub-Continent: Can International Law Halt the Impending Nuclear Conflict Between India and Pakistan?*, 23 HASTINGS INT'L & COMP. L. REV., 495, 498-99 (2000).

95. Louis Rene Beres, *In a Dark Time: The Expected Consequences of an India-Pakistan Nuclear War*, 14 AM. U. INT'L L. REV. 497, 498 (1998).

96. For further discussion of the legality and ramifications of nuclear weapons development in the subcontinent, see generally Beres, *supra* note 95; Guthrie, *supra* note 94; Fakiha Khan, *Nuking Kashmir: Legal Implications of Nuclear Testing by Pakistan and India in the Context of the Kashmir Dispute*, 29 GA. J. INT'L & COMP. L. 361 (2001); Onkar Marwah, *India and Pakistan: Nuclear Rivals in South Asia*, 35 INT'L ORG. 165 (1981).

dispute. By narrowly applying legal arguments favorable to its own interests, either country can defend its own position with some validity. The scholarly literature on the subject is illustrative; as is typical in a conflict situation, law, history, and politics can all be plausibly interpreted (or manipulated, in the eyes of the opposing viewpoint) to demonstrate the legitimacy of one viewpoint or the other.

Such arguments rarely rely on firmly grounded international law. Granted, the line between law and politics is often blurred in this context, but where clear international law exists, it should not be ignored. Competing passions frequently fail to appreciate the difference between binding or "hard" international law,⁹⁷ non-binding "soft" law,⁹⁸ and non-legal arguments.

This section will begin by examining the partition as the trigger of the overt conflict. It will then analyze the validity of the various legal propositions put forth in the Kashmir discussion. It will demonstrate that the majority of the legal arguments raised in the past have not been binding law, but that over-reliance on these arguments has deepened the conflict. It will explore the political effects of the law and the consequences of misplaced reliance on the law. It will demonstrate that these legal and political factors resulted in the entrenchment and protraction of this conflict.

A. Partition as Trigger of the Conflict

The internal and interstate tensions that have been manifested in the Kashmir conflict were not caused by the partition of British India in 1947. To suggest so would be to overlook the long and complex history of the subcontinent prior to the Raj.⁹⁹ In addition, divisive "communalism" was nurtured by the colonial administration. However, if one event can be considered the trigger that caused the underlying conflict to become overt, it is the partition.

The negotiations that preceded the partition were extensive, with both the League and Congress jockeying for the upper hand and the spectre of partition hanging overhead. Although popular sentiment

97. Law that states have a legal obligation to comply with, such as international conventions, treaties, and judicial decisions. For a discussion of the sources of international law, *see generally* IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 1-31 (4th ed. 1990).

98. Law that states are not bound by, such as resolutions of the U.N. General Assembly, non-binding Security Council resolutions, and declarations of international organizations. These sources may be used as evidence to show the existence of binding international law, however. *See generally* BROWNLIE, *supra* note 97, at 11-15.

99. *See* Kahn, *supra* note 2, at 502-03 (suggesting that the seeds of religious and cultural conflict in Kashmir were sown as early as the 14th century).

existed for partition, revisionists contend that Jinnah did not fully embrace the idea but merely used the threat of partition as a strategy to secure concessions from the Congress.¹⁰⁰ In any event, it appears that neither party was prepared for the sudden British withdrawal, precipitated by the election of a Labour Government to Westminster.¹⁰¹

The unilateral withdrawal and partition was an expeditious method for Britain to disentangle itself and yet leave behind a strong central government for the majority of the subcontinent. It is ironic that Britain's commendable goal of decolonization was executed in such an unfortunate and arguably irresponsible manner.

Would Kashmir have been the center of a half-century-long dispute between India and Pakistan had Britain definitively settled the territorial issue? Any answer is speculative. Certainly, conflict would have existed in Kashmir and may still have erupted into overt internal conflict. However, it seems that the extent of interstate conflict that has occurred could have been avoided. As a result, it is fair to conclude that the politics and territorial division of the partition triggered the interstate conflict over Kashmir.

B. Legality of Accession

A legal mechanism was provided for determining the future of the princely states, but the legal effect of the Instrument of Accession and the acceptance by Mountbatten on behalf of the Indian government is debated. It is widely argued that acceptance of the accession by India was a provisional mechanism to allow Indian military intervention.¹⁰² The accession was merely a temporary legal tool utilized to permit assistance. This point of view relies heavily on the content of Mountbatten's personal letter to the Maharaja, particularly the statement that the issue of accession should be referred to the people of Kashmir. Additional support for the temporary nature of the accession is found in statements made by Indian Prime Minister Nehru, which indicated his government's belief that the conditional accession should be affirmed by a referendum of the Kashmiri people.¹⁰³

It is also argued that accession should only have been given legal effect if it was confirmed by a plebiscite. The partition occurred at a time when the concept of self-determination was gaining acceptance in

100. Asim Roy, *The High Politics of India's Partition: The Revisionist Perspective*, in *INDIA'S PARTITION: PROCESS STRATEGY AND MOBILIZATION* 129 (Mushirul Hasan, ed., 1993).

101. *Id.*

102. See, e.g., Howley, *supra* note 10, at 95; Khan, *supra* note 2, at 508; Potter, *supra* note 1, at 361; Tremblay, *supra* note 64, at 481.

103. Howley, *supra* note 10, at 95; Tremblay, *supra* note 64, at 481.

international law, and had been included in the Charter of the United Nations in 1945.¹⁰⁴ Much of the language of the pre-partition debate was couched in terms of self-determination, and the claims to Kashmir made after the accession also invoked this doctrine. The manner in which Kashmir acceded to India has therefore been criticized as violating the principle of self-determination.

Although these arguments have merit, they are not persuasive. The accession should be analyzed on two levels: domestic law and international law. In the domestic context, the Indian Independence Act was controlling. The Indian Independence Act contained no requirement of a plebiscite or referendum prior to, or as ratification of, accession by the ruler of a princely state.¹⁰⁵ It did, however, provide that the dominions should continue to be governed by the Government of India Act of 1935.¹⁰⁶ This earlier Act provided that "an Indian State shall be deemed to have acceded to the Dominion if the Governor-General has signified his acceptance of an Instrument of Accession executed by the Ruler whereby the ruler on behalf of the State declares that he accedes to the Dominion."¹⁰⁷ Thus, under these two acts, Kashmir became a part of the Dominion of India upon delivery of the Instrument of Accession and the formal statement of acceptance by Mountbatten, regardless of subsequent personal letters or political statements.

Indeed, the accession of over 500 princely states to India and Pakistan was accomplished by the signing of an instrument of accession by the ruler and acceptance by the respective dominion.¹⁰⁸ Academic writings confirm that, though clouded by the conduct of the parties and the politics of the day, Kashmir acceded to India and became an integral part of India following acceptance of the Instrument of Accession.¹⁰⁹ Statements made by members of the Indian government regarding a Kashmiri plebiscite were unilateral pronouncements made subsequent to, and having no effect upon, the actual accession of Kashmir into the Dominion of India under the Act.

Under the international law analysis, the status of the concept of self-determination must be examined. There is no doubt today that self-

104. See U.N. CHARTER art. 1.

105. See generally Indian Independence Act, 1947. In spite of the clarity of the Act, one author simply concludes that, "though there was no mention of provisional accession in this Instrument of Accession or the formal acceptance, it clearly was part of the instrument." Howley, *supra* note 10, at 95.

106. Indian Independence Act § 8(2).

107. Government of India Act, 1935.

108. SarDesai, *supra* note 4, at 84.

109. See, e.g., MICHEL BRECHER, *THE STRUGGLE FOR KASHMIR* (1953); Taraknath Das, *The Kashmir Issue and the United Nations*, 65 POL. SCI. Q. 264, 268 (1950); SarDesai, *supra* note 4, at 84-85.

determination is a legal norm of international law,¹¹⁰ and it is arguable that it has even evolved into customary international law.¹¹¹ The doctrine of inter-temporal law, however, requires that the situation in question must be analyzed in light of the rules of international law as they existed at the time.¹¹²

Thus, the status of self-determination in 1947 must be examined. Self-determination was mentioned in the U.N. Charter of 1945, but only in a "limited" manner.¹¹³ Its increase in significance from that time was gradual. The most important period of its development was the 1960s. During this time, several important international instruments were adopted, including the Declaration on the Granting of Independence to Colonial Territories and Peoples,¹¹⁴ General Assembly Resolution 1541,¹¹⁵ the International Covenant on Civil and Political Rights,¹¹⁶ the International Covenant on Economic, Social and Cultural Rights,¹¹⁷ and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the U.N.¹¹⁸ The latter Declaration, adopted in 1970, is considered to mark the full evolution of the norm of self-determination into international law.¹¹⁹

This review demonstrates that the most important steps toward the evolution of self-determination into a norm of international law took place well after the partition. One must conclude, then, that the doctrine of self-determination did not apply to Kashmir as binding law in 1947. Therefore, the argument that Kashmir did not legitimately accede to India cannot rest on this proposition, although application of the principle of self-determination will be further discussed.¹²⁰

110. JOSHUA CASTELLINO, *INTERNATIONAL LAW AND SELF-DETERMINATION* 149 (2000).

111. *Id.* at 41.

112. BROWNLIE, *supra* note 97, at 129 (discussing application of the doctrine of inter-temporal law).

113. CASTELLINO, *supra* note 110, at 20.

114. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (1960).

115. G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16 at 29, U.N. Doc. A/4684 (1960).

116. 999 U.N.T.S. 171 (1976).

117. 993 U.N.T.S. 3 (1976).

118. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8018 (1970).

119. CASTELLINO, *supra* note 110, at 34.

120. *See infra* Part V.A (considering the role of self-determination in resolution of the conflict).

C. *Legal Force of United Nations Resolutions*

Attempts by the United Nations to mediate the dispute in its early years reveal several shortcomings.¹²¹ Clearly, cold-war-era politics made the Security Council an ineffective forum for resolution of the dispute. In addition, the United Nations was itself new and untested, and the impact of its pronouncements was not clear. The year India brought the issue of Kashmir to the attention of the Security Council was also the year the Universal Declaration of Human Rights was adopted. Although excitement still surrounded the creation of the U.N., doubts also existed, and the U.N. did not have the stature and influence it later attained. As a consequence, both India and Pakistan were able to invoke or deny the authority of the U.N. to their advantage.

The best example of this has been manipulation of the various U.N. resolutions, particularly the August 13, 1948, resolution of UNCIP. To this day accusations are made that the other party is at fault for failing to fulfill its obligations. Blame is frequently assessed to a state for what it did or refused to do regarding a specific provision: India faults Pakistan for not withdrawing its troops, thus impeding progress toward the plebiscite; Pakistan blames India for refusing to demilitarize and commit to a plebiscite. This exchange is well documented in – and has been perpetuated by – literature on the topic.

Such an exchange is obviously not productive and does little to encourage positive dialogue. What is lost in the discussion is the fact that these claims are not soundly based on international law. Rather, they are a futile attempt by each state to justify its own position by pointing to the misconduct of the other.

One cannot ignore the fact that the relevant resolutions of the Security Council were not binding decisions pursuant to Article 25 of the U.N. Charter; they were recommendations made under Article 38.¹²² Nor were the resolutions adopted by UNCIP binding. As UNCIP member Josef Korbel wrote in 1949, one “had to keep constantly in mind that [UNCIP] was an agency of good offices having no power to impose its decisions.”¹²³ It cannot be forgotten that the UNCIP resolution of August 13, 1948, was a *proposal* that UNCIP itself considered to be rejected.¹²⁴ Thus, all of the diplomatic and academic wrangling over

121. For interesting contemporaneous perspectives on the Kashmir issue in the U.N., see generally Michael Brecher, *Kashmir: A Case Study in United Nations Mediation*, 26 PAC. AFF. 195 (1953); Josef Korbel, *The Kashmir Dispute After Six Years*, 7 INT’L ORG. 498 (1953).

122. See generally U.N. CHARTER arts. 25, 38.

123. Korbel, *supra* note 42, at 281.

124. See *supra* text accompanying notes 48-49.

which state has prevented its full implementation is somewhat misguided. Indeed, the conclusion reached in answering such a question is an academic one, as the legal question is moot.

The lack of binding action by the Security Council is not surprising given the intense rivalries and suspicions that existed. The competing interests and prejudices of four of the five permanent members – China, the Soviet Union, the United Kingdom, and the United States – guaranteed inaction. Several factors made Kashmir particularly contentious, among them:

- 1) Kashmir's borders with China and the U.S.S.R.;
- 2) American interest in forging stronger ties with Pakistan;
- 3) British involvement in the Past subcontinent; and,
- 4) American suspicion at India's commitment to the nonaligned movement.

The U.S. interest in Pakistan and India's relationship with the Soviet Union ensured veto of any decision prejudicial to either country. As with other cold war disputes the Security Council was hobbled and no binding resolutions would be made.

The U.N. involvement in Kashmir, though well intentioned, had unfortunate consequences. Essentially, the various resolutions of UNCIP and the Security Council were, at best, soft law that became ammunition in the war for legitimacy of position. Ultimately, this has resulted in further entrenchment of the conflict in Kashmir.

D. Consequences of Domestic Law and Politics

The diplomatic and political actions taken by India and Pakistan since the partition, particularly in domestic legislation, have also contributed to the confused status of Kashmir. Both nations, in asserting their claim over the disputed territory, have essentially refused to acknowledge any potential legitimacy to the other's claim. Enshrining these claims in domestic legislation has served to reinforce each party's belief in its own righteousness, perpetuate the other's alienation, and prevent the issue from moving toward resolution.

The Indian government's decision to make a constitutional claim over Kashmir and enact the Constituent Assembly has been detrimental to resolution of the conflict. It cannot be denied that these actions have served to tighten India's grip on the state. However, the manner in which they have occurred has cast considerable doubt on India's claim to Kashmir.

Rather than legitimize the accession of Kashmir to India, the creation of the Constituent Assembly and adoption of the state constitution have stood out as glaring attempts to avoid the pitfalls of a

truly democratic exercise of self-determination. At the same time, they harden public opinion within India and create an environment in which any willingness to change the situation is perceived as a concession. Discussion of legitimate issues is therefore sacrificed, impeding negotiations regarding ultimate conflict resolution.

On the other hand, Pakistan's decision to enter into a military alliance with the U.S. at a key moment may have ruined one of the few chances for the resolution of the conflict in its early years. It marked the end of any possibility that India would agree to a plebiscite. Furthermore, it ruined any chance for the development of productive relations between India and Pakistan. American interference may be partially blamed, but such a conclusion neglects the true culprits. It is difficult to deny that potential peaceful resolution of the Kashmir issue was consciously sacrificed by Pakistan's military leadership in favor of their own ambitions.

E. Bilateral Stalemate

The bilateral negotiations of India and Pakistan have had no more success than the U.N. in settling their dispute over Kashmir. It has, however, registered modest success by developing a binding legal regime between the parties in the form of the Simla Agreement. Although both sides persist in their claims – for instance, Pakistan still does not accept the territorial division resulting from the agreement¹²⁵ – and sporadic fighting continues, a territorial status quo has generally been maintained since 1972.

Perhaps, though, the Simla Agreement has allowed the conflict to become even more deeply entrenched. Because of the prohibition of unilateral action and clear binding nature of the agreement, the line of control assumed the status of a *de facto* international border. Under the terms of the agreement neither country can, acting alone, alter the line of control. Nor can either country invoke international mediation or rely on third-party intervention. Because of the insistence on strict bilateralism, the line of control can only be changed if both countries consent.

Taking a strict legal view, the situation might never change so long as one of the countries refuses to agree. Thus, the bilateral provision of the agreement creates, potentially, a perpetual stalemate in which no other country or organization can interfere. At a time when the U.N. may finally be equipped to deal with the Kashmir issue effectively, either party can invoke the Simla Agreement to insist that third-party involvement is unwarranted.

125. See Makeig, *supra* note 5, at 283.

V. The Role of International Law in Conflict Resolution

Part IV explored the triggering and entrenchment of the interstate conflict over Kashmir. It suggested that the conflict has been perpetuated, rather than resolved, through the use of international law. Despite this, principles of international law and the international system should be at the center of any future attempt to bring peace and stability to the region.

This section will demonstrate the importance of these institutions in the settlement of the Kashmir dispute. It will examine the roles of the following in resolution:

- 1) The doctrine of self-determination;
- 2) The Simla Agreement;
- 3) U.N. action; and,
- 4) Interstate cooperation.

Finally, it will suggest that these factors together offer the possibility of a final resolution for Kashmir.

A. *Self-determination*

Self-determination, in its most basic sense, consists of freedom from foreign domination and the ability to determine one's own political future.¹²⁶ As discussed above, self-determination can now be considered a norm of international law.¹²⁷ Thus, the doctrine of self-determination must play a central part in any plan for the peaceful future of Kashmir.

It can be argued that the first part of self-determination – freedom from foreign domination – was fulfilled by the withdrawal of the British from Kashmir in 1947. Of course, nationalists from both sides, as well as advocates for Kashmiri independence, would assert that this has not yet happened. Without disputing these claims, it can still be said that 1947 saw the end of salt-water colonialism,¹²⁸ marking an important step toward self-determination.

The real focus of self-determination in Kashmir is on the political future of the state. Valid claims exist in favor of possession by both India and Pakistan, and the possibility of independence or a power-sharing agreement cannot be discounted, either. It seems, then, that the will of the people must be ascertained in order to determine the preferred arrangement.

As with many self-determination cases, determining who should

126. CASTELLINO, *supra* note 110, at 149.

127. See *supra* text accompanying notes 110-19.

128. This term refers to classic overseas colonization, generally by European powers. See CASTELLINO, *supra* note 110, at 65.

exercise the right is a difficult question. It has been suggested that the right to self-determination should be exercised by the people of the entire state, the people of each region, or only by the people of the Kashmir Valley.¹²⁹ Determining the correct group of people is further complicated by the changing demographics resulting from political upheaval.¹³⁰

It is entirely possible that a geographically limited exercise in self-determination might impact the traditional borders of Kashmir. Changes to the boundaries could conflict with the doctrine of *uti possidetis*, which states that the colonial boundaries should be maintained upon decolonization.¹³¹ Under this doctrine, any alteration to the colonial boundary must be justified by acceptable evidence.¹³² Ironically, it is suggested that the undoing of colonial boundaries during the partition of the subcontinent contributed to application of the doctrine of *uti possidetis* in Africa in the 1960s.¹³³

There are not clear answers to these questions under international law. It is important, though, that they are addressed. The issues must be definitively dealt with as part of any final agreement on Kashmir's future.

B. *The Simla Agreement*

The Simla Agreement will be a factor in any future negotiations between India and Pakistan. Because of its strict requirement of bilateralism, the Agreement has been viewed as a roadblock preventing any real progress.¹³⁴ Historically, this assessment has been true, with the Agreement allowing either country to veto any change to the status quo.

Of course, direct, bilateral negotiations eliminate possible interference and allow for an agreed plan of action, rather than one forced upon India and Pakistan by outside parties. This is certainly the preferable method for determining such issues as who should exercise the right to self-determination. A role may exist for the international community, if India and Pakistan agree. With willing parties, the Simla Agreement could provide a workable framework toward resolution of the Kashmir issue.

The parties, however, have been unwilling and the Simla

129. See Khan, *supra* note 2, at 533 (advocating a plebiscite only for the Kashmir Valley).

130. See, e.g., Das, *supra* note 109, at 270 (describing significant change in population between 1941 and 1948).

131. CASTELLINO, *supra* note 110, at 110.

132. *Id.* at 142.

133. Rehman, *supra* note 9, at 459.

134. See *supra* text accompanying notes 82-87.

Agreement has yielded little progress. Still, by its terms the Agreement commits India and Pakistan to eventual settlement of the Kashmir issue through meetings.¹³⁵ It is likely that international pressure will have to come to bear on the parties for real progress to be made; the Agreement ensures, however, that the parties have the opportunity to reach a mutual agreement.

Should the Agreement continue to prove unworkable, two possibilities exist. First, India and Pakistan could decide to enter into a superseding agreement that offers better chances at eventual settlement. Second, the U.N. could resolve to take binding action to bring a final settlement to the issue.

C. *United Nations Action*

As discussed above, U.N. attempts to mediate the Kashmir dispute proved unsuccessful.¹³⁶ The reasons for the lack of success have been primarily attributed to cold-war politics and the resulting inability of the U.N. to take binding action on the issue. This past disappointment, though, is no reason to discount the potential for the U.N. to play a useful role in any future settlement.

There are three primary roles the U.N. will play in settlement of the issue. First, the U.N. is the obvious organization to apply continued pressure on India and Pakistan to resolve the dispute bilaterally under the Simla Agreement. By respecting the bilateral terms of the Agreement but actively encouraging dialogue between the countries, the U.N. can help avoid the suspicions of the past, particularly from India.¹³⁷

Second, organs of the U.N. should indicate their continued willingness to play an active role in mediation or negotiation of a settlement. The U.N. should be careful not to force itself on the situation so long as progress is being made. However, it should also make it clear that if the parties mutually agree, an existing organ or special commission of the U.N. would be available to facilitate settlement.

Finally, the U.N. may be forced to assert its responsibilities to maintain world peace and stability.¹³⁸ Although it should respect the current bilateral regime, the U.N. must be ready to take such action as is necessary if the situation again becomes openly hostile. In this case, past experience has taught that the Security Council must take firm and

135. Simla Agreement, *supra* note 83, at art. VI.

136. See *supra* text accompanying notes 33-54, 121-24.

137. The U.N. recently declined to intervene in Indo-Pakistani relations, citing the bilateral nature of the issues. *U.N. Rejects Pakistan's Request to Intervene*, TIMES OF INDIA, January 10, 2002.

138. U.N. CHARTER, art. 1.

binding action. While this presupposes a certain amount of unity among the members of the Security Council, particularly among the permanent members, the chances of such a consensus are far greater today than during the cold war era.

D. *Interstate Cooperation*

It seems very simplistic to say that interstate cooperation is a key to final settlement of the Kashmir issue; had India and Pakistan been able to cooperate there would likely be no issue to discuss. Nonetheless, a cooperative approach may prove to be the only means by which India and Pakistan can reach an agreement that will prove satisfactory to all, including the people of Kashmir. While a detailed plan for cooperative action would be of significant scale,¹³⁹ a few points can be set out here.

First, it is essential that political leaders in both India and Pakistan put their desire for a settlement before any short-term political goals. Use of the dispute as a political rallying point would have to end.¹⁴⁰ Only if this could be accomplished would there be hope of settlement under the Simla Agreement. If not, it seems likely that settlement would only occur if imposed from the outside or if it resulted from another military confrontation.

To a certain extent this would require abandoning long-standing claims of being in the right. For example, India's conduct in acquiring the princely state of Junagadh is frequently mentioned in academic literature on the Kashmir dispute.¹⁴¹ Although it might be relevant to events at the time of the partition, it does not contribute anything positive to the discussion of the future of Kashmir.

A useful example for a negotiated settlement in Kashmir is the Belfast Agreement.¹⁴² The Agreement was concluded on April 10, 1998, between the governments of the United Kingdom and the Republic of Ireland. Appended to the treaty was an agreement entered into by all of the region's major political powers. The agreement was essentially a framework providing the structure for more detailed treatment of difficult issues such as self-determination, policing, and decommissioning of weapons.¹⁴³

139. For a plan for regional cooperation within Kashmir, *see generally* Khan, *supra* note 2.

140. *See* Mehta, *supra* note 88, at 393 (describing the political posturing of both governments at the onset of the 1989 hostilities).

141. *See, e.g.*, Howley, *supra* note 10, at 96; Khan, *supra* note 2, at 510.

142. Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, April 10, 1998, 37 I.L.M. 751 (commonly known as the Belfast Agreement or Good Friday Agreement).

143. *Id.*

Such an approach might be suited to Kashmir, where there has been great difficulty in reaching agreement because of political sensitivities and competing interests. Such an agreement could certainly be accomplished within the constraints of the Simla Agreement. The concerns of the parties to the agreement would, in fact, be paramount.

VI. Conclusion

This paper has examined the genesis of the Kashmir dispute and the subsequent entrenchment of the conflict. The partition of 1947 has been identified as the trigger of the conflict. It has been suggested that the approach of the international community, due to political interests and the failure to take binding action, contributed to this process. Legal arguments based on “soft” law have also compounded the problem by allowing each side to focus its attention on the misdeeds of the other. Meanwhile, the unilateral actions of both countries have frequently moved them further away from agreement.

Despite these difficulties, negotiation and international law offer the best opportunity for final settlement of the dispute. Taking into account the principle of self-determination, the parties should work bilaterally toward an agreed resolution with the assistance and urging of the international community. Cooperation between India and Pakistan will be the key in bringing long-term stability to this volatile region.