NUKING KASHMIR: LEGAL IMPLICATIONS OF NUCLEAR TESTING BY PAKISTAN AND INDIA IN THE CONTEXT OF THE KASHMIR DISPUTE

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"The earth will be enveloped in darkness. There will be no day. Only interminable night. What shall we do then, those of us who are still alive? Burned and blind and bald and ill, carrying the cancerous carcasses of our children in our arms, where shall we go? What shall we eat? What shall we drink? What shall we breathe?"

Since August 1947, South Asia has been victim to the ongoing tensions between India and Pakistan. There have been a number of conflicts between the two countries, some political, some ideological and some violent. One of the oldest aspects of the ongoing Indo-Pak hostilities is the conflict over Kashmir. The newest face of this rivalry is nuclear since both countries declared their new status as nuclear powers in tests carried out by India on May 11 and 13, 1998, and by Pakistan on May 28 and 30, 1998. The question now regards how this nuclear armament will affect the historic tensions of the two countries.

I. KASHMIR

The roots of the Indo-Pak problems lie first and foremost in the creation of Pakistan. Before World War II, India's myriad cultures and peoples were united only by who ruled them, from the Moghuls to the Maharajas. With the colonial movement, the United Kingdom planted seeds of its own dominion and eventually took rule of most of the area except for about five hundred

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small princely states.\textsuperscript{5} As the rulers of India before them, the British also had
to deal with the administration of a large area with the added stress of internal
tensions among the indigenous peoples. In 1947, with the end of World War
II and the anti-colonialist movement, the British gave up control of India,
carving out Pakistan from predominately Muslim areas and allotting the
predominately Hindu areas to India.\textsuperscript{6} August 1947 thus served a dual purpose.
One, it was the independence of India from its colonial master; two, it was the
creation of what the Muslims considered a long awaited homeland and what
the Hindus thought of as a resentful separation of their sovereign nation.\textsuperscript{7}

The matter was, however, not fully resolved because of the hundreds of
princely states, of which the area of Jammu and Kashmir was a part.\textsuperscript{8} During
the British Raj,\textsuperscript{9} these semi-autonomous states had administrative freedom, but
only to a certain extent.\textsuperscript{10} In fact, the rulers of these princedoms had to
recognize the paramountcy of the Crown in the areas of defense, foreign
affairs and communications.\textsuperscript{11}

In 1846, the British granted Maharaja Gulab Singh the princedoms of
Jammu and Kashmir.\textsuperscript{12} The Maharaja (Hindu) ruled a seventy-five percent
Muslim population, and although he was fairly equitable towards the Muslims,
his descendants were not.\textsuperscript{13} Soon, the situation was such that the minority
Hindu population owned most of the land while the majority Muslim
population tilled it.\textsuperscript{14} A political movement led by Sheikh Mohammad
Abdullah started up in the area with the formation of the All Jammu and

\begin{footnotes}
\footnotetext[5]{See Anthony Wanis St. John, The Mediating Role in the Kashmir Dispute Between
Indian and Pakistan, 21-SPG Fletcher F. World Aff. 173, 174.}
\footnotetext[6]{See id. at 173.}
\footnotetext[7]{The occasion of partition may explain the cultural distrust between the two countries. The
political situation within both countries and their foreign policies display a mutual antagonism,
if nothing else. The best explanation for these negative feelings may be rooted in the trauma of
partition. After all, Indians still refer to it as the biggest mistake of the British in India. Sensing
the dissatisfaction with their independence and perhaps anticipating a threat to their sovereignty,
Pakistanis approach India with a self-conscious defensiveness.}
\footnotetext[8]{See id. In fact, before the British entered, India was made up largely of a confederacy of
princedoms, each tiny area being ruled by its own prince. The British did take control of a large
portion of these princedoms, but about 561 princely states remained at the time of partition. See
Sumit Ganguly, The Crisis in Kashmir 6 (1997).}
\footnotetext[9]{'Raj' refers to the time of British rule of India.}
\footnotetext[10]{See Ganguly, supra note 8, at 6 (1997).}
\footnotetext[11]{See id.}
\footnotetext[12]{See id.}
\footnotetext[13]{See id.}
\footnotetext[14]{See id.}
\end{footnotes}
Kashmir Muslim conference in 1932. At the same time, there was a growing movement for independence of India from the British led by Mohandas Gandhi and Jawaharlal Nehru and their nationalistic movement for a secular, united India on the one hand and by Mohammad Ali Jinnah and his struggle for a Muslim homeland on the other. Nehru, himself of Kashmiri descent, pressured Abdullah to join the nationalist movement, which he accepted by changing the party to the All Jammu and Kashmir National Conference in 1939. Then, as the nationalist movement took center stage, the Kashmiri struggle was put on the back burner; however, the point of Kashmir was far from moot. In fact, the Indian nationalists wanted Kashmir to show that Muslims and Hindus could be united under the wing of nationalism, while the Muslims viewed Kashmir as an integral part of what would be Pakistan.

At the time of partition, the British did carve India along religious lines, but could not grant the princedoms to the new nations. Hence, the British gave these states the choice of either acceding to India or Pakistan or becoming independent nations. The choice was not really a choice in most circumstances because of the geography of the area. In order to give both Pakistan and India somewhat contiguous territories, the bulk of the states acceded to whichever state they were nearest. Jammu and Kashmir, Jugandh, and Hyderabad, along with a few others, were the exceptions.

The accession debate became heated when the question became who would decide the ultimate fate of the princedoms—the princely ruler or the people. Both countries wavered on which would be the correct manner of accession depending on which choice suited their political motives. On the issue of Jugandh, when the Muslim ruler asked for accession to Pakistan and it accepted, the Indian army entered the area and offered the Hindu population a chance at self-determination. The vote came out, as expected, in favor of Indian accession. On the other hand, Hyderabad had no real choice because

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15 See id.
16 See id. at 7.
17 See id.
18 See id. at 7-8.
19 See Khan, supra note 2, at 495.
20 See id. at 496.
21 See GANGULY, supra note 8, at 7-8.
22 See id.
23 See Khan, supra note 2, at 508.
24 See id.
25 See id. at 510.
26 See id. at 509.
India's military entered the area and declared accession to India on behalf of the Hindu population without a vote or a letter of accession by the ruler.\textsuperscript{27}

The big problem, now, was Kashmir because it had a Muslim population ruled by a Hindu Maharaja and it abutted both Pakistan and India.\textsuperscript{28} To make the situation worse, in October of 1947, a band of Pathans\textsuperscript{29} from the North West Frontier Province of Pakistan came into Kashmir, took the city of Muzaffarabad, and then headed towards the capital of Srinagar.\textsuperscript{30} Taken off guard, Maharaja Hari Singh appealed to his neighbor, the prince of Patiala, and although the Patialan reinforcements arrived, they were unsuccessful in fighting off the Pathans.\textsuperscript{31} Thus, Hari Singh appealed to Nehru in India, and on the advice of Lord Mountbatten (the last British Vice-roy), India offered to help Hari Singh in exchange for a letter of accession to India.\textsuperscript{32} Even though Nehru agreed to ask Hari Singh to accede, he pushed for a condition on the letter of accession that it would be ratified by a vote of the Kashmiri people.\textsuperscript{33} So, the Maharaja offered a letter of accession to India on October 26, 1947, and the letter was accepted without a vote by the people.\textsuperscript{34}

While Pakistan had championed the right of the ruler to decide the ultimate fate of his principedom in Jugandh, it now cried out for a vote by the majority Muslim population of Jammu and Kashmir, knowing that the vote would probably favor accession to Pakistan. At the same time, India (who had fought for the right of the Jugandhi peoples to choose accession) now firmly stood for the right of the Maharaja to make the choice, while remaining firmly in support of its intrusive actions with Hyderabad.\textsuperscript{35} Although the actions of both countries regarding Hyderabad, Jammu and Kashmir, and Jugandh showed the political aspects of the issue, the accession debate now centered solely on Jammu and Kashmir because of the mixed religious dynamics of the area and its strategic position between the countries.\textsuperscript{36} By November of 1947, what had

\textsuperscript{27} See id. at 510.
\textsuperscript{28} See GANGULY, supra note 8, at 9.
\textsuperscript{29} 'Pathans' are members of the indigenous tribes of the Northwest Frontier Province of Pakistan.
\textsuperscript{30} See GANGULY, supra note 8, at 10.
\textsuperscript{31} See id.
\textsuperscript{32} See id.
\textsuperscript{33} See id.
\textsuperscript{34} See St. John, supra note 5, at 175.
\textsuperscript{35} See Khan, supra note 2, at 510.
\textsuperscript{36} See generally Khan, supra note 2 (explaining the role of religion in the Kashmir conflict). The people of the Kashmir valley and Gilgit are Muslim, while those of Jammu are Hindu and those of the Ladakh and Baltistan region are Buddhist. See id. at 496.
begun as the taking of Muzaffarabad by the Pathans had turned into full scale fighting between Pakistani and Indian troops.\textsuperscript{37}

The political debate over accession culminated into three separate wars between Pakistan and India—1947, 1965, and finally in 1971.\textsuperscript{38} The latest of these wars resulted in an official peace between the countries and more importantly, in the Treaty of Simla. This treaty established the Line of Control (LOC) along the Kashmir border that is now the center of hostilities.\textsuperscript{39} Between the first and last war, the United Nations (UN) also passed a number of resolutions regarding Kashmir, re-affirming the right of the Kashmiri people to an internationally supervised plebiscite,\textsuperscript{40} urging India to restore peace to the region, and calling for Pakistan to withdraw its forces from the area.\textsuperscript{41} Although Pakistan did officially remove its forces, and India did attempt to restore peace, tensions arose again and no internationally supervised plebiscite ever took place.

The Simla Agreement, however, looked to be a step in the right direction because it would serve as a basis for bilateral negotiations and because it, too, referred to the right of the Kashmiri people to choose their own future. Still, it failed to be a final resolution, for the tensions remained. As it stands, the Line of Control is serving as the interim border, with most of the area in the hands of Pakistan (Northern portions of Gilgit and Baltistan), India (Kashmir Vale and Ladakh), and China (Aksai Chin portion of Ladakh).\textsuperscript{42} A portion of the western Kashmir valley (Azad or “Free Kashmir”) is also ‘in’ Pakistan even though it is virtually free of control from Pakistani administration.\textsuperscript{43} The remaining portions of the Kashmir valley are now the bone of contention between India and Pakistan.

Another aspect of the conflict are the Kashmiri people. Not only is there fighting between India and Pakistan, but there is also extensive bloodshed at the hands of internal Kashmiri militants fighting each other.\textsuperscript{44} The result has been over-reaching devastation throughout Kashmir, including human rights

\textsuperscript{37} See GANGULY, supra note 8, at 11.

\textsuperscript{38} See St. John, supra note 5, at 174.

\textsuperscript{39} See generally The Simla Agreement, July 2, 1972, India-Pak. 858 U.N.T.S. 71.

\textsuperscript{40} Plebiscite refers to an election where all the people of an area are asked to vote on which government they want to represent them.


\textsuperscript{42} See St. John, supra note 5, at 175.

\textsuperscript{43} See id.

\textsuperscript{44} See generally Khan, supra note 2 (explaining the movement of internal Kashmiri separatists).
abuses by both the Indian army and the freedom fighters (allegedly supplied and trained by Pakistan). The last fifty years have brought no resolution to the conflict, and even as recently as 1994, tensions became so high as to cause an expulsion of the other’s diplomats by both countries.

II. NUCLEAR PROGRAMS

Since the Second World War, the threat of Nuclear War has been present not only because of the Cold War, but also because of the possibility of other nations seeking nuclear weapons. Among these nations were Pakistan and India. With their tense historical relations (buttressed by an equally tense relationship between India and its considerably larger nuclear neighbor, China), the two were prime targets for non-proliferation efforts. The rest of this section will present a short timeline of the nuclear programs of both India and Pakistan from inception to the current situation.

A. India’s Nuclear Program

The Indian government showed its interest in nuclear development soon after independence with the passage of the Atomic Energy Act of 1948, which looked towards the promise of economic development through atomic energy. In fact, in 1954, Prime Minister Jawaharlal Nehru stated that “nuclear, chemical and biological energy and power should not be used to

45 See St. John, supra note 5, at 176.
46 See id. at 174. To further complicate the situation, Pakistan’s democratic government was overthrown by a military coup, led by General Pervez Musharraf, in October 1999. See David Gardner & Farhan Bokhari, Pakistan’s Long Road to Stability, FINANCIAL TIMES (London), July 12, 2000, at 25. This change in Pakistan’s political situation triggered fear about Kashmir In many, especially considering that many in Indian politics were completely averse to the idea of talks with the military leadership. Cf. id.; See also India Will Not Talk to Pakistan or its “Military CEO” (visited July 5, 2000) <www.in.news.yahoo.com/000703/7/19hl.html> (stating that Ajit Panja, the Indian Minister of State for External Affairs, questioned how India “could . . . shake hands with Musharraf whose hands are blood stained?”).
48 See generally Gary Milhollin, Stopping the Indian Bomb, 81 AM. J. INT’L L. 593 (1987) (explaining that because of the tense relations between India and Pakistan, the two countries should be steered away from acquiring nuclear weapons).
forge weapons of mass destruction.”50 With this policy, India entered the nuclear arena as early as the 1960’s when the United States (U.S.) and Canada helped India build and run its first nuclear reactor (CIRUS) in 1964.51 The United States granted the assistance under the Agreement for Cooperation Concerning Civil Uses of Atomic Energy or the Tarapur Agreement. That treaty offered American aid in developing India’s non-military nuclear capabilities to be used only for non-military purposes, i.e., not to be used in the production of nuclear weapons.52 CIRUS was followed by a set of twin reactors in Rajasthan built with aid from Canada in the 1970’s and 1980’s and finally with India’s very own reactor in Madras in 1983.53

Under the cooperation agreements with Canada and the United States, India was technically obligated to undergo international inspection in the form of safeguards of the International Atomic Energy Agency (IAEA);54 however, the safeguards did not work effectively to stop non-civilian use by India. IAEA safeguards did not govern Tarapur because the agency was formed after the Tarapur agreement.55 In addition, Madras was not governed because that reactor was built without foreign assistance.56 India used the plutonium from each plant for eventual military use, and when it could not use the plutonium because of international safeguards, there is some evidence that India received essential supplies from China.57

Then, in 1974, India exploded an atomic bomb using nuclear imports intended for non-military use.58 Since that time, India has had a vigorous nuclear program that cites national security and fear of China’s nuclear capabilities as its raison d’être.59 In fact, the Indian government said to its Parliament that “in our region there has come into existence a pattern about clandestine acquisition of nuclear materials, missiles and related technologies. India, in this period, became the victim of externally aided and abetted

50 Id. at ¶ 4.
51 See Milhollin, supra note 48, at 595.
53 See Milhollin, supra note 48, at 596.
54 See id. at 598.
55 See id. at 597.
56 See id.
57 See id. at 596.
58 See id. at 595.
terrorism, militancy and clandestine war through hired mercenaries.\textsuperscript{60}

Though not naming Pakistan, it is likely that the reference to terrorism and mercenaries is a reference to Pakistan's role in the Kashmir conflict. With this background, the Indian nuclear program came into fruition with a set of underground nuclear tests in May of 1998.

Despite its status as a nuclear power, India continues to commit itself to the elimination of nuclear weapons altogether even though it has reiterated that it cannot and will not sign onto the Nuclear Non-Proliferation Treaty (NPT).\textsuperscript{61}

The major reasons for India's refusal to sign the NPT are the treaty's inherent weaknesses and its discriminatory effects on non-nuclear states.\textsuperscript{62}

Currently, India has a deterrent type of nuclear policy whereby it will only use the weapons for retaliation.\textsuperscript{63} Further, the Indian government has declared a unilateral moratorium on further testing.\textsuperscript{64} According to Prime Minister Vajpayee, India's "intentions were, are, and will always be peaceful. . . . India is now a nuclear weapons state. [But] [o]urs will never be weapons of aggression."\textsuperscript{65}

India has also not signed the Comprehensive Test Ban Treaty, which it views as a divergence from the original idea of a true comprehensive test ban, a final text that "does not do justice to the negotiating mandate."\textsuperscript{66}

As for the future, the Indian National Security Advisory Board's Draft Report states that research and development of nuclear technology will continue\textsuperscript{67} while reaffirming the commitment to a no-first-use policy and disarmament.\textsuperscript{68} More specifically, India plans on acquiring light water reactors from friendly countries in an effort to have the capability of producing 20,000 MW by the year 2020.\textsuperscript{69} To some scholars, the implications of Indian nuclear proliferation were clear even before India officially disclosed its nuclear capabilities. As one commentator noted, "the Indians will deploy [a nuclear

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\textsuperscript{60} Paper Laid on the Table, supra note 49, at ¶ 8.

\textsuperscript{61} See id. at ¶ 15 (citing various nuclear prohibition initiatives taken by India).


\textsuperscript{64} See Paper Laid on Table, supra note 49, at ¶ 19.

\textsuperscript{65} Interview with Prime Minister Atal Bahari Vajpayee, supra note 59, at 9.

\textsuperscript{66} Comprehensive Test Ban Treaty (visited Feb. 5, 2000) <http://www.indianembassy.org/policy/CTBT/ctbt-index.htm> (on file with author) [hereinafter 'CTBT India'].

\textsuperscript{67} See NSAB, supra note 63, at ¶ 7.

\textsuperscript{68} See id. at ¶ 8.

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b], which would force a Pakistani test . . . If this happened, South Asia would be left with a pair of nuclear-armed rivals face to face . . ." The prophecy became reality only weeks after India tested its bomb, when Pakistan conducted its own underground tests.

B. Pakistan’s Nuclear Program

Pakistan’s nuclear program, like India’s, finds its roots in cooperation agreements with the United States. As with India, the United States signed a cooperation agreement with Pakistan in 1955 under which the United States would facilitate Pakistan’s atomic energy program as long as it is used for peaceful, non-military purposes. The treaty dealt with America leasing enriched Uranium to Pakistan and exchanging information regarding atomic energy development for “peaceful and humanitarian uses of atomic energy.”

While India was more forthright in its nuclear development, overtly using ‘civilian’ reactors for ultimate military purposes, Pakistan’s programs were more covert. The central figure in Pakistan’s nuclear program was Dr. Abdul Qadeer Khan, although Pakistan officially denied his involvement until the late 1970’s. But, with more media coverage of the country’s uranium enrichment, Pakistan eventually recognized Dr. Khan, though only giving him the status of any other scientist working with the Pakistan Atomic Energy Commission. In January of 1987, after two decades of secret development, Dr. Khan admitted not only to his involvement but also implied the success of a Pakistani nuclear weapons program.

On the U.S. front, Congress had been expressing concern over nuclear proliferation. Starting with the Glenn-Symington Amendment in 1977, Congress declared that no aid would be given to any country “which the President determines delivers nuclear enrichment equipment, materials, or technology to any other country . . . or receives such equipment, materials, or technology.” Under the amendment, President Jimmy Carter cut aid to

70 Milhollin, supra note 48, at 593.
72 Id. at 2665.
73 See Aldrich & Pollard, supra note 47, at 105.
74 See id.
75 See id.
76 Aldrich & Pollard, supra note 47, at 106 (citing the Glynn-Symington Amendment, 22 U.S.C. § 2346 (aa) (1990)).
Pakistan because it was receiving nuclear materials for military use and using them for unsafeguarded enrichment and reprocessing facilities at Kahuta, Chashma, and New Labs. Once President Ronald Reagan took over the administration in the 1980's, however, the U.S. focus turned from Pakistan's nuclear program to the threat of communism in Asia through the USSR and China. In efforts to win allies in the area, President Reagan successfully procured annual exemptions to the Glenn-Symington Amendment for Pakistan. The result was a reformulation of the law so that there was an automatic exemption for Pakistan as long it did not possess a nuclear explosive device. As soon as it did possess such a device, all aid would be cut off. At the time, Pakistan fully supported the amendment. But as current history shows, the amendment did not effectively stop Pakistani development of nuclear weapons.

While both rivals continued in their respective quests for building nuclear capabilities, the international community began serious non-proliferation efforts. These efforts culminated in the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water and more importantly, the Nuclear Non-Proliferation Treaty (NPT), which was opened for signature in 1968. While both India and Pakistan signed the first of the treaties, both abstained from agreeing to the provisions of the NPT. Both countries have cited security concerns and resentment for the treaty's seemingly discriminatory provisions that leave non-nuclear countries no real nuclear options. Since that time, Pakistan sponsored a General Assembly non-binding resolution for the creation of a South Asia Nuclear Free Zone in 1984.

77 See id.
78 See id.
79 See id. at 106 (citing Pressler Amendment, 22 U.S.C. § 2375 (e) (1990)).
80 See id. at 107. In fact, according to news sources, "China is continuing to help Pakistan build long-range missiles that could carry nuclear warheads." Ian Brodie, China's Aid to Pakistan Bomb Risks US Deal, THE TIMES (London), July 3, 2000, at 16. However, Pakistan consistently denies any reports of further nuclear testing and in fact, has reaffirmed a unilateral moratorium on testing nuclear weapons. See Pakistan Denies US Reports About Preparations for Another Nuclear Test, THE NEWS INTERNATIONAL, May 25, 2000, at 10.
83 See id.
However, India, along with Bhutan and Mauritius, voted against the resolution, indicating its unwillingness to close any doors on its nuclear capabilities.\(^4\)

Because Indian tests occurred first, Pakistan's stated reasons for nuclear armament were not an arms race, but rather, national security concerns from the Indian front.\(^5\) In fact, in a statement to the United Nations, the permanent representative from Pakistan stated that "[f]aced with these ominous developments resulting from India's deliberate and calculated actions to alter the strategic equation, Pakistan was left with no choice but to exercise its nuclear option in its supreme national interest . . . ."\(^6\) Even though the statement takes a defensive tone, and the tests are characterized as security motivated, Prime Minister Nawaz Sharif also pointed out that Pakistan has had the capabilities for such tests and armament for the last fifteen or twenty years.\(^7\)

As the situation stands now, all efforts to prevent Asian proliferation have ended in no success. Similarly, all efforts with the Kashmir situation have found no success. In either case, it appears to be a lack of active solution making on the part of both India and Pakistan and the international community. All efforts thus far seem to focus on retention of the status quo without any serious dialogue or any actual resolution.

Both the problems of Kashmir and the nuclear non-proliferation efforts are now at a dangerous cross roads in South Asia. Some facts of history are clear: the two have fought over Kashmir before; they continue to exchange sporadic military fire, and (more frequently) diplomatic debate over the future of Kashmir; the two have also been very serious about developing nuclear weapons for security and in fact mention each other in reference to their security concerns.\(^8\)

From these premises, the question that presents itself is what will happen to the area if another war breaks out between India and Pakistan and either

\(^4\) See id. at 109.
\(^7\) See Sharif's Remarks, supra note 85, at ¶ 5.
\(^8\) See id. at ¶ 6. See also STATEMENT BY THE PERMANENT REPRESENTATIVE OF INDIA TO THE U.N. SECURITY COUNCIL ON 22 SEPTEMBER 1999, U.N. GAOR, 54th Sess., at 42, U.N. Doc. A/54/PV (referring to Pakistan and China as security threats for whom nuclear weapons are necessary) [hereinafter 'India's Statement of 12/20/99'].
country decides to make use of its nuclear capabilities. Though no one can predict the outcome of the South Asian cold war, the prospect of a nuclear war is hardly a pleasant or acceptable resolution to Kashmir. In this context, it is vital that the international community re-think its current stance of non-proliferation efforts as well as long-term dispute resolution so that the world does not have to witness another arms race between two historical rivals—a race that could develop into an increasingly dangerous game of 'chicken' as both try to keep up with the other.

III. THE LEGAL PROBLEM

The legal implications of the current situation are far reaching. The specific issues that require analysis are: 1) lack of a fair election for the Kashmiri peoples, 2) control of the area by the Indian government and the actions of the Indian military, 3) support of insurgents and guerrilla groups by Pakistan and India, and 4) nuclear armament by both countries. The obligations of both states regarding Kashmir have two distinct sources—the UN Charter (and its provisions on international disputes) and the Simla Agreement (which refers to the UN Charter). As for the nuclear question, it should be narrowed to the Kashmir context; the legal analysis will be more complex because neither country is a signatory of the Nuclear Non-Proliferation Treaty (NPT), which is commonly understood to be the most important document of the international non-proliferation efforts. The new Comprehensive Test Ban Treaty presents similar problems because both states refuse to ratify the treaty without some confidence building measures. Therefore, the search for a guiding source leads to the advisory opinions of the International Court of Justice as the legal wing of the United Nations and to the possibility of customary international law regarding nuclear testing and aggression. More specifically, the analysis will focus on the implications of the nuclear situation under the Simla Agreement.

89 See generally GANGULY, supra note 8 (giving a historical analysis of the politics surrounding the Kashmir conflict).
90 See Simla Agreement, supra note 39, at ¶ I.
A. Sources

The first portion of this section will deal with the presence of India and Pakistan in and around Kashmir. In order to do justice to the issue, it is vital to understand that historically, both countries view the other’s claim to the area as illegal. Pakistan views the accession to India as invalid for the will of the people was never considered (because no vote was ever held) for the accession in October of 1947. However, in a purely legal sense, the accession was valid under the Indian Independence Act, which gave the final decision on accession to the Maharaja. On the other hand, the basis for allotting territory to Pakistan at all was the religious preference of the people in the areas. Jammu and Kashmir, being majority Muslim, should, in theory, have been included in the initial territories allotted to Pakistan. As the debate on this issue raged, the war of 1947 broke out, and the issue developed a further dimension.

The war was started when Pakistani tribesmen entered Kashmir and took the city of Muzaffarabad. India has, since then, consistently alleged that the Kashmir situation is caused by the covert actions of Pakistanis within the region. To a certain extent, the allegation may be correct. A majority of the insurgent and guerrilla groups are armed and trained within Pakistani borders, often with the help of the Pakistani military wing of the Interservice Intelligence (ISI). However, the problem is not wholly made by Pakistan, which only took advantage of a precarious situation for political purposes.

On the other hand, Pakistan claims that the situation is the result not only of the Indian government’s illegal meddling with the electoral process, but also because of its “historical betrayal, state repression, religious discrimination, economic deprivation,” et cetera. Although some of these allegations may be true, there is no general, monolithic repression of Kashmiris by the Indian government.

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94 See GANGULY, supra note 8, at 13-14.
95 See St. John, supra note 5, at 174.
96 See GANGULY, supra note 8, at 13-14.
97 See id. at 15.
98 See id.
99 See id. at 16. Rather than declaring war on India, Pakistan only supplied the internally based terrorists. So, the situation is not one of outright aggression, but of fanning the internal politics for the sake of the Kashmir agenda. See id.
100 Id.
101 See id. at 17.
In truth, both countries had a hand in the creation and perpetuation of the Kashmiri problem. Thus, after the 1948 cease fire, the United Nations became involved and issued a set of resolutions. In these resolutions, the United Nations repeatedly affirms the rights of the Kashmiri people to decide their own fate, implying that the letter of accession is invalid without a general ratification. Further, through Resolution 39, the United Nations set up a Commission of the Security Council, composed of representatives of three member states, one to be chosen by India, one by Pakistan, and the third to be designated by the two chosen representatives. The duties of the commission were to include traveling to Kashmir and keeping the Security Council informed of its investigations pursuant to Article 34 and to exercise "any mediatory influence likely to smooth away difficulties."

A few months after this resolution, the Security Council adopted Resolution 47. This document noted the urgency of the Kashmir conflict and the willingness of both India and Pakistan to decide the question of accession through free and impartial plebiscite. The resolution also requested that the government of Pakistan withdraw from Jammu and Kashmir any of its forces and any Pakistani nationals who may have gone to the area to fight. Moreover, Pakistan had the obligation under Resolution 47 to prevent any fighters from entering Jammu and Kashmir and to refrain from providing any aid to them.

Conversely, India had the responsibility of managing the cessation of the fighting in Jammu and Kashmir and to withdraw its own forces from the area to the satisfaction of the commission. However, in the interest of maintaining peace, India was allowed to leave a minimum number of troops in the area. As soon as order was maintained, India was to recruit local personnel

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103 See Res. 47, supra note 41.

104 See Res. 39, supra note 102, at § A.

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

106 Res. 39, supra note 102, at § C (2).

107 See Res. 47, supra note 41, at ¶ 3.

108 See id. at § A 1. (a).

109 See id.

110 See id. at § A 2. (a).

111 See id. at § A 2. (c).
to re-establish and maintain law. In addition, if the local forces were inadequate, Pakistan and India would have to confer on the entrance of troops from either country to keep the peace. The most important portion of the resolution, however, regarded a plebiscite. The Indian authorities were responsible for organizing the election, but under the supervision of a UN appointed plebiscite administrator who would have the Indian forces at his/her disposal for the fair administration of the plebiscite. Above all, the elections had to be free of meddling, and India had the responsibility to make sure this was so. Finally, the Indian government was responsible for removing all Indian citizens who were not Kashmiri and to release all Kashmiri political prisoners.

Despite the all encompassing mandates of Resolution 47, the impartial election never took place. In fact, "whenever the elected local government in the Indian-held Jammu and Kashmir showed any direct or indirect support for the idea of self-determination, India suspended the local government and brought the occupied territories under its direct rule." Jammu and Kashmir became part of the Indian union after a pro-Indian constituent Assembly adopted a new state constitution. However, the international community and the United Nations rejected the legal authority of the Assembly in a Security Council resolution. The international community continued to press for an impartial plebiscite for the Kashmiris but to no avail.

The United Nations' involvement in the dispute came to a slow halt due to the Cold War. Because of U.S.-Soviet Union tensions, the Security Council could come to no consensus regarding Kashmir. The efforts ended in a stalemate, leaving the Kashmiris with a precarious future. The international community could do nothing, so Pakistan started its own mission to liberate Kashmir by violating the cease-fire line of 1948. A new war broke out and

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112 See id. at § A 4.
113 See Res. 47, supra note 41, at §§ A 4-5.
114 See id. at § B 6.
115 See id. at §§ B 9-10.
116 See id.
117 See id. at §§ B 13-14.
118 See Khan, supra note 2, at 518-519.
119 Id.
120 See id.
122 See Khan, supra note 3, at 520.
123 See id.
124 See id.
125 See id. at 521.
ended in the Tashkent Declaration, which was mediated by the Soviet Union.\textsuperscript{126} The Tashkent Declaration required both parties to assume their pre-war borders and to respect the cease fire line. Further, it encouraged cross border dialogue. It did not, however, contain any provisions for an election.\textsuperscript{127}

\textbf{B. The Simla Agreement}

The peace would not stay long, and only a few years after the Declaration, Pakistan and India clashed again. This time, negotiations resulted in the Simla Agreement, which essentially superseded the Tashkent Declaration and the 1948 cease-fire line.\textsuperscript{128} According to the Simla Agreement, Pakistan and India agreed that:

1. the UN Charter would govern their relations;
2. the two would settle their differences through bilateral negotiations;
3. neither would unilaterally alter the situation;
4. both would prevent organization, assistance or encouragement of any acts detrimental to the maintenance of peaceful and harmonious relations;
5. according the United Nations Charter, both will refrain from the threat or use of force against the territorial integrity of the other;
6. the cease-fire line will be the Line of Control (LOC) and both nations will retreat to their own sides of the LOC;
7. the two will meet to discuss how to keep peace between India and Pakistan.\textsuperscript{129}

Notably, like the Tashkent Declaration, the Simla Agreement also did not mention a plebiscite for the Kashmiris, although it affirmed twice the obligations under the UN Charter.\textsuperscript{130} Finally, the agreement stated that mutual differences or legal interpretations cannot be used to justify any revision of the Line of Control.\textsuperscript{131}

\textsuperscript{126} See id. \\
\textsuperscript{128} See Khan, supra note 3, at 527. \\
\textsuperscript{129} See Simla Agreement, supra note 39. \\
\textsuperscript{130} See id. \\
\textsuperscript{131} See id.
C. Bilateralism

Although the UN declarations do not give much assistance in judging the actions of India, there is more to look at in the Simla Agreement, which sets up a score of obligations for both India and Pakistan. Of the important portions of these mutual obligations is the provision regarding bilateral decision making to change the status quo. Incidentally, this provision has often been cited as the reason for controversies regarding the Simla Agreement because whenever Pakistan pushes for third party intervention, India refuses on the grounds that it is against the bilateral approach of the Simla Agreement. In fact, India has shown mistrust of third party involvement, especially the West, in solving disputes in Asia and so prefers to deal with the Kashmir issue on bilateral terms.

The Agreement also states that the parties will find a final resolution to the Kashmir problem, implying that the Agreement is not the final solution. Therefore, India and Pakistan alone must convene to decide the Kashmir issue, because that is what bilateralism requires of them. Though in theory this may work, the problem of bilateralism is that it fails to take the internal division of the Kashmiri people into account. Not all Kashmiris consider accession to India or Pakistan the only alternatives. Even for India and Pakistan, a bilateral approach may not be the best one for the Kashmir dispute because both governments use the issue as a political vehicle. Thus, Kashmir is a major part of both countries' foreign relations and internal politics. Consequently, any bilateral negotiation would not be free of these internal political considerations, which only muddle the already complicated situation in Kashmir. Both countries have serious pressure to hold on to Kashmir—all of it—and to give nothing to the other side. Neither is willing to compromise on the issue, partly because of pressure of domestic politics.

Historically, although neither can agree on where Kashmir should accede, both can agree that Kashmir should not have independence. Thus, a bilateral
approach would, at best, end with an accession solution. It confines the debate between India and Pakistan as representatives of what the Kashmiris will want to do. Sadly, though, even Kashmiris are not positive on the best future plans because of serious internal division on the accession-independence issue.\footnote{See St. John, supra note 5, at 178.}

Nonetheless, India does have a strong case for demanding a bilateral approach because the rest of the Agreement refers only to consensual methods of dispute resolution.\footnote{See Khan, supra note 2, at 528.} In other words, the resolution of the Kashmir issue is severely limited because the only way to solve it under the Simla Agreement is through a settlement that is acceptable to both.\footnote{See id.} Neither country can force the other to adhere to a settlement. That means that if India refuses third party intervention, Pakistan cannot legally force the issue upon India.\footnote{See id. at 529.} Ironically, the two cannot find much common ground, especially regarding Kashmir. Thus, the bilateral approach to a solution is highly unlikely to be effective.\footnote{See id. at 529.}

\textbf{D. Plebiscite}

The first legal question is regarding the plebiscite for the Kashmiri people. While it is not mentioned in the Simla Agreement, it seems the best starting point because there are specific United Nations declarations on the topic. In fact, both Pakistan and Kashmiris point to these declarations\footnote{See Statement by the Permanent Representative of Pakistan to the Security Council on 23 December 1998, U.N. SCOR, 3954th mtg., at 8, U.N. Doc. S/PV.3954 (Resumption) (1998) [hereinafter ‘Pakistan’s Statement, December 23’] and Memorandum Presented by True Representatives of the Kashmiri People to the OIC, September 29, 1997, (visited Dec. 28, 1999) <http://www.U.N..int/pakistan/1597929a.htm> (on file with author); See also, Schofield, supra note 92, at 286.} in their argument against Indian occupation.

According to the rules of international law, United Nations declarations are all part of the corpus of international law, but only the Security Council decisions are binding on member states.\footnote{See Christopher C. Joyner, Conclusion: The United Nations as International Law-Giver, in THE UNITED NATIONS AND INTERNATIONAL LAW 439 (Christopher C. Joyner ed., 1997). General Assembly resolutions, although, declaratory of international law are recommendations rather than binding rules. See id. at 441. Except for administrative and budgetary issues, the General Assembly does not have authority to make binding legal norms without the consent of the states involved. See id. at 440. Hence, any General Assembly resolutions on point will be left out in the legal analysis.} According to the UN Charter,
member states have an obligation to carry out the decisions of the Security Council. At the same time, the Security Council also makes recommendations in the settlement of disputes, but such recommendations cannot bind the state. Thus, it is vital to look at the language of the UN resolutions to see if they have legal effect.

The first of the pertinent instruments is Resolution 38 from January 1948. This deals with the 1948 hostilities and focuses mainly on procuring a ceasefire. There is no mention of a plebiscite or of self-determination for the Kashmiri people. Similarly, Resolution 39 does not mention self-determination because it focuses on setting up a commission in the area. Resolution 47 of April 1948 is, on the other hand, more helpful. It instructs India and Pakistan not only to demilitarize, but also to conduct a plebiscite. In fact, it is the government of India that is given the responsibility for ensuring self-determination for the Kashmiri people.

The language employed in this resolution does not sound obligatory. In fact, as a preamble to the instructions, the Security Council states that it "recommends to the Governments of India and Pakistan the following measures . . . ." The employment of the term "recommends," is critical because it puts Resolution 47 into the category of recommendations rather than binding resolutions. Obligatory terms such as "instructs" refer only to the two states' cooperation with the Commission.

Similarly, subsequent resolutions such as 80 and 91 do not create any more obligations. Instead, they remind the parties of Resolution 47 and obligate them to all duties under prior resolutions. Resolution 91 does state, however, "[o]bserving that the question is to be decided" through a plebiscite. Once again, the terms do not sound as if they oblige the parties. Instead, they seem like recommendations. Hence, it would be difficult to argue that there is a legal breach of obligations by India in not committing to a plebiscite in Kashmir pursuant to the resolutions.

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148 See U.N. CHARTER art. 25.
149 See U.N. CHARTER art. 36, para 1.
151 See id.
154 See id. at § B(8).
155 Id.
156 See id.
157 See Res. 91, supra note 41 and Res. 80, supra note 41.
158 See, e.g., Res. 91, supra note 41.
159 Id.
As for the Simla Agreement, there is no mention of a plebiscite. If the analysis focuses on the four corners of that Agreement, there is really no legal basis for Kashmiri self-determination. There is historical evidence to the contrary, however. In fact, the original accession by the Maharaja of Jammu and Kashmir to India was conditioned on an election for the Kashmiri people when conditions allowed it. The UN resolutions further supported the idea of Kashmiri self-determination. However, the idea did not make it into the Simla Agreement or the Tashkent Declaration. As such, there is only a weak legal argument that India is in breach for not giving self-determination to the people of Kashmir. Neither the Security Council resolutions nor the Simla Agreement and Tashkent Declaration put into writing that there is a legal obligation to hold elections.

E. Territorial Integrity

The Simla Agreement provisions dealing with territorial integrity and positive obligations of both countries in the maintenance of peace are also notable. The Line of Control, which serves as a de facto border between the countries, partitions Jammu and Kashmir between the parties; the Agreement mandates that neither party can alter the line unilaterally through threat or use of force. Along with this mandate, the treaty also references the UN Charter, which prohibits the threat or use of force against another state. The references to the Charter imply that the Simla Agreement and the parties to it are to be governed by the “full force of contemporary international law.” In addition, the importance of the Line of Control as a border is that any invasion of the line or any threat thereof will be considered a threat against the territorial integrity of the other state.

This also means that the bulk of Kashmir is technically within Indian borders. So, the LOC is not simply a cease-fire line or a demilitarized zone, but, for all intents and purposes, it is the border. This distinction will become important in the analysis of recent actions by both countries.

Along with the definition of the de facto border, the Simla Agreement has a broad definition of territorial integrity. Not only can neither country use force or threat of force, but neither is allowed to be involved in, aid, or

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160 See Schofield, supra note 92, at 148.
161 See Khan, supra note 2, at 526.
162 See U.N. CHARTER art. 2.
163 Khan, supra note 2, at 526.
164 See id. at 523.
165 See id.
encourage any action by a third party that may threaten peace in the area. Moreover, the treaty mandates against any interference by one in the internal affairs of the other country. Finally, the treaty also requires that “[b]oth governments will take all steps within their power to prevent hostile propaganda against each other.”

With this in mind, many events of the recent past may be considered contrary to the treaty obligations of both countries. For example, both countries claim that the other is helping separatist groups, which could be considered not only interference with internal affairs of the other country, but also contrary to the provision against encouraging activities that threaten peace in the area. India claims that Pakistan is involved in assisting Sikh nationalists of the Indian Punjab, while Pakistan claims that India is funding the Sindhi separatists in Pakistan. These allegations, if true, would be contrary to the provisions of the 1972 Agreement, and India recognizes them as such.

Further, since the 1970’s, Pakistan has been involved in various forms of aid to Kashmiri insurgents. Pakistan has funded various madrassas (Islamic schools) in the area, which apparently teach anti-Indian propaganda to Kashmiri children as well as encouraging pro-Pakistani sentiment by emphasizing their religious bond to the latter. Once again, this type of propaganda is forbidden by the Simla Agreement.

Most importantly, though, Pakistani support for insurgent groups has been very prominent in the areas of arms supply and training within Pakistani borders. In fact, these training camps may have been the reason for the last serious threat of confrontation. In May of 1990, India, in an attempt to restore peace within Kashmir, decided to do away with the insurgent

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166 See Simla Agreement, supra note 39, at ¶ ii.
167 See id. at ¶ iii.
168 Id. at ¶ iv.
170 Sikhs are a minority religious group in India and are centered in the Indian province of Punjab. On the other hand, the Sindhis are a tribal group indigenous to the Sindh province of Pakistan.
171 See The PRS Group, supra note 169, at 1.
172 See CTBT India, supra note 66, at ¶ 6. In fact, the Indian government refers to the Kashmir situation as a consequence of Pakistan’s “territorial ambitions” because Pakistan “has deliberately sought to project a distorted version of developments in the State [Kashmir] since 1947 when the State joined the union of India . . . .” See id.
173 See GANGULY, supra note 8, at 15.
174 See id. at 15.
175 See id.
176 See id. at 110.
sanctuaries and training camps located in Pakistani Kashmir. In response, Pakistan put its air force on nuclear alert. The impending confrontation was cooled due to diplomatic intervention by U.S. officials.

Even though that particular situation was resolved, India continues to blame Pakistan for encouraging Kashmiri guerrilla groups. In turn, Pakistan blames India for human rights abuses and terrorism. Because the area is administered by Indian troops, the official reports rarely say that the Indian forces are abusing human rights. However, even domestic Indian agencies and several international agencies have noted that there are grave human rights abuses that occur in Kashmir. There are also similar allegations against Pakistan.

Focusing the attention solely on the territorial integrity issue, it is evident that both India and Pakistan are responsible for violation of the Simla Agreement. The ongoing border clashes and negative propaganda by both parties are in direct conflict with the Agreement. However, neither country has taken the initiative to institute any proceedings with the International Court of Justice, probably because of the emphasis on bilateralism in the treaty and in Indian foreign policy.

This too changed on September 22, 1999, when Pakistan instituted proceedings against India for shooting down a Pakistani aircraft on August 10, 1999. Rather than the Simla Agreement, Pakistan focused on India's obligations under the UN Charter, the Agreement of Prevention of Air Space Violations and customary international law. In this situation, as with many other border clashes, the dispute crossed the Line of Control. Since the LOC is the de facto border, the clashes could very well be considered illegal and

177 See id. at 110-11.
178 See id.
179 See id.
180 Cf. CTBT India, supra note 66.
182 See SCHOFIELD, supra note 92, at 263.
185 See id.
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against the UN Charter prohibitions against violation of territorial integrity of another state.

Another obligation under the Simla Agreement is that neither party will change the status quo of the area. There is, however, no definition for the "status quo." Does the term refer to crossing the border to change the status quo physically, or does it prohibit changing the political situation in the other through philosophical and financial support of internal separatists? Because the agreement mentions propaganda specifically, logic would say that change of the status quo by propaganda is prohibited. Perhaps, the writers of the treaty realized what an amazing weapon politics can be. From that point of view, the propaganda that India alleges by the Pakistanis could certainly be considered as having changed the political status quo. After all, where did internal militants come from? They are major players, and according to Ganguly, they only came around during the 1990's. So, their joining the fight is by all means a change in the status quo. Is Pakistan responsible for that change?

Also, India has recently heightened its nationalist agenda and its propaganda machine has been reminding the Kashmiris of their Indian-ness. Since there are Kashmiri militants fighting on India's side, maybe India has had a hand in the changing of the status quo as well.


187 A subtle example of such nationalism is evident in statements by Indian officials. Prime Minister Vajpayee, for instance, blames Pakistan for "[t]errorist attaches on our security forces and civilians." Prime Minister Vajpayee's Statement on the Situation in Jammu & Kashmir, January 18, 2001 (visited March 26, 2001) <http://www.indianembassy.org/special/cabinet/primeminister/pm_january_18_2001.htm> (emphasis added) (on file with author). In another statement, Vajpayee says, "[o]ur sisters and brothers in the State [Jammu and Kashmir] have always longed for the return of peace and normalcy ...." Statement by the Prime Minister Atal Bihari Vajpayee on the Situation in Jammu & Kashmir, November 19, 2000 (visited March 26, 2001) <http://www.indianembassy.org/specia...rimeminister/pm_j&kNov_19_2000.htm> (on file with author). Perhaps, the terms of inclusion by the Prime Minister are in response to feelings of resentment by Kashmiris who feel that "journalists have little time and no courage to write truthfully about what is really happening in the Valley." 'Your Country and Mine,' BUSINESS LINE, July 12, 2000 (visited March 24, 2001) <www.indiaserver.com/businessline/2000/07/12/stories/041255ma.htm> (on file with author). According to one author, the Indian people's views on Kashmir can be summed up as: "Kashmir is ours and will always remain with us. After all, it is like a moustache on a man's face." Id.
F. Nuclear Proliferation

The biggest change in the area has been nuclear proliferation by the countries. Now, the question is whether such proliferation was contemplated by the Simla Agreement. Whenever one discusses the legality of nuclear weapons, the first thought goes to the Nuclear Non-Proliferation Treaty; however, both Pakistan and India have steadfastly refused to sign the treaty for various reasons. Thus, it cannot be the basis for judging the legality of their nuclear actions. On the other hand, there is the possibility of analyzing nuclear proliferation under not only the Simla Agreement, but also under customary international law and the advisory opinion of the International Court of Justice (ICJ).

1. Customary International Law

There is no treaty specifically prohibiting possession or development of nuclear weapons, and thus, the weapons are not per se illegal. Customary international law may, then, be the best source for discovering the legal implication of nuclear weapons possession. In this context, law will appear in the form of jus cogens (norms binding on all international actors) and opinio juris (norms that have developed with the consent and practice of states).

The jus cogens rules tend to be very general because they bind all international actors without a treaty, without ratification. Because of this, jus cogens rules are few and not extended very often. Among jus cogens norms is that of respecting the sovereignty and territorial integrity of other international actors. The UN Charter declares this norm in Article 2. While the ongoing clashes over Kashmir (in so much as they violate territorial integrity) do qualify as violations of the Charter, is the same true for the

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190 See id.

191 See LOUIS HENKIN, ET AL., INTERNATIONAL LAW CASES AND MATERIALS 91-92 (3d ed. 1993) (Jus Cogens (Preemptory Norms)).

192 U.N. CHARTER art. 2 (stating that “The Organization is based on the principle of the sovereign equality of all its Members... 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.”).
nuclear testing? In other words, could the armament by India and Pakistan be considered a threat of force against the political independence of another state?

a. Deterrence

Nuclear weapons theory is based on the idea of deterrence. In fact, India specifically refers to this theory in its nuclear program and even the ICJ discusses it in its advisory opinion. According to the theory, nuclear weapons provide security to a state because a potential aggressor will not risk nuclear war by violating the territorial integrity of the nuclear state. The case in point would be the Cold War where both the United States and the Soviet Union remained rivals but did not go to war because of the fear of the use of nuclear weapons. The flaw of the theory according to some is that "[p]ossession of nuclear weapons may indeed justify an inference of preparedness to use them." In other words, weaponization with deterrence in mind means that the state is willing to use the weapons at some point, and this future willingness to use the weapons could constitute a threat. According to the ICJ, this argument could be valid, but it hinges on the intent of the parties. So, it is vital to look at the type of use and whether it is directed at the territorial integrity of a state or against the objectives of the UN Charter.

Pakistan considers the Indian tests to be exactly that—a threat. In a statement to the United Nations, the Pakistani representative said that the tests by India "affirmed that it had the "big bomb" and [that India] threatened Pakistan with use of nuclear weapons and held out a threat of nuclear blackmail to impose a military solution in Kashmir." This was the rationale

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193 See Weston, supra note 189, at 13.
194 See Paper Laid on the Table, supra note 49, at ¶ 20 (referring to its nuclear capabilities as a nuclear deterrent).
195 See Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. (I) 226 (July 8), 254, para 66.
196 See Weston, supra note 189, at 13.
197 Legality of the Threat or Use of Nuclear Weapons, supra note 195, at 246, para 48. In a November 1998 resolution, the General Assembly also noted that "the proposition that nuclear weapons can be retained in perpetuity and never used accidentally or by decision denies credibility, and that the only complete defence (sic) is the elimination of nuclear weapons . . . ." See U.N. GAOR 1st Comm., 53rd Sess., U.N. Doc. A/C.1/53/L.48/REV.1 (1998).
198 See id.
199 See id.
for their own tests. Even though Pakistan felt the tests to be a threat, an analysis under the ICJ standard reveals that they probably were not. After all, India repeatedly stated that the tests were not directed towards any particular nation, but were “peaceful.” Its official reasons are national security and defense. Despite the logic of the inference of a threat, there has been no official nuclear aggression or threat. In fact, India reiterates a no-first-use policy. Looking at the ICJ language focused on the intent and credibility of any intent for future use, India’s testing is probably not illegal. On the other hand, some scholars urge that even technically legal possession should be illegal because of the flaws in the deterrent theory. Despite the appeal of the idea, under current law as interpreted by the ICJ, India’s nuclear testing was not illegal. By extension, because Pakistan tested its weapons in response to what it considered a real threat to its national security, the Pakistani tests were legal as well.

On a related note, India considers its nuclear option an exercise of its sovereignty. According to the Indian National Security Advisory Board, “[a]utonomy of decision making in the developmental process and in strategic matters is an inalienable democratic right of the Indian people.” In an address to the Parliament, the Indian executive said that “India believes it is the sovereign right of every nation to make a judgment regarding its supreme national interests and exercise its sovereign choice.” This basis for the nuclear option, i.e., sovereignty, also poses a serious challenge to a general international law argument against Indian testing. After all, probably the most fundamental jus cogens principle is that of sovereign equality of a state. In fact, international law is a positivist institution based on sovereign equality, so that each nation chooses to be bound by international law because it has the sovereign power to do so. This underlying principle of India’s nuclear

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201 Interview with Vajpayee, supra note 59, at ¶ 9.
202 See id. See also India Hits out at Critics of its Nuclear Tests, supra note 69; Paper Laid on the Table, supra note 49.
203 See NSAB, supra note 63.
205 See Sharif’s remarks, supra note 85.
206 See, NSAB, supra note 63, at § 1.3.
207 Id.
208 Paper Laid on the Table, supra note 49, at 2.
209 See HENKIN, supra note 191, at 92 (stating that “the equality of states” is a recognized principle of jus cogens).
210 See id. at 10 (noting that “International law has been said not to be “real law” since it is
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policy is nearly impossible to argue because even if testing nuclear weapons could be considered a threat under the ICJ definition, it would be overridden by the venerable argument of sovereign equality. As for Pakistan, its tests having been in direct response to India could not even qualify as a threat because the requisite hostile intention would be missing from the defensive posture Pakistan has already taken towards its nuclear program. Therefore, the tests by India and Pakistan are not illegal under the general principles of international law.

2. The Simla Agreement

However, moving to the more specific source of the Simla Agreement, the original tests by India could be considered illegal because they have changed the status quo of the area. One of the major parts of the Simla Agreement was the prohibition against any unilateral action to change the status quo.211 In this context, the nuclear tests do significantly change the face of the Kashmir conflict. Pakistan considers the nuclear tests to be inextricably linked to Kashmir.212 On the Indian side, even though neither Pakistan nor Kashmir are specifically mentioned in connection with the nuclear tests, issues surrounding both are subtly present. After all, there are references to “clandestine acquisition of nuclear materials,” and to “externally aided and abetted terrorism, militancy and clandestine war through hired mercenaries.”213 China, a known nuclear power, is obviously not the security threat to which these phrases refer. The only other option is that they refer to India’s other threat—Pakistan. Further, references to externally aided terrorism are also aimed at Pakistan and specifically Pakistan’s actions in Kashmir. Similar sentiments were reiterated in another statement in Parliament by Prime Minister Vajpayee.214 With the history of India and Pakistani rivalries in mind, the inference that nuclear weapons do have an affect on the Kashmir issue is not far fetched. In fact, nuclear tests have a major impact on the Kashmir issue because now a conflict over Kashmir could turn into a nuclear war. In this context, Indian tests (having been first) would be illegal because they were a unilateral change in the status quo.

commonly disregarded, states obeying it only when they wish to, when it is in their interest to do so.”).

211 See Simla Agreement, supra note 39.

212 See LETTERDATED 2 JULY 1998, supra note 200, at 3 (declaring that “Jammu and Kashmir lies at the heart of the problems between India and Pakistan.”).

213 Paper Laid on the Table, supra note 49, at ¶ 8.

214 See Suo Moto Statement, supra note 2, at para 7.
Under the Simla Agreement, therefore, there have been a score of violations. Both India and Pakistan have been guilty of these transgressions whether they were in the form of propaganda, military exchange at the Line of Control, or aid to terrorists and insurgents. Nuclear armament is simply the next violation.

IV. SOLUTIONS

The question now is what can be done with the many violations by both countries? Is there a solution that will actively deal with not only settling the Kashmir dispute, but also stabilizing the nuclear balance of the area? In fact, the international community does have a score of solutions, some even suggested by India and Pakistan. The only requirement is that there has to be compromise by India and Pakistan and action by the world at large. The nuclear dimension added to the Kashmir dispute has raised the issue to a critical stage and it is now time for the international community to revisit Kashmir and try to find a solution for it. What that means for India and Pakistan is that they must recognize the miserable failure of a bilateral approach to the conflict.

In the process of finding a workable solution to Kashmir, one has to look at all of the parties involved and consider an approach that will appease each. That may be the most difficult aspect of the Kashmir debate. India is resolute that Kashmir is an Indian state and that the accession by the Maharaja was legal and final.215 On the other hand, Pakistan's problem with Kashmir is specifically that the accession was not legal.216 At the same time, India refuses to resolve the Kashmir issue in a multilateral forum and continues to press for bilateral negotiations for both the nuclear problem and the Kashmir situation.217 On the other hand, Pakistan continues to press for international involvement.218

As discussed earlier, a bilateral approach has proven to be very problematic; however, the framework of the Simla Agreement does depend on it.


216 See SCHOFIELD, supra note 92, at 163.

217 See, e.g., A Comprehensive Note Jammu & Kashmir, supra note 183 and NSAB, supra note 63.

218 See SCOR Debate, June 6, 1998, supra note 86, at 31 (stating that the U.N. has failed its international duty to maintain peace by leaving India and Pakistan to settle the problems themselves); see also, LETTER DATED 2 JULY 1998, supra note 200, at 3.
Despite the numerous violations by both countries, there have been attempts at a bilateral approach. The most recent result was the Lahore Declaration of February 21, 1999. Without deciding on any specific issues, the instrument simply states that the countries are determined to execute the “letter and spirit” of the Simla Agreement by “intensify[ing] their composite and integrated dialogue process for an early and positive outcome of the agreed bilateral agenda.” However, other than reaffirming the Simla Agreement, the declaration provides no concrete mechanisms for a solution. It is, essentially, another paper that, while affirming in theory that there will be a solution, does not define how that solution will come about.

Looking at the last fifty-three years, it is apparent that there is a serious problem between the countries concerning Kashmir. What is also apparent is that the mechanisms that have been used are not working. More specifically, it is the bilateral approach that has failed. In fact, others have also recognized that the negotiation process has proven fruitless. In the same vein, it is recognized that the use of bilateralism to cut off the Kashmir debate from the international arena is counter-productive. In the words of the Pakistani government, “[i]f Pakistan and India could have sorted out these problems by themselves, today South Asia would not have been nuclearized.” The sentiment is very realistic. Indeed, Pakistan and India have proven that they cannot find a solution to their problems on their own, and any solution has to come with the understanding that the status quo is not acceptable. For that to happen, “both countries may have to give away the moral high ground and admit some incontrovertible truths.” In essence, strict bilateralism has to be abandoned for a different negotiation process whereby the United Nations and the international community could intervene and find a diplomatic solution.

Another important thing to recognize is that aside from accession, there is a very real, and perhaps a better solution: independence for the Kashmiri people. In any case, the future should be decided by the Kashmiris, i.e., self-determination. But, the question remains as to who will be responsible for carrying out the elections whereby the Kashmiris can decide their own future?

Although the bulk of Kashmir is within India, leaving the elections in Indian hands may not be wise. The international community has done this

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220 See Khan, supra note 2, at 529.
221 See id. at 530.
223 SCHOFIELD, supra note 92, at 292.
224 See Khan, supra note 2, at 531.
before, and it proved unsuccessful. So, perhaps, it is time for a more active role from the international community, much as Pakistan has been demanding.

There are those who feel that a plebiscite is neither workable nor desirable. After all, the problems range from who would be considered ‘Kashmiri’ and be eligible to vote and who would make sure there would be an impartial election to what would happen to the minority Hindu and Buddhist populations. However, rather than denying the right of self-determination to the whole group and leaving the situation as is, it is more desirable to allow them the opportunity to at least try and choose their own future. Aside from this, a further difficulty is that India probably would not agree to a plebiscite. In fact, there is doubt if even Pakistan would really care for a true vote because neither country wants to give up any control over Kashmir whether it is the Indian occupied valley or the Pakistani occupied Azad Kashmir.

As much as India and Pakistan desire, however, there is no clear cut answer to the situation. After all, they are not the only players. And, since it is the Kashmiris who are in the thick of the disaster, they should have a hand in deciding what happens to them. As one scholar notes, “[u]nless the Kashmiris themselves can be made to feel that they have been given the freedom to choose their destiny, the issue may never be laid to rest.”

To counteract the problems of a plebiscite controlled by India, the United Nations should step in as the unbiased mediator. After all, in this era of burgeoning humanitarian rights, it seems only logical for the international community to enter and protect the rights of the Kashmiri people as it had affirmed in the UN declarations.

Another possible solution is some sort of an Indian protectorate. Under the traditional protectorate model, the Kashmiri insurgency would make a treaty with the Indian government so that except for defense, the Kashmiris could control their own internal and external policies. The option may be viable, but it may not be attractive for India, which claims Kashmir as its own

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225 See, e.g., GANGULY, supra note 8, at 142-43.
See id.
226 See Schofield, supra note 92, at 286. One of the serious Indian concerns is that if Kashmir is given the choice and does decide on independence, then other states will also try to secede from the Indian Union. See id.
228 See GANGULY, supra note 8, at 145.
229 Schofield, supra note 92, at 291.
230 See GANGULY, supra note 8, at 144.
231 See id.
state; however, India will have to choose an unattractive option in any case to try and put the issue to rest. Perhaps one in which India retains some control may be more desirable for India and considerably less desirable for Pakistan. Another option is that the United Nations could create a trusteeship in Kashmir as was done with many former colonies after World War I. All of the former trusteeships have now achieved self-government, and if the international community was successful with those areas, perhaps, that is an option for Kashmir. With a UN trusteeship in Kashmir, Pakistan could not complain that there is no self-determination or that India is suppressing the Kashmiri people. On the other hand, India could finally solve the Kashmiri problem by handing it over to the trusteeship.

There has been concern that the UN peacekeeping operations may not be productive in solving long-term conflicts; however, these concerns regard traditional peacekeeping, which has focused on maintaining the status quo by halting hostilities rather than by attempting to solve the underlying problem. Instead, the United Nations should take an active part by providing peacekeeping while also pushing for a diplomatic solution for Kashmir that will appease all who are involved. However, for this to be successful, both Pakistan and India must cooperate and compromise, something that they have been unwilling to do historically.

Another important part of finding a peaceful solution to the Kashmir issue is to forge some understanding that military force will not be used on or across the border by either party. Rather than reiterating theoretical commitments to peace, it is time for India and Pakistan to come to a cease-fire agreement that they will both honor. This will also be an essential in alleviating the dangers of a nuclear war between the rivals. Perhaps, the United States, with its historical ties to both countries and Russia and China could also get involved in diplomatically finding a solution to demilitarize Kashmir and push for Kashmiri self-determination. The United States "could be instrumental in

232 See SCHOFIELD, supra note 92, at 289.
233 See HENKIN, supra note 191, at 296.
234 See id.
236 See id. at 4.
237 See id. at 5.
238 See SCHOFIELD, supra note 92, at 289.
240 See id.
helping to reduce tensions between the countries over . . . Kashmir and in applying pressure to get them both to sign the Comprehensive Test Ban Treaty . . . ”241

At the same time, it is vital that there be some resolution to halting a prospective nuclear arms race in the region. As noted earlier, both countries have refused to sign the Nuclear Nonproliferation Treaty. They also refuse to sign and ratify the Comprehensive Test Ban Treaty, although both countries have declared moratoriums on further testing; however, the unilateral declarations to discontinue testing are far from a permanent solution.

In order to forge a permanent solution to the nuclear problem there has to be a universal solution to nuclear weapons. After all, one of India’s main objections to the Comprehensive Test Ban Treaty (CTBT) is that it is not comprehensive enough.242 The CTBT, for example, forbids all explosive tests, which may be the crux of Asian nuclear capabilities, but it leaves room for the United States to test its weapons through computer simulation.243 The problem is similar to the problems with the NPT—while the treaty might disable Asian nuclear capabilities, it leaves the West free to develop its own weapons with its superior technology.244 Pakistan, on the other hand, refuses to sign the CTBT until India does so as well.245

The problem is that the world has been unable to find a universal approach to nuclear disarmament. But, it seems unwise to leave South Asia on its own while the international community decides on a global solution. Perhaps starting a regional approach to the nuclear issue may be the best solution for South Asia. Currently, Pakistan is pushing for India to enter negotiation for a fissile material control treaty.246 Unfortunately, India is not entertaining the idea.247 In fact, India has said that “regionalization of the concept of a world

242 See CTBT India, supra note 66.
244 See Press Release of the U.N. Permanent Mission of India (visited Dec. 27, 1999) <www.clw.org/coalition/inU.N.0515.htm> (on file with author) (referring to the Nuclear States’ refusal to alter their nuclear programs while attempting to limit Indian nuclear capabilities).
245 See Pakistan to Retain Right to Conduct Nuclear Tests, supra note 91.
free of nuclear weapons is inconsistent with our global approach to this question.\textsuperscript{248} Rather, India prefers the more comprehensive approach of a complete and universal disarmament.\textsuperscript{249} 

Although the Indian position on test ban does carry some weight, it is too stringent an approach. It is counter-productive because it leaves the status quo unchanged while waiting out the possibility of a totally comprehensive test ban. Instead, India and Pakistan should both accept the CTBT with all of its weaknesses if they truly are committed to nuclear disarmament. The ‘all or nothing’ approach to nuclear testing takes the positivist approach to the international issue too far. Self-defense and deterrence aside, nuclear weapons are a dangerous future for the world, and for there to be a successful end to the nuclear threat, there has to be some compromise between the state’s perception of its own security and the reality of nuclear weapons for the rest of the world. As with the Kashmir issue, there is a need for international involvement in order for, so that both Pakistan and India to come to some solution to stabilize the area once and for all. Initiatives by the other nuclear powers to actively move towards disarmament and to give confidence building measures to the non-nuclear states are all a part of creating a world community that is working cohesively to minimize the nuclear threat.

V. CONCLUSION

The Twentieth Century proved to be one filled with war and terrorism, one bombarded with regional conflicts. It was also the century that saw the independence of a myriad nations and peoples. Now, that the Twenty-First Century is beginning, perhaps the world should welcome it as the century of peace. But, peace must begin somewhere, and one of the best places for it to begin is in South Asia. The debate over Kashmir is now 53 years old and it has brought along its dangerous new companion—nuclear weapons.

In order to conciliate the fire that remains buried deep in Pakistani and Indian politics, it is time for the international community to enter and take its new responsibilities. It is time for the world to solve the Kashmiri problem and help bring peace to a war torn nation of people. In the democratic vain of anti-colonialism, it is time to give true self-determination to the Kashmiris, and it is finally time for India and Pakistan to let go of the historic conflict and

\textsuperscript{248} \textbf{STATEMENT BY THE INDIAN REPRESENTATIVE TO THE GENERAL ASSEMBLY, U.N. GAOR, 32nd Sess., 100th mtg., at 26, U.N. Doc. A/32/PV.100 (1977).}
\textsuperscript{249} See id. at 43.
find a real, workable solution by cooperating with the international community.