Kashmir, India, Pakistan and the United States: A Clarification of Legal-Policy Interests of Concerned States

Winston P Nagan, University of Florida Levin College of Law

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Winston P. Nagan, FRSA
Sam T. Dell Research Scholar Professor of Law
Chair of the Board of Directors, World Academy of Art and Science
Affiliate Professor of Anthropology
Director, Institute for Human Rights, Peace and Development
Visiting Fellow, Brasenose College, Oxford, UK

Kapil Longani
B.S., Cornell University
J.D., University of Florida
LL.M. Yale
B.C.L., Oxford
Research Fellow, Institute for Human Rights, Peace and Development

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Prologue

This article clarifies the legal status of the allegedly disputed territory of Jammu and Kashmir (hereinafter Kashmir). Kashmir has been a visible symbol of long-standing, violent conflict between the Republic of India and Pakistan. The conflict between these two states over Kashmir coincided with the division of the world along Cold War lines. The Cold War, itself, was fueled by serious ideological contestation between the world’s two superpowers, the United States and the USSR. Adding intensity to the rivalry were critical issues of national, regional and global security, which became serious concerns as the nuclear capacity of the antagonists began to dictate the state of world peace and security. Pakistan allied itself with the U.S. as a reliable opponent of ‘atheistic’ Communism. The Republic of India sought to position itself as a balancing force between the two, believing that it could play a moderating role in constraining massive retaliation between the great Cold War antagonists. Massive retaliation implied the possible exchange of nuclear weapons therefore the doctrine was named MAD, or mutually assured destruction.

The geographical proximity of India and Pakistan to the USSR and the People’s Republic of China meant that the policies of each state were directly or indirectly influenced by how it positioned itself in terms of the pressures generated by bi-polar ideological and strategic interests. Under the shadow of the Cold War, and the latent possibilities of nuclear exchanges by accident or design, Pakistan and India confronted this specific problem of Kashmir, a condition and a consequence of difficult transitional arrangements from colonial rule to national independence. Among the most important points of difficulty was Muhammad Ali Jinnah’s notion that there should be a partition of India into a Muslim state, and an India accommodating
all other confessional groups. Jinnah was a secular Muslim and a leader in the Indian nationalist movement. We should parenthetically note that India has the second largest Muslim population in the world after Indonesia. That population is spread over the length and breadth of India therefore partition along these lines was bound to be enormously destabilizing and tragic.

The U.S. has historically maintained a strong interest in both India and Pakistan. It played a leading role in attempting to mediate an early settlement of the Kashmir problem. However, that mediation focused on the amelioration of conflict instead of the underlying issue that generated the conflict in the first place. U.S. policy then assumed that Kashmir was a disputed territory in international law, requiring India and Pakistan to engage in discussions to resolve the dispute. In fact, such a view favored Pakistan and its interest in using coercion to subvert Indian rule in Kashmir. A disputed territory is essentially a territory confined to a legal vacuum, effectively creating a zone of non-law. This obscures the issues of the legal merits and lawful methods of asserting such claims. It appears that there is no starting point to a rational assessment of the dispute in terms of state interests and the fundamental values of the international system. Effectually, since neither side implicitly has a claim, they are both wrong and therefore there is no pathway to a workable future where law may be an important part of the solution.

This problem itself has been subject to incremental transformation over time. Changes in the nature of the Kashmir problem have been influenced in part by the strategic geo-political

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1 Muhammad Ali Jinnah, Address to the Constituent Assembly of Pakistan (Aug. 11, 1947), “If we want to make this great State of Pakistan happy and prosperous we should wholly and solely concentrate on the well-being of the people, and especially of the masses and the poor... you are free- you are free to go to your temples, mosques or any other place of worship in this state of Pakistan. You may belong to any religion, caste or creed that has nothing to do with the business of the state... in due course of time Hindus will cease to be Hindus and Muslims will cease to be Muslims- not in a religious sense for that is the personal faith of an individual- but in a political sense as citizens of one state ” This statement affirms the deep nationalist roots that Jinnah shared with the Congress movement. The critical question then is why was it necessary to partition India if this arrangement could have been made in a broader India national state.
position of Pakistan relating to the USSR, China, and the Cold War. With regard to China and the USSR, it was in the U.S. national interest to exploit the differences between them. Pakistan performed valuable services to U.S. national interests during the period of so-called ping-pong diplomacy. Additionally, Pakistan’s anti-communist stance served as an important barrier for the USSR’s expansionist tendencies. The USSR, seeking to protect its surrogate government in Afghanistan, landed itself in a major civil war in that country. The new battleground of the Cold War was Afghanistan.

Afghanistan was one of the last, but most critical theaters of armed conflict fed by Cold War rivalries. This form of armed conflict was performed by surrogates (although the USSR participated directly) and Pakistan, in particular ISI (Inter Services Intelligence), was a critical player in managing vast resources to organize the insurrection in Afghanistan against a government supported by the USSR. The USSR was defeated in this conflict and this was considered a major victory for U.S. interests. However, the billions generated to fund the jihad and to train the terrorist operatives in insurrectionary warfare made the ISI the largest terrorist training institution in South Asia. The terrorist training included trainees from Kashmir. It was in Pakistan’s security interest to also train Kashmir terrorists because they might use experience gained in Afghanistan to infiltrate back into Kashmir and India.

These background facts were certainly obvious to U.S. policymakers. U.S. policy appeared to determine implicitly that this was part of the cost of the Cold War and world peace. However, the price was borne largely by the Afghans. The U.S. was put in an awkward position because it rhetorically opposed terrorism while it was in fact funding terrorism to constrain its great ideological adversary in Afghanistan. After the 9/11 terrorist attacks, the U.S. determined that the attacks were generated by the alumni of the jihad in Afghanistan. The proverbial
chickens had come home to roost. In intelligence circles, this was known as a case of “blowback.” The Bush War on Terror after 9/11 made it impossible for Pakistan to be a U.S. ally in the region while simultaneously acting as an incubator for terrorist operatives desperate to destroy anything American. Additionally, there was India, the silent victim of the terrorist onslaught. The events in Mumbai made what was notorious to Indians an issue that was utterly obvious to opinion leaders in the U.S. and the world community.

India and Pakistan have nuclear arsenals that can be deployed against each other. However, there will be no winners in a nuclear exchange. Religious fanatics may find this an ideal justification for the destruction of India and/or Pakistan especially since fundamentalism has a dangerous fascination with end of days, apocalyptic destruction. This provides critical challenges for U.S. policy as the U.S. seeks to influence and constrain its long-time Cold War ally, Pakistan. It has also become apparent to the U.S. that Indian democracy is not a threat to U.S. interests. Indeed, India is in reality a long-term security ally. Moreover, India’s secular outlook and dramatic economic development make it an important partner in U.S. technological and commercial interests. Therefore, trade and development are in the mutual interest of India and the U.S. With the advent of new U.S. administration, a thoughtful and careful analysis of US policy options would be extremely beneficial to U.S. interests in the War against Terrorism. It would also benefit both India and Pakistan since both states have been victimized by fundamentalist terrorism.

Central to U.S. policy in India and Pakistan must be recognition that each state has security interests and that wise foreign policy should work cooperatively to secure peace and stability and expectations of security for all. Additionally, after intense conflict, Pakistan has now developed a weak but important democratic dispensation. The full implications of this are
still unfolding. India is a democracy but it has been under siege by terrorism identified as sectarian or by sectors of Pakistan’s extremists who are as opposed to Indian secular democracy as they are opposed to Pakistani secular democracy. Terrorism is a fact-creating phenomenon that feeds on sectarian chaos. As such, terrorism is a threat to India and Pakistan. U.S. policy must therefore reflect the common concern of all about how to strengthen democracy, weaken sectarian fundamentalist warmongers, and proceed to mature political accommodations based on the rule of law. A more stable India and Pakistan will be an important economic partner for U.S. and global economic stability. A core impediment to the development of a less dangerous South Asia is the apparent intractability of the Kashmir dispute. The Kashmir issue may be simplistically expressed in terms analogous to private property law: Who owns Kashmir? If a *prima facie* clarification of this legal issue is effectually done, the policy options for the future may be more promising for India, Pakistan, and Kashmir.

**Introduction**

It is our contention that the Jammu and Kashmir (hereinafter Kashmir) dispute has limited the ability of the U.S. to act constructively for the resolution of the India/Pakistan conflict. There is the perception that any positive indications of U.S. cooperation with India are a threat to Pakistani interests. India, on the other hand, has not viewed the history of cooperation between the U.S. and Pakistan as a threat but as an unhelpful approach that does not lead to confidence building between the U.S. and India. The events of 9/11 seem to require a significant change in outlook. Since the attack, regional conflict has escalated in Afghanistan. Terrorist
attacks have correspondingly increased in both India and Pakistan. After great turmoil, Pakistan succeeded in getting rid of its military dictatorship but it is unclear whether their fragile democratic dispensation can hold. The Taliban and al-Qaeda have used Pakistani territory to reorganize themselves and enlarge their capacity for both domestic and international terrorist aggression. A new U.S. administration will have to be very skilled in navigating through the failures of past U.S. administrations by developing a foreign policy that is appropriate to support the world’s largest democracy, India, as well as the fledgling and fragile democracy in Pakistan.

The critical question is: What is the starting point? We contend that we must start with the question of who owns Kashmir: The Kashmir dispute must be unpacked, given a contemporary legal appraisal that clarifies as effectively as possible the appropriate claims and counter-claims of the parties and settles the border dispute in a manner consistent with the common interest of all. We maintain that a U.S. policy that provides that the border dispute involving Kashmir is an “unresolved” issue establishes an international legal vacuum, a non-law zone. It has the effect of encouraging indirect aggression in the form of terrorist activity and all the related deficits of de-stabilization and violence that destroy the common interests of all the parties. Notwithstanding the contentious claims about Kashmir, we believe that a threshold clarification of this legal dispute may be followed by an appropriate and face-saving form of negotiation of the final boundaries in light of what international law actually mandates. This approach requires a reconstruction of the legal history of Kashmir before, during and after its accession to India.

I. The Legal-Political History of Kashmir Prior to Accession
a. The Colonial Paradigm of Accession Relating to the Transfer of Territory

It is valuable to examine the Kashmir problem in the broader context of the legal-political mechanisms employed by the British to extend British imperial control over the Indian subcontinent. Typically, the British supplemented direct force or indirect political subversion with a complicated regime of concessionary agreements and other treaty-like instruments made with local rulers. These agreements formed the juridical basis for consolidating either direct or indirect colonial rule, creating complex legal structures where various forms of governance could be formulated in terms of suzerainty and other forms of dependency. Thereafter, these instruments attained legal validity under colonial law and served as the basis for establishing the rule of a local potentate. Although colonial sovereignty vested completely in the colonial master, various functions of authority and control were often ceded to a local potentate. Therefore, while the colonial master exercised full sovereignty over the region from an international perspective, these local potentates were able to exercise dependent forms of control and authority under colonial law.

As such, we must recognize that the independence process envisioned accession as partially rooted in principles of colonial legality. In order to appreciate the state of authority and control at the point of independence and accession, it is appropriate that we understand the relationship between colonial legality as an aspect of authority and the internal development of claims to inclusive political participation within the princely states. To develop these themes from a legal perspective, we focus on Kashmir’s pre-accession internal constitutional developments.
b. The Colonial Paradigm of Accession in the Context of Pre-Independence Kashmir

The classic study of the evolution of the legal history of Kashmir is that of Justice Anand, former Chief Justice of the Indian Supreme Court. According to Justice Anand, to understand the constitutional law and expectations of Kashmir, one has "to go far back into history." One must begin in a time "prior" to the creation of the state and consider the "manner" and "effect" of its creation, as well as the "influence" of these factors on the development of constitutional expectations. The Treaty of Amritsar is the technical instrument that created the sovereignty of Kashmir in March 16, 1846. In Article I of the Treaty, the British government transferred "independent possession" to Maharaja Gulab Singh. As consideration for the deal, Singh was required to pay to the British government "fifty lakhs" upon ratification and a further twenty-five lakhs on or before October 1, 1846. The British transferred a form of colonial sovereignty with bare legitimacy by normal constitutional or international law standards.

According to J.D. Cunningham, "the transaction scarcely [seemed] worthy of the British name or greatness." Kashmir and its people were the price of Singh's collaboration with British colonial ambitions. The new, authoritative princely body politic was integrated by Singh’s desire to collect revenues from the inhabitants and administration evolved to meet this objective. Singh was acutely aware that the Kashmir boon was based on the beneficence of his colonial masters. As such, he was always ready to hear his "master's voice." "I am ready," he wrote, "to sacrifice

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3 Id.
4 Id.
5 Id.
my life and my property as proof of my obedience to your honor." Gratitude extended from the British authorities to the private sector; in the same letter, Singh wrote, "anyone who is faithful to the honorable company has to remain faithful with his heart and soul…as an obedient servant, he has to carry out all orders." Colonial "sovereignty" in a nutshell! To consolidate social control, the sovereign developed an administrative structure and a court system. As early as 1873, the State Civil Procedure Code was published. These events represent the modern roots of the political identity of Kashmir.

To ensure that Kashmir’s rulers did not use the Treaty of Amritsar to exclude British influence in Kashmir’s internal affairs or undermine British interests, the British imposed Kashmir’s first Resident in 1885. A Resident essentially acts as a shadow sovereign therefore diminishing the functional attributes of sovereignty in the Maharaja. In 1888, at the initiation of the colonial rule, the Maharaja drafted the first "Constitution" of Kashmir. The "constitution" was approved and adopted in 1889. The Constitution created a governing council for Kashmir and represented a drift away from autocracy, as well as from colonial discretion reposing in the office of the Resident. These arrangements were far from the modern idea of popular representation as a legitimizing political and legal force in Kashmir. However, it represented a modest development of both "native" and "colonial" sovereignty along constitutional lines regulated in some degree by the constituted exercise of power. This was soon subverted by the Resident, who precluded the Maharaja from all participation in the governing Council--an act not reviewable in international or colonial law because the conduct of the Resident was an act of state. Later, the Maharaja was restored to a generic role in the state but the Resident retained an

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6 Id.
7 Id.
absolute veto on power so exercised. The Resident represented the Crown and Crown sovereignty, which reposed in the colonial government of India.

In addition, constitutional control over matters of state (fiscal, foreign relations, etc.) was allocated to the competence of the colonial government. This technical matter suggests two important issues in Kashmir’s legal history. The Resident was a creature of British India and exercised constitutional law competence over the Maharaja as the body politic of Kashmir. Second, certain key attributes of sovereign competence resided in the government of British India. These juridical indications show that, from its earliest beginnings, Kashmir’s constitutional development was not based on pure princely autocracy. It also had direct constitutional expectations tied to British India and this led to the evolution of a Council of Ministers, a legislative assembly, and the creation of a High Court of Judicature for the administration of justice. While these constitutional institutions were not based on popular will, they created expectations of the rights and responsibilities of broadened popular participation. These popular demands were coined in the phrase, "State for the State's People," the group forgotten by both the native potentate and the Crown.  

As pressures for political and economic civil rights intensified, especially among the Muslim population, then-Maharaja Hari Singh was forced to set up the Glancy Commission to review the situation and make recommendations. The aggregate of these and other proceedings led to the promulgation of a new constitutional act in 1934 creating a new and more representative legislative assembly, named Praja Sabha. Efforts to regulate or hijack the representation of the new Praja Sabha had to confront the creation of the Muslim Conference of 1932, which sought to express Muslim democratic interests. Sheik Muhammad Abdullah

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8 Id.
became its president in 1932 and he provided effective and forceful leadership to the disenfranchised Muslim majority population. These developments were a watershed in the political and constitutional development of Kashmir allowing for increased political participation and government responsibility.

Although early constitutional development was a clear advance on crude autocracy, the details in the developments consistently sought to limit or weaken the full enfranchisement of all Kashmiris. Sheik Abdullah, a progressive nationalist, was influenced by his friend, Jawaharlal Nehru, a prominent leader of the Congress movement calling for complete independence from British rule. Both politically and juridically, the Maharaja Hari Singh symbolized colonial sovereignty. His legitimacy lay with the colonial authority and the constitutional changes that pointed to key elements of legitimacy and authority reposing in the anti-colonial movement based on popular political participation. According to Sheik Abdullah, "the people of Kashmir were determined to mold their own destiny" based on the justice and strength of their cause.\(^9\) The record is clear that Abdullah’s political and constitutional claims were directed at anti-colonial autocracy and based on nationalist symbology of a non-sectarian character. More importantly, demands for autonomy and participation were partially understood as part of the larger Indian national struggle for self-determination and independence. Kashmiri self-determination was constitutionally tied to the internal constitutional architecture, and in part to the larger claim of Kashmiri identity incorporating anti-colonial values of a non-sectarian character associated with the Congress movement of India. As a result, Abdullah represented a struggle for constitutional development and inclusive participation in a political process that was not shackled by religious

\(^9\) Id.
or ethnic chauvinism. Indeed, the Muslim population was largely influenced by one of the most tolerant versions of Islam, the tradition of Sufism.

During the fight for independence, it was the manifest claim of all Indian nationals, be they Muslim, Hindu, Sikh, Christian, or Socialist, that the fight for independence was a fight for freedom from external, alien, colonial rule. It was not a movement that worked through the specific details of Constitution-making, other than the assumption that demands for independence included democratic expectations, modern forms of Constitutionalism, and rule of law protections. Accordingly, it was assumed that matters involving the protection of minority rights, religious minority rights, the rights of the underclasses, and a whole range of other issues, would evolve through the independence process, itself. Therefore, we may conclude that, prior to the accession of Kashmir to India, the foundation for authority in Kashmir was partially based on the colonial instruments that created it and authorized accession, and partially on the independence movement in India, which envisioned a largely secular political system, devoid of religious sectarianism.

We may summarize the historic context of the evolution of expectations of law and governance in Kashmir by stressing the tension between colonial legality upon which the element of control and authority vested in the Maharaja, the Resident, and the government of British India. Those expectations were under stress and a certain level of mutation by the pressures generated through the struggle for genuine constitutional ideals of political participation and governing accountability. The anti-colonial struggle resisted policies of colonial dominance, which made sectarianism, division, and the politics of divide and rule a part of the efficacy of colonial governance. In the next section, we explore the workings of colonial
sectarianism and the inherent expectations of division that influenced the process of transition to independence in the Indian subcontinent.

c. The Colonial Background and Roots of Sectarianism in Kashmir

The problem of the status of Kashmir is rooted in the self-serving structure of colonial rule and the political shortcomings of the Indian transformation and independence process. It is perhaps a forgotten element of colonial transformations that they were either vigorously resisted or reluctantly embraced, thus creating an undercurrent of economic and political colonial interests that gave terms like "neo-colonial" a political meaning. In the case of India, colonial governance was an impossible patchwork of direct and indirect rule established for British convenience rather than the interests of the inhabitants of these variously structured polities--sovereignties, suzerainties, protectorates, princely autocracies, regent-run states, and other ingenious levels of governance, control, and intervention to secure British interests, particularly commercial interests.

A persuasive theme of British control was the principle of "divide and rule" for establishing effective imperial administration.\textsuperscript{10} The political culture of "divide" was an almost instinctual policy of the colonial office.\textsuperscript{11} This perspective was as simple as it was effective: a central objective of British expansion into local polities was preceded by a determination of the potential for sectarian division.\textsuperscript{12} The greater the potential for social division, the greater the

\textsuperscript{10} Neil Stewart, *Divide and Rule: British Policy in Indian History*, 15 Sci. & Soc’y 49 (1951).
\textsuperscript{11} Id.
\textsuperscript{12} Id.
possibility for alien subversion, penetration, subjugation and ultimately, political control.\textsuperscript{13} It is an irony of history that the colonial policies of division and sectarianism came back to haunt Britain as the Irish resisted the incorporation of Ireland into the UK. The Northern Ireland problem is a homegrown monument to the costs of policies, which cultivated political division along sectarian lines.

A second important theme in the structure of colonial domination was the use of law as an instrument for expanding, consolidating, and creating the forms of colonial governance based on the principle of division. It is amazing to observe the volume of treaties, "quasi-treaties," "concessionary agreements," "accessions," etc. which were constructed under the umbrella of colonial sovereignty and colonial-conditioned international law. The nature of this kind of jurisprudential inventiveness seemed to work in the following way: the colonial sovereign would regard the local native potentate as holding sovereign competence, sufficient for that potentate to transfer or relinquish that potentate's sovereign titles. The potentate generally now had no rights under international law based on any agreements, which were executed ostensibly under the umbrella of international law. The potentate would have some sovereign legal personality under colonial law but the personality would be largely extinguished under international law. The colonial power would then use the acquired sovereign titles to proclaim the validity of the acquisition of titles and interest against other colonial sovereigns.

The natives themselves or their rulers had no such rights under international law. What is even more interesting is that the European Powers established themselves as a de facto club of international sovereigns. International law, they claimed, was based only on treaty and custom between civilized sovereigns. The source of this narrow view of international law was based in

\textsuperscript{13} Id.
part and paradoxically on the treaties made with the native sovereign-non-sovereigns. In short, Eurocentric international law was based on non-Eurocentric sources, that is, non-European sources. This background is essential to understanding the origin and nature of the Kashmir dispute. Whether one likes or dislikes the colonial experience, it was an expectation-creating experience for law and politics for both the colonizer and the colonized. Colonial public order evolved into a structure of colonial and commonwealth law and some of its elements influence international law.

The Privy Council of the House of Lords was a colonial court with certain international characteristics. Colonial law was expectation-creating and, in part, shaped the contours of the patchwork of the independence process. This is important because the Maharaja of Kashmir, Hari Singh, carried the mantle and expectation of a form of sovereignty identified with colonialism and state absolutism. However, there were claims by the people of Kashmir that his "sovereignty" be amenable to some degree of responsible authority and popular will. In short, within the archive of colonial imperialism, there were changed perspectives about the scope of personal rule and the relevance of popular will and responsible authority.

When the British set in motion the processes of princely governance, the natural evolution of political interests gave rise to expectations of authority and control in Kashmir, which suggests that the Maharajas were forced to move from an absolutist perspective to one drawing a patina of authority from the Kashmiri people themselves. As mentioned earlier, constitutional control over matters of state (fiscal, foreign relations, etc.) were allocated to the colonial government. Therefore, Kashmir's constitutional development from its earliest beginnings was not based on pure princely autocracy, but rather had direct constitutional expectations tied to British India. Furthermore, as aforementioned, although the development of
its constitutional institutions was not based on popular will, they enhanced Kashmiri expectations of rights and responsibilities for broadened popular participation.

As earlier indicated, Sheik Abdullah said, "the people of Kashmir were determined to mold their own destiny." Indeed, the record is clear that the political and constitutional demands of Abdullah’s claims were directed at anti-colonial autocracy and based on a nationalist symbolism of a non-sectarian character. More importantly, the demands for autonomy and participation were viewed as part of the larger Indian struggle for self-determination and independence. As aforementioned, Kashmiri self-determination was constitutionally tied to the internal constitutional architecture and in part to the larger claim of Kashmiri identity incorporating anti-colonial values of a non-sectarian character associated with the Congress Movement of India. The persecution of Sheik Abdullah by the Maharaja was simply recognition that national identity, especially national identity influenced by the Congress movement of India, was a threat to princely rule. The repression of the nationalist movement in Kashmir created a political vacuum. The vacuum was an ideal situation for exploiting the politics of religious opportunism. It should therefore be recognized that as we approach the accession of Kashmir to India, the princely authorities did a great deal to repress nationalist political activism, to depreciate inclusive constitutional governance therefore leaving open the possibility of challenges to his power from religious interests.

II. The Accession of Kashmir to India

[^14]: Id.
The events immediately preceding the accession of Kashmir to India evidence the antipathy that Kashmiris felt about the collapse of their national identity and the stroking of religious commitment. When Muhammad Ali Jinnah, former leader of the All-India Muslim League and founder of Pakistan, advised the Kashmiri Muslims to move in the direction of a Muslim identity and union with Pakistan, he was greeted with shouts of "Go back, Jinnah!"\(^{15}\) In part, the prime issue on Kashmir’s political agenda at the time was the establishment of a responsible government. The Maharaja was in a difficult situation because he did not want accession to India because of its secular democratic leanings yet he also did not want to be a part of greater Pakistan, an Islamic or religious-based body politic that would extinguish his power as a “Hindu” leader over a Muslim majority. Pakistani authorities approached the Maharaja with the proposition that should he accede to union with Pakistan, the government of that state would not "touch a hair of his head or take away an iota of his power.\(^{16}\) Apparently, the Maharaja did not consider this a reliable offer.

On October 20, 1947, events began to take shape on the ground. What is historically claimed to be a tribal invasion from Pakistan was in effect a well-organized military effort with Pakistani troops on leave attacking the boundaries of Kashmir. This initiative represented an effort to resolve the question of accession of a princely state under the dominion and control of British India by extralegal methods of violence and coercion. However, like most forms of so-called sectarian conflict, the promoters of the conflict seek to obscure the chain of critical decision-making and therefore responsibility for its consequences. Thus, the idea of “tribal”

\(^{16}\) Id. at 6.
implies that the tribalists were acting out of spontaneity rather than from motives and processes of planned decision-making. Qualifying the term “tribalists” with the term “irregulars” is a clear effort to create a symbol that directs responsibility away from the emerging Pakistani elite and their possible complicity in the use of unauthorized violence and coercion to acquire Kashmir by conquest with the use of force.

The use of force appears to be consistent with the strenuously argued position of Muhammad Ali Jinnah that there was a critical need to divide India into Muslim and Hindu entities. He placed great faith in his conclusion that this was not so much a matter of religious preference but a matter of social and political reality. It should be borne in mind however that Indian history saw the vast majority of Hindus living under Muslim rule. Muslim rulers did not consider the notion that Muslims should geographically separate themselves from the Hindus. If they had come to this conclusion, they would not have engaged in the conquest of India in the first place nor been enticed by the wealth and cultural refinement of the pre-existing culture.

The well-established international law rule, namely the *uti possidetis* principle, protects the boundaries of newly independent nation states. Indeed, this principle not only applies to the third world but also through the Helsinki Accords to the European context. The principle states that if the boundaries of a state were legitimate under colonial law and legitimately transferred under colonial law, those boundaries are legitimate under modern international law. The fact that a state may have more citizens of a particular religion in it, does not give a third state the right to sever it by the use of force or terrorist methods of insurrection.

Self-determination is radically weakened when citizens of a state live in a democracy in which they can fully experience their civil and political rights, including their right to religious freedom. Thus, self-determination is significantly weakened in the context of post-colonial
arrangements, and for good reason. If every ethnic and/or religious group in any state can call for an exclusive referendum, there would simply be widespread chaos and anarchy. Consequently, Pakistan's claim against India has several major weaknesses: First, it is a claim in which Pakistan asserts the right to acquire territory under the basis that people in that territory share its religious outlook. As a principle of international law, there would simply be mayhem on the planet if all states had the right to make these claims. Second, Pakistan has sought to vindicate its claim by the use of force, which is tantamount to aggression and is a clear violation of Article 2(4) of the United Nations Charter.17 Third, the validity of the accession under colonial law and its validation under the uti possidetis principle makes India's claim that Kashmir is an integral part of India clearly valid under modern international law. More specifically, Article 2(7) of the United Nations Charter protects Indian sovereignty.18

The Kashmir problem as a conflict has continued since 1947 and the nature of the conflict has evolved so as to become a point of major contestation between two of the earliest of the decolonized states, India and Pakistan. This does not mean that Kashmir was without conflict during the period of British acquisition and colonial rule. However, the cast of players was configured differently after 1947. In descriptive terms, Kashmir was simply a boundary problem and one could rationally ask, as property lawyers might, who owns Kashmir? The problem is also more properly seen as a problem of the imperfections of transformations about decolonization in the international constitutional system. The period of colonial or imperial

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17 Article 2(4) states, “all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

18 Article 2(7) states, “nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

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hegemony experience accelerated sunset after World War II. The major colonial powers, such as Britain, were confronted with the technical question of how to transfer power to end colonial rule. These matters are politically and legally complex, as are all major changes in basic power and legal relations. A key challenge was how to responsibly transfer power to ensure that the transfer would do the least amount of damage to peace and security, as well as the basic rights of the formerly colonized people. The practical problem that confronts these kinds of transformations is that political power cannot be transferred as if preexisting arrangements and tensions no longer existed. Thus, it was these preexisting arrangements that created incredible difficulties in precisely defining the political future of Kashmir as well as those of India and Pakistan.

The historic question of legal importance is whether this export of tribal irregulars and troops on leave was a spontaneous invasion or one orchestrated by the Pakistani authorities and their intelligence operatives. It has long been claimed by both the Indian government and outside observers that the distinction between direct and indirect involvement in the use of force places responsibility with the government of Pakistan. From a perspective of legal expectation, we note provisionally that the colonial administration developed rules and understandings about the process of accession for the princely states. Nowhere does this suggest that the use of unjustifiable force or coercion is to be the operational norm of transition from colonial rule to independence. As a technical matter, we shall later show that the accession under any standard of interpretation of colonial law was perfectly valid and legitimate. Moreover, this applies to the entire framework of boundaries, including those that created Pakistan and India. Both Pakistan and India are a product of colonial transition.
The central point is that Pakistan initiated force to gain control over territory over which it technically had no right in law. In short, the use of force radically changed expectations about the future of Kashmir. On October 24, 1947 the Maharaja appealed to India for help. On October 26, he executed the instrument of accession and on October 27, the instrument was formally accepted by India. Kashmir was now a part of the Indian union and as a technical, legal matter, India was charged with the responsibility of Kashmir’s defense. Today, the invasion by Pakistani operatives would constitute an act of aggression in violation of Article 2(4) of the United Nations Charter. India, in turn, would have a right to defend its territorial integrity and political independence from outside aggression under Article 51 of the United Nations Charter. Furthermore, it also had an obligation under Article 2(7) of the United Nations Charter to restore law and order to the state.

Unfortunately, even though the accession was completely consistent with the British government’s policy as well as Jinnah’s own policy statements concerning the partition of India, the precise aspects of British policy remained clouded because of the great gulf between colonial law on the one hand, and modern ideas of responsible governance on the other. In short, the transformation was quite problematic. Indeed, the untidy mosaic of transformation suggests a kind of make up the rules as you proceed approach. The division, for example, between British India and the India of the potentates depreciates the salience of "control" by the imperial power and the strategic imperative of "division" as a major element in colonial control, sovereignty and public order.

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19 Article 51 UN Charter “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”
This point is important because the distinction between British India and the princely states obscures the fact that there were 565 of them in various states of dependency with the paramount power, with complex ethnic and demographic characteristics. The Maharaja of Kashmir was, himself, subject to the control of the British Resident, a functionary of British India. Perhaps, in theory, the potentates had choices other than incorporation into either India or Pakistan. In reality, the British authorities advised them that there was no real option. Apparently, "geographic compulsions" could not be avoided. According to Lord Mountbatten, "You cannot run away from the dominion government, which is your neighbor any more than you can run away from the subjects for whose welfare you are responsible." These are flimsy procedures for political transformation of an entire sub-continent. The Maharaja of Kashmir did not make a choice on August 12, 1947. Apparently he needed more time to decide and stated his intention to negotiate a standstill agreement with both India and Pakistan. The potentate feared the democratic possibilities of affiliation with India and political extinction by Muslim Pakistanis sensing a power vacuum in the aftermath of the paramount authority. However, Pakistan organized the invasion of Kashmir with operatives alleged to be tribalist and with troops on leave and the Maharaja was compelled to sign the Instrument of Accession to India. The untidiness of transformation, which was built into the structure of colonial rule, now provided an arena of conflict that was to endure from 1947 to the present.

The colonial and transformation background to the present crisis in Kashmir underlines several important themes implicating the relevant historical trend. First, colonial transformations were messy matters and an effort to salvage the values of minimum order in political

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20 Barbara N. Ramusack, The Indian Princes and Their States (Cambridge University Press, 2004).
21 Id.
transformations often could not be credibly claimed in terms of a "best interest" objective. Second, boundaries were an inevitable problem of colonial conquest because colonial powers defined spheres of influence and drew boundaries without regard to local needs, interests, demographics or other concerns of the colonized people. As a result, colonial boundaries may split ethnic groups further exacerbating the problem where colonial rule added a dimension of cultural change. This resulted in incompatible demands for assimilation alignment in the aftermath of colonial rule.

\[b. \text{ Respect for Colonial Boundaries in International Law}\]

A central, logical principle that colonial boundaries could not be changed other than by agreement, emerged during the era of decolonization. In short, colonial boundaries, with all the imperfections of their etiology, are the recognized logical boundaries of decolonized, independent states. In the African context, where boundary problems have been an acute and poignant inheritance, the rule is firmly accepted. The alternative would be the harbinger of continental chaos and endless conflict. As aforementioned, this principle is firmly grounded in modern international law in the *uti possidetis* principle.

We earlier indicated an important historical element, that the Kashmiri people’s claims for inclusion in the constitutive process of colonial governance, was a claim to a democratic political dispensation. Furthermore, the broader Indian independence movement along with both Nehru and Abdullah’s national democrat leanings inspired this dispensation. The repression of the democratic movement provided implicit support for the Islamic religious chauvinists but the
trend to independence shows a clear and unequivocal claim for democratic rights along the lines of the Congress movement.

The Pakistani-inspired invasion of Kashmir triggered elements of religious chauvinism that were alien to Kashmir, reinforcing its message with brutal murders, atrocities, and practices of ethnic cleansing. The acceptance of a plebiscite later by a representative of the government of India was at best an exercise in unrealism, given the conditions and expectations of high intensity conflict on the ground. The claim to a democratic dispensation aligned or coextensive with the claims of Indian independence, and the Congress movement, now stood in stark contrast to the claims for incorporation by Pakistan. Pakistan has not been able to sustain a democratic political culture since 1947. Indeed, the track record inside Pakistan itself led to the army committing atrocities in modern-day Bangladesh involving a widespread pattern of sexual aggression against Bangladeshi women. Additionally, the military organized a rigged trial to execute President Bhutto, in what most observers saw as a case of state-sanctioned juridical murder. Moreover, the methods used to capture Kashmir for inclusion into a greater Pakistan involved both aggression and the use of terrorism targeting civilians as well as the institutions of democratic governance. These background facts render Pakistan's claim to Kashmir weak, if not entirely improper, and possibly obsolete. It is possible that Pakistani authorities recognized this and changed their tactics by recruiting disgruntled or disenfranchised Kashmiris for training as terrorist operatives. The precise nature of the Pakistani claim is not altogether clear. Although it seems to overtly suggest the claim is for Islamic (religious) self-determination for the Kashmir people, the real claim appears to be for a greater Pakistan.

c. Colonial Legality and the Transition to Independence

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Another important factor emerges from the facts at independence. As a technical matter, colonial legality, for what it was worth morally, counts in constituting new state entities. The procedure of accession was fully in accord with the colonial law of transformation and accession. Pakistan was a key beneficiary of these "rules" since its existence is drawn from the British practice to divide India along the lines of some rough religious division. It is hard to see the same political entity whose existence was dependent on those rules and who at the same time tried to unsuccessfully undermine those rules by brute force, now claim to be a champion of democracy, freedom and self-determination, as well as an opponent of the sanctity of colonial borders. The Pakistani claim seems to have a hollow ring. Pakistan’s own boundaries are defined by the legal system. Pakistan appears willing to selectively embrace some rules of the new international law and undermine others, which is problematic in the long term. What are we to make of the trend over 50 years later?

Pakistan has rested its claim to sovereignty over Kashmir on the basis that it has and continues to have a majority Muslim population and therefore it is entitled to Kashmir severed from the India on the basis of a plebiscite exclusively limited to Kashmir, excluding the rest of India and Pakistan. By selectively choosing the universe of people who may vote in a plebiscite, one is, of course, pre-determining the result. In short, Pakistan had attempted in the past to take the matter of the plebiscite to the UN Security Council for a vote on the matter, assuming that a vote by the UN Security Council would be definitive on the matter. This is not a simple as it appears. The ethnically homogeneous state is a rarity. The idea of a religious or ethnic state was precisely the circumstance the creation of the modern state system sought to avoid. The 1648 Treaty of Westphalia was preceded by religious wars of unparalleled ferocity and brutality in
Europe, making it clear that religion was not going to create a form of governance that could ensure peace and security. The idea of a secular state, accommodating multiple group identities and religious affiliations, yet mediating between them in ways that could maintain peace and security while providing for more constructive forms of association (political, economic, cultural) was the animating force of the development of the so-called statist paradigm of international law. As a result, boundaries that have been a product of historical circumstance while not necessarily moral, if undetermined would nonetheless produce untold chaos and conflict.

Thus, although colonial rule in some respects was unjust and immoral under contemporary international law, it cannot be said that every aspect of colonial law is therefore invalid. Even South Africa effected a transition to democratic rule despite its roots being the Apartheid state forcing the new government to enact numerous laws to repeal the Apartheid legal edifice. Certainly no one in South Africa would hold that all of the marriages entered into under Apartheid were invalid just because Apartheid was an illegitimate system under international law. Even Nazi marriages were valid after WWII. We therefore must accept the fact that transitions from colonial rule came from colonial legal order that, although morally flawed and often distasteful, was an infinitely better alternative than colonially managed transformations of authority.

d. Problems of Accession and its Aftermath

The problem of the future of Kashmir was influenced by developments prior to the independence of either India or Pakistan. In 1947, the untidy process of transition left unresolved
issues and those issues were particularly salient in Kashmir. As aforementioned, Kashmir was a princely state run by a Maharaja who in turn was run by a British resident in a paradigm of indirect rule. His choices at independence were accession to Pakistan or India or to establish an independent princely state without a British regent. The Maharaja felt neither the first nor the second option was attractive but had no capacity or legitimacy to establish an independent modern state of Kashmir, at least under the post-colonial UN Charter standards. The die was cast when so-called tribalist Muslims, armed by the dominant forces behind the new state of Pakistan, invaded Kashmir in a transparent effort to obscure an act of aggression attributable to the state itself. In short, Pakistan was using indirect to establish Pakistani sovereignty over Kashmir by an act of conquest. As previously mentioned, an act of conquest, defined as meeting the criteria of the act of aggression, is in itself unlawful under international law.

The Maharaja saw accession to India as the lesser of two evils and signed the Instrument of Accession of Kashmir territory to the Republic of India. Pakistan has never accepted the Instrument of Accession as a valid transfer of title of Kashmir to the Republic of India. The Kashmir problem has generated three wars and has been a major spawning ground for Islamic fundamentalism throughout South Asia. It has also been a security issue for Pakistan that has kept it in a state of militarized dominance for most of its independence spawning within its framework of governance one of the most powerful and impressive intelligence networks, the ISI. Justifying the ascendance of the military and intelligence security elite has been a disaster for Pakistan in the sense that it has been unable to sustain democratic institutions and degrees of reform in governance necessary to improve the well being of its people economically, politically, and socially. In short, Kashmir has been a disaster for Pakistan.
On the other hand, the transformation of India to an independent state is in many ways a miracle. The colonial master, with an acute mindset based on division, had to negotiate with the architects of a modern Indian nationalism based on Indian solidarity. Indian nationalism included many different language groups, ethnic groups, and religious orientations. The most obvious division to the British was the division between Muslims and Hindus. Thus, one could theoretically divide India giving a portion to the Muslims and a portion to the Hindus. Such a division, of course, would overlook the fact that Muslims and Hindus were spread all over the Indian subcontinent. Areas in India where such expectations were aggressively pursued resulted in a terrible bloodletting and the displacement of Muslim and Hindu populations. As aforementioned, it was Muhammad Ali Jinnah who promoted the idea of a divided India, with one portion forming Pakistan and the other, India. It was a division that found the sympathetic ear of the colonialists but it was a division that would fracture Indian nationalism and the political solidarity of the independence movement.

*e. The Lawfulness of Accession to India*

As previously mentioned, the claim to create a religious Muslim state was an unusual aberration in the context of the development of the modern state system. The current state system owes its roots to the Treaty of Westphalia, which was specifically designed to avoid collapsing religion into the state. The idea of a state creates obligations on the basis of citizenship, not religious affiliation, which enables the state and its citizens to mediate between and integrate people of many different religions. The primary symbol of loyalty is loyalty of citizenship and duty to the state. Therefore, Pakistan's claim to relatively exclusive religious-ethnic statehood
challenges in some degree the model of a secular state and runs counter to the concept of the state as assumed by traditional international law and the UN Charter. India, on the other hand, strongly asserted the importance of the secular state based on universal citizenship and with protections for people of many different religions.

At the time of independence, Maharaja Hari Singh of Kashmir presided over a pluralistic state in which the majority of the citizens were Muslims. The Kashmiris, several years prior to the partition of India, developed a democratically elected assembly and thus exercised some secular obligations of citizenship and statehood prior to independence. Pakistan sought to resolve the question of what form of accession should happen by seeking to physically invade the territory. In other words, Pakistan tried to use force to resolve the problem of the status of Kashmir. Since the Maharaja was vested with colonial legal authority, he had the right to determine whether to sign an accession agreement with either India or Pakistan and he chose India. His act was perfectly legal in terms of standards of colonial law and the Indian Independence Act. His choice made India the sovereign by accession in Kashmir and made Pakistan a foreign sovereign state. The Maharaja’s act of accession, whether intentional or not, was consistent with the constitutional reforms and non-sectarian expectations about political participation in Kashmir. It was also consistent with the general support internally given to the Congress movement and its broad secular philosophy, which sought to downplay the relevance of ethnic or confessional differences.

Perhaps the method of constituting authority under colonialism may be regarded as undemocratic and exploitive. Nonetheless, almost every state that has emerged from the shackles of colonialism had to derive its instrument of transformation from the legal consequences of colonial rule. The most obvious of these elements is the fact that virtually all former colonies in
present day Africa and Asia have boundaries fixed by colonial law. These boundaries might be arbitrary and indeed divide up people and cultures but colonialism is a fact-creating phenomenon of the most profound significance. Colonies were changed from what they were to colonies and now these colonies were to be transformed into nation-states in the modern sense.

The accession to India and subsequent incorporation of Kashmir into the constitutional foundations of the Indian state was a result that was contested by Pakistan. However, the contestation was through indirect promotion of insurrectionary terrorism and violence. The direct and indirect methods used by Pakistan carried the implication of sectarian conflict, today more generally characterized as ethnic conflict. Since Pakistan was a state sponsor of indirect violent reaction, the issue also became one implicating a regional threat to peace and security, creating a further level of legal complexity. In the following section, we reexamine the Kashmir dispute in the light of the notion of sectarian/ethnic conflict.

\textit{f. Relevance of the Colonial Law of Accession to the Status of Kashmir}

In the context of the current dispute regarding the status of Kashmir, very little attention was given to the legal and political consequences of colonial law relating to the accession of Kashmir to India. The practice of colonial law up to and including transition from independence, utilized the principles of agreement and accession for ruling hierarchies or potentates. The pressures inside Kashmir for the removal of direct and indirect vestiges of colonial rule were fed by the demand for popular participation in the state. Those demands were also reflected in internal constitutional developments that all pointed in the direction of a secular, popular, political and constitutional dispensation. These principles of political struggle were also broadly
reflected in the larger Congress movement led by Gandhi, Nehru, and others. Sheik Abdullah was himself a Muslim and Indian nationalist from Kashmir and a leader of the pressures for popular governance in Kashmir.\(^{23}\)

Once the accession took place, the possibility that the accession had been achieved by some principle of deception, fraud, or deceit, might have been raised to challenge the lawfulness of the act. However, no such credible claims have been made. In fact, the record is clear that so-called tribalists from Pakistan, armed to the teeth and now widely regarded as Pakistani soldiers in civilian uniforms, were unleashed on Kashmir committing acts of atrocity and terror, generating fear in the civilian population, and dislocations analogous to ethnic cleansing. The invasion threatened the Maharaja who then ceded the territory, which he could do under colonial law and practice of the Raj. Thus, Kashmir was ceded to India and India produced the Instrument of Accession.

As previously mentioned, the foundation of the Maharaja’s rule was the product of a colonial treaty between the government of Britain and the Maharaja Gulab Singh. In the Treaty of Amritsar, it is stipulated that the limits of territories of the maharaja (boundaries) “shall not be at any time changed without the concurrence of the British government.” Additionally, the British government assured the Maharaja, in Article IX of the Treaty of Amritsar, that “the British government shall give its aid.... in protecting his territories from external enemies.” The final article acknowledges “the supremacy of the British government in the princely state of Kashmir.”\(^{24}\) The Instrument of Accession was directed at the then Governor-General of India, Lord Mountbatten of Burma and contains the following: “I do accept this instrument of accession.” The Governor-General was the highest colonial authority in India prior to


\(^{24}\) Article X, Treaty of Amritsar.
independence. It should also be noted that the framework for the lawfulness of accession such as that of the Maharaja was founded in the Government of India Act of 1935. The Indian Independence Act of 1947 provided that an independent India will be set up on August 15, 1947 and that the Government of India Act of 1935 shall apply with such changes and amendments as the Governor-General might specify as applicable to the new state of India. The Government of India Act, which was of course a colonial act, was adapted and provided authoritatively that “an Indian state may accede to the dominion of India by an instrument of accession executed by the ruler thereof.”

The important question raised is the *prima facie* legality of the Instrument of Accession in the light of colonial law, as modified by the principles of political transition. It is carefully indicated in the Instrument of Accession that accession is executed and accepted by the representative of the Raj, the Governor General. This is punctilious colonial legality. The Maharaja could not dispose of Kashmir without the concurrence of the British authorities. Specifically, the Maharaja’s authority is in fact not absolute under the treaty and any accession or change to territorial boundaries required British approval. Furthermore, his sovereignty specifically acknowledges the “supremacy of the British government,” to which he was required to present annual tokens of subordination. The accession agreement was accepted by the Governor General thus giving the approval of the colonial authority, Britain, for Kashmir’s accession to the Dominion of India.

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26 Article X, Treaty of Amritsar.
The critical question from an international law point of view is what are the *prima facie* effects of the transfer of territories like Kashmir, in the context of India and Pakistan’s transition to independence. The *uti possidetis* principle is clearly applicable to all concerned states in the region, whose boundaries were created by acts of colonial authority. That colonial authority actually provided mechanisms within colonial control to produce an orderly process of transition in context of accession. It is here that the *uti possidetis* doctrine performs a critical stabilizing function in the context of the uncertainties and instability of major political transformation because it lends *prima facie* stability to boundaries drawn under colonial law. For example, in contemporary international law, the Helsinki Accords develop this principle with the force of explicit codification in Principles III (The Inviolability of Frontiers); IV (The Territorial Integrity of States) and VI (Non-Intervention in Internal Affairs). It also requires a commitment to the peaceful settlement of disputes (Principle V); restraint from the threat or use of force (Principle II); and respect for human rights and fundamental freedoms (Principle VII). These principles are codified in other international law documents and generally have the status of customary international law. As indicated earlier, these principles of international law were subverted by Pakistani operations in Kashmir.

Even if the establishment of colonial authority was done from imperialistic or base self-serving motives, the central value of the *uti possidetis* principle is that attempting to undo what is a political and legal fact would generate great conflict and exponential destruction. There is nothing immoral or unsustainable in a legal principle that permits potential adversaries to significantly cut their losses. Justice is not ideal but this principle provides a workable method to consolidate postcolonial rule in terms of peace and security. We maintain that it is regrettable
that the *prima facie* validity in Indian law, regional law, and international law of the accession of Kashmir to India was not accepted as a starting point for further negotiations toward the resolution of various concerns relating to the well being of all the inhabitants of the region.

The fact that the boundary is a *prima facie* determination does not mean that states cannot negotiate in good faith a complex range of interests and concerns that may involve boundary rearrangement or even the complete permeability of boundaries in the region in order for all people to have a free flow of access. Our concern is in part United States policy because the U.S. is a significant player in the region. U.S. policy starts out with the notion that the *prima facie* lawfulness of the accession to India is a factor to be ignored. Whether this comes from well-meaning sloppiness of State Department thinking or whether it emerges from a concern for strategic alliances in the region of which in the past Pakistan has been a major beneficiary, is not at all clear. However, the U.S. position is that the status of Kashmir is undetermined. Given this status, which has been a position implicitly accepted by other states, including China, Pakistan now views its unsuccessful use of force to acquire Kashmir by conquest as not prohibited because the status of Kashmir essentially occupies a legal vacuum.

**h. Specific Mechanisms of the Transfer of Authority in Kashmir**

It was not expected that the transfer of authority from the princely states to the new Indian state would involve any latent claim based on the fact that Indians inside their own country could somehow be regarded as aliens by some form of international standard and thus be candidates for freedom from colonial rule or some form of external domination. Indeed, the mechanisms of technically ceding authority to the Indian state could be done by numbers or by
the legal expectations contained in concessionary agreements that, in effect, created the legal status of the princely states. Either of these mechanisms would have sufficed to provide the patina of legality needed to secure the transformation to statehood in India since the overriding international legal standards evolving with regard to the freedom from colonial rule were clearly being realized.

Thus, this meant that the Maharaja's transfer of authority to the state of India via the process of a technical legal instrumentality based on his authority, which was sustained by the Raj through concessionary agreements is 1) supported by colonial law, and 2) consistent with international expectations of decolonization at the time. Unfortunately, Pakistan did not accept the legality of transfer on the basis that Kashmir internally enjoyed an independent right of self-determination under international law and therefore the status of Kashmir remained unresolved. The practical problem with Pakistan’s logic is that it is a claim, which pressed to its political limits, would put virtually every state with a religious or other minority in a state of limbo. Since the primary purpose of self-determination was to get rid of colonial rule and therefore tied to the process of decolonization, the Pakistani claim in this regard is especially weak.

III. Sectarian conflict

a. The Background of Kashmiri Sectarian Conflict

It may be useful for us to reexamine the policy options and possibilities for a peaceful solution to the Kashmir problem. It would also be useful to review the expectations of both
constitutional development and violence up to the present time. The strategic deployment of violence has, in the past, resulted in two wars directly implicating Kashmir, and a third indirectly implicating it. There has also been enhanced growth of anti-democratic fundamentalism, the use of terrorist and insurrectionary methods of conflict to shape the dispute, and of course, there has been the development of nuclear arsenals. It may be a difficult undertaking to picture future policy projections that are not overly pessimistic. However, a careful exploration of the policy implications of these background facts in the light of 9/11 may suggest possible cues to more constructive possibilities for the future of the sub-continent.

To examine Kashmir as a political-legal problem rather than a problem incapable of resolution because of historically based enmities requires that we look more carefully at the context of the transformation of Kashmir at the time of independence. One of the most important historical glosses made about religion and demography in Kashmir is that although the ruling elite was Hindu, the majority of the population was Muslim. One has to be cautious about culturally assuming that every group of Muslims is the same as every other group of Muslims. To the occidental mind, such categories are simple and often politically convenient but they do not square with reality. The particular form of Islam in Kashmir was a benign, spiritually insightful and tolerant form of Islam, which seemed to be significantly influenced by Sufism.  

Furthermore, the leading Kashmiri statesman of the time and a man viewed as identifying with Kashmiri hopes and expectations is Sufist Sheikh Abdullah. Nicknamed “the Lion.” He was deeply influenced by the Sufi tradition of Islam as well as traditions of secularism and beneficent socialism associated with Nehru's wing of the nationalist Socialist party. Hence, the spiritual

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29 Id.
reflectiveness of this form of Islam could be contrasted with other forms of Islam that demanded more strident forms of religious action for the enhancement of the religion. The idea of seeking to convert a tolerant, introspective form of Islam into a strident militant perspective would at the end of the day be a politically inspired act, done for political objectives. In any event, this way of politicizing religion would be incompatible with the idea of separating the state from religion. Simplistically, the idea of a Hindu ruler of a predominantly Muslim body politic is by definition a separation of church and state.

The appeal of the idea of a separate Muslim state was that it carried a visceral identification with the divide and rule principles pursued by British and colonial rule. Thus, as independence became imminent, an appeal to division enhanced the power of those charged with the business of division. If the British remained true to the secular foundations of the Eurocentric state system, which had been applied uniformly throughout the rest of the state-centered world, the British could have used all the mighty power of their Empire to block a slippery slope of transformation from colonial rule to a nightmarish scenario of fragmented parochial conceptions of independence based on religion, ethnicity, language-identification or simply issues of tribalism and localism.

What seems apparent from the record is that the British were intuitively drawn to the idea of a divided India because of their ideological predispositions about divide and rule and a crackpot realism suggesting that religious or cultural differences within a state can never be effectively managed by strategies of enlightened statecraft and public policy. Thus, the process leading to the promise of independence from alien rule became bogged down in a quagmire of colonially reinforced perspectives designed to significantly undercut Indian national identity. In effect, having accepted the divide and rule assumptions about political transformations, there
seemed to be no articulate strategy about how the division could be done in an orderly process of transformation. The short-sighted colonial approach posited a kind of "take it or leave it" perspective, which created the seeds of exaggerated conflict when it became apparent that the so-called "princely states" - states in which the British colonial class perfected the process of divide and rule and in fact ruled indirectly - essentially became an anarchic process of accident and possible political opportunism.

The historic facts display the futility and weakness of attempting to create religious or ethnic based states by unscrambling, ethnically cleansing, and murdering whole communities. Pakistan’s inability to sustain secular democracy has often resulted in an internal competition for power where political groups adopted religious symbols in a quest for an ever purer and more exclusive version of Islam.30 Consequently, these parties often emphasized that a secular form of governance was inappropriate and possibly a sin.31 During times of instability in Pakistan, the military often took control in order to sustain the state with military leaders seeking political justification, not in the authority of the people, but in the authority of extremist interpretations of the Koran. Thus, this created political competition amongst Muslims themselves about which extreme version was the most appropriate version of Islam.32 The practical problem with the competition for the purity of religious symbols is that the purest of the pure versions assumes that the use of force carries an absolute religious justification for its vindication. Thus, in the hands of certain interpreters of Islam, the restrictive idea of Jihad could become a justification for perpetual conflict. Such a justification would be continuous if the conflicts included an

31 Id.
32 Id.
adjoining state whose public values are secular, democratic, citizen-based, and conditioned by the rule of law and constitutionalism.

Thus, the Kashmir conflict seems to be a paradigm of sectarian conflict, as it has become a political battleground of an Islamic Jihad pitted against its contemporary status in India based on the formal foundations of the rule of law, citizen participation in governance, and the principle of democratic entitlement. We would submit that sectarian conflict is one of the most dangerous and unpredictable forms of conflict. What has made Kashmir difficult is that it falls in the set of problems classified as "ethnic conflict." The central myth of the notion of ethnic conflict is that it assumes that religious or ethnic identity is so impermeable that when groups with different religious exist side by side they inevitably resort to high levels of conflict and irrational butchery of one other. Ethnic conflicts in this view are completely incomprehensible and not amenable to rational interventions. Therefore, the alleged enmity between India and Pakistan over Kashmir is doomed to endless rounds of blood letting until the parties simply tire of the business of murder and atrocity. As a result, very little can be effectively contributed to peacefully settle the dispute.

In truth, the conflict in Kashmir, like any other form of conflict, has operatives seeking to cloak responsibility for their conduct with violence inspired by political and possibly socio-pathological objectives. It is difficult to pinpoint responsibility for shadowy practices of murder and atrocity that leave no chain of accountability where no one knows who organizes, recruits, and pays the insurgents or which players are in the chain of command. The lessons of Nuremberg, as well as the more modern Truth and Reconciliation Processes, show us that when the perpetrators are identified and the chain of command exposed, we quickly come to grips with who the agents of violence are, what perspectives of identity they have, what basis of power they
are able to marshal, in which operational situations they are able to maneuver, what strategic tools they use to move for violence, and what the outcomes of their activities are for the prospects of peace and security. As a result, it is important that we gain a better understanding of the inner workings of the problems in Kashmir as well as how those problems are conditioned by the arrangement of power in the contiguous region.

b. Sovereignty and the Nation-State System

Today, the world community is comprised of 195 sovereign nation states. Some of them are odd. The Vatican is a nation-state and it is accorded that legal status but we do not regard it as a state in the traditional sense of defining a state as having control over territory, population, normal governance, and foreign relations. It is true the Vatican has some of these elements but not in the sense of making war or peace or engaging in the general framework of international state-to-state intercourse. As previously mentioned, the roots of the modern state system are essentially Euro-centric and are embodied in the 1648 Peace of Westphalia.

The Westphalian Peace was the political and juridical result of a common understanding that interminable religious wars were a prescription for anarchy and mayhem rather than order and civility. If the Peace of Westphalia provided the imprimatur for the modern secular state, it also made a powerful comment on the notion of a state exclusively informed by religious values and religious intolerance. A political order where religion is used to justify the depreciation of the most fundamental values of the ordinary human being through endless war and distorted religious beliefs that justify the extermination of non-believers was, itself, a distortion of religion.

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and a depreciation of its true cultural significance. We must then look at the critical date regarding the arrangements for transition in India and Pakistan to determine how the operative players saw the political evolution in the aftermath of colonialism. This at least provides a perspective and a context through which we can more realistically appraise the legal status of Kashmir today.

c. The Myth of Ethnically Homogenous States

The ethnically homogenous state is an exception in world politics. In 1993, one scholar argued that fewer than 20 of the then-180 sovereign states may be said to be ethnically and nationally homogenous, where a homogenous state was defined as one in which minorities made up less than 5% of the population. As a result, “[t]he age of the ethnoculturally homogenous state, if ever there was one, is over.” These basic facts generate two significant legal problems. The first is the problem of colonial boundaries in post-colonial states whose boundaries cut across lines of social and cultural division. However, everyone concedes that you cannot unscramble colonialism and the first and most important function of a post-colonial state is to stabilize its fundamental basis of state power in order to establish a sustainable public order system. By making the boundaries impermanent, international law would in effect further undermine the stability of the international system by eroding the state’s foundation to maintain its public order. It is precisely for this reason that international law has tended to enhance peace

and security over endless localized division on sectarian lines. The latter is the exception and not the rule in international law.

d. The Uti Possidetis Doctrine Relating to the Stability of Boundaries in International Law

_Uti possidetis_ is a “Roman legal term that essentially means one should leave the place as one received it.” As Professor Ratner provides, “[s]tated simply, _uti possidetis_ provides that states emerging from decolonization shall presumptively inherit the colonial administrative borders that they held at the time of independence. It largely governed the determination of the size and shape of the states of former Spanish Latin America beginning in the early 1800s, as well as former European Africa and Southeast Asia beginning in the 1950s. The relevance of _uti possidetis_ today is evidenced by the practice of states during the dissolution of the former Soviet Union, Yugoslavia and Czechoslovakia, apparently sanctifying the former internal administrative lines as interstate frontiers. Grotius, while not explicitly approving of the concept, “his tacit

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36 Siegfried Wiessner, _Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples_, 41 Vand. J. Transnat’l L. 1141, 1150-51 (2008) stating, “The decolonization of Spanish lands in Latin America set the precedent that was followed in other areas of European conquest, particularly Africa. There, the boundaries were drawn by rulers who often literally used rulers at the Berlin Congo Conference of 1884. The straight lines drawn there cut right through the heartlands, and the hearts, of very distinct linguistic and ethnic groups, creating problems that persist to the present day. Pursuant to the principle of uti possidetis, the UN-effectuated return of lands retraced the borders drawn by the conquerors. Even the dissolutions of European countries today did not dare violate uti possidetis, as confirmed by the Badinter Commission, which formulated the conditions for EU recognition of breakaway entities of the former Yugoslavia. Kosovo had to deal with the application of this principle--originally directed at the infamous Republika Srpska, the Serbian part of Bosnia-Herzegovina--as a major obstacle in its quest for recognition as an independent state.”


38 _Id._
support can be gleaned from his emphasis on the concept of order, which he considered to be a prime requirement within international law.”

The *uti possidetis* doctrine is rooted in antiquity. It originated in the praetorian edict that was absorbed into the *ius civile*, which of course forms the foundation of the civil law systems in the world community. The *ius civile* has in turn had its principles widely applied not only in terms of private law but also public law, in particular public international law. The rules relating to property have been most faithful to the Roman tradition in the context of public international law relating to areas such as the law of servitudes, as well law relating to boundaries and changes in boundaries, acquisition or accession to title, etc. The most direct, authoritative source for the application of civil law principles to international law is in the statute of the International Court of Justice, Article 38. Article 1(c) is included in these sources and deals with general principles of law. Although the obvious reliance in past practice has been on civil law, common law institutions have also been adopted and pressed into service for the purpose of managing contemporary international law issues. For example, the question of the governance of dependent territories in the aftermath of the First World War was creatively subjected to the civil law contract of mandate. The contract of mandate is one of the earliest examples of the origins of the law of agency however it required that it be a gratuitous undertaking, in accordance with the Roman law tradition. Common law institutions have also been pressed into service. In the aftermath of World War Two, dependent, non-self governing territories came under a private law

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40 ICJ Art. 38 provides in relevant part, “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principle of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”
concept drawn from the common law tradition: the concept of trust. This concept was used and given international constitutional stature in the United Nations Charter, Chapter XII, which created the international trusteeship system.\footnote{See U.N. Charter, Art. 75-85.}

Regardless of whether the \textit{uti possidetis} principle is put into an obligatory treaty, or whether it may have independent legal status as customary international law, it clearly has a status based in part on tradition and in part on functional necessity as an independent and operational international legal norm. As Lauterpacht provides, “[g]eneral principles are principles of law, private and public, which contemplation of the legal experience of civilized nationals leads one to regard as obvious maxims of jurisprudence of a general and fundamental character.”\footnote{Hersch Lauterpacht, \textit{General Rules of the Law of Peace}, in 1 International Law 68-74 (E. Lauterpacht ed. 1970).} As Bin Ching points out, distinguishing between custom and general principles of international law is not a facile task.\footnote{Bin Cheng, General Principles of International Law As Applied by International Courts and Tribunals, 23-25 (Cambridge University Press 2006) (1953).} However, there is one obvious difference between the two concepts. Unlike customary international law, there is no requirement of general practice in general principles of law.\footnote{\textit{Id.}}

e. \textit{Sectarian Conflict and Ideology}

Classes of conflict such as Kashmir, the conflict in the Balkans, or the Palestinian-Israeli conflict seem to driven and fed by deeper human motivations wrapped up in the mantle of ideology, nationalism or religion. To begin unpacking these kinds of conflicts, we must penetrate the veil of ideology and myth to precisely identify who the decision makers are, what animates...
their subjectivities in terms of identity, basic expectations, what resources they deploy, and more. For example, is violence itself an element in the continuation of violence? Do those who gravitate to positions of control in situations of high intensity violence have a need to remain in control and therefore need to continue the violence that sustains control?

In short, when crisis and conflict generates the "violence specialist," why would a specialist voluntarily give up the stratagem that makes him important? Would it not necessarily follow that the "violent specialist" would facilitate the expectations of violence becoming normative because they give added importance to the establishment and maintenance of this kind of decision-making? Ideology can be a critical element in the justification of violence, but justification is not the core cause of the violence itself. However, undermining ideological or religious justifications for violence may provide some constraints on the psycho-pathological displacement of violent behaviors. It may be the case that in longstanding disputes like Kashmir, we may be able to isolate key ideological symbols that support the deep underlying personality predisposition to displace violence on public objects and to rationalize it in the name of patriotism, liberation, or religion.

It is possible that such a focus would also help us better understand the evolving symbols of expectation in a place like Kashmir. In particular, the symbols that not only support or rationalize conflict, but also those symbols that generate expectations moving away from conflict and instead in the direction of containment and in the further direction of creating stable expectations about the exercise of power and rational strategies for constituting it. It may also be the case that a focus of inquiry on actual decision-making may disclose strategic choices and options not easily observable. This may suggest a distinction between official decision-making, which creates a myth, and operational decision-making, which underlines the reality of peace or
violence. In order to develop these themes we shall provide a reconstruction of the evolution of governance expectations in Kashmir in the context of evolving colonial rule, accession to India, evolving expectations of constitutional governance and large-scale international elements of conflict and disputation under the United Nations Charter.

IV. International Security and Kashmir

a. Sectarian Conflict and Terrorism in India and Kashmir

During the post-war period, the international community became more aware of the problems of so-called ethnic conflict. The conflict in Southeast Europe (the Balkans) as well as central Africa (e.g., Rwanda) raise the question of whether such conflicts are at all explicable in terms of the conduct of the players, their partiality to unrestrained violence and atrocity, what the parties want, and whether interventions into matters that are incomprehensible can be justified. As previously mentioned, one of the features of such forms of conflict is the inability to identify who the critical players are and whether, if one identified such players, these actors are amendable to rational negotiations. Central to this paradigm is the notion that such conflicts are incomprehensible. However, this also provides a convenient excuse for non-intervention, even when the most heinous atrocities occur. In fact, a careful analysis of many of the arenas of so-called ethnic conflict will quickly reveal that strategies of mayhem, anarchy, and atrocity are consciously employed to send the signal that since a rational person would not employ such
strategies then the conflict, itself, must also be irrational. This ensures that the conflict is insulated from outside intervention.

Furthermore, this consciously maintained veil of anonymity gives the perpetrator the freedom to maintain the violence for an indefinite period of time. Therefore, even though Pakistan’s intelligence agency, ISI, has been in the business of recruiting and funding terrorists with Saudi Arabian and U.S. money, it has successfully used the veil of anonymity to ensure that terrorist atrocity can never directly be attributed to them or the Pakistani government. While it is difficult to maintain this level of autonomy from a democratic government, a military government may easily maintain critical and subtle complex links with the ISI. A further layer of complexity is added because even within the military there may be competition over who will be the next leader or stage the next successful coup. The resulting situation is one where only certain factions of the military establishment maintain linkages with certain factions of the ISI. For example, although there appears to be evidence that former President Musharraf had strong ISI backing, there were certain groups within the ISI who gave him little loyalty or deference. As a result, we are able to roughly group the ISI into three different factions. The first group has demonstrated loyalty to Pakistan’s democratic government while the second group instead tends to hedge their bets in the event of another military group. The third group however has close ties to the Taliban and to the Islamic fundamentalist movement. As a result, this third group invariably has access to funds outside of normal governmental channels and is able to maintain ties with various fluid terrorist groups who, from time to time, are financially and otherwise dependent upon the ISI.

Although terrorism has made India a victim state for many years, there has been very little international outcry. However, now that the U.S. and Western Europe have become primary
terrorist targets, India’s position in the context of western interests appears to have changed significantly. The War on Terror, if it is to be successful, confronts situations of sectarian conflict, analogous to ethnic conflict, where terrible things happen but the ascription of responsibility remains obscure. This appears to be the situation in Kashmir. We would submit that the tried and tested approach to penetrating the veil of anonymity and assigning responsibility for atrocity and terrorism in Kashmir must advance using procedures that have been perfected in law and in particular, from an international law point of view, the Nuremberg experience.

The most important principle that we can glean from Nuremberg is the court’s rejection of the idea that an abstraction called the state is responsible for everything.45 Instead, the court recognized that there are active agents of decision-making behind the state and they may be held accountable for crimes against humanity.46 Similarly, behind the veil of terrorist groups are active agents of decision-making along with agents who recruited, funded, trained, and aided and abetted or conspired with them to commit acts of terrorism and atrocity. It therefore becomes critical that inquiry at every level penetrates the inner recesses of decision making, which may well overlap with renegade aspects of governance. The Pakistani government could provide a critical service to peace and security if it secured clear loyalty from its own security services and required them to penetrate the recesses of groups created and supported by their predecessors. There is no mystery to it - many of these groups come from poverty stricken and alienating circumstances therefore a little bit of money and religion can easily transform them into ruthless operatives.

46 Id.
One of the important problems undermining efforts to resolve the status of Kashmir is the United States’ position that Kashmir is an unresolved matter in international law.\textsuperscript{47} This position became an entrenched part of U.S. policy for nakedly partisan, political reasons. The Cold War was now at its height and Pakistan was an avowedly anti-Communist Islamic state. India, on the other hand, positioned itself as a secular model of non-alignment between the world's contending ideologies, believing that it was important to mediate between the major cold war adversaries rather than stoking up conflict, which could lead to a global conflagration. By maintaining that Kashmir is an unresolved matter under international law, the United States sent the message that, as an unresolved matter, Kashmir’s status would have to be negotiated, discussed, and fought about. As such, terrorist operatives justified their jihad by stating that since Kashmir’s status is undetermined, their strategies to determine their alleged rights are at least partially validated because their claims have not been repudiated in law. From their perspective, since their claims have not been rejected, this must mean that they are valid and they can therefore use any methods to vindicate those claims including acts of terrorism and other forms of violence and mayhem. In short, U.S. policy favored Pakistan and served to sustain the Kashmir conflict, if not encourage it while effectually partially aiding and abetting in the militarization of the region.

As such, Kashmir represents a long-term, critical danger for India and Pakistan when viewed as an internally lawless, up for grabs entity because the ensuing political vacuum becomes an incubator for terrorism throughout the region. Pakistan has experienced violent attacks against its own politicians, jurists, human rights activists and even school children therefore it must face the reality that there may be rogue elements within its intelligence and

security services. Kashmir has also proven to be a serious security problem for India. There have been numerous terrorist attacks on Indian personnel and other democratic institutions with the intention of undermining the rule of law and democratic foundations of the Republic of India. This has meant that from time to time Indian security forces have had to react and sometimes overreact, generating human rights problems and violations that are the antithesis of India’s legal and political structure.

Furthermore, Kashmiris live in a state under siege by unremitting terrorist groups who exploit religion and insecurity while refusing to work through constitutional authority that was developed explicitly for all the people of Kashmir to participate in governance and shape the future of Kashmir under Kashmir's own constitution. ISI operatives have vastly infiltrated Kashmir and terrorism has been indiscriminate in the territory, regardless of confessional outlook or affiliation. This is a melancholy fact that has continued from 1947 to the present and may be fairly labeled a continuous institutionalized pattern of medium to high intensity conflict often gravitating to outright war. Additionally, from as early as the Afghan war between the USSR and the left wing government of Afghanistan, Kashmir has regularly been used by the ISI as a key training ground for terrorist operatives. It essentially became a training ground for the Al Qaeda network funded by the US and Saudi Arabia. As such, ISI regards this as one of its greatest intelligence coups.

As previously mentioned, the lack of transparency concerning the orchestration and support of violence by Kashmiri terrorists has allowed the ISI to freely provide support to these terrorist operatives without consequence. This has caused the Kashmir problem to become an important crutch for Pakistan’s intelligence and military elites. Kashmir being kept alive as a form of managed or containable conflict fits into the general defensive posture of Pakistan
namely, its “Forward Defensive Strategy” against India. In short, forward defensive generally means generating terrorist attacks in Kashmir and India sufficient to keep India off balance yet not large enough to engage India into war because India’s vast resources would overwhelm Pakistan. The use of terrorism as an attempt to keep an overpowering enemy off balance, while pretending you are doing heroic things to defend the state, has been a substantial part of the security doctrines of Arab states adjacent to Israel. It was clear that after 1973, Arab states could no longer think of confronting Israel in a conventional war because of Israel’s nuclear arsenal. Whether this forward defensive strategy used by Pakistan in the past may continue to be used or will instead be deemed obsolete, because both Pakistan and India have nuclear weapons, may be a matter that must still percolate through to the security elites in each country.

As a result, it is appropriate that the legal status of Kashmir is clearly restated and properly developed so that the notion of Kashmir as a so-called unresolved problem might be disposed of once and for all. This particular unresolved status has caused untold misery for the people of the region. Furthermore, as indicated, India and Pakistan are now also nuclear powers with each state possessing delivery systems capable of using nuclear arsenals as instruments of strategic positioning. The deployment, threat or possible use of nuclear weapons has elevated a regional conflict into one that represents a serious threat to international peace and security. Whether international and constitutional law might light a path out of the conflict or confront the risk of a nuclear conflagration is an urgent challenge. Therefore, we submit that clarifying the political and legal status of Kashmir, including its status in international law, will likely lead to a radical reduction of tensions and provide a clearer framework within which expectations of political, economic, and constitutional development can take place in the region.
b. Violence and Decision-Making in Kashmir

One of the central insights of policy thinking is that human beings, whether consciously or unconsciously, have lives permeated by choice: the ubiquity in human interaction of decision-making about values. Human beings who gravitate to prominence or influence, in the context of power relations, tend to have more access to, as well as influence upon, the important value distributions in a society. We might describe these, as Lasswell did, in terms of the classic, (political) power-conditioned personality.\textsuperscript{48} The political personality displaces its private perspectives on public objects and rationalizes the displacement as being in the public interest.\textsuperscript{49} A central insight here is that ideology is more a matter of manifest justification than a real reason for action.\textsuperscript{50} This suggests skepticism about the nature of ideology or myth as a condition of conflict.\textsuperscript{51}

The distinction between real private motives, that is to say, real subjectivities and manifest justification is a critical insight into the nature of political decision and operational activism in political arenas. As applied to the deep structure of ethnic conflict, it could well be asked whether the private motives for fueling ethnic conflict are perhaps driven by social pathologies rationalized in the name of religion or racial supremacy or some romantic idealization of an atavistic identity. Although stating these insights may be uncontroversial, developing a framework within which we can explore the causes and conditions of conflict and why it continues to endure may be more challenging. It is by no means clear that conflict based on human pathology is easily amenable to rational solutions based on rational alternatives.

\textsuperscript{48} Harold Dwight Lasswell, Power and Personality (Transaction Pub., 2009).
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
Adequate, timely diagnosis is better than a therapeutic intervention after the fact. A part of this preventive approach has to be rooted in transparency, responsibility, and specific accounting for atrocious conduct.

V. United States Policy Relating to India, Pakistan and Kashmir

a. U.S. Policy in the Context of Kashmir’s Transition to Independence and the Resulting Violence and Insecurity

As indicated earlier, competition for political control of Kashmir in the aftermath of transition caused the Maharaja to perfect the instrument of accession. After accession, Indian and Pakistani governments employed different strategies to either consolidate accession or to completely undermine it. Pakistan attempted to forcefully rearrange the borders of Kashmir by using insurrectionary violence. India, on the other hand, responded using strategies of peaceful coexistence based on the foundations of the UN Charter and international law. Prime Minister Nehru persuaded the Indian government to take the matter to the UN Security Council under Article 35 of the UN Charter. Article 35(1) states, “any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.”

The central claim of the Indian government, reduced to its essentials was, that the since the transfer of Kashmir to India by an act of accession was lawful under international law, under the UN Charter, Kashmir is now part of Indian sovereignty. Therefore, efforts of the Pakistani
public and religious interests to undo the accession by using direct or indirect force is an act of aggression in violation of Article 2(4) of the UN Charter.\(^{52}\) Furthermore, the Indian Constitution’s clear delineation of the constitutional position of Kashmir further strengthens the principle that Pakistan’s interference in India’s internal affairs is a violation of Indian sovereignty and, in particular, India's domestic jurisdiction under Article 2(7) of the UN Charter.\(^{53}\)

While before the Security Council, Pakistan’s government chose to strategically deny India's charges by attempting to change the focus of the precise nature of the Kashmir situation. For example, Pakistan accused India of persistently seeking to undo "the partition scheme."\(^{54}\) The word "scheme" is cleverly chosen because it seeks to deny any legal efficacy to the agreed upon rules of colonial transformation in the subcontinent. It in effect implies that since the borders of Kashmir, and ultimately of India and even Pakistan, are based on a "scheme" devoid of any authority, they can be rearranged by the use of force. This of course is one of the central policy concerns that the international doctrine of *uti possidetis* seeks to constrain. These large-scale implications are extremely critical for the safety and security of India because India is a quintessentially pluralistic state. Its pluralism represents religious, linguistic, ethnic, and more broadly, cultural pluralism in the highest degree. Thus, a recognition that claims to parochial identities can be used to peremptorily promote matters of isolationism or secessionism constitute a serious threat to nation building and the constitutional integrity of a democratic state. It is

\(^{52}\) Article 2(4) states, “all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

\(^{53}\) Article 2(7) states, “nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

\(^{54}\) Matt Taylor, *Path to Kashmir Resolution will be Arduous, but Uneasy Truce Should Hold*, 4 Strategic Insights 1, 2-3 (2005).
interesting to note that this “scheme” of transformation is precisely the "scheme" demanded by Jinnah in order to establish a two-state process of transformation. Therefore it appears that there is a double standard where the scheme that establishes accessions to Pakistan is viewed as constitutionally valid while accessions to India are dubbed as unsanctioned by any law or authority. The paradox, of course, is that the very process that secured Pakistan's borders would now be used to destabilize India's borders.

Pakistan also suggested that communal violence involving religious identities in the Punjab amounted to a campaign of genocide by the Indian government. All the information we have about the Muslim-Hindu massacres at transformation certainly does not point to the violence being pre-planned by the Nehru-Gandhi led Indian Congress. Instead, Congress did everything possible to control the violence because it did not support India's need and desire to be an independent, sovereign state capable of democratic rule of law and governance. Here, as well, Pakistan’s claim appears to be largely strategic, designed to create the impression that since there was genocidal anarchy in the region, political power and territorial boundaries were correspondingly up for grabs. Pakistan’s final point was that the accession was achieved by fraud and violence.

In short, India brought a relatively straightforward issue to the Security Council, namely, that Pakistan or Pakistani interests were bent on using force to change the political future of Kashmir. This was a narrow issue appropriately before the Security Council because it related to Pakistan’s breach, and the threat of further breaches, of peace and security in Kashmir. Pakistan strategically sought to defuse this issue by raising broad concerns about threats to Muslim identity created by the independence process, suggesting that significant boundary allocations in Kashmir were up for grabs.
On January 17, 1948, the Security Council passed Resolution 17-1-1948. This Resolution called upon India and Pakistan to take all measures within their competence to improve the situation on the ground and to refrain from any activity that would make the situation worse. Both states then submitted draft proposals seeking to resolve the dispute. Following the Indian draft, Sir Gopalaswami Ayyangar, as the Indian representative to the Security Council, stated, "In accepting the accession they (India) refused to take advantage of the immediate peril in which the State found itself and informed the ruler that the accession should finally be settled by plebiscite as soon as peace has been restored." While this statement could be read to imply that the accession to India was not perfect under international law, India has never conceded such a proposition and such a reading would effectually undermine Indian policy regarding methods to transfer authority under the colonial constitutional system. Therefore, the statement’s logical interpretation is that the perfection of Kashmir’s accession to India is a matter of Indian Constitutional Law, which has consistently worked to secure an appropriate constitutional status for Kashmir within the framework of the India’s commitment to regional diversity.

It is with this background that we touch on the second part of the statement of the Indian Representative on the floor of the Security Council. Namely, that "accession should finally be settled by plebiscite as soon as peace had been restored." This statement created the unintended inference that the boundary issue could finally be negotiated to accommodate as much of the Pakistani concerns as Indian. It is not clear whether “plebiscite” was a term understood by the meaning developed in international practice or whether it was used as a term of art indicating that the perfection of accession would be achieved by democratic means by consulting the people.

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56 Id.
of Kashmir. It is important to stress these principles because the ambiguity involved in the statement has led to enormous costs for the people of India, Pakistan and Kashmir. We repeat that a review of Kashmir's own constitutional struggle reflected a struggle against autocracy. The promise of accession and independence within the Indian constitutional scheme was a promise of self-determination based on democratic principles and the rule of law. This base demand was a cornerstone of India's struggle for independence as well as the specific struggles in various parts of India, including Kashmir.

Therefore, the term plebiscite was likely loosely used in the context of draft proposals for consideration rather than the basis of a specific agreement with the Security Council or the government of Pakistan. Indeed, the Indian representative would have acted beyond his constitutional authority were he to have agreed to the principle that India and Pakistan were "international schemes" up for grabs. Furthermore, as a technical matter, Governor-General Mountbatten already authorized the Instrument of Accession using his authority as representative of the colonial power and the new Indian government. Therefore, using the notion of a plebiscite in a rather loose sense, the Indian representative indicated that, notwithstanding the prima facie validity of the act of accession, India as a secular democracy would still work to consult with the people of Kashmir about future governance. However, at this point, these issues would be matters of internal governance and have no genuine concern to Pakistan because Kashmiris were not and are not Pakistani citizens.

There is a simplistic identification in modern international law of a plebiscite as an essentially peaceful, democratic way of facilitating the process of self-determination. The central paradox of the plebiscite issue is if the plebiscite produces an authoritarian or fascist result, it will institutionalize a scheme of values designed to undercut the legitimacy of the plebiscite and
the currency of democracy. Modern commentators recognized this paradox acknowledging that plebiscites are not a silver bullet solution of every conceivable problem of coexistence and security of different groups within state borders. Indeed, the *uti possidetis* principle recognizes that secessionist groups redefining consultative boundaries can create instant majorities and minorities in which patterns of repression or group intimidation are reversed. It is recognized that the ethnically homogenous state is an exception to the general norm that the overwhelming majority of states are diverse and pluralistic. Moreover, colonialism often created cultural and demographic facts so that formerly homogenized ethnic groups would be sufficiently acculturated to different colonial norms such as Francophonic and Anglophonic colonial cultures. These differences make it impossible to recreate a preexisting form of homogenous ethnic identity and it is for this reason that the distinguished Dr. Brzezinski suggested caution when simplistically using plebiscites in the current Middle East Crisis:

Democracy, impatiently imposed, can lead to unintended consequences. If the Palestinians were able to choose a leader in truly free elections, might they not opt for the head of Hamas? If free elections were soon held in Saudi Arabia, would Crown Prince Abdullah, a reformer, prevail over Osama bin Laden or another militant Islamic leader? If not genuinely accepted and reinforced by traditions of constitutionalism, democracy can degenerate into plebiscites that only add legitimacy to extremism and authoritarianism.57

This statement provides a great deal of clarity to previous, ambiguous formulations of the legal and political bases in the conflict over Kashmir.

b. The Form of Conflict in Kashmir and Kashmir as a Legal Vacuum

It is impossible to find a solution to Kashmir when viewing it simply as an example of the imperfections created by transitions to independence. It may be useful to get a firmer grasp of the nature of the problem it presents apart from the looming omnipresence of nuclear weapons. It should be noted at the outset that violence and destruction in Kashmir are not monopolized by terrorist infiltrators or Pakistani-trained militants. In situations of extreme conflict where terrorist methods are designed to target civilian populations so that insecurity and the possibility of normal governance are the outcomes of terrorist action, it is also the case that state reaction and overreaction also facilitate the descent into grave violations of human rights and humanitarian abuse. With this qualification, figures about the physical destruction of homes and infrastructures in Kashmir by Islamic terrorists and militants are astonishing. Since the conflict began, over 1,100 government buildings, 640 educational buildings, eleven hospitals, 337 bridges, and more than 10,000 private houses and shops have been destroyed in violent incidents.\(^{58}\) Indian authorities state that, as of July 2009, the death toll from nearly two decades of insurgency in Kashmir is more than 47,000.\(^{59}\) The figure does not include people who disappeared as a result of the conflict although human rights groups put the number of missing Kashmiris at 10,000.\(^{60}\)

The continued instability generated by a problem consigned to an international legal vacuum has generated a multitude of new interest groups and complex alignments. The


\(^{59}\) India revises Kashmir death toll to 47,000, Reuters (Nov. 21, 2008), http://in.reuters.com/article/2008/11/21/idINIndia-36624520081121.

\(^{60}\) Id.
emergence of these groups and alignments were integrated into a novel version of preemptive uses of violence and coercion. As previously mentioned, Pakistani security elite developed a security doctrine known as the forward defensive strategy. At the heart of the strategy was the idea of being able to deploy terrorist operatives for terrorist activities inside India and Kashmir in ways that could not ascribe responsibility to the Pakistani state. The justification for this security doctrine was the small size of Pakistan and its modest resources. In short, random terrorism targeting Indian soft targets was a way of keeping India off balance therefore preventing it from launching a conventional confrontation with extended conventional war-making strategies.

A significant change in the dynamism of this doctrine came when the USSR intervened in Afghanistan to defend the left wing government in the early 1980's. The United States and Saudi Arabia were willing to intervene in a proxy war orchestrated by Pakistani intelligence, the ISI. The ISI was the biggest trainer of terrorists in South Asia. As previously mentioned, although the terrorists were supposed to be trained to fight in Afghanistan, it is obvious that there was a dual training agenda where Kashmiri Muslims could be recruited, paid, and trained for actions in Kashmir and India. Although these trainees were sometimes sent to Afghanistan for practical training, ISI’s ultimate objective was to train them for operations in India and Kashmir.

The ideology driving these Kashmiris was now dictated, not by the U.S. Cold War rhetoric about freedom and liberty, but Saudi Arabian Wahabism. Wahabism is an ultra-conservative, fundamentalist sect of Sunni Islam. According to ISI sources, ISI operatives boast that they pulled off the greatest intelligence coup in history by having the U.S. and the Saudis pay for the training of these terrorists while simultaneously depreciating the Saudi royal elite and denigrating the materialistic and immoral U.S., from the point of view of Wahabi

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fundamentalism. Presently, it is probably correct that the billions funneled through ISI for the war in Afghanistan are depleted. However, the disturbing information that so many terrorist groups have been able to engraft themselves in areas of Pakistan that also fall within a political no-man’s land or vacuum, indicates that even terrorism generates a certain rudimentary institutional base, which continues after the initial flow of heavy capital and military hardware.

In the recent tragedy in Mumbai, highly trained and well-rehearsed terrorist operatives killed and wounded hundreds of people within the full glare of global television. It is now apparent that the charges made by the Indian government that Pakistan indirectly orchestrated these bombings, have been confirmed in part by the fact that terrorist group, Lashkar-e-Taiba (LeT), planned the Mumbai operations and had training bases inside Pakistan. One has to be cautious about assigning too strong an institutional label to any particular group of terrorists coming from anywhere. It is obvious that one of the strengths of terrorism is the fluidity by which they move from one group to another while assuming randomly chosen names. This of course means that when a new name is floated, intelligence services develop concerns because there is now a new name that they have not previously heard of. As a result, it is difficult to ensure that perpetrators of terrorist acts are held accountable because even if the terrorists have links with governmental units, those links are going to be strenuously obscured. Thus, when the U.S. initially asked the Taliban government to hand over Bin Laden and his compatriots, they insisted that they would not act unless the U.S. government provided direct evidence implicating Bin Laden as the mastermind behind the 9/11 attacks.\footnote{\textit{Taliban Defy Bush Ultimatum}, The Guardian (Sept. 21, 2001), http://www.theguardian.com/world/2001/sep/21/september11.usa15.} It may be a coincidence but the initial
statements of the Pakistani government denying any link to the Mumbai bombings, similar to those of the Taliban, also demanded direct evidence from the victim state, India.63

Therefore, it is critical that U.S. policy does not tolerate the idea of a legal vacuum in Kashmir where all the rules of law are suspended. One fact that sustains violence in so-called sectarian conflicts is providing those who are prone to use violence with a justification for the suspension of legal and moral regulation. In the context of Kashmir, the original justification was that everyone else agrees that the boundaries here are undetermined and in effect there is no law providing guidance in state-to-state claims. This has meant intermittent conflict, condoned by a dangerous cultural artifact, namely extremist interpretations of religion justifying whatever means necessary to resolve the Kashmir dispute. Finally, in this regard, the idea of a legal vacuum relating to the undetermined nature of the boundaries in Kashmir must now confront the fact that both India and Pakistan are nuclear powers. When conflict is fed, not by the concrete expression of political interests but by religious fanaticism, the boundaries that otherwise constrain conflict become weak and could lead to unintended but catastrophic outcomes.

Current U.S. policy was most effectively defined by the Clinton administration and continued by the Obama administration however the policy leaves much to be desired. The central elements of this policy are as follows: 1) Both India and Pakistan should respect the Line of Control (LOC); 2) Both sides should restrain themselves from further armed conflict; and 3) The resolution of Kashmir is a bilateral issue between India and Pakistan with the U.S. unwilling to serve as a third party mediator.64 This policy does not change things in terms of the non-policy that has characterized the U.S. approach to Kashmir prior to Clinton. First of all, the line of

control is a cease-fire line. It was frankly a line generated by Pakistani aggression and sustained by its military-dominated government. One has to be curious about gratuitously saying that we respect a cease-fire line, and ascribe fault on both sides for it. This only encourages the strategies involved in the Pakistani forward defensive doctrine, which has made India the primary victim of terrorism.

Secondly, in order to resolve the problem, the parties have to possess a keener sense of the political capacity of each side. Pakistani stability has been tottering on the brink for years. One of the issues keeping Pakistan together is the demonization of India, supported by religious extremism and military authoritarianism. Pakistan is poor and needs money. The money it gets is largely from Saudi Arabia and comes with the baggage of anti-American/anti-Indian extremism. Moreover, it’s not likely that this money will be provided to support the new secular, democratic developments inside Pakistan. Lastly, U.S. policy is overly simplistic, failing to solve the security problems of India, Pakistan, or the U.S. The U.S. has a long-standing policy of refusing to take sides in territorial disputes. What this technically means is that it does not take sides regarding the merits of complex international territorial disputes however it takes a position on the methods used to resolve it. The U.S. has a strong position opposing terrorism therefore it is obvious that if terrorism has been used to resolve a territorial dispute, U.S. policy should not support or enhance the terrorist activity.

The importance of our initial boundary analysis in Kashmir and its relation to the uti possidetis international law principle is that it creates a prima facie settlement of the dispute and Pakistan has the burden of publicly disclosing its exact legal position regarding the boundary dispute. Furthermore, it is possible that India may be willing to forego any claims beyond the

65 Id.
LOC in order to facilitate dialogue and encourage peace and stability in the region. This is a good deal for Pakistan because it gains border security and its democratic government does not have to spend vast amounts of money targeting India, who does not have a record of regional or global aggression. However, what is lacking is the recognition of a starting point. As previously stated, Pakistan’s own borders are owed to precisely the legal system that created India’s borders and validated the accession of Kashmir to India. We therefore submit that a prima facie recognition of this principle of legality and the implications of the established uti possidetis principle serve as a foundation that will temper and moderate excessive claims that have enormous social, economical, and political costs to Pakistan, India, and the people of Kashmir.

c. Fundamentalist Terrorism and the Cold War

During the 1980's, the value of Islamic terrorism was seen as a vital element in the politics of the Cold War. Afghanistan became the arena of fundamentalist action, using terrorism to confront the Soviet occupiers. The ISI fully supported these developments and Jihad fighters came from all parts of the Islamic world to engage in and learn methods of fighting the Russian ideological infidel. To support these activities, money flowed from both Saudi Arabian and American sources. Since the ISI was a chief broker of these activities, the Afghan intervention created a role for the ISI as "a center of Islamist terrorism" and "a melting pot" for a worldwide Islamist Jihad. Among the chief targets of the ISI-sponsored worldwide Jihad was a program to "initiate full-fledged subversion of the Kashmir valley.""67

67 Id. at 23.
Apart from international Jihad operatives, Pakistan aggressively sought to recruit Kashmiri Muslims to carry the banner of the Jihad. Hashim Qureshi, the founder of the Nationalist Jammu and Kashmir Liberation Front, gives the following account of his recruitment: "in 1984 ISI Generals and Brigadiers approached me with the offer, 'get us young people for training from the Valley so that they could fight India on return.'" Qureshi was then effectually deposed when he declined ISI’s offer and ISI picked a new leader for the task. ISI was aware that to recruit operatives to fight for Pakistani regional interests and ambitions, they would have to collapse those interests into an ideological package, much the way U.S. or Russian interests were clothed in the package of capitalist freedom and socialist progressivism. Islam could now fill the ideological gap. The Russian presence in Afghanistan could be packaged as an "Islam in danger" idea. Similarly, Indian control over Kashmir could be packaged as a danger to Islam; the danger in the first case was from godless atheists while the danger in the second case was from idol-worshipping Hindus.

Many of the terrorists and militants who showed up in Kashmir received their field training in Afghanistan. A large number were armed and trained by ISI and many of their weapons systems came indirectly from the Gulf, often with U.S. support or acquiescence. ISI was also able to supply Kashmiri militants and terrorists with Chinese and Russian arms. For example, Indian security forces captured Stinger SAM’s (Surface-to-Air Missiles) in the possession of terrorist groups, ostensibly supplied by ISI. The makeup of Mujahedeen militants and terrorists destined for Kashmir included Pakistanis, Afghans, Saudis, Algerians, Egyptians, Sudanese, Nigerians, Jordanians, Palestinians, as well as numerous other outside volunteers. In

68 Bodansky, at 16-17.
69 Id.
70 Bodansky, at 23.
fact, Pakistan threatened India with nuclear devastation as early as 1995. A Pakistani Foreign Ministry spokesman said in February 1995, "if India carries out another aggression and war breaks out between Pakistan and India, it would not be a war of a thousand years or even a thousand hours, but only a few minutes and India should not be oblivious to the potential devastation."\(^71\) Other Pakistani officials adding, "Pakistan is really in a position to strike a heavy blow against India through its nuclear capability."\(^72\)

As we have continued to stress, Pakistan’s emphasis on covert operations indicates the importance of knowing who the real decision-makers are, what animates them, and whether the formal structures of government give only a partial picture of the actual operations of decision-making, in order to develop rational solutions to the Kashmir dispute. ISI’s crucial role in the strategic use of terror, skill in mobilizing religious fundamentalism and even getting the United States to pay part of the bill, is itself an impressive intelligence achievement. While the events of 9/11 destroyed Pakistan's fundamentalist strategic vision for Afghanistan partially exposing Pakistan as a player in the terrorism game, it also indicated how important it was a strategic player in the war against terrorism. President Musharraf had to do some fancy political footwork to reassure his longtime U.S. patron that he was cleaning out the ISI, but not do so too effectively because after all, there was still the holy grail of Kashmir to be secured.

This brings us to U.S. policy. It was a policy that for a very long time was dominated by containment and later, the rollback of atheistic communism. In this war, Islam was an ally and Pakistan was a super-ally because of its strategic proximity to both Russia and China. The Achilles heel of Russia was the national question. Practically, the national question meant that

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\(^72\) Id.
inside Russia were vast aggregates of unappreciated, aggrieved followers of Islam. A ring of Islamic states bordered Russia therefore playing the religious card would be an important way to keep alive the national question as an irritant to socialist stability and ideology. Christianity was not the enemy of Islam, instead Christianity and Islam shared a common enemy: atheistic communism. The logic would not be lost on strategic planners. What was the United States to do with the problem of Kashmir? It was, after all, a secular democracy and, in some sense, a model for India's own secular democracy. U.S. policy, in effect, kept alive the idea that Kashmir was a kind of *terra nullius* construct in international relations; it was an unresolved territorial dispute. This was precisely a policy that looked neutral on its face but in fact favored Pakistan. It is a policy that seemed to be supported by the "even-handed" Bush administration, as well as the Obama administration. In short, the war on terror has strategic limitations of national interest. It is probably for this reason that Indians have refused to send their troops into Iraq to support President Bush's war against terrorism.

*d. Terrorism and the Peace and Security of the Indian Sub-Continent Post-Mumbai*

The terrorist attacks in Mumbai began on November 26, 2008 and ended on November 29, 2008. The aftermath of the attacks continue to generate considerable uncertainty and instability. The city of Mumbai has a population of approximately 19 million, more than many nation-states.\(^73\) It is also the symbol of the new India; the India that is self-consciously embracing a new dispensation of economic prosperity, deepening democracy, and a decided term to the symbols and images of flashy modernization. The Indian middle class sees this development as

reflected in the way their symbols of national identity, e.g., athletics, compete globally. The symbol on the cap of the famous Indian national cricket team is that of a lion. This symbol touches on bravery, courage, and action and ties in with the caste known as the shatria. India is becoming a nation of shatris. In the protests after the Mumbai terrorist attacks, middle class Indian protestors lamented the efficacy of the local and state responses to the attacks. One particular sign given international prominence lamented that a nation of lions was being led by a group of donkeys. Symbolically, a donkey is a slow-witted, rarely inspired to act, and has to be led to do anything. This symbol of protest stands in marked contrast to the enormous successes that Indians have experienced while competing in athletics and business globally.

India has a several soft targets, many of which have been exploited ruthlessly by terrorists. Clearly, attacking religious targets and worshipers in pious mode makes a point about ruthlessness but will never shake the spiritual underpinnings of the Indian nation and Indian identity. However, Mumbai presents something quite different: it is the symbol of Indian modernization and of the Indian commitment to embrace all the challenges of modernization, commercially, scientifically, and educationally. Mumbai is therefore the symbol of the new India and its commitment to economic development and modernization. It is precisely this symbol that the terrorists in the Mumbai attacks sought to compromise or damage. To attack the commercial and financial hub of the nation represents planning strategically calculated to undermine the economic underpinnings of the new India and undermine the confidence in the Indian economy and its future development. Additionally, the killings were overtly sectarian. Indians, implicitly Hindus and Christians, were the primary victims. Another primary target was American and British foreigners. The gratuitous murder of Jewish rabbi and his family was a rhetorical ethnic gloss to underline the effort to exploit sectarianism in these attacks.
Terrorist attacks in India and most other places that target particular, identifiable subjects will create a reaction in those sub-groups who will then target the group that is ostensibly ascribed to the terrorist. Thus, terrorism is fact generating in the sense that it creates insecurity in all groups and groups become identified with those like them out of fear. This fear is essentially a way in which international events generate personal insecurity with political effects within the state. Thus, the perception that the terrorists in Mumbai are Muslim will generally create fear in the innocent Muslim population in India that they may be blamed for the terrorist attacks and victimized. Additionally, groups that are somewhat xenophobic or psychologically disposed to it are a ripe constituency for exploitation. This may explain the ability of the BJP, which from time to time is able to tap into religious xenophobia as a base of power to sell itself in the political marketplace. In fact, the terrorist strategists must doubtlessly be aware that terrorism attacks the Congress party and its insistence on a non-sectarian political dispensation. Thus, terrorism fuels the possibility of exploiting grievances by providing a false object of blame.

The terrorists must have also calculated that there would be sufficient evidence to point to connections with Pakistan. The critical question here is why the democratic state of Pakistan, which has moved significantly on so many fronts with India, would underwrite such a foolish act. Linking the terrorists to the central government would actually be a causus belli, with the prospect of deploying nuclear weapons. We would submit that there could not be any conceivable political reason that Pakistan’s fragile democracy had a hand in this. However, there are groups in Pakistan and possibly even renegade groups within the security and intelligence establishment who would benefit from a crisis that weakened confidence in Pakistan’s democratic government. We would venture the proposition that the military is not a sufficiently homogeneous interest group such that it is squarely behind and in the control of the elected
government. As previously mentioned, it represents interests that clearly support the state but also interests that are probably a function of internal conflicts and careerist opportunism with hopes for the resurrection of military dominance in Pakistani politics. It is also possible that there are groups inside the military whose clear allegiance is to the fundamentalists’ aggregation of groups in various parts of Pakistan who are united only in their commitment to the free use of violence against anyone they deem to be an enemy.

It may also be the case that ISI may actually function with an even higher level of autonomy within the state than even the democratic government itself. The essential democratic weakness is that the government does not have the power or the connections inside the security elite to know who to purge, who is a threat, and who is moved by sincere patriotism. One thing is clear and is obvious from the Indian reaction to the Mumbai attack, while the Indian government acted with restraint, the Pakistani government acted with a sense of panic. The truth probably is that Pakistan now knows they have clear rogue elements within ISI and the military and because they cannot bring these under direct control, they appreciate that their weakness has been exposed. Pakistan’s weakness is further emphasized by a Pakistani court’s decision to grant bail to Zaki-ur-Rehman Lakvi, a man accused of masterminding the 2008 Mumbai terror attacks. It appears that for Pakistani politicians, democracy is generally a short-term thing while military and security dictatorship is not.

Whether democracy survives in Pakistan is very much an Indian call. Indians will have to act with restraint and Pakistanis must act with sufficient credibility to make the Indians believe that they are acting in good faith. The U.S. role in Pakistan has left a decidedly foul taste in the mouths of democrats. It has propped up one military dictator after the other over the past fifty years because of its interest in needling the USSR. U.S. policy therefore confronts only interests
of convenience rather than interests of greater political durability. George Bush cannot take all the blame for this but his administration has certainly not improved matters and neither has the Obama administration. Pakistani intellectuals see even the most well-intentioned U.S. moves in Pakistan as generally leading to bad outcomes, at least for Pakistanis.

The United States must therefore present a posture in collaboration with its partners, which has a greater vision for peace and stability within the region if it seeks to ultimately advance U.S. interests. Among the proposals that have been produced is the creation of a South Asian union to facilitate a genuinely foundational, on the ground, economic transformation. Creating incentives for the future will make the old blocks of blood, territorial boundaries and spaces, less important. This can be accomplished by projects such as an Iran-Pakistan-India pipeline project, which the U.S. has opposed, threatening sanctions on both Pakistan and India if they choose to pursue the project. However, a new administration could seriously facilitate such a move. The South Asian Free Trade Area (SAFTA) has gone some way in encouraging collaboration.\(^{74}\) It is an agreement that came into force in 2006, operational following agreement by eight governments, which creates a free trade area of 1.6 billion people in Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka. The goal is to reduce customs duties of all traded goods to zero by 2016.

Enhancing the economic opportunities available in India, Pakistan, and Kashmir while encouraging all the parties to agree on a suite of programs that would bring about positive change may set the stage for ultimate resolution of the conflict as all sides now have a vested interest to resist any retrenchment from continued progress.\(^{75}\) India and Pakistan, along with a community of international and bilateral donors, should consider launching a massive program


\(^{75}\) Id.
of economic development and reconstruction on both sides of the border within the framework of the existing SAFTA Agreement.\textsuperscript{76} Kashmir is a predominantly agrarian society yet there is a pattern of decreasing agriculture production directly associated with the escalation of violence after 1989. Therefore, along with injecting money into Kashmir’s horticulture industry, efforts should be made to develop other industries.

Tourism also forms an integral part of the state’s economy therefore India, Pakistan, and Kashmir should go even further than the SAFTA agreement by encouraging the free movement of services and people.\textsuperscript{77} Such an arrangement would allow free access to potential tourists from Pakistan to Kashmir and to India, and from India and Kashmir to Pakistan. Such movement could integrate the sizeable handicraft industry that exists on both sides of Kashmir. Before the partition, the Kashmiri handicraft industry, including wool weaving and woodworking, had strong links with the handicraft industry in Indian border cities and these links could be reestablished.\textsuperscript{78} Those links could be reestablished. The ultimate goal should be to raise Kashmir’s GDP to about the average for South Asia because this will significantly reduce the pool of poverty and better integrate the economies of Kashmir with Pakistan and northern India, making the possibility of the development of a free-trade area much more plausible.\textsuperscript{79}

India has a history of long-standing communal conflicts overwhelmingly targeting Muslims. Examples of such episodic massacres are the riots associated with the 1992 demolition of the mosque at Ayodhya and communal riots in Gujarat in 2002.\textsuperscript{80} As a result, Muslims within India often feel disenfranchised and more likely to sympathize with Islamic radicals. The Indian

\begin{flushleft}
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\end{flushleft}
government must actively work to successfully integrate its Muslim population by vocally discouraging such acts of targeted violence while working to improve the socio-economic status of Muslims, which makes them an underclass within the country. India’s significant development in creating and elevating its middle class has somewhat marginalized India’s Muslim population from the opportunities of the Indian economy. The 2007 Council of Foreign Relations study indicated that Muslims inside India were in fact marginalized and the government has not come to terms with the problem.\footnote{Carin Zissis, \textit{India’s Muslim Population}, Council on Foreign Relations, June 22, 2007.} No society has been able to eliminate sectarian stratification however the government must work to be viewed by the Muslim population as being concerned about them by employing policies emphasizing inclusion, not simply at the top, but at the middle and at the bottom. The report of Chief Justice Rajinder Sachar, former Chief Justice of the Delhi High Court, pointed out that while Muslims enjoy religious freedom in India, they have not equally shared “the benefits of growth progress.”

Muslims are the largest minority in India, making up 13.4\% of the population, yet they seriously lag behind in terms of human development indicators.\footnote{Social, \textit{Economic and Educational Status of the Muslim Community of India}, Government of India, Nov. 2006, 1.} The Sachar committee reported that Muslims are not just poorer but also less educated.\footnote{Id.} 25\% of six to fourteen year olds have either never gone to school or dropped out.\footnote{Id.} Their literacy rate is 59\% compared to the national rate, which is 65\%.\footnote{Id.} Additionally, Muslims account for only 4\% of the students at the top universities and only 5\% hold government positions.\footnote{Id.} A particularly insight from the Sachar report is the following: “Muslims complain that they are constantly looked upon with a great degree of suspicion, not only by certain sections of society, but also by public institutions and
government structures. This is a depressing effect on their psyche.” This suggests that the level of marginalization and its psychological effects may generate widespread alienation, and if alienation is exploited by apocalyptic visions of destruction, India itself may be breeding an important national security threat. Hence, there are critical strategies at all levels in public and private life that must involve self-conscious inclusion and opportunity. Furthermore, successfully integrating India’s Muslim population may have positive effects on disenfranchised, Muslim youth in Kashmir who may, in turn, view themselves as belonging to wider Indian society therefore removing their motivation to join fringe, Islamic movements.

One important aspect of the issue of terrorism is who funds it. Even if elements of the ISI are involved, they obviously get those funds elsewhere. Training terrorists is not cheap. Therefore, victim states such as India must enact legislation, with a reasonable extra-territorial effect, providing that funding and other forms of indirect support for acts of terrorism in India are subject to both criminal and civil liability for damages. It still seems to be the case that delinquent activity tends to diminish when it must pay a price. In fact, India has suffered enormous losses in Mumbai and elsewhere. If there are oil rich states that have allowed funds to be diverted through negligence or intentional but covert connivance, then those states should be held accountable, at least financially, for the losses suffered by the victims and the state in having to reconstruct its infrastructure.

Our tentative conclusion is that the key to a resolution of the Kashmir dispute would be how seriously the United States and the larger world takes the war against terrorism. Without the support of Pakistan, the militants and terrorists in Kashmir would be seriously marginalized. After the terrorist school attack in Peshawar, Pakistan on December 16, 2014, where 141 people

87 Id.
including 132 school children were murdered in cold blood, there is renewed hope that Pakistan will fully understand the costs of allowing the Taliban to operate within their borders. If they form a united front against these militants, the prospect of a peaceful political dispensation involving other possibilities for Kashmir would be more attainable. These could include a greater level of participatory democracy, deeper respect for the rule of law and eventually even the development of such levels of autonomy that approximate the associate state status of the Commonwealth of Puerto Rico. There is a great deal more research that needs to be done on this project, but this outline of our thoughts will, we hope, generate interesting discussions about how scholars trained in legal policy analysis can use their tools of description, analysis, forecasting, and alternative thinking might come up with practical ways of facilitating peace and security in the region.

e. Towards Transitional Justice in Kashmir

In our very recent past, several countries involved in high-intensity conflicts have used the method of transitional justice as a way to move from conflict and violence toward a sustainable peace from which may be built a durable social process, which maximizes the benefits of social organization for all members of the community. It seems at least obvious to us that so long as there is an expectation of high intensity violence in Kashmir the situation will reflect a violence-infused stalemate. The price of this stalemate will be experienced by the majority of Kashmiri’s and others. An additional complicity of the problem of Kashmir is that it has evolved with elements of sectarian animosity.
The experiment in South Africa with transitional justice is one that, with some modifications, may be recommended as a method of establishing and sustaining peace with the prospect of a more promising vista of human capital and social capital development. In South Africa, the contending partners agreed to create a Truth and Reconciliation Commission. Central to this idea, was the notion that anyone who committed a crime with a political motive could come before the commission and tell the whole truth about his story. After providing his story, he would be passed on to an amnesty commission who would review whether the story he told was complete and truthful. If it was found to be the complete truth, he would be given amnesty from any prosecution by the state. The commission also had a commission dealing with reparations. The victims could apply to the committee and request preparations for what had transpired. It is possible that such reparations could include finding employment for survivors, providing scholarships for schools and restees for the independents etc. It is possible that a Truth and Reconciliation process could be created for Kashmir. This would include a commission receiving those who come forward to speak, a commission for those who seek amnesty after having spoken and a commission providing some form of rehabilitation for victims. This could be set up as a matter involving the government of India and the government of Pakistan in collaboration with the local authorities of Kashmir. It could be done with the Indian government and the government of Kashmir only. Central to this process, will be how the commissions are picked, whether they will be exclusively from India, Kashmir and Pakistan or India and Kashmir alone or whether they will have international participators along with the local participators. One fact about the success of the South African Truth and Reconciliation is that the moral leadership of this process reflected the influence of Bishop Desmond Tutu and Nelson Mandela. Bishop Tutu himself infused two important principles into the process: forgiveness and reconciliation.
This suggestion, with modifications, may well work for resolving the dispute and permit a more peaceful dispensation for all affected parties in the region.