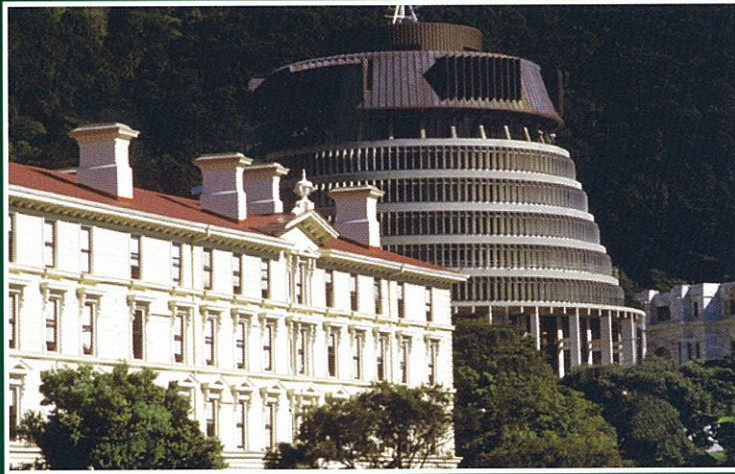


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VICTORIA UNIVERSITY OF WELLINGTON

Te Whare Wānanga o te Ūpoko o te Ika a Māui



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KASHMIR: A REGIONAL CONFLICT WITH GLOBAL IMPACT

*Holger Wennig**

For centuries, poets and travellers described Kashmir as a paradise on Earth. But the paradise has become the site of a conflict that has dragged on for more than 50 years. Nothing divides India and Pakistan as Kashmir does, and nobody has suffered more in the dispute than the people of Kashmir. This paper considers why this region has been so hotly fought over for so many years.

I INTRODUCTION

The Kashmir conflict is a highly complex phenomenon offering an apparently intractable challenge to modern conflict resolution methods. In developing possible conflict resolution strategies, this paper starts with an examination of Kashmir's historical background, then discusses the numerous factors contributing to the current situation. In analysing the various conflict causes, the author seeks to illustrate the impact of the Kashmir conflict on the global security situation. The paper will also consider the implications of this conflict for the international community and international law.

Geographically, the Kashmir crisis is situated in South Asia or, more precisely, in the state of Jammu and Kashmir, a region framed by Pakistan and Afghanistan in the west, Tajikistan and China in the north and east, and India in the south. Although Kashmir Valley represents the centre of hostilities today, the actual conflict area involves the entire state of Jammu and Kashmir and its five regions – Jammu, Ladakh, Kashmir Valley, Gilgit, and Baltistan.¹ Since Gilgit, Baltistan, and Ladakh are only sparsely populated, the whole state is named after its most populous parts, Jammu and Kashmir.² The area in dispute

* This is an edited version of a paper submitted in fulfilment of the requirements of the LLM degree, Victoria University of Wellington, 2002.

1 Ali Khan "The Kashmir Dispute: A Plan for Regional Cooperation" (1994) 31 Colum J Transnat'l L 495, 495.

2 Ali Khan, above, 495.

encompasses about 222,236 square kilometres.³ Currently, India controls approximately 37 per cent (the fertile and populous Kashmir Valley, Jammu, and the sparsely populated Ladakh region), Pakistan holds about 44 per cent (the northern portions of Gilgit and Baltistan along with Azad Kashmir), and China occupies the remaining 19 per cent (Shaksgam and Aksai Chin).⁴

Demographically, the Kashmir region represents a paradigm of ethnic heterogeneity as it is inhabited by approximately twelve million people with different cultural backgrounds, different religions, and different languages. The dividing line separates Indian-administered Kashmir with a population of about nine million people from the Pakistan-controlled portion with three million inhabitants.⁵

II THE EVOLUTION OF THE KASHMIR CONFLICT

To understand the Kashmir crisis accurately it is essential to take its historical background into account. The Kashmir crisis originated in the partition of India in 1947. With the end of World War II and the anti-colonialist movement, Britain withdrew from the subcontinent, dividing it up along religious lines. According to the two-nation theory, Britain carved out Pakistan from predominantly Muslim areas and allotted the predominantly Hindu areas to India.⁶

The problem arose of how to deal with the numerous princely states, of which the Kashmir area was a part. Britain gave these states the choice of either acceding to India or Pakistan or becoming independent nations.⁷ However, this choice was not really a choice due to the princedoms' geographical position and demographic structure.⁸ In order to give Pakistan and India contiguous territories, most princely states joined whichever state they

3 Kashmir Study Group <<http://www.kashmirstudygroup.net/mapsexplan/population.html>> (last accessed 25 September 2003); Ali Khan, above, 512; Türkaya Ataöv *Kashmir and Neighbours: Tale, Terror, Truce* (Ashgate, Aldershot, 2001) 7.

4 Kashmir Study Group <<http://www.kashmirstudygroup.net>> (last accessed 25 September 2003).

5 John Gershman "Overview of Self-Determination Issues in Kashmir" (Foreign Policy in Focus, Washington, 2001) <<http://www.selfdetermine.org/conflicts/kashmir.html>> (last accessed 25 September 2003); Simon Houston "Countdown to Nuclear War" (27 May 2002) *Daily Record* Glasgow 8.

6 Fakiha Khan "Nuking Kashmir: Legal Implications of Nuclear Testing by Pakistan and India in the Context of the Kashmir Dispute" (2001) 29 *Ga J Int'l & Comp L* 361, 362.

7 Fakiha Khan, above, 363.

8 Michael L Feeley "Apocalypse Now? Resolving India's and Pakistan's Testing Crisis" (2000) 23 *Suffolk Transnat'l L Rev* 777, 780; Ali Khan "The Kashmir Dispute: A Plan for Regional Cooperation" (1994) 31 *Colum J Transnat'l L* 495, 496.

were nearest to.⁹ Alternatively, the choice was based upon the principal religion of the population.¹⁰ This procedure did not work for Kashmir. The problem was that geographically, the area was close to both Pakistan and India.¹¹ Additionally, there existed within Kashmir a religious dichotomy between the ruling House of the Dogra dynasty (Hindu) and the majority of the population (Muslim).¹² This raised the question of who was to decide on Kashmir's future – the princely ruler or the people?

Initially, the Hindu Maharaja preferred independence for Kashmir. The situation deteriorated in October 1947 with the onset of tribal incursions from the North West Frontier Province of Pakistan (although it is contested whether Pakistan actually masterminded the incursions).¹³ When the armed tribesmen besieged important towns and headed towards Srinagar, the capital of Kashmir, the Maharaja called for military assistance from India.¹⁴ India agreed to provide military assistance under certain conditions: first, the Maharaja had to declare Kashmir's accession to India, and second, "the question of the state's accession should be settled by a reference to the people".¹⁵ On 26 October 1947 the Maharaja offered a letter of accession to India, accepted by India without a vote by the Kashmiri people.¹⁶

In the aftermath, a serious accession debate developed between India and Pakistan about the legitimacy of the accession, culminating in their first war over Kashmir. India's viewpoint was that the Maharaja had made a valid decision of accession. Pakistan, in contrast, argued that Kashmir's fate had still not been ratified by the Kashmiri people.¹⁷ In 1948 India brought the Kashmir issue before the United Nations Security Council. The

9 Sumit Ganguly *The Crisis in Kashmir: Portents of War, Hopes of Peace* (Woodrow Wilson Center Press, Cambridge, 1997) 9; Fakiha Khan, above, 363.

10 Feeley, above, 780.

11 Sumit Ganguly, above, 9; Vernon Hewitt "An Area of Darkness, Still? The Political Evolution of Ethnic Identities in Jammu and Kashmir, 1947–2001" in Rajat Ganguly and Ian Macduff (eds) *Ethnic Conflict and Secessionism in South and South East Asia: Causes, Dynamics, Solutions* (Sage, New Delhi, 2003) 59, 67; Fakiha Khan "Nuking Kashmir: Legal Implications of Nuclear Testing by Pakistan and India in the Context of the Kashmir Dispute" (2001) 29 *Ga J Int'l & Comp L* 361, 364.

12 Hewitt, above, 69; Fakiha Khan, above, 364.

13 Hewitt, above, 70–71; Fakiha Khan, above, 364.

14 Ali Khan "The Kashmir Dispute: A Plan for Regional Cooperation" (1994) 31 *Colum J Transnat'l L* 495, 508.

15 Hewitt, above, 71; Ali Khan, above, 509.

16 Fakiha Khan, above, 364.

17 Fakiha Khan, above, 373.

Security Council passed a series of resolutions with regard to Kashmir, re-affirming the right of the Kashmiri people to an internationally supervised plebiscite. However, such a plebiscite never took place.¹⁸

Following the Indo-Chinese War in 1962, China occupied a part of the Indian-administered Kashmir (Aksai Chin). At the same time China and Pakistan built up a friendship against their common enemy, India. One year later Pakistan even conveyed some of the Kashmir territory under its control to China (Shaksgam).¹⁹ In 1965 the second war between India and Pakistan over Kashmir broke out. The Tashkent Agreement (1966) stopped the fighting and restored the status quo ante. India and Pakistan fought a third war in 1971-1972, which led to the breaking away of East Pakistan to become Bangladesh.²⁰

In 1972 the two adversaries signed the Simla Agreement. This document established the current line of control ("LoC") and committed both conflict parties to settling their dispute only through bilateral negotiations or by any other peaceful means mutually agreed upon between them.²¹ Although the Simla Agreement did not provide any final resolution to the Kashmir issue, the LoC nevertheless serves as the de facto border between India and Pakistan. The LoC represents the current partition and is still the centre of hostilities.²²

The conflict reached a more precarious stage in 1998 when both India and Pakistan successfully conducted nuclear weapon tests and declared themselves nuclear powers.²³ As a positive signal of détente, the Prime Ministers of both states met for peace talks at Lahore in February 1999. However, in May 1999, shortly after their handshake, Pakistan-supported insurgents and troops crossed the LoC near Kargil and launched attacks on Indian troops. They provoked the fourth Indo-Pakistan war over Kashmir, known as the Kargil Conflict.²⁴ The incursions probably occurred without the consent or apparent

18 Fakiha Khan, above, 365; John Gershman "Overview of Self-Determination Issues in Kashmir" (Foreign Policy in Focus, Washington, 2001) <<http://www.selfdetermine.org/conflicts/kashmir.html>> (last accessed 25 September 2003).

19 Türkaya Ataöv *Kashmir and Neighbours: Tale, Terror, Truce* (Ashgate, Aldershot, 2001) 160.

20 Gershman, above.

21 Simla Agreement (3 July 1972), reprinted in Ataöv, above, 219-220.

22 Fakiha Khan "Nuking Kashmir: Legal Implications of Nuclear Testing by Pakistan and India in the Context of the Kashmir Dispute" (2001) 29 *Ga J Int'l & Comp L* 361, 376; Gershman, above.

23 Ataöv, above, 155, 157; Fakiha Khan, above, 361.

24 Ataöv, above, 208-209.

knowledge of Pakistan's then Prime Minister Nawaz Sharif.²⁵ Following the diplomatic intervention of the United States, the Pakistani Government was pressurised to make its military authorities withdraw from Indian-controlled territory. From a Pakistani point of view this was tantamount to a defeat, adding to tensions in the domestic power structure. Public unrest in Pakistan opened the door for General Pervez Musharraf's military takeover in October 1999.²⁶

Another meeting between Musharraf and India's Prime Minister Atal Behari Vajpayee in July 2001 (the Agra Summit) brought no final resolution to the conflict. The terrorist attacks of December 2001 and May 2002, the first against the Indian Parliament in Delhi and the second against a military camp in India, severely exacerbated the situation and brought the two rivals closer to nuclear war than ever before. India continues to blame Pakistan for supporting Muslim extremists infiltrating and terrorising Kashmir. The mutual allegations culminated in Pakistan's Chief General Pervez Musharraf's threatening to use nuclear weapons against India.²⁷ India countered in July 2002 by electing Abdul Kalam President of India. His election sent an ambiguous message to Pakistan: on the one hand Abdul Kalam is a Muslim representing a "secular" India, but on the other he is the engineer of India's nuclear warhead carrier systems.²⁸

This historical background indicates that despite numerous summits, negotiations, agreements, and declarations, the Kashmir issue has not yet been resolved. The United Nations, the United States, and the Soviet Union have all failed in their attempts to mediate the dispute. Relations are characterised by fear and mistrust. What are the underlying causes of the conflict, that have sustained it for over 50 years and continue to hinder a final resolution?

25 Vernon Hewitt "An Area of Darkness, Still? The Political Evolution of Ethnic Identities in Jammu and Kashmir, 1947-2001" in Rajat Ganguly and Ian Macduff (eds) *Ethnic Conflict and Secessionism in South and South East Asia: Causes, Dynamics, Solutions* (Sage, New Delhi, 2003) 59, 91; Victoria Schofield *Kashmir in Conflict: India, Pakistan and the Unfinished War* (I B Tauris, London, 2000) 209-210.

26 Compare Ataöv, above, 155; Angélique R Kuchta "A Closer Look: The US Senate's Failure to Ratify the Comprehensive Test Ban Treaty" (2001) 19 *Dick J Int'l L* 333, 346.

27 Rory McCarthy and Luke Harding "Musharraf Renews Call for Peace Talks: Kashmir Crisis Russian President to Urge Indian Leader to Negotiating Table at Regional Summit in Kazakhstan" (4 June 2002) *The Guardian* London 9; Rahul Bedi "Efforts Intensify to Ease Pakistan, India Tensions" (1 June 2002) *The Irish Times* Dublin 12.

28 Rory McCarthy "Missile Man Cruises into Indian Presidency: Father of the Country's Nuclear Weapons Programme May Hold Key after Next Elections" (19 July 2002) *The Guardian* London 17.

III CAUSES OF THE CONFLICT

The Kashmir crisis is a multi-layered phenomenon with a broad range of contributing factors.

A *The Territorial Dimension*

The conflict is primarily a dispute over the Kashmir territory. Since the Indo-Pakistani wars over Kashmir and the establishment of the LoC under the Simla Agreement, the state has been divided into Indian-administered Kashmir to the east and south (Jammu, Ladakh, and Kashmir Valley) and Pakistani-administered Kashmir to the north and west (Azad Kashmir, Gilgit, and Baltistan).²⁹

Because both India and Pakistan claim the right to annex the entire territory, each country has a significant military force occupying portions of Kashmir.³⁰ Currently, about one million troops are deployed along the LoC.³¹ The dilemma is that each rival views the other's presence in the Kashmir region and its claim thereto as illegal.³² Both countries pursue a nationalistic policy and claim the disputed territory on a theory of accession.³³

India regards Kashmir as an integral part of the Indian Union.³⁴ Long before the 1947 partition, the Indian leadership rejected the idea of princely states within a state, considering those states historical anomalies or merely historical fragments of an indivisible country.³⁵ Thus India was and still is convinced that Kashmir constitutes an Indian state. Furthermore, Delhi views Kashmir's accession to the Indian Union as both

29 John Gershman "Overview of Self-Determination Issues in Kashmir" (Foreign Policy in Focus, Washington, 2001) <<http://www.selfdetermine.org/conflicts/kashmir.html>> (last accessed 25 September 2003); Cynthia Mahmood "Kashmir and the 'War on Terrorism'", Joan B Kroc Institute <<http://www.nd.edu/~krocinst/polbriefs/pbrief8.html>> (last accessed 25 September 2003).

30 Ali Khan "The Kashmir Dispute: A Plan for Regional Cooperation" (1994) 31 *Colum J Transnat'l L* 495, 496.

31 Rory McCarthy "Powell Fears New Kashmir Danger" (29 July 2002) *The Guardian* London 2.

32 Embassy of India, Washington, DC <http://www.indianembassy.org/policy/Kashmir/Kashmir_MEA/Indian_Position.html> (last accessed 25 September 2003), <http://www.indianembassy.org/policy/Kashmir/Kashmir_MEA/POK.html> (last accessed 25 September 2003); Fakiha Khan "Nuking Kashmir: Legal Implications of Nuclear Testing by Pakistan and India in the Context of the Kashmir Dispute" (2001) 29 *Ga J Int'l & Comp L* 361, 373.

33 Ali Khan, above, 504.

34 Ali Khan, above, 505-506; Michael L Feeley "Apocalypse Now? Resolving India's and Pakistan's Testing Crisis" (2000) 23 *Suffolk Transnat'l L Rev* 777, 795; Fakiha Khan, above, 388.

35 Ali Khan, above, 505-506.

legal and final and refuses any discussion about its status.³⁶ "The accession of the State of Jammu and Kashmir took place as per the provisions of the India Independence Act and is final and legal and cannot be disputed".³⁷ The only matter India is willing to discuss is Pakistan's "relinquish[ing] control of that part of Jammu and Kashmir that it illegally occupies".³⁸

Pakistan, on the other hand, views Kashmir's accession to India in October 1947 as invalid because the will of the Kashmiri people was never considered.³⁹ The "reference to the people" through a referendum, as promised in the Indian letter of 1947 and as envisaged in United Nations resolutions on the issue, in reality never took place. Pakistan supports a Kashmiri right to self-determination, which would give the predominantly Muslim population of Kashmir the option to accede to Pakistan.⁴⁰ In demanding a plebiscite, Islamabad regards the Kashmir issue as unfinished business of partition.⁴¹

The Pakistani leadership lays claim to Kashmir on religious grounds. Under the two-nation theory, India was created from primarily Hindu areas, whereas those regions with a majority of Muslims were allotted to Pakistan. Pakistan contends that Kashmir should actually have become part of Pakistan because the state was inhabited by a Muslim majority.⁴²

B Ethnic Heterogeneity

The Kashmir dispute is about more than territorial aggrandisement. Kashmir's ethnic heterogeneity plays a crucial role in shaping the dynamics of this dispute. During their long and chequered history, the people of Jammu and Kashmir came into contact with the

36 Embassy of India, Washington, DC <http://www.indianembassy.org/policy/Kashmir/Kashmir_MEA/Indian_Position.html> (last accessed 25 September 2003); Fakiha Khan, above, 388.

37 Embassy of India, Washington, DC <http://www.indianembassy.org/policy/Kashmir/Kashmir_MEA/Indian_Position.html> (last accessed 25 September 2003).

38 Embassy of India, Washington, DC <http://www.indianembassy.org/policy/Kashmir/Kashmir_MEA/Indian_Position.html> (last accessed 25 September 2003).

39 Fakiha Khan "Nuking Kashmir: Legal Implications of Nuclear Testing by Pakistan and India in the Context of the Kashmir Dispute" (2001) 29 Ga J Int'l & Comp L 361, 373.

40 Ali Khan "The Kashmir Dispute: A Plan for Regional Cooperation" (1994) 31 Colum J Transnat'l L 495, 503-504, 506.

41 Cynthia Mahmood "Kashmir and the 'War on Terrorism'" Joan B Kroc Institute <<http://www.nd.edu/~krocinst/polbriefs/pbrief8.html>> (last accessed 25 September 2003).

42 Fakiha Khan, above, 373.

Persian, Central Asian, Indonesian, Macedonian, Tibetan, and other civilisations. The contemporary population of Kashmir is heterogeneous—a blending of diverse cultures.⁴³

1 *Religious diversity*

Kashmir's ethnic heterogeneity is reflected in the many different religions in the conflict area. While India's population is predominantly Hindu (81.3 per cent)⁴⁴ and Pakistan's population mostly Muslim (97 per cent),⁴⁵ there is no uniform Kashmiri religion. Kashmir is a mosaic of different religions encompassing three major faiths—Islam (74.9 per cent), Hinduism (22.6 per cent), and Buddhism (1.2 per cent)—and several smaller religious groups.⁴⁶

These religions are not evenly spread throughout the conflict area. The three major religions in Kashmir are concentrated into groups that roughly correspond to the state's five distinct regions.⁴⁷ Islam is the principal faith in Kashmir Valley, Azad Kashmir, Gilgit, and Baltistan. Jammu has a Hindu majority with significant Muslim and Sikh minorities. The large but thinly populated Ladakh is Buddhist.⁴⁸

Islam is virtually the sole religion in the Pakistani-controlled regions, and predominates on the Indian side of the LoC. Since the population of Kashmir Valley exceeds the combined population of the other four areas, Muslims constitute a majority in the state as a whole.⁴⁹ Yet there are many differing traditions and orthodoxies within Islam itself. Thus, not even the Muslim majority can itself be considered a homogeneous entity.

2 *Linguistic diversity*

Another factor indicative of Kashmir's ethnic heterogeneity is its remarkable linguistic diversity. Kashmir's population is made up of many different language groups of varying sizes and origins. These language groups belong to two major language families, the Indo-

43 Türkaya Ataöv *Kashmir and Neighbours: Tale, Terror, Truce* (Ashgate, Aldershot, 2001) 25.

44 CIA World Factbook <<http://www.cia.gov/cia/publications/factbook/geos/in.html>> (last accessed 25 September 2003).

45 CIA World Factbook, above.

46 Kashmir Study Group <<http://www.kashmirstudygroup.net>> (last accessed 25 September 2003).

47 Ali Khan "The Kashmir Dispute: A Plan for Regional Cooperation" (1994) 31 *Colum J Transnat'l L* 495, 496.

48 Kashmir Study Group <<http://www.kashmirstudygroup.net/>> (last accessed 25 September 2003); Cynthia Mahmood "Kashmir and the 'War on Terrorism'", Joan B Kroc Institute <<http://www.nd.edu/~krocinst/polbriefs/pbrief8.html>> (last accessed 25 September 2003).

49 Ali Khan, above, 496.

European and the Sino-Tibetan, each dominant over extensive areas. Within the Indo-European language group are Kashmiri, Shina, Dogri, Punjabi, Gojri, Pahari, and several other local tongues. The Sino-Tibetan language family comprises Tibetan, Ladakhi, Balti, and further local dialects.⁵⁰

There are thus more than nine different languages in Kashmir. But these languages are not spoken or understood everywhere in the state. The distribution of each language is confined to one or more districts which differ both in their spatial expansion and their population density. Kashmiri, for example, despite being the language of most people in the state as a whole, is spoken in a relatively small area centring on Kashmir Valley. Punjabi, the second most spoken language, predominates in Azad Kashmir, while Dogri is the principal language of Jammu.⁵¹

Comparing the distribution of languages with the dissemination of religions in Kashmir, it is possible to draw another conclusion: the lines of religious separation are not congruent with the linguistic divisions, and it is not easy to demarcate clear areas of settlement in terms of language or faith. It is extremely difficult to detect one sole Kashmiri identity.

C *The Ideological Dimension*

Ideologically, the dispute over Kashmir can be traced to the profoundly divergent conceptions of nation-building that underlay the Indian and Pakistani nationalist movements.⁵² Kashmir is highly valuable to the self-conception of both countries. Both India and Pakistan consider the region essential for their states to be complete.⁵³

India has been committed to the notion of a secular and democratic state.⁵⁴ Thus from the Indian point of view, the heterogeneous state of Jammu and Kashmir stands for the country's pluralistic and secular character and exemplifies the integrative strength of the Indian Union where all faiths can live under the aegis of a secular state.⁵⁵ The website of the Indian Embassy in the United States states that the heterogeneity of Kashmir "reflects

50 Kashmir Study Group <<http://www.kashmirstudygroup.net>> (last accessed 25 September 2003).

51 Kashmir Study Group <<http://www.kashmirstudygroup.net>> (last accessed 25 September 2003).

52 Šumit Ganguly *The Crisis in Kashmir: Portents of War, Hopes of Peace* (Woodrow Wilson Center Press, Cambridge, 1997) 8.

53 Šumit Ganguly, above, 8.

54 Šumit Ganguly, above, 8.

55 Šumit Ganguly, above, 8.

the ethnic, linguistic, cultural and religious diversity of India".⁵⁶ Since the Kashmir region is the only state in India with a Muslim majority, the area is regarded as the "jewel in the crown" of India's commitment to secularism and federalism.⁵⁷

Kashmir's secession from multi-ethnic and secular India could set a precedent and inspire other ethnic minorities to leave the Indian Union, endangering the stability and integrity of multi-ethnic India. Increasing fragmentation could lead to the Balkanisation of the subcontinent.⁵⁸

The Pakistani nationalist movement, by contrast, sought to establish a religiously based state that would serve as a homeland for South Asian Muslims.⁵⁹ From the Pakistani point of view this objective cannot be achieved until Kashmir's Muslim majority is reunified with the Muslims living in Pakistan.⁶⁰ Hence for Islamabad the Kashmir dispute stands for the struggle of the state's Muslim majority against Hindu domination. The conflict has even been portrayed as a holy war (*jihad*).⁶¹

D The Insurgency Problem

Against this ideological backdrop, one matter has clearly dominated press reports on the Kashmir crisis: the insurgency problem. The Kashmir crisis is not only a conflict between India and Pakistan, but also a paradigm of intra-state conflict. It involves militant groups of insurgents fighting against the Indian administration in Delhi. These groups have started a violent campaign to force India to grant self-determination to the Kashmiri people.⁶² Recently, a series of violent terrorist attacks in both parts of Kashmir as well as in India itself have directed public attention to the unresolved Kashmir issue.

The militant insurgent groups are not a new phenomenon. Their origin probably lies in the late 1980s when India implemented authoritarian rule in the state of Jammu and

56 Embassy of India, Washington, DC <http://www.indianembassy.org/policy/Kashmir/Kashmir_MEA/geography.html> (last accessed 25 September 2003).

57 Cynthia Mahmood "Kashmir and the 'War on Terrorism'", Joan B Kroc Institute <<http://www.nd.edu/~krocinst/polbriefs/pbrief8.html>> (last accessed 25 September 2003).

58 Robert G Wirsing *India, Pakistan, and the Kashmir Dispute* (St Martin's Press, New York, 1994) 230.

59 Šumit Ganguly *The Crisis in Kashmir: Portents of War, Hopes of Peace* (Woodrow Wilson Center Press, Cambridge, 1997) 8.

60 Šumit Ganguly, above, 8.

61 Michael L Feeley "Apocalypse Now? Resolving India's and Pakistan's Testing Crisis" (2000) 23 *Suffolk Transnat'l L Rev* 777, 783.

62 Ali Khan "The Kashmir Dispute: A Plan for Regional Cooperation" (1994) 31 *Colum J Transnat'l L* 495, 499.

Kashmir in an attempt to repress Kashmiri discontent. Today there is a strong difference of opinion between India and Pakistan on what factors brought about the emergence of these insurgent groups.

The Indian Government views the insurgency problem as terrorism sponsored by the Pakistani Government. Delhi argues that Pakistan supports the insurgents morally, logistically, and financially. The Indian leadership contends that Pakistan uses this state-sponsored terrorism as a means of infusing Islamic fundamentalist ideology into Kashmir.⁶³ This is believed by India to jeopardise the process of democratisation in Kashmir.⁶⁴

Pakistan, on the other hand, regards the issue as a legitimate liberation struggle by Kashmiris against Indian oppression. In this respect a member of the Pakistani Government recently stated: "The people of Kashmir are determined to carry on their just struggle and are not afraid of rendering sacrifices for liberation from the Indian yoke".⁶⁵ From Pakistan's perspective, the uprising is a completely indigenous phenomenon revealing the alienation of the Kashmiri people and their complete rejection of Indian occupation. The insurgency represents the internal struggle of the Kashmiri people for self-determination.⁶⁶ Pakistan blames Delhi for massive human rights abuses and terrorism in Kashmir.⁶⁷

What can be stated safely is that both countries have had a hand in creating the insurgency problem. Pakistan's part in aiding the insurgency is incontrovertible. The insurgents have derived the bulk of their weaponry as well as much of their training from Pakistani sources. Their actions against India, however, are not of Pakistan's making. Pakistan has simply exploited the existing discontent within the Kashmiri population.⁶⁸

63 Sumit Ganguly, above, 15.

64 Embassy of India, Washington, DC <http://www.indianembassy.org/policy/Kashmir/Kashmir_MEA/Indian_Position.html> (last accessed 25 September 2003).

65 Nisar Memon (Minister for Information and Media Development) "Freedom Struggle in Kashmir is Indigenous" (23 August 2002) Associated Press of Pakistan News Summary <http://www.pak.gov.pk/public/news/news2002/appnews2002/app24_august.htm#5> (last accessed 25 September 2003).

66 Nisar Memon, above.

67 Fakiha Khan "Nuking Kashmir: Legal Implications of Nuclear Testing by Pakistan and India in the Context of the Kashmir Dispute" (2001) 29 Ga J Int'l & Comp L 361, 382.

68 Sumit Ganguly *The Crisis in Kashmir: Portents of War, Hopes of Peace* (Woodrow Wilson Center Press, Cambridge, 1997) 16.

The roots of the Kashmiri separatist groups lie in the Indian-controlled part of Kashmir. The insurgency can be traced to the Kashmiris, not outsiders.⁶⁹

Public discontent in Kashmir probably derives from a practice of institutional decay. In the late 1980s India launched a process of concentration of state power in favour of Delhi, thereby neglecting the existing democratic institutions in Kashmir. This policy was accompanied by a process of political mobilisation of the Kashmiri people. Through increased media exposure, literacy, and education Kashmiris had become aware of their status and the institutional decay, and demanded broader integration in the political process.⁷⁰ In producing a generation of politically aware Kashmiris while also allowing political institutions in Kashmir to become stunted and corroded, the Indian Government left open few institutional channels for the expression of political discontent and dissent. Inevitably, this lack of channels for political participation drove the Kashmiris towards more extreme forms of political expression.⁷¹

However, there is not only one insurgent group, fighting for only one objective. The rebellious groups in Kashmir are highly fragmented. As many as 130 insurgent groups are currently operating in Kashmir and the number of armed separatists has grown from hundreds to thousands.⁷² Ironically, some of these militant units even aspire to conflicting objectives. The major militant groups are those advocating an independent Kashmir and those supporting accession to Pakistan. The All Parties Hurriyat Conference and the Jammu and Kashmir Liberation Front (the oldest and arguably the most popular of the various insurgent groups) support Kashmir's independence. The Hizbul Mujahideen, the Ikhwanul Muslimeen, and the Jaish-e-Mohammed, by contrast, advocate Kashmir's affiliation with Pakistan.⁷³ There is then a series of smaller rebellious groups whose political objectives (beyond extortion) are often unclear.⁷⁴

69 Cynthia Mahmood "Kashmir and the 'War on Terrorism'", Joan B Kroc Institute <<http://www.nd.edu/~krocinst/polbriefs/pbrief8.html>> (last accessed 25 September 2003).

70 Šumit Ganguly, above, 21.

71 Šumit Ganguly, above, 42.

72 Šumit Ganguly, above, 138.

73 Šumit Ganguly, above, 169-171; John Gershman "Overview of Self-Determination Issues in Kashmir" (Foreign Policy in Focus, Washington, 2001) <<http://www.selfdetermine.org/conflicts/kashmir.html>> (last accessed 25 September 2003).

74 Šumit Ganguly, above, 169.

IV THE GLOBAL IMPACT OF KASHMIR

The Kashmir crisis is not only an intra-state conflict within the state of Jammu and Kashmir, but also an inter-state dispute between India and Pakistan. It goes beyond the bilateral too and has the potential to inflame the whole South Asian region, and even the global security situation.

A Nuclearisation

When India and Pakistan declared themselves nuclear powers in 1998, the Kashmir crisis evolved into the world's most likely flashpoint of nuclear exchange. Former United States President Bill Clinton classified Kashmir as "the most dangerous place in the world today".⁷⁵ Over the last decades, both conflicting parties have more or less overtly developed their own nuclear weapon systems and carrier missiles. At present, both have significant arsenals of nuclear weapons at their disposal. With these arsenals lurking in the background, the Kashmir crisis has reached an even more precarious dimension.

1 Origin and development

Given the ongoing crisis in Kashmir and the tense historical relations between India and Pakistan, the question arises why both countries have engaged in developing nuclear weapons. Their nuclear programmes have clearly brought further tensions to an already complicated situation.

India's nuclearisation is based on the premise of economic development through atomic energy. Since Delhi declared that it intended to use nuclear technology for civil purposes only and not for the production of weapons of mass destruction, the United States and Canada agreed to assist India in developing nuclear capabilities to be used for non-military purposes, only under the Tarapur Agreement.⁷⁶ Although India was required by the terms of the Agreement to undergo international inspections, these safeguards did not work effectively to stop non-civilian use of nuclear technology. Instead, India used nuclear imports and technology intended for non-military purposes to develop and finally explode an atomic bomb in 1974.⁷⁷ This process culminated in five nuclear tests in May 1998.⁷⁸ To justify the development of nuclear weapons India cites national security

75 Mike Wooldridge "Analysis: Clinton's Disappointments in South Asia" (26 March 2000) BBC News <http://news.bbc.co.uk/1/hi/world/south_asia/691339.stm> (last accessed 25 September 2003).

76 Fakiha Khan "Nuking Kashmir: Legal Implications of Nuclear Testing by Pakistan and India in the Context of the Kashmir Dispute" (2001) 29 Ga J Int'l & Comp L 361, 366-367.

77 Fakiha Khan, above, 367.

78 Michael L Feeley "Apocalypse Now? Resolving India's and Pakistan's Testing Crisis" (2000) 23 Suffolk Transnatl L Rev 777, 777.

interests: on the one hand the existing tensions with arch-enemy Pakistan and on the other China's nuclear capabilities.⁷⁹

Pakistan's nuclear programme has a history of cooperation with the United States as well. The United States agreed to facilitate Pakistan's atomic energy programme by supplying information and material for peaceful and humanitarian uses of atomic energy.⁸⁰ Nevertheless, Pakistan launched a programme of nuclear enrichment for military purposes. During the Cold War Pakistan evolved into an important geostrategic ally for the United States, given the threat of communism in Asia through the Soviet Union and China.⁸¹ In order to improve their relationship the United States administration procured significant exemptions for Pakistan, as long as Islamabad did not possess a nuclear explosive device. But these provisions could not keep Pakistan from developing nuclear weapons.⁸² Chinese-Pakistani nuclear cooperation contributed to the transformation of Pakistan into a nuclear power.⁸³ Today, Pakistan uses India's nuclear capabilities as well as China's nuclear arsenal to justify its own nuclear programme.⁸⁴ In response to India's five nuclear tests in May 1998, Pakistan exploded six nuclear devices only two weeks later.⁸⁵

2 *Current threat assessment*

Since India and Pakistan have never revealed the number of nuclear warheads they have built, the size of their arsenals can only be estimated. Estimates vary greatly. According to recent information, India has between 60 and 250 nuclear warheads at its disposal. Pakistan, is believed to possess between 25 and 150 nuclear warheads.⁸⁶ It is also estimated that both countries have additional weapons grade uranium and plutonium to produce more devices. Most of these would have to be dropped by military aircraft rather

79 Feeley, above, 790; Fakiha Khan, above, 367-368; Adam Packer "Nuclear Proliferation in South Asia" (2000) 38 *Colum J Transnat'l L* 631, 634.

80 Fakiha Khan, above, 369.

81 Packer, above, 642.

82 Fakiha Khan, above, 369-370.

83 Türkaya Ataöv *Kashmir and Neighbours: Tale, Terror, Truce* (Ashgate, Aldershot, 2001) 160; Michael L Feeley "Apocalypse Now? Resolving India's and Pakistan's Testing Crisis" (2000) 23 *Suffolk Transnat'l L Rev* 777, 790-791.

84 Feeley, above, 791-792.

85 Feeley, above, 777.

86 Roger Boyes "Musharraf Warns India He May Use Nuclear Weapons" (8 April 2002) *Times Online* <<http://www.nci.org/02/04f/08-06.htm>> (last accessed 25 September 2003); "The World's Nuclear Arsenal" (2 May 2000) *BBC News* <<http://news.bbc.co.uk/1/hi/world/733162.stm>> (last accessed 25 September 2003).

than delivered by missile. But both countries presently conduct missiles testing, and India already possesses Agni II missiles, which can hit anywhere in Pakistan.⁸⁷

Apart from the worrying size of their nuclear arsenals, there are factors that further complicate the situation. Most notably, it is the two rivals' nuclear policy that threatens global security. Neither country has a doctrine defining when and how nuclear weapons can be used. Currently, India pursues a no-first-use type of nuclear policy, that is, it will use nuclear weapons only for purposes of deterrence, defence, and retaliation but not for aggression.⁸⁸ While India accentuates its commitment to a no-first-use policy, there has been no equivalent declaration from the Pakistani side. Islamabad is well aware that in terms of conventional military Pakistan is clearly inferior to India. With India's conventional military superiority hanging over Pakistan like a Sword of Damocles, there is a high risk of Pakistan's using its nuclear capabilities in a first strike against Indian military installations in the event of an act of conventional aggression.⁸⁹ Pakistan's leadership has declared that the country is prepared to be the first to use nuclear weapons in any conflict.⁹⁰ According to General Musharraf: "Nuclear weapons are the last resort If Pakistan is threatened with extinction, then the pressure of our countrymen would be so big that this option, too, would have to be considered".⁹¹ Pakistan might be the first party to resort to nuclear weapons and India, in turn, might answer with nuclear force.

With regard to the Kashmir crisis this kind of nuclear policy is particularly dangerous. First, the two rivals have already fought wars over Kashmir with conventional weapons before. Second, they continue to exchange military fire across the LoC almost daily. Finally, and most importantly, the militant insurgent groups continue to infiltrate and terrorise the Kashmir region with more or less official support from Islamabad. All these factors amount to a situation in which an Indian military intervention is on the razor's edge. In such a situation, the next terror attack committed by insurgent groups may be the

87 Boyes, above.

88 Fakiha Khan "Nuking Kashmir: Legal Implications of Nuclear Testing by Pakistan and India in the Context of the Kashmir Dispute" (2001) 29 Ga J Int'l & Comp L 361, 368, 386; Matthew McKinzie and others "Nuclear War in South Asia" (June 2002) Foreign Policy in Focus <<http://www.fpif.org/pdf/reports/PRnuclearasia.pdf>> (last accessed 25 September 2003) 1.

89 Muqtedar Khan "India Flirting with Disaster" (5 June 2002) Foreign Policy in Focus <<http://www.fpif.org/pdf/gac/0206kashmir.pdf>> (last accessed 25 September 2003) 1; McKinzie, above, 1; Victoria Schofield *Kashmir in Conflict: India, Pakistan and the Unfinished War* (I B Tauris, London, 2000) 214.

90 McKinzie, above, 1; Schofield, above, 214.

91 Roger Boyes "Musharraf Warns India He May Use Nuclear Weapons" (8 April 2002) Times Online <<http://www.nci.org/02/04f/08-06.htm>> (last accessed 25 September 2003).

trigger for India to start a conventional war against Pakistan. Pakistan, once under Indian attack, might use nuclear weapons for its defence because its conventional military is inferior. Should either country decide to use nuclear weapons, the consequences would be fatal. A full-scale nuclear exchange between India and Pakistan would not only cause millions of deaths on either side, but it would also result in a global environmental catastrophe.

The problem is aggravated by the lack of positive contact and cooperation between the two rivals. Apart from their diplomatic debate over Kashmir, India and Pakistan sustain hardly any friendly communication or cooperation. Given the two countries' proximity and the lack of communication between them, there is a very high risk of misunderstandings and misinterpretations as to a possible (nuclear) attack.⁹² In this strained environment it would not be inconceivable for misperceptions to provoke a nuclear exchange. Factors such as stress, miscalculation, and misperception might act as a trigger for a military exchange. There is some evidence to suggest that a spiral of mutual misunderstandings brought India and Pakistan to the brink of a full-scale war in 1990.⁹³ Hence, there is an urgent need for confidence-building measures that would reduce fear and mistrust and create a channel for communication and ultimately cooperation.

Consequently, the Kashmir issue has a global impact not only because of the imminent nuclear threat, but also because of nuclear co-operation between China and Pakistan and between the United States and both Pakistan and India. The current situation of acute danger in Kashmir has at least partly been created by a failed policy of superpowers supplying India and Pakistan with nuclear technology and not seriously furthering global nuclear disarmament. The nuclear powers that supplied South Asia with nuclear technology failed at the outset to establish effective safeguards that would have excluded any non-civilian usage of this technology, and once India and Pakistan had revealed their military nuclear activities, failed to bring these developments to an end. Instead, they continued to supply both rivals with nuclear technology for short-term economic benefit or political advantage. The supplying countries bear a corresponding responsibility to assist in resolving the Kashmir dispute.

92 Michael L Feeley "Apocalypse Now? Resolving India's and Pakistan's Testing Crisis" (2000) 23 *Suffolk Transnatl L Rev* 777, 793.

93 Šumit Ganguly *The Crisis in Kashmir: Portents of War, Hopes of Peace* (Woodrow Wilson Center Press, Cambridge, 1997) 139.

B *The War on Terror*

The impact of Kashmir on the global security situation is also revealed by its various links to the so-called "war on terror". First, the war on terror has aggravated the situation in Kashmir:⁹⁴

by changing the language and the ground rules of conflicts. This has legitimised the intransigence of both governments in avoiding engagement with a political process to address the crisis.

Second, the war on terror in Afghanistan depends on Islamabad's support because Pakistani territory or airspace is needed for the development of troops to hunt al-Qaeda and Taliban loyalists.⁹⁵ United States-Pakistani anti-terror cooperation might give General Musharraf cause to feel strengthened in his position on Kashmir. But the presence of the United States in Pakistan is not welcomed by all Pakistanis. Members of the Pakistani military and intelligence services may still have strong ties to the fundamentalists or even to the Taliban.⁹⁶ In July and August 2002 this anti-American sentiment came to the fore when Islamic militants targeted Christians and Westerners in Pakistan in retaliation against the Government's support for the war on terror.⁹⁷ Pakistan's decision to cooperate with the United States in responding to the September 11 terrorist attacks had triggered an increase in domestic terrorism. These terrorist attacks weaken Musharraf's Government and threaten Pakistan's internal stability.⁹⁸

A troubling possibility in the current situation is that Pakistani nuclear weapons or fissile material could fall into the wrong hands, including the hands of terrorists. In this respect, General Musharraf admitted that there had been contact between his country's scientists and followers of Osama bin Laden, "[b]ut we know today that the scientists

94 Institute of Development Studies, University of Sussex "How to Help Kashmir" (10 June 2002) *The Guardian* London 19.

95 Rory McCarthy "Powell fears new Kashmir danger" (29 July 2002) *The Guardian* London 2.

96 David Albright, Kevin O'Neill, and Corey Hinderstein "Securing Pakistan's Nuclear Arsenal: Principles for Assistance" (Institute for Science and International Security, Washington, 1001) <<http://www.isis-online.org/publications/terrorism/pakassist.html>> (last accessed 25 September 2003); John Gershman "Overview of Self-Determination Issues in Kashmir" (Foreign Policy in Focus, Washington, 2001) <<http://www.selfdetermine.org/conflicts/kashmir.html>> (last accessed 25 September 2003).

97 Mike Collett "Musharraf Praises Crackdown" (15 August 2002) *The Independent* London 10; "Anti-Western Attacks" (15 June 2002) *The Independent* London 14.

98 Muqtedar Khan "India Flirting with Disaster" (5 June 2002) Foreign Policy in Focus <<http://www.fpif.org/pdf/gac/0206kashmir.pdf>> (last accessed 25 September 2003) 2.

involved had only a very superficial knowledge and that the al-Qaeda terrorists did not come closer to their dream of building their own atomic bomb".⁹⁹

Furthermore, when the United States sought allies in South Asia for the war on terror in Afghanistan, not only Pakistan offered its support. India did too. Delhi expected that if the United States operated out of Indian territory it would not only combat terrorism in Afghanistan but also extend the anti-terrorism campaign to the insurgent groups originating from Pakistan and infiltrating Kashmir. India appears to want to use the new international environment created by the American campaign against terrorism in the aftermath of September 11 as an opportunity to not only suppress the Kashmiri uprising but also to punish Pakistan for supporting and aiding the Kashmiri cause.¹⁰⁰ India regards violence as a legitimate means to fight against insurgents. It is encouraged by the war on terror. India understands the use of force or the threat thereof to be legitimate means to suppress legitimate struggles for freedom.¹⁰¹ If the United States and Israel can use military force in response to terrorism, then why not India? If Israel can enter the West Bank and the United States can occupy Afghanistan, then why can India not cross the current line of control in Kashmir?¹⁰² The war on terror has serious repercussions for the situation in Kashmir.

The Kashmir crisis is not an isolated problem confined to the South Asian region. It is interlaced with global security issues such as the global war against terrorism, the presence and control of nuclear weapons, and the role of superpowers in conflict situations.

V SOLUTION STRATEGIES

Considering the conflict's historical background, its various causes and its potential impact on the global security situation, the question arises of how to resolve the extremely complex Kashmir issue. There are various options, ranging from the status quo to an independent Kashmir.

Ideally, any solution should satisfy the interests of all conflicting parties, or at least as many as possible. Pakistan's position is that Kashmiris should be allowed to vote in a referendum based upon numerous United Nations resolutions on the issue, but that the

99 Roger Boyes "Musharraf Warns India He May Use Nuclear Weapons" Times Online <<http://www.nci.org/02/04f/08-06.htm>> (last accessed 25 September 2003).

100 Muqtedar Khan, above, 1.

101 Muqtedar Khan, above, 1.

102 Muqtedar Khan, above, 2.

only option in the referendum should be accession to either Pakistan or India.¹⁰³ India's position is that the state of Jammu and Kashmir represents an integral part of the Indian Union, that Pakistan has to vacate the illegally occupied territories, and that talks between Pakistan and India should be held on a strictly bilateral basis, in accordance with the Simla Agreement.¹⁰⁴ Kashmiri activists demand either independence or accession to Pakistan.¹⁰⁵

A Perpetuation of the Status Quo

The Kashmir crisis is so deeply entrenched in Indo-Pakistani relations that the best idea may be not to intervene at all. The Indian Government would continue to repress the insurgent groups; they in turn would react with more and more violence. Pakistan would continue more or less overtly to support the political activists.¹⁰⁶

In addition to being morally untenable, this approach has the severe drawback that no-one's objectives would be satisfied. Neither country would win Kashmir. Nor would the Kashmiri activists come closer to their objectives. The enduring conflict over Kashmir would increase the physical and financial costs on all sides to the detriment of the needs of the South Asian people.¹⁰⁷ This approach also fails to take the Kashmiri people into account. Both India and Pakistan take a nationalistic view of Kashmir. So far they have not taken the interests of the Kashmiris into account, and they are unlikely to do so in the future. They regard Kashmir as either an integral part of India or, from a Pakistani perspective, as the missing link in the re-unification of South Asian Muslims. The long and bellicose conflict unambiguously reveals the intransigence of the two rivals and their inability to find a solution by themselves.

B Accession Model

Since the parties to this conflict appear incapable of finding a way out of the crisis by themselves, the question arises as to what alternative solution would be feasible. One proposal is to cede Kashmir completely to either Pakistan or India. This strategy would

103 John Gershman "Overview of Self-Determination Issues in Kashmir" (Foreign Policy in Focus, Washington, 2001) <<http://www.selfdetermine.org/conflicts/kashmir.html>> (last accessed 25 September 2003).

104 Embassy of India, Washington, DC <http://www.indianembassy.org/policy/Kashmir/Kashmir_MEA/Indian_Position.html> (last accessed 25 September 2003).

105 Victoria Schofield *Kashmir in Conflict: India, Pakistan and the Unfinished War* (I B Tauris, London, 2000) 232.

106 Schofield, above, 236.

107 Schofield, above, 236.

require one country to give up Kashmir, to withdraw its troops, and to relinquish its claim to the region.

But it is highly unlikely that either country would be prepared to take such a step. The international community could offer support via diplomacy, military pressure, or the promise of economic assistance for their weak national economies. Even if these measures could convince either India or Pakistan to take such a step, neither Government would ever be able to "sell" this climb-down to the electorate. The conflict is so deeply entrenched in the two states' national ideologies that neither state can afford to cede Kashmir. Kashmir's symbolic value is too high for either country to back down. To cede Kashmir to the enemy would be to admit defeat, and to rule out any chances of re-election. Nor would this solution satisfy the pro-independence activists. The allocation of the entire region to either India or Pakistan cannot be regarded as a viable solution.

C Partition Model

If neither country were prepared to cede and to withdraw completely, another option would be to divide up the territory in dispute. There would be no allocation of the entire Kashmir area to either India or Pakistan. The region would instead be divided in two, one for India and the other for Pakistan. This strategy entails the problem of demarcating a border between the Indian and Pakistani parts of Kashmir.

1 Conversion of the line of control into an international boundary

As a starting point, the existing line of control that separates Indian- from Pakistan-held Kashmir could be converted into the new official border between the two states. This would bestow legitimacy to the territorial status quo.¹⁰⁸ India would retain the Indian-administered part of Kashmir, comprising Kashmir Valley, Jammu, and Ladakh. Pakistan would then retain the areas currently under its control (Azad Kashmir, Gilgit, and Baltistan).

Delhi would certainly welcome this method of demarcation, as the approach would allow India the possession of the precious and populous Kashmir Valley and thereby tacitly acknowledge India's dominant standing in the region. For the same reason, however, this approach would not be acceptable to Pakistan.¹⁰⁹ Pakistan would view the cession of the Kashmir Valley to India as a betrayal of the Muslim majority living there. The desire to reunify the Valley's Muslim majority with Pakistan's Muslim population has been Islamabad's core motivation since the outset of the Kashmir crisis. Pakistan's

¹⁰⁸ Robert G Wirsing *India, Pakistan, and the Kashmir Dispute* (St Martin's Press, New York, 1994) 220.

¹⁰⁹ Wirsing, above, 220.

leadership would be thwarting its own national objectives if it agreed to the LoC as the new international border.¹¹⁰

In addition, the conversion of the LoC into an international frontier would not satisfy the interests of the Kashmiri activists who want either the independence of the entire state or its accession to Pakistan.¹¹¹ These groups would continue to resort to cross-border violence and terror. Serious assistance would be needed from Pakistan in securing the border against further militant activity.¹¹² Since this would require Pakistan to act in contradiction to its own national objectives, assistance would be unlikely to be forthcoming.

2 *Drawing a new border along religious or linguistic lines*

Alternatively, a new border between Indian- and Pakistani-administered Kashmir could follow either religious or linguistic lines. If the religious distribution were the basis for creating a new border, this would probably result in the predominantly Muslim Kashmir Valley joining the Pakistani-controlled areas of Kashmir where Islam is virtually the sole religion, whereas the larger but less populated regions of Jammu and Ladakh would remain under Indian administration.

This approach would correspond to the basis on which Pakistan achieved statehood: Muslim majority and geographically contiguous areas.¹¹³ The approach would enable Pakistan to attain its national objective: the re-unification of the Valley's Muslims with the Muslims living in Pakistan. India, however, would not be prepared to cede the precious Valley. Turning the Valley over to Pakistan would be regarded as an act of political surrender. It would require a massive effort to find public support.¹¹⁴ To date there is no reason why India should agree to cede the Valley.

But even if India's strong objections could be overcome, the new border would still leave significant religious minorities in those newly arranged states. On the Indian side, for example, there would still be significant Muslim minorities.¹¹⁵ Islam is the leading faith in three of the six districts of Indian-held Jammu (with more than 800,000 Muslims) and also

110 Schofield, above, 234.

111 Schofield, above, 233–234.

112 Schofield, above, 234.

113 Schofield, above, 235.

114 Robert G Wirsing *India, Pakistan, and the Kashmir Dispute* (St Martin's Press, New York, 1994) 221.

115 Wirsing, above, 221.

accounts for a large share of the population in the Kargil district.¹¹⁶ To avoid the creation of a new minority problem, the displacement of thousands of people might become necessary. Such a wave of migration would bring additional potential for conflict. Again, this approach would not satisfy the Kashmiri activists' demand for unrestricted self-determination and might create further tensions at a later stage.¹¹⁷

Drawing the new border along linguistic lines would entail even more difficulties. There are many more languages than religions and it would be almost impossible to demarcate clear areas where only one language is spoken. But even if such a border could be created, it would not correspond to Kashmir's religious composition because the lines of religious separation are not congruent with the linguistic divisions.

The only way to eliminate those inadequacies would be to negotiate territorial adjustments. By means of negotiation India and Pakistan could agree to exchange some parts of their Kashmir territories. The exchange of territories would then compensate for the non-uniform distribution of languages and religions. However, India currently rejects any renegotiation of Kashmir's borders. Any debate over territorial adjustments would require strong diplomatic efforts to secure India's goodwill. But the difficulty of finding appropriate areas for a territorial exchange would remain.

D Third Party Intervention

The parties to this conflict appear not to be in a position to resolve their differences over Kashmir between themselves. Is third party involvement required? If so, another option would be to employ a neutral third party, such as the United Nations, to settle the dispute.

1 UNMOGIP

Following India's referral of the Kashmir issue to the United Nations, the Security Council adopted a series of resolutions with respect to Kashmir. In addition, in January 1949 United Nations deployed the United Nations Military Observer Group in India and Pakistan (UNMOGIP). Its ongoing task is to supervise the ceasefire between India and Pakistan.¹¹⁸

116 Kashmir Study Group <<http://www.kashmirstudygroup>> (last accessed 25 September 2003).

117 Victoria Schofield *Kashmir in Conflict: India Pakistan and the Unfinished War* (I B Tauris, London, 2000) 235; Wirsing, above, 221.

118 UNMOGIP <http://www.un.org/Depts/DPKO/Missions/unmogip/body_unmogip.htm> (last accessed 25 September 2003).

Should the United Nations mandate be expanded to allow it to play a more prominent role in settling the Kashmir conflict? For example, the United Nations could engage in third party mediation to decrease tensions between India and Pakistan. Such mediation efforts could pave the way for the previously mentioned solution strategies. The United Nations could promote negotiations on territorial adjustments. Reports of organisations such as Amnesty International and Human Rights Watch reveal massive violations of human rights in Kashmir,¹¹⁹ which could even justify a United Nations military intervention.

Alternatively, the Kashmir region could become a United Nations Trust Territory.¹²⁰ Under the trusteeship scheme, troops of both India and Pakistan would have to leave Kashmir and international peace forces would take over control. A United Nations administrator and the Trusteeship Council would then look after the affairs and administration of the state. After a period of interim international administration, the Kashmiris would be given the right to self-determination in a plebiscite. This method has already been applied to many former colonies after World War II, all of which have since acquired self-government.¹²¹ The advantage of this proposal is that Pakistan could not complain that there was no self-determination or that India was suppressing the Kashmiri people. India, on the other hand, could solve the Kashmir problem by handing it over to the United Nations trusteeship.¹²² Hence, the trusteeship model might be a successful instrument in resolving the Kashmir dispute.

2 *The Simla Agreement – peace treaty or stumbling block?*

But why has the United Nations been so reluctant and unforthcoming in Kashmir? Why does it not increase its presence in the conflict area in order to exert more influence on the parties? The main reason for the relatively limited United Nations engagement in Kashmir is that India and Pakistan disagree as to whether it should be admitted as a neutral third party mediator. While Pakistan indicates its willingness to have third party

119 See for example the annual reports of Amnesty International <<http://www.amnesty.org/ailib/aireport/index.html>> (last accessed 25 September 2003) and Human Rights Watch <<http://www.hrw.org/reports/world/reports>> (last accessed 25 September 2003).

120 See Charter of the United Nations, ch XII; Wirsing, above, 222-223.

121 Fakiha Khan "Nuking Kashmir: Legal Implications of Nuclear Testing by Pakistan and India in the Context of the Kashmir Dispute" (2001) 29 Ga J Int'l & Comp L 361, 391.

122 Fakiha Khan, above, 391.

involvement, India categorically refuses this option by referring to the Simla Agreement, which reads:¹²³

In order to achieve [peace], the Government of India and the Government of Pakistan have agreed as follows: ...

(ii) That the two countries are resolved to settle their differences by peaceful means through bilateral negotiations or by any other peaceful means mutually agreed upon between them.

The Indian Government regards the Kashmir crisis as a bilateral issue with which the international community need not concern itself.¹²⁴

India will work towards the resolution of all outstanding issues, including Jammu and Kashmir, through a direct bilateral dialogue process as mandated in the Shimla Agreement. There is no place for any third party involvement of any nature whatsoever in such a process.

But the Kashmir crisis is not merely a bilateral issue. It is not just confined to the state of Jammu and Kashmir. The conflict has acquired ramifications for the whole South Asian region now that both India and Pakistan are nuclear powers. The conflict has an alarming impact on the global security situation. Therefore, the Kashmir crisis has already exceeded the bilateral framework. As the parties' inability to resolve their differences over Kashmir reveals, the concept of bilateralism has backfired and left both parties in a diplomatic stalemate.

Given the rising nuclear threat in South Asia, the failure of bilateralism calls for third party intervention. However, it is important to keep in mind that whatever animosity exists between India and Pakistan, they will always be neighbours and their agreement will always be essential for any peaceful outcome. However useful a third party mediator might be in diffusing tensions, it would be impossible to force either country to accept a decision contrary to its national interest, no matter how morally justified that decision might be.¹²⁵ In Kashmir the combatants are not yet willing to co-operate or to accept third party involvement. Therefore, before the United Nations can operate effectively in Kashmir, it is important to create awareness among the parties that they all need the United Nations and that its involvement will be to their benefit. To impose third party involvement on India and Pakistan without their consent is not likely to settle the dispute.

123 Simla Agreement (3 July 1972), reprinted in Türkaya Ataöv *Kashmir and Neighbours: Tale, Terror, Truce* (Ashgate, Aldershot, 2001) 219-220.

124 Embassy of India, Washington, DC <http://www.indianembassy.org/policy/Kashmir/Kashmir_MEA/Indian_Position.html> (last accessed 25 September 2003).

125 Victoria Schofield *Kashmir in Conflict: India, Pakistan and the Unfinished War* (I B Tauris, London, 2000) 237.

E Independence Model

Another option that merits discussion is independence. If neither side can agree on the question of to whom Kashmir belongs, the creation of an independent Kashmiri state might be the only logical consequence.

A new independent state would mirror the borders of the former princedom of Jammu and Kashmir; it would bring together the two halves of today's Indian- and Pakistani-held Kashmir.

Although neither party can agree on how Kashmir might accede to one or other of them, both are against independence.¹²⁶ For both sides, the creation of an independent Kashmiri state inevitably involves a significant loss of territory.¹²⁷ Furthermore, from the Pakistani perspective, decades of struggle with India over Kashmir would have been wasted.¹²⁸ India, on the other hand, regards an independent Kashmir as a threat to its territorial integrity, because Kashmir's independence might lead to the Balkanisation of the whole region.¹²⁹

Yet India and Pakistan are not the only opponents to the independence option. The neighbouring states also do not want to see the two halves of Kashmir united. China and Russia share India's fears because of the effect a successful act of self-determination could have on their minorities.¹³⁰ In addition, an independent Kashmir might be politically weak, vulnerable to exploitation by its more powerful neighbours, and economically unviable.¹³¹

Since both India and Pakistan reject the idea of independence for Kashmir, the only advocates for independence are the Kashmiris themselves. However, even they are divided on this issue because some appear to favour union with Pakistan over independence.¹³² Kashmir is not a homogeneous ethnic or religious unit, and the aspirations of its people vary widely. Neither independence nor Pakistani rule would be

126 Ali Khan "The Kashmir Dispute: A Plan for Regional Cooperation" (1994) 31 Colum J Transnat'l L 495, 504; Fakiha Khan "Nuking Kashmir: Legal Implications of Nuclear Testing by Pakistan and India in the Context of the Kashmir Dispute" (2001) 29 Ga J Int'l & Comp L 361, 377; Robert G Wirsing *India, Pakistan, and the Kashmir Dispute* (St Martin's Press, New York, 1994) 231.

127 Schofield, above, 233.

128 Wirsing, above, 231.

129 Wirsing, above, 230-231.

130 Schofield, above, 231.

131 Wirsing, above, 230.

132 Wirsing, above, 231.

acceptable to the Hindu-dominated parts of Jammu and the Buddhist district Leh in Ladakh, for instance. The enormous variety of Kashmiri identity makes the issue of an independent Kashmiri state extremely problematic. Would such a state be secular or Islamic, and how would it deal with its internal cultural diversity?¹³³

F Self-determination Model/Plebiscite

Unlike any previously mentioned approach, a plebiscite would (at last) allow the Kashmiri people to determine their own future. It would allow them to exercise the right to self-determination that they have claimed since the time of partition.

1 An internationally affirmed right to self-determination?

A key question is whether the Kashmiri people have right to self-determination and, if such a right exists, whether it is still able to be exercised. India and Pakistan disagree on this matter.

Pakistan argues that there is a Kashmiri right to self-determination. To support this position, Pakistan cites the instrument of accession which stated: "the question of the state's accession should be settled by a reference to the people".¹³⁴ From the Pakistani point of view, "by reference to the people" means that the accession's legality is subject to a plebiscite. Additionally, Pakistan refers to the various United Nations resolutions on the issue that explicitly call for a plebiscite. The plebiscite option was first mentioned in Security Council Resolution 47 of 1948:¹³⁵

The Security Council ... [r]ecommends to the Governments of India and Pakistan the following measures ... to bring about a cessation to the fighting and to create proper conditions for a free and impartial plebiscite to decide whether the State of Jammu and Kashmir is to accede to India or Pakistan.

India, on the other hand, categorically rejects any Kashmiri right to self-determination. To justify its objection, India points out that the letter of accession was merely a political undertaking, separate from the juridical and formal act of accession and thus not legally binding.¹³⁶ Moreover, India argues that the letter of accession does not explicitly mention the word "plebiscite". Thus, from the Indian point of view, the will of the Kashmiri people

133 Vernon Hewitt "An Area of Darkness, Still? The Political Evolution of Ethnic Identities in Jammu and Kashmir, 1947–2001" in Rajat Ganguly and Ian Macduff (eds) *Ethnic Conflict and Secessionism in South and South East Asia: Causes, Dynamics, Solutions* (Sage, New Delhi, 2003) 59, 95.

134 Hewitt, above, 71.

135 UNSC Res 47 (21 April 1948) UN Doc S/RES/47.

136 Robert G Wirsing *India, Pakistan, and the Kashmir Dispute* (St Martin's Press, New York, 1994) 58.

can be ascertained not only through a plebiscite, but also through democratic elections. Accordingly, India points out that the Kashmiri people have already been given the chance to participate in a series of democratic elections in the state of Jammu and Kashmir.¹³⁷ Confronted with the United Nations resolutions explicitly calling for a plebiscite, India replies that the implementation of these resolutions depends on Pakistan's withdrawing its troops from Kashmir.¹³⁸

Regarding India's argument of the democratic elections held in Indian-controlled Kashmir, it is important to examine whether the outcome of these elections reflected the genuine will of the Kashmiris. If so, the right to self-determination would already have been exercised. However, there is some evidence to suggest that this has not been the case. First, India created the Jammu and Kashmir Constituent Assembly as a mechanism through which the Kashmiri people could express their will. But the Assembly was "elected" without any balloting. Second, the Assembly's powers constrained by the Government in Delhi. Moreover, whenever the elected local government in Indian-held Kashmir pursued the idea of self-determination, India suspended it and imposed direct rule on the occupied territories.¹³⁹ For these reasons, the Constituent Assembly as an alternative to a plebiscite failed to persuade the international community that the people of Indian-held Kashmir were actually engaged in a process of self-determination. Consequently, the Security Council reaffirmed that Kashmir's final status would still have to be decided by a free and impartial plebiscite.¹⁴⁰

After examining this issue, the International Commission of Jurists concluded that "the right of self-determination to which the peoples of Jammu and Kashmir became entitled as part of the process of partition has neither been exercised nor abandoned, and thus remains exercisable today".¹⁴¹ Historically there was a general consensus in British legal circles that the revocation of paramountcy conferred upon the states the juridical authority to choose their future.¹⁴² Moreover, all the Kashmiri insurgent groups have consistently

137 Embassy of India, Washington, DC <http://www.indianembassy.org/policy/Kashmir/Kashmir_MEA/Indian_Position.html> (last accessed 25 September 2003); Wirsing, above, 58.

138 Embassy of India, Washington, DC <http://www.indianembassy.org/policy/Kashmir/Kashmir_MEA/Indian_Position.html> (last accessed 25 September 2003).

139 Ali Khan "The Kashmir Dispute: A Plan for Regional Cooperation" (1994) 31 *Colum J Transnat'l L* 495, 517-519.

140 Ali Khan, above, 519-520.

141 International Commission of Jurists *Human Rights in Kashmir, Report of a Mission* (Geneva, 1994) cited in Victoria Schofield *Kashmir in Conflict: India, Pakistan and the Unfinished War* (I B Tauris, London, 2000) 232.

142 Ali Khan, above, 505.

declared that they are in favour of and would abide by a free and impartial plebiscite on Kashmir's future.¹⁴³

2 *Plebiscite with two or three options?*

The meaning of self-determination is a critical point of contention between India and Pakistan.¹⁴⁴ The question is whether the right to self-determination should include a right to vote for independence (the "third option") or whether it should be limited to a choice between accession to India and accession to Pakistan. In principle, the Kashmiris should be free to vote for accession to either country or for complete independence.

Both the Kashmiri activists and the Pakistanis agree in principle on the Kashmiri right to self-determination, although the latter prefer restricting the choice to two options. However, the Kashmir issue will never come to a peaceful solution unless the Kashmiris have been given the genuine freedom to choose their destiny.¹⁴⁵ If the Kashmiri people are free to determine their own future, then there exists no reasonable argument why such a right to self-determination should be restricted to two options only and why it should not include the third option. A free and impartial plebiscite should include the independence option in order to settle the conflict for the long term.

3 *Plebiscite on unitary or regional level?*

This leads to the problem of whether such a plebiscite should be held at the level of the entire Kashmir state or on a regional level.

A plebiscite carried out on a unitary basis would accord with the demands of the pro-independence activists. However, if the majority voted in favour of independence, both India and Pakistan would have to vacate the entire state. This would cause significant loss of territory with strategic importance on both sides, something which neither India nor Pakistan would accept.¹⁴⁶

Furthermore, such a plebiscite would be likely to be dominated by Kashmir Valley because its inhabitants represent the largest population group in the Kashmir region. Since the people of Kashmir Valley are almost entirely Muslim (95 per cent), Muslim interests

143 Cynthia Mahmood "Kashmir and the 'War on Terrorism'" Joan B Kroc Institute <<http://www.nd.edu/~krocinst/polbriefs/pbrief8.html>> (last accessed 25 September 2003).

144 Ali Khan, above, 503.

145 Fakiha Khan "Nuking Kashmir: Legal Implications of Nuclear Testing by Pakistan and India in the Context of the Kashmir Dispute" (2001) 29 Ga J Int'l & Comp L 361, 390; Victoria Schofield *Kashmir in Conflict: India, Pakistan and the Unfinished War* (I B Tauris, London, 2000) 232.

146 Schofield, above, 233.

would be likely to have a disproportionate influence over the dynamics of the plebiscite. The plebiscite's outcome could be a major vote in support of accession to Pakistan. This result would probably conflict with the interests of the people of Jammu and Ladakh, who might have voted against this option. Hence, under a unitary plebiscite the numerically inferior groups in Ladakh and Jammu would be outvoted by the numerically superior inhabitants of Kashmir Valley. The unitary plebiscite would run the risk of ignoring Kashmir's multiplicity of views and opinions. Instead, Kashmir's fate would be decided by the people of Kashmir Valley according to their concerns. Apart from the problem of a possible Muslim preponderance, a plebiscite conducted on a unitary basis might have the undesirable outcome of a narrow majority of 51 per cent, leaving many people dissatisfied.¹⁴⁷

These shortcomings could be overcome if the plebiscite were carried out on a regional basis. Under a regional plebiscite, the peoples of each region would have the opportunity to vote separately according to their (differing) wishes. A plebiscite held on a regional basis might represent the best way of determining the will of all Kashmiris.

4 *Possible outcome*

If Kashmir's fate were to be decided through a regional plebiscite, there would need to be assistance from the international community to guarantee the plebiscite's security and impartiality. Safeguards would be necessary to counteract the problems of manipulation by either country and to ensure that the people could genuinely vote according to their wishes.¹⁴⁸ This task should be entrusted to the United Nations as an unbiased mediator.¹⁴⁹

A plebiscite conducted on a regional level would be likely to have the following outcome: the people of Azad Kashmir, Gilgit, and Baltistan would probably opt for an accession to Pakistan, as the majority population in these regions adheres to the Muslim faith. The Hindu Jammu and Buddhist Ladakh, in contrast, would almost certainly vote to stay with India. The Kashmir issue ultimately centres on the voting of Kashmir Valley. If the majority of the Valley's inhabitants voted for India, then the Kashmiri activists would have to accept this decision and refrain from further violence. If the majority voted in favour of an accession to Pakistan, they would have to abide by this decision as well. However, in the latter case Kashmir Valley would have to be politically transferred from Indian into Pakistani control. India, which is currently in physical possession, might

147 Schofield, above, 231.

148 Schofield, above, 235.

149 Fakiha Khan "Nuking Kashmir: Legal Implications of Nuclear Testing by Pakistan and India in the Context of the Kashmir Dispute" (2001) 29 Ga J Int'l & Comp L 361, 390.

fiercely resist letting the Valley go.¹⁵⁰ If the Valley voted for independence, it would need safeguards for its survival. Its borders would have to be carefully assured. For its economic viability, the independent Valley would require access to India and Pakistan either through the Jammu district or through Azad Kashmir. An independent Kashmir Valley with no access to its neighbours would find it impossible to survive in isolation.¹⁵¹

The advantage of this solution is that Kashmir's fate would finally be decided on the basis of what the Kashmiri people want, rather than what India or Pakistan want. As far as possible this approach would also take the various regional interests into account. The obstacles that independence would face can be overcome with goodwill and some honest effort on either side. To do so will be a lot easier and cheaper than continuing warfare.

In conclusion, none of these solution models is able to satisfy the interests of all conflicting parties at the same time. Every approach entails minor or major shortcomings for at least one party. In order to find a long-term settlement to the Kashmir dispute it is therefore necessary to develop a mutual willingness to compromise among the conflicting parties. The parties must learn and understand that it is preferable to accept these shortcomings in order to achieve the long-term benefit of peace. However, it will be particularly hard to convince the various insurgent groups of the advantages of any such compromise. As long as these groups are not convinced of those advantages, they will continue their terror campaign and thereby undermine any attempts at confidence-building between India and Pakistan.

VI CONCLUSION

The Kashmir conflict presents an apparently intractable challenge. It is not only a territorial battle where armies fight for physical control over territory; it is also a psychological war. In this psychological warfare there exists a protracted ideological debate between India and Pakistan, based on their conflicting national ideologies.

Given Kashmir's high ideological value, any real and lasting solution to the Kashmir problem will have to be immune to the suggestion that it amounted to a defeat for either of the warring neighbours. India and Pakistan have already fought several wars over Kashmir. As this history of wars reveals, any feeling of defeat risks sowing the seeds of further tensions. These tensions might erupt at a later stage into a new and even more violent conflict. As both rivals are nuclear powers, their next conflict could be fought with nuclear weapons. Such an escalation would have disastrous consequences, not only for India and Pakistan, but also for the world as a whole.

150 Schofield, above, 235.

151 Schofield, above, 235-236.

Currently, two main factors reduce the likelihood of any permanent solution for Kashmir. The first problem is the infiltration of Kashmir by groups of mercenaries and rebels terrorising the region. Unless Pakistan recognisably ceases supporting the insurgents by providing training, weaponry, and financial resources, there will be no long-term resolution. Second, India and Pakistan are caught in a diplomatic stalemate, because the Simla Agreement resembles more a stumbling block on their way to peace than a reasonable and constructive peace agreement. On drafting the Simla Agreement the negotiating parties were of the opinion that they could find a resolution by themselves. The past five decades of conflict, however, have demonstrated without a doubt that this was a fallacy. Therefore, in order to guide both conflict parties out of their stalemate, it is considered necessary that India change its intransigent attitude of adherence to the Simla Accord and that it finally agree to third-party involvement. Delhi however will not be prepared to make such a step, until clear evidence is presented revealing that Pakistan has ceased its support of the insurgency and is working against further incursions.

As far as the Kashmiri right to self-determination is concerned, it is the author's personal estimation that a plebiscite held on a regional basis and under international supervision would be the best and fairest solution for the Kashmiri people. Since India is at present categorically opposed to this solution, there will have to be substantial preparation involving all levels of diplomacy to lay the groundwork for such a proposal. Given India's rigid opposition, the author considers that the conversion of the current LoC into an international boundary is the scenario most likely to occur if both countries maintain their attitude of intransigence.

As long as both India and Pakistan can be appealed to through international negotiation efforts, there will be no nuclear weapon exchange between them. But it is likely that there will be no final resolution to the Kashmir issue until one of the parties is too weak to continue the contest.

