Negotiating the India-Pakistan Conflict in relation to Kashmir.

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NEGOTIATING THE INDIA-Pakistan CONFLICT IN RELATION TO KASHMIR

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INTRODUCTION

Any academic discussion centered on a particular conflict is incomplete without first attempting to garner a better understanding of the genesis and subsequent alteration of the underlying factors that contribute to a dispute through an integrative approach. Such an approach has been termed as “Transformation Studies,” wherein an attempt is made to first study the experiences which lead to grievances and ultimately to disputes. In this approach the emergence and transformation of a dispute is analogous to studying a social process as it occurs. Only when a particular experience is perceived to be injurious, does one feel the need to attribute the cause of that injury to a particular entity. Such attribution is linked to an anticipation of relief, followed by a claim for remedy by the aggrieved. A rejection of that claim is
considered by Felstiner as the catalyst which transforms the claim into a dispute.\textsuperscript{6} Such an approach recognizes that disputes depend significantly upon people’s feelings in connection to the experiences which lead up to and surround them, because such disputes are in the end a “subjective perception.”\textsuperscript{7}

It is here that we look at the sources that shape this subjective perception. In recent history, conflicts have rested on the twin prongs of “identity” based on religion, culture, and language, and “distribution of economic, political, and social resources.”\textsuperscript{8} A combination of the two is understood to fuel what is referred to as a “deep-rooted conflict.”\textsuperscript{9} Such conflicts threaten one’s sense of self and are emotionally-driven,\textsuperscript{10} hence they are less amenable to rational negotiation and are complex and persistent.

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Though deep-rooted conflict is described as an intrastate phenomenon, the conflict that exists between Indian and Pakistan reveals all the characteristics associated with identity. Identity is a bond shaped by a shared community.\textsuperscript{11} In Pakistan this bond involves the shared religion of Islam and the sentiments regarding the distribution of land in Kashmir.\textsuperscript{12} That this conflict is persistent is no secret, it has been prolonged, with four wars being fought from the beginning until now.\textsuperscript{13} Negotiations with regard to the conflict have not always been amenable, with both states engaging in strong positional bargaining.\textsuperscript{14}

It is important to note that none of the wars were successful in resolving the underlying causes of the dispute, and hence there is skepticism as to whether recourse to arms is a viable solution to the roots of this conflict.\textsuperscript{15} This has created a greater impetus to find a solution through talks.\textsuperscript{16} These talks in turn require a greater understanding of the sources of conflict.
PART-I

Structural Factors

Although a number of case studies exist on each of the wars between India and Pakistan (1947, 1965, 1971 and 1999), none looks upon the similarities or provides a comprehensive explanation as to their origins. Also, there exists a difference between the classification of a conflict as one based on “identity” and elucidating the underlying factors that bring about a conflict. An identity remains a common thread connecting and, in many cases, causing the various individual factors that initiate conflict.

The source of the India-Pakistan Conflict can be isolated into three broad structural factors that reflect certain profound social and historical forces that have shaped and continue to influence the relations of India and Pakistan. They are as follows:

1. The nature of British colonial and disengagement policy;
2. The ideological commitments of the leaderships of India and Pakistan; and lastly,
3. The strength of the irredentist/anti-irredentist relationship between the two countries.

The first structural factor of the conflict is attributed to the process of colonial disengagement by the British Empire, which was neither well-planned, nor tranquil. It is said that the British were worried about their ability to maintain Law and Order as the Muslim League and the All India Congress reached a political impasse on issues related to the transfer of power and hence decided on shock therapy. In February 1947, Clement Atlee announced that the Raj would end in June 1948, whether or not any agreement was reached with regards to the subsequent political arrangements. Thereafter, Lord Mountbatten, a cousin of King George VI, replaced Wavell as the Viceroy of India. Lord Mountbatten’s appointment had profound consequences on the British Colonial disengagement policy.

Mountbatten is said to have initially refused the position because it conflicted with his desire to resume his career in the Navy. Atlee’s announcement of a specific date for the transfer of power, combined with the eagerness that Mountbatten felt to return to Admiralty substantially
raised the possibility of an abrupt and hence inevitably disastrous disengagement of British power from the simmering volcano that was the Indian subcontinent. Mountbatten rapidly concluded that partition was inevitable and that the date for independence should be advanced by a year to August 1947. Mountbatten’s proposal for partition of the country into two and the subsequent transfer of power, though hastily drawn, was accepted by the Congress and the Muslim League as the only other alternative to civil war.

Advancing the date of departure for the British meant that there were only three months to split the Indian Empire into two separate states. This mammoth task involved splitting the major functions of the country, including the division of Punjab and Bengal provinces, dividing financial and other national assets, dividing the Army, Navy and Air-Force, deciding how to divide the Indus River irrigation system, resolving the fate of the princely states that comprised one third of British India, and fixing the final boundaries of India and Pakistan. As can be expected, this haste to leave rendered the transitional process a complete disorder. It caused a mass exodus of over 15 million people from their homes in fear of unfavorable treatment from a government with a different religious ideology, and sparked a dispute over Kashmir that remains unresolved even today.

This process of colonial disengagement has two aspects. The first is that it ignored the inevitable consequences of leaving to their own fate people who were divided along ethnic lines in order to facilitate better governance for the British. Separatist feelings within the Indian Muslim Community were cultivated in part by the British rule in tune with the now well-documented policy of “divide and rule.” With the growing separatist sentiments, and antipathies between Hindus and Muslims in British India, it became easy for the colonizers to contend that British rule was the only means of maintaining peace and stability on the continent.
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After years of employing this maneuver, when the British precipitously relinquished control, the brewing animosity spilled out into the political rhetoric of the leaders of the two states. Burke provides an insight into the religions of Islam and Hinduism, while asserting that their inherent antithetical nature played significant role in shaping the conflict. He said that the two religions lacked any forbearance with respect to each other and the schism between the two was only intensified by the “cut” and “run” nature of the British departure. The cause of the Hindu-Muslim riots of 1947 at the time of the partition were attributed to this “hasty departure,” which led to a lack of government arrangements to transport populations across newly created international borders. The carnage that ensued as a result of the riots only acted to deepen the hostilities between the two communities and hence the two nascent states.

The second aspect of colonial disengagement that affected the post-colonial domestic order is the external relations of newly formed states. The post colonial readjustment of boundaries by the colonial powers were often not congruent with the natural distributions of the social, economic, linguistic, and cultural traits of the human population. Hence, an array of different cultural groups found themselves in different countries as “minorities.”

The second structural factor was the ideological commitments of the leadership of India and Pakistan. Sisir Gupta identified the reason for the fundamental ideological differences that existed between the Congress and the Muslim league, which were the two vanguard parties responsible for the creation of India and Pakistan, respectively. In a detailed account of the factors that led to the First Kashmir war and the subsequent escalation of violence Gupta wrote:

The origin of the conflict between India and Pakistan over Kashmir can be traced back to the days before the division of the sub-continent. In fact, the major elements of the conflict are the images that India and Pakistan had created for themselves on the eve of the partition. For the Congress, the old India continues to exist as an entity, though the secession of some areas was agreed to in the conviction that what remained would be integrated into a strong, secular and unified state. The Muslim League envisaged that the Muslim majority areas in the northwest and East India, constituted
into a separate state, would grow into a strong, strategically vital Islamic State. What was more, this latter state would become as important as India, which might well be balkanized into independent units, due to the “sovereign rights” of the princely states. There was no finality about the political map of the subcontinent, when India and Pakistan emerged as Independent States on 15 August, 1947.\(^\text{38}\)

It has become clear that even before the partition, the ideologies of the parties, which were instrumental in the creation of the states in the first place, were fundamentally adverse to one another with one’s basis of state formation being the dogma of Islam, while the other’s being secularism.\(^\text{39}\) Therefore the success of one meant the undermining of the other.\(^\text{40}\) Gupta drew attention to the uncertainty of the borders of the two states, which was the eventual tipping point that led to an outbreak of violence between the two states. Because we classify the India-Pakistan conflict as one based on identity, it is important to understand the role played by ethnicity in shaping the ideological commitments of the leadership of India and Pakistan. “Ethnicity,” as we defined, has both a communal and personal dimension, wherein it equips an individual with a sense of belonging and positions him in society.\(^\text{41}\) Ideology, on the other hand, is defined as “a set of beliefs, infused with passion that seeks to transform the whole way of life.”\(^\text{42}\) These definitions help us understand that Pakistan’s commitment to Islam and India’s rejection of religion as the basis of state building create rival ideological orientations the underlie political actions.\(^\text{43}\) The Pakistani leadership felt the need to assimilate Kashmir along with other areas having a predominantly Muslim population in the former British Indian Empire because it was felt that only then could the Muslims develop a separate cultural ethos.\(^\text{44}\)

This ideology centered on ethnicity and identity was employed repeatedly by the Muslim League in the pre-partition era, when it asserted that the creation of the separate theocratic state of Pakistan (incorporating the Muslim-dominated areas of British India) alone would ensure freedom
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from Hindu dominance and would guarantee its “completeness.” At the same time it was equally important to the Indian Leadership to demonstrate that Muslims could retain their sense of identity in a secular though predominantly Hindu state. Therefore, if Kashmir was to be ceded to Pakistan it would mean that India’s “secularism” was “superficial,” with religion being the only basis for the creation of a state.

Brass draws a link between the formation of ethnic identities and the manifestations of such identities in politics. He points out that the manner in which ethnicity is employed by a political organization reflects the social characteristics of the population whose interest it purports to represent. In the context of India and Pakistan, the raison d’être of the Muslim League was understood to be the homogenization of the Muslim population in British India to act politically against its ethnically homogeneous adversary, the Hindus. The Congress, on the other hand, formulated an ideology of secularism, and desired a democratic state encompassing numerous cultural communities.

Brines, who presents the most comprehensive study on the matter, states that it was the growing hostilities, and mutual distrust and fear that fuelled Indo-Pakistan conflict:

These insecurities were built into the two nations by the history of communal discord, by the nature of their birth, and the alchemy of Independence.

He further states that:

Kashmir crystallizes the fear, the mistrust and the bigotry that darken the subcontinent and provides a vehicle for enlarging them with modern political complications.

The last structural factor is the irredentist/anti-irredentist relationship that developed between India and Pakistan over Kashmir. The last ruler of the state of Kashmir constituted a puppet monarchy and was a Hindu called Maharaja Hari Singh. This dichotomy of having a Muslim population but a Hindu ruler paved the bedrock of Pakistani irredentism defined by Weiner to be the desire on the part of a state (in this case Pakistan) to revise some portion of its international boundaries to incorporate the ethnic/religious minority of a contiguous state and the territory that it occupies.
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However, to understand Pakistan’s irredentism with regards Kashmir it is important to first understand the Indian actions that shaped this ideology and made Pakistan pursue it with such fervor. The division of the British Empire into two separate countries meant that the issue of accession of the princely states had to be settled. Lord Mountbatten made it clear, in his address on July 25, 1947, that these princely states would have to join one or the other of the two created dominions. Most of the rulers of the princely states acted upon Mountbatten’s suggestions and signed instruments of accession with either India or Pakistan. Three princely states however did not do so immediately, and the accession of two of them was solved through the use of force. These three states were that of Junagarh, Hyderabad, and Jammu and Kashmir. The actions taken by India regarding the forcible accession of Junagarh and Hyderabad shaped Pakistan’s irredentism towards Kashmir.

Junagargh was a state with a predominantly Hindu population, but with a Muslim ruler. It had contiguous borders with India. On August 17, 1947 the Nawab (Ruler) of Junagarh decided to join Pakistan. This move was seen as unacceptable to the state department in India who felt that because of Junagarh’s geographical location and predominantly Hindu population it should have joined India. While negotiations for reconsideration were underway, the Nawab of Junagarh fled for Pakistan, along with a substantial portion of the state’s treasury causing the state’s machinery to break down and giving the Indian military an excuse to intervene in Junagargh and hence integrate it into India.

The case of Hyderabad was decidedly similar. This state, like Junagarh, was surrounded on all sides by India and was also a Hindu Majority state with a Muslim Ruler. This time however the Nizam (Ruler) of Hyderabad decided not to join either state but remain an independent entity. The Nizam was being persuaded to sign an instrument of accession with India when agitations were started in the Hyderabad by fanatical Muslims who wanted to accede to Pakistan. As political instability grew in the state, with
the Nizam’s indecision still hanging over the fate of Hyderabad, the Indian government decided to intervene militarily. The Indian Army entered Hyderabad on September 13 and, by September 17, Hyderabad’s forces had surrendered.

With this backdrop in mind it is hardly surprising that the Indian Government received news that Pakistani Tribesmen had invaded Kashmir and were moving in on Srinagar (Capital of Kashmir). Pakistan used India’s logic in Junagarh against India in Kashmir, saying that, regardless of the ruler’s decision, Kashmir with its large Muslim population and contiguous borders with Pakistan should accede to it. When the news of the invading tribesmen reached New Delhi on October 25, the ruler of Kashmir appealed to the Indian government for help to repel the invaders. The Indian government agreed to help but only on the condition that he promptly accede to the Indian dominion, which he did on October 27. Within twenty-four hours of the Maharaja’s decisions the Indian forces were air-lifted into Pakistan thereby setting the stage for the first War between India and Pakistan.\(^{58}\)

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**Situational factors**

After discussing the theoretical framework underlying the India-Pakistan Conflict and the factors shaping it, we move on to the specific historical occurrences that triggered armed combat between the two states. As per Ganguly, structural factors combine with certain situational factors that trigger war.\(^{59}\) He asserts that, regardless of other factors, war is most likely to occur in the subcontinent when the ideological commitments of either side are threatened in a fundamental fashion:

Neither state was capable of overlooking basic threats to its ideological underpinnings. In 1947-1948, the possession of Kashmir was crucial for both states. Just prior to the 1965 War, Pakistan recognized a fundamental
ideological challenge from India because India was attempting to integrate Kashmir and thereby sweep away the long standing Pakistani ideological and irredentist claim on Kashmir.\textsuperscript{60}

The situational factor for the first war was the invading Pakistani tribesmen; however, the situational trigger for the second war isn’t so clear. Like the first war, the second started without a formal declaration of war and is said to be built on the experiences of the first.\textsuperscript{61} It is widely believed that the war began with the infiltration of Pakistani-controlled guerrillas into Indian Kashmir around August 5, 1965, while the first Major engagement of the regular armed forces of the two sides took place on August 14, 1965. The situational factor that set the stage for the second war is widely believed to be the status quo approach that India took towards Kashmir, since the bulk of the state was in its hands and the acquisition of the remainder would not yield any particular strategic benefits.\textsuperscript{62}

Pakistan, on the other hand, continued to hold the view that the “completeness” of the nation depended on the integration of the contiguous Muslim-majority state into Pakistan.\textsuperscript{63} Thus the Pakistani goals in the negotiation were opposed to those of the Indian side. A compromise on this issue seemed difficult as it would discredit the raison d’être of the Pakistani state. Hence the domestic politics and repeated failure of negotiations can be said to be situational factor in the second war.\textsuperscript{64}

\textbf{PART II}

\textbf{Bilateral negotiations 1953–1956}

The period from 1953 to 1956 witnessed several instances of bilateral negotiations between India and Pakistan, with sporadic involvement of the U.N. Security Council. In 1953, hopes were raised with the election of Prime Minister Bogra and his subsequent meeting with Nehru in London, at the Commonwealth Prime Ministers Conference, where it was believed a solution to the Kashmir issue might be discussed. This meeting was followed by one in New Delhi where the parties agreed that the dispute would be settled without force and with the help of a plebiscite to ascertain the wishes of the people.\textsuperscript{65} However, the subsequent act of Pakistan joining
SEATO in September 1954 and signing the Baghdad Pact in September 1955 significantly affected the politics of the sub-continent and left the question of the plebiscite in the background, as Pakistan had allied itself with the U.S and bought the cold war into the region.

This U.S link provided Pakistan with an important source of both political and military leverage against India.\(^6^6\) Fearing the use of this newly acquired might by Pakistan, Nehru raised the possibility of a “no war” pact with Pakistan. In response, Bogra’s stand after U.S support became decidedly more rigid. He stated that:

> Without an agreement to resolve, by arbitration if necessary, all outstanding disputes such a pact would have no significance.\(^6^7\)

This response drove the sides further apart, as it was interpreted by the Indian Foreign Policy establishment to be rigid and intransigent.\(^6^8\) Talks resumed again in 1955 under the presidency of Iskander Mirza, who did not enjoy much political support and unfortunately sought to change that by deciding to attack the recent Soviet support for the Indian position on the Kashmir issue. Such an act always garnered popular support in Pakistan due to the widespread animosity towards India on Kashmir.\(^6^9\) Thus, bilateral relations were sacrificed to Mirza’s political ambitions.

Next the Kashmir issue was brought to the U.N. Security Council in January 1957 by Pakistan. There were two reasons why Pakistan approached the Security Council. First, Pakistan had realized that bilateral negotiations had yielded no results and that India favored the status quo.\(^7^0\) Second, Pakistan hoped to get support from the U.S.\(^7^1\) The Security Council suggested stationing a temporary U.N. peacekeeping force in the area while potential solutions were being discussed. Pakistan was amenable to the proposal, but Nehru\(^7^2\) rejected it, stating that it would not accept foreign troops on what was essentially its soil.

The Security Council passed an amended resolution giving five recommendations: (1) creating an atmosphere favourable to negotiations, (2) reaffirming the integrity of the cease-fire line, (3) withdrawal of Pakistani and Indian troops from Kashmir, (4) interpreting the terms of a plebiscite, and (5) a meeting of the two prime ministers. India objected, stating that such a proposal would be equivalent to saying that Pakistan had honored its commitments and not occupied Indian territory illegally.\(^7^3\) During this
deadlock, President Mirza declared martial law and subsequently appointed General Ayub Khan as President on October 27, 1958. India was skeptical as to how a military government would deal with the issue of Kashmir compared to a parliamentary democracy. Despite military rule, however, the Indus water treaty was signed in September 1960.

As time passed both India and Pakistan further solidified their positions in Kashmir. Pakistan built the Mangala Dam in Azad Kashmir (occupied in 1947), whereas in 1960 the Indian Supreme Court assumed jurisdiction over the Kashmir state. This process of integration only made clear the fact that India had no interest in giving up the status quo and enjoyed a more favorable BATNA. Nevertheless Pakistan continued to bring the issue of Kashmir before the Security Council. The India attitude is well-described by the statement of V. K Krishna Menon.

This is the 104th meeting on the subject. You can hold 200 meetings. We will come here every time you ask us to, but on no condition shall we trade out sovereignty.

Negotiations over Kashmir 1960-1964

With reluctance, both India and Pakistan returned to the negotiating table with the specific mandate of resolving the Kashmir issue. Accordingly, six rounds of talks were to be held between December 1962 and May 1963. The first rounds of talks were held December 27 and 29, 1962. Bhutto represented Pakistan and Swaran Singh represented India. The first round concluded with both parties merely reiterating their previously-held stand with regards the plebiscite and the dispute in general. The second round was held from January 16-19, 1963. Pakistan continued to push for a plebiscite and India showed reluctance. India argued that the election of a democratic government in Kashmir obviated the need for a plebiscite. Instead he proposed alternatives such as partition of Kashmir, withdrawal of military forces, and signing a “no-war” pact between the two nations. This proposal was accepted as a draft by Pakistan.

The third-round talks were held from February 8-10, 1963. Discussions were held on how to delineate the boundary of Kashmir if a partition were to take place. Bhutto greatly increased Pakistan’ s territorial demand, which was unacceptable to India, and the talks broke down. The fourth round
was held between March 12 and 14, 1963. It started with the backdrop of Pakistan having acceded 2,500 square miles of Indian-claimed land to China. India reacted sharply to this as being a violation of the 1948 Security Council regulation requiring a standstill after the first war in 1947.

The fifth round was held from April 22-25, 1963. Bhutto made a weak attempt to break the deadlock when he suggested that Pakistan would grant Indian troops transitory facilities to deal with the Chinese threat in Ladakh if it conceded to Pakistan territorial demands. Not surprisingly, India rejected this proposal. The last round was held from May 14-16, 1963, wherein Bhutto returned to the plebiscite question and Singh once again raised the question of the no-war pact. Both the representatives rejected the other’s offer, with Bhutto stating that the acceptance of a no-war pact by Pakistan would mean the conversion of the cease-fire line into an international border which was unacceptable to him.

PART III

Strong positional bargaining based on fixed ideology was the primary cause for the breakdown of negotiations on the Kashmir issue, wherein each party refused to concede, fearing discreditation of their respective ideologies. Professor Raymond Cohen in his study titled, “Negotiating Across Cultures,” laid down three elements that impact negotiations: (1) The role of the media, (2) the involvement of external players, and (3) the impact of cultural differences on negotiations.

According to Cohen, before the start of any diplomatic negotiation, senior leader’s statements at press briefings and in public are extremely important. They establish the tone for the upcoming negotiations, signal the likely issues of contention, and articulate the public goals on either side. The public statements are usually addressed to their audiences back home, but are crafted so as to not disturb the waters for the meeting. One country’s comments have often caused negative responses from the other, impairing the prospects of the talks. For example, Nehru’s comments that any change in the status of Kashmir would be bad nearly scuttled the 1962-1963 negotiations over Kashmir before they had begun.

Traditionally, Pakistan has eagerly sought third-party involvement, whereas India has strongly preferred to deal bilaterally with its neighbor. In
the 1953 negotiation and again in the 1962-1963 Kashmir talks, the World Bank, the U.S, the U.K, and Soviet officials were actively engaged. During the negotiations of the Indus Water Treaty, the World Bank was a direct party to the talks. In the 1962-1963 talks, the Americans and the British were diplomatically engaged, but not physically present, in the negotiating sessions. From the Indian perspective, third-party involvement in the form of the U.N and then American and British engagement regarding Kashmir in the late 1940s, 1950s, and early 1960s proved unsatisfactory. Because of Cold War alliance considerations, New Delhi believed that outsiders opposed India’s position and favored Pakistan’s stand on Kashmir.

In contrast, Pakistan has actively sought to involve other countries as a way of offsetting India’s greater strength. However, after the agreement in Simla in 1972, both parties agreed not to internationalize India-Pakistan disputes, but rather deal with them bilaterally. This change is viewed by India as a major achievement. Resistance to third-party involvement is seen as a significant barrier to negotiations, as was evidenced by Israel’s unwillingness to involve neutral third parties.81 Without a neutral entity, the two distrustful parties had no choice but to accept that each serve as the judge of the other’s actions.82

Lastly, Cohen and Dajani assert that cultural differences can cause major negotiating difficulties, which lead to misunderstanding.83 In the case of India and Pakistan, one can safely say that this has not been the case. Though Pakistan has developed a significant Islamist flavor and subsequent governments in India have laid stress on India’s Hindu roots to gain political support, the officials that actually conduct the dispute remain very much alike insofar as they derive their mannerisms from their British Colonial past, and not their religions.84 They might disagree on substantial issues, but remain quite amicable on a personal basis. All written communication and documents between the two sides are in English.

Indians and Pakistanis have no problem understanding the perspectives of their interlocutor, having a detailed knowledge of the position that the other has taken in the past. Indian and Pakistani negotiators fully comprehend the implications of each other’s body language, and other cultural South Asian mannerisms. Hence, we see that both Indian and Pakistani negotiators faced no dichotomy between Mnookin’s “empathy and assertiveness,” yet continued to maintain a strong positional stand.85
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External factors such as the media, third parties, or culture have not really affected the negotiating process between India and Pakistan, however, in negotiations between 1953-57, and again in 1960-64, the impact of external events caused a definite impediment to negotiations, (for example Pakistan’s alliance with the U.S and China) reaffirming Bar-Zion’s view that such events act as a barrier to negotiation and peace.86

What then are the factors that affect India-Pakistan negotiations? We see that the major difference between the two was an institutional one. In Pakistan, the Army dominated policymaking in Islamabad, whereas in New Delhi the power was in the hands of a civilian prime minister chosen by a popularly elected Lok Sabha.87 Hence, India faced a situation similar to the Israeli negotiators with regards to the Palestinian political disorganization that heightened their mistrust.88 Pakistan, like the Palestinians negotiators, submitted unclear proposals and negotiated under the fear of opposition from Pakistani political principals who provided vague guidance in the first place.89 It is believed that the legacy of distrust between India and Pakistan was the singlemost important factor that weighed heavily on their bilateral relations.90 With the exception of the Indus Water Treaty of 1960, India and Pakistan have failed to make any significant progress towards achieving normal relations.

In both countries, unflattering stereotypical perceptions of each other exist. The Pakistani Army is imbued with a firm belief that India, and Hindus, are inherently hostile to Pakistan and are seeking to weaken the country in any manner possible.91

In bilateral negotiations, India enjoys a much more favorable BATNA and is satisfied with the status quo. Pakistan, on the other hand, continues to be the revisionist power, seeking to alter the status quo. This has led to another barrier in negotiation spelled out by Bar-Zion: Pakistan has a feeling of being victimized, and hence, expects India to make concessions.92 India has long been willing to settle the dispute by transforming the cease-fire line and now the line of control into a permanent international border solidifying the status quo.
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The strategy of Pakistan’s single-minded pursuit of Kashmir as a fundamental foreign policy and national security objective, subordinating all other aspects of its relations with India, has a historical connection. The same policy of inflexibility was adopted successfully by Jinnah in his negotiations with the Congress and the British in his pursuit for an Independent Pakistan. It is felt that same tactic is being employed by Pakistan again, rendering a creative solution to the Kashmir issue impossible. This strong positional bargaining by Pakistan prevents the creation of a settlement. The reason for Pakistan’s hard stand is based on its fundamental ideology of state creation. Hence, positional bargaining continues, as the issue at stake is a matter of principle and the parties are not interdependent. In addition, they desire the same thing for the same purpose—the ideology of state creation. Thus, both Pakistan and India find it difficult to retract from their earlier stands without discrediting their ideology.

PART IV

Referring to the Israel-Palestinian dispute, Dajani suggested that deep-rooted conflicts involve a number of issues that simply cannot be resolved by reference to international legal rights and obligations. Nevertheless, Dajani believes that international law can provide a context to the dispute and tools to help resolve it. This section examines the international legal aspects of the Kashmir conflict.

The first issue to be considered is whether the accession of Kashmir to India was legal. It is India’s assertion that Kashmir acceded to the Republic of India the minute Maharaja Hari Singh signed the Instrument of Accession. India further claims that because Maharaja Hari Singh was the recognized ruler of Kashmir at the time, he was the only authority competent to sign the instrument of accession.

India went on to espouse its claim by stating that International Juristic opinion recognized the right of the head of a state to enter into international treaties that are binding upon the country. It relied upon the principle of \textit{jus representationis omnimodae}, stating:
International law imputes to a State all the manifestations of will and the acts which the head of the State acting in that capacity accomplishes in the domain of international relations.\textsuperscript{100} India reiterates that because this instrument was signed by the Head of State for Kashmir, accepted by Lord Mountbatten\textsuperscript{101} and India’s Prime Mister Nehru, it was justified in international law for India to protect Kashmir from invading tribesmen.

Pakistan countered this claim by questioning Maharaja Hari Singh’s authority to sign the instrument of accession, stating that as per prevalent international state practice, a state government could only be recognized on the foundation of three basic factors: first, the government’s actual control of the territory; second, the government’s enjoyment of the support and obedience of the majority of the population; third, the government’s ability to stake the claim that it has a reasonable expectation of staying in power.\textsuperscript{102} Pakistan claims that the State of Jammu and Kashmir was under the control of either the tribesmen that had invaded it or local rebels. It asserted that Maharaja Hari Singh exercised influence in only small pockets of the state, enjoying little or no support from the local population.

It further maintained that the state’s armed forces had been defeated in the process of repelling the invading tribesmen and quelling the internal rebellion and hence it could be reasonably assumed that the Maharaja’s government could not remain in power without Military assistance from India.\textsuperscript{103} According to Pakistan, this assumption is validated by the contents of the Maharaja’s letter to the government of India wherein he states, “if my state has to be saved, immediate assistance must be available at Srinagar.”\textsuperscript{104} If the Maharaja had no authority to sign the instrument of accession, Pakistan can consider it to be without legal standing in international law.\textsuperscript{105} Pakistan has also questioned the instrument on the grounds that it was an outcome of coercion. It reiterated that any international agreement concluded under the threat or use of force is void as per the Vienna
Convention on the Law of the Treaties. Pakistan suggested that the Indian Government had made military aid to Kashmir conditional upon the Maharaja signing the Treaty, and in any case the Indian troops had begun pouring into Srinagar even before the signing of the instrument of accession, leaving the Maharaja with no choice but to accede.

Pakistan further lays emphasis on India’s behavior surrounding the treaty and suggests that its actions further arouse suspicions as to whether the instrument of accession was ever signed in the first place. For example, in 1995, India’s authorities claimed that the original copy of the Instrument of accession was either lost or stolen. Though international law requires that any treaty entered into by a member of the United Nations needs to be registered with its secretariat, this was never done. This makes it ineligible to bring before any organ of the United Nations. Finally, Pakistan claims that the instrument of accession was never presented to either Pakistan or the United Nations.

Pakistan argues that regardless of whether or not the instrument of accession is considered illegal, India is still bound to hold a plebiscite in Kashmir, to allow its people to decide whether they would like to accede to India or Pakistan. This, Pakistan claims, is in accordance with the U.N Commission for India and Pakistan(UNCIP) Resolutions of August 13, 1948 that India accepted signalling the end of the first Kashmir War. It is important to note that India was the one to approach the Security Council of the United Nation in order to seek an intervention, the result of which was the Resolution of August 13, 1948. India refused to carry out the plebiscite because, according to it, there must first be a complete withdrawal of both Pakistani and Indian troops from Kashmir, which has not yet taken place. This, as per Pakistan, is a gross violation of the internationally recognized principle of natural law expressed in the Latin maxim *nullus commodum capere potest de injuria sua propria* (no man can take advantage of his own wrong).

*Kashmiri’s right to self determination.*

Pakistan and India both employ conflicting norms of international law to justify their stand. While India asserts its right to sovereignty and territorial integrity, Pakistan’s claims are based on the principles of
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Self-determination. Affirming that the right to self-determination supersedes any instrument of accession, Pakistan’s then-foreign minister Bhutto argued before the United Nations in 1964:

Kashmir is not a piece of property, that its fate is not to be sealed or signed away through any instrument of accession ... that [it] is rather the free will of the inhabitants ... which has to be determined and decided.”

Article 1.1 of the 1966 International Covenant on Civil and Political Rights and the 1966 International Covenant on Economic, Social, and Cultural Rights stated that “all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

In response to this India is quick to point out Paragraph 6 of the General Assembly Resolution 1514 which, while reiterating the right of “people” to self-determine, states that “any attempt aimed at the total or partial disruption of the national unity and the territorial integrity of a country is incompatible with the Purposes and Principles of the Charter of the United Nations.” India has relied on paragraph 6 of this resolution and asserted that the secession of Kashmir will cause irrecoverable harm to the nation’s unity and cohesiveness and so the “peoples” of Kashmir cannot have the right to unilaterally decide on secession. India further asserts that Kashmir is essential for India’s security as every land-based invasion was carried out through the north-west that is Kashmir and, hence, its retention is essential. Hence we see that similar to the Israel-Palestine conflict, the disagreement as to the applicability and the determinacy ensured that international law played no significant role in help the parties reach an agreement.
PART V

Political analysts and academicians have limited the possible solution in Kashmir to four viable scenarios. The first is in line with the original UNCIP resolution of 1948 that a plebiscite to determine the future of Kashmir be held. However, one then wonders about the fate of the Hindu minority in the state of Jammu and Kashmir if the Muslim Majority voted for merger with Pakistan.\(^{120}\) Even members of the UNCIP realized that the “mere technicality of carrying out a plebiscite seemed beyond the scope of reality.”\(^ {121}\) However, a plebiscite remains the solution formally suggested by the United Nations and pressed for by Pakistan.\(^ {122}\) Sir Owen Dixon, in his report on the matter to the Security Council, wrote that because the state of Jammu and Kashmir lacks demographic or geographic unity, a decision either way would cause a mass exodus of people—Hindus if Kashmir passed to Pakistan, and of Muslims if it passed to India—with a possibility of genocidal massacres.\(^ {123}\)

The second option, one that has in recent time gained considerable acceptance amongst the Indian populace, is to concede the Kashmir Valley to Pakistan. This option shares an essential drawback with the previous one with regards to the fate of the Hindu population. In addition, it is feared that conceding Kashmir will set in action other disintegrative forces in India as India’s ideology of secular unity would take a blow.\(^ {124}\) Finally, it is felt that such action could lead to a vicious Hindu backlash against Muslims in India and in other states where the communal sentiment is already widespread.\(^ {125}\)

A third option is that of an independent Kashmir. Such an option has been popular among a large section of Kashmir’s political elite and many western scholars.\(^ {126}\) However, it is pointed out by Sisir Gupta that such a sovereignty can only be possible if it is guaranteed by her neighbors, India and Pakistan. Such a guarantee seems unlikely judging by the precedent set so far in the relations of the two states.

The previous experiences of 1947 and 1965 means that India will no longer accept paper guarantees.\(^ {127}\) Furthermore, because India and Pakistan’s foreign policies are so diverse, there will always be pressure on Kashmir from each to get it onto its side of the fence. Lastly, it is important to understand that, from India’s perspective, a weak independent state of Kashmir would be a temptation for the Chinese, with just an aggressive
thrust from the north bringing them across the natural defense line of the Indian subcontinent. Therefore, the option for an independent Kashmir does not seem like one India would be willing to consider. Regardless of India’s or Pakistan’s desires, the inevitable economic dependence of the state on external financial assistance would make it difficult for Jammu and Kashmir to be truly independent.

A fourth option of shared sovereignty has recently been suggested as a creative solution to the Kashmir issue. Such a solution lacks historical precedence. It is felt that such a solution would be difficult to implement for any two nations of the world, and in the case of India and Pakistan it would be impossible to evolve a practical scheme of joint control over Kashmir. Some of the questions that come to mind include: “How would India and Pakistan decide differences over their responsibilities?” “Who would assume the responsibility of economic development and who would collect the revenue?” These questions pose a major barrier to this option being implemented.

The fifth option appears to be the most viable. Though Sisir Gupta advocates the partition of Kashmir along the lines of the 1948 border, the solution offered by Ganguly appears to be more practical. This option has three elements. They are as follows:

1. The first element is the granting of greater autonomy within a reorganized federal polity. This will involve the undoing of years of political centralization. Discussions with militant groups willing to hold discussions will have to be undertaken in order to curb the rampant military activities.

2. The second element involves improving the recruitment, organization, and training of India’s paramilitary forces in order to check the growing number of human rights violations by these forces in the area due to lack of supervision and training. Such abuse of state power in dealing with the local population of Kashmir has to be checked in order to retain peace and contain resentment among the populace.
3. The third element entails restarting negotiations with Pakistan on a number of unresolved bilateral issues. These negotiations must attempt to first build trust through unilateral concessions and then proceed with soft positional bargaining, with contentious issues like Kashmir being put on the back burner in order to achieve cooperation in less controversial issues.

CONCLUSION

It is clear from the actions of India and Pakistan that international law and international legal institutions have played a minimal role in regulating their behavior. One is forced to reconcile to the fact that no international legal solution is possible to the Kashmir issue, and attempts at a military solution have only resulted in overwhelming loss of life and drain on resources. Therefore, the only path forward seems to be a concerted political effort requiring tactful negotiations between the leadership of the two states. Managing deep-rooted conflicts requires far-sighted leadership. Negotiation becomes particularly difficult when the leaders negotiating the conflict are those who have provoked or maintained the conflict. It requires leaders to forego short-term gains, for the long-term benefits of their country. This may involve unilateral concessions on the part of India which may induce Pakistan to abandon its irredentist claims on Kashmir and build trust.\textsuperscript{134} Such a change can only be brought about by a concerted effort of the leadership of India, Pakistan, and Kashmir, who have to approach the negotiating table with “flexibility” and apply an “integrative approach” to negotiations.\textsuperscript{135}

Notes


3. Ibid, p. p.632
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4. Ibid, p. 635.
5. Ibid.
6. Ibid., p. 636.
9. Ibid.
12. Ibid.
16 “India-Pakistan Talks—Rapprochement or Renewed Great Game” (Article) (Washinton: Center for Strategic and International Studies) online:http://csis.org/blog/india-pakistan-talks-rapprochement-or-renewed-great-game.
18. Supra n. 8.
22. Ibid.
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26. Ibid.
28. Ibid.
33. Ibid.
34. Supra, n. 32.
40. Ibid.
43. Supra, n. 14, p. 10.
46. Supra n. 16 at p. 10.
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48. Ibid., p. 37.
50. Ibid., p. 209.
52. Ibid., p. 433.
53. Ibid., p. 7.
54. Ibid., p. 21.
58. Ibid., p. 383.
59. Supra, n. 52 at p. 11.
61. Ibid., p. 49.
62. Supra, n. 60.
63. Ibid., p. 50.
64. Ibid., p. 49
67. Ibid., p. 283.
69. Ibid.
70. Ibid.
71. Ibid.
72. India’s Prime Minister from 1947-1965.
74. India had a stronger Army and occupied most strategic locations in Kashmir.
75. Head of the Indian delegation to the U.N.
77. Being Pakistan’s then-foreign minister.
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78. Supra, n. 76.
82. Ibid.
83. Ibid.
87. Indian House of Commons.
89. Ibid.
90. Ibid., p.56
97. Ibid.
99. Ibid.
100. Judge Anzilotti, a former President of the Permanent Court of International Justice, stressed this principle, Ibid., p. 340.
101. The then-Governor General of India.
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104. Supra, n. 6., p. 78.


110. Ibid., p. 339.


112. Ibid.


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125. Ibid.
127. It is India’s belief that Kashmir might have worked its way towards independent status but for the invasion of the Pakistani tribesmen in 1947.
132. Ibid.
133. Ibid.
135. Ibid.