INTERNATIONAL LAW AND THE NUCLEAR THREAT IN KASHMIR: A PROPOSAL FOR A U.S.-LED RESOLUTION TO THE DISPUTE UNDER UN AUTHORITY

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I. INTRODUCTION

India and Pakistan have been embroiled in an intractable dispute over the Kashmir region since the end of British colonial rule. In 1998, the conflict became far more troubling to the international community, as both India and Pakistan developed and tested nuclear weapons. The United States and other countries have taken measures, including economic sanctions to encourage India and Pakistan to halt the advancement of their nuclear programs. However, since India and Pakistan have colorable claims under international law for developing and maintaining their nuclear weapons, the focus should be on resolving the Kashmir dispute so as to avert a nuclear conflict. This Note will argue that the United Nations Security Council (U.N.S.C.) should pass a new resolution aimed at resolving the dispute; to be successful, this resolution must be backed diplomatically and, if necessary, militarily, by the United States.

In October 2002, the United States Congress authorized President George W. Bush to use force against Iraq to enforce U.N.S.C. resolutions pertaining to the development of weapons of mass destruction. In November 2002, the U.N.S.C. passed Resolution 1441, which required Iraq to cooperate fully with UN weapons inspectors, to give a full and accurate account of its weapons of mass destruction programs, and to disarm it to the extent that weapons and

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4 Id. at 240.

After several months of renewed weapons inspections in Iraq and a failed attempt by the United States to gain support for a second U.N.S.C. resolution authorizing the use of force against Iraq, the United States invaded Iraq in March 2003 under the auspices of Resolution 1441. An authorization of the kind sought by the United States would necessarily be premised on a threat to "international peace and security" within the meaning of Chapter VII of the UN Charter. However, this Note contends that the situation in Kashmir was and is at least as great a threat to international peace and security as that posed by Iraq, if not greater. Thus, the United States should deal with the conflict in Kashmir as urgently as it addressed the threat of weapons of mass destruction in Iraq.

This Note examines the situation in Kashmir, including the extent of its threat to international peace and security and a possible means of resolution of the conflict. Part II gives the historical background of the Kashmir conflict. Part III looks at the international security implications of the current situation in Kashmir. Part IV argues that customary international law and treaties are ineffective in deterring a potential nuclear conflict between India and Pakistan over Kashmir, and that, therefore, the focus, both legally and practically, should be on resolving the territorial dispute. Part V examines existing U.N.S.C. resolutions regarding Kashmir. Part VI compares the threat to international peace and security and the legal justification for U.N.S.C. action in the Kashmir situation to that of other situations, specifically Iraq, in which the UN has been asked to act. Part VII suggests that a new international custom has developed since the end of the Cold War, with the United States serving as the enforcement mechanism of similar U.N.S.C. resolutions, and that this near custom is necessary to ensure that the resolutions are ultimately effective. This Note will conclude that the Kashmir conflict is a serious threat.


8 See U.N. Charter art. 42.
to international peace and security that cannot be resolved by non-proliferation measures, and that the combined action of the United Nations and the United States is required to avert disaster.

II. HISTORICAL BACKGROUND

A. Post-Colonial Division of India

The former British colony of India consisted of nine provinces and 584 "princely states" which retained their internal sovereignty while being subject to the British Crown in relation to external affairs. 9 Each of these princely states was ruled by either a Hindu leader, called a Maharajah, or a Muslim leader, called a Nawab. 10 At the end of British colonial rule in 1947, the princely states were each granted complete independence. 11 The provinces were partitioned into the states of Pakistan and India. 12 The newly independent princely states had three options: (1) join Pakistan, the newly created Muslim state in the north, or (2) join the sub-continental Indian state, or (3) become an altogether independent state. 13 Generally, states with majority Muslim populations joined Pakistan while states with majority Hindu populations joined India. However, some states made their choice based on geography. 14

The princely state of Kashmir 15 was somewhat unusual in that the majority of its population was Muslim, but it was ruled by a Hindu leader, Maharajah Hari Singh. 16 Kashmir initially attempted to become independent. When Pakistan attempted to annex the state, citing as justification the majority Muslim population, Singh solicited the military aid of India. 17 India demanded

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9 See Khan, supra note 1, at 504.
10 Id. at 504-05.
11 See id.
12 Id. at 505.
13 See id.
15 The full original name of the princely state was "Jammu and Kashmir". Because of modern usage and for the sake of brevity, this Note will refer to both the former state and the currently disputed territory as simply "Kashmir."
16 See Anthony Wanis St. John, The Mediating Role in the Kashmir Dispute Between India and Pakistan, 21 FLETCHER F. WoRLD AFF. 173, 175 (1997). But see Khan, supra note 1, at 507 (discussing the accession by the Nawab of Junagadh, a Muslim, to Pakistan against the wishes of his predominantly Hindu citizenry).
17 See Feeley, supra note 14, at 780.
as a condition of its assistance that Kashmir join India. Singh agreed, and India pushed the Pakistani troops back into the western third of Kashmir, with both sides eventually settling on the militarized "Line of Control." This line has been the boundary of the dispute since 1948.

B. Subsequent Conflict

Since the initial conflict following partition in 1947, India and Pakistan have fought three wars, two of which were explicitly over the Kashmir region. Even when the countries have not been officially at war, skirmishes along the Kashmir border have been almost constant. Since the two nations developed nuclear weapons programs, the conflict has become a grave threat to the stability not just to the region, but of the world. A nuclear conflict between these two populous nations would have global security complications, particularly for China, Russia, and the Middle East. Despite some recent diplomatic olive branches extended by India and Pakistan, the underlying tensions remain high and the situation has great potential for conflict.

III. SIGNIFICANCE OF THE CURRENT SITUATION IN KASHMIR

A. Nuclear Threat

Prior to 1998, the United States and other major powers with sophisticated intelligence operations assumed that India and Pakistan were non-nuclear states, despite some evidence indicating development of nuclear programs.

18 See St. John, supra note 16, at 175.
19 See Guthrie, supra note 2, at 498.
20 See id.
21 Id.
22 See id.
23 See id. at 501.
24 See Gautum Singh, Separatist Leaders from Kashmir Visit New Delhi to Hold Talks with Indian Officials, ASSOCIATED PRESS NEWSWIRES, Aug. 2, 2003 (discussing talks held between a major Kashmiri separatist group and Indian officials, and mentioning recent peace gestures by both countries); see also World In Brief, WASH. POST, July 26, 2003, at A17 (describing the current situation in Kashmir as a "relative lull" since peace gestures were made in April 2003, while nonetheless reporting eleven suspected Muslim rebels and five Bangladeshis killed by Indian security forces in four separate incidents, as well as exchanges of artillery fire between Indian and Pakistani troops across the Line of Control).
25 See Guthrie, supra note 2, at 498-501.
In 1998, both nations abruptly announced their nuclear status to the world by testing nuclear weapons. Each nation uses the nuclear status of its neighbors (each other and China, which controls a small portion of Kashmir and possesses nuclear weapons) to justify the maintenance and further development of their nuclear programs.

On December 13, 2001, an attack by a Pakistan-based terrorist group on the Indian Parliament building in New Delhi killed nine Indians, and dramatically heightened tensions between India and Pakistan. Both countries moved troops closer to the Kashmiri Line of Control and clashes increased in both intensity and frequency. Both countries also moved significant weapons systems closer to the border; for example, India moved ballistic missiles capable of carrying nuclear warheads. A few months later, in late May 2002, Pakistan further exacerbated the situation by testing a nuclear-capable missile. The nations' leaders eventually heeded U.S. diplomatic calls for de-escalation and avoided what would have been their fourth all-out war since partition in 1947. However, tensions remain high and another attack similar to the one on the Parliament building could easily set off a major, perhaps nuclear, conflict. The governments of India and Pakistan have downplayed the likelihood of nuclear conflict. Instead, they claim to appreciate the consequences of a nuclear conflict and are quick to assure that any war between the two countries would be a conventional one; Pakistani President Musharraf was quoted as saying, “Any sane individual cannot even think of

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26 Id. at 499.
27 See id. at 501.
28 The five militant gunmen who perpetrated the attack were also killed. See Michael Schaffer & Thomas Omestad, India and Pakistan Become the Powder Keg Next Door, U.S. NEWS & WORLD REPORT, Jan. 14, 2002, at 18.
29 See id.
31 See Peter Popham, India Stands Firm in Its Refusal to Talk to Pakistan, INDEP. (London), June 4, 2002, at P8.
32 See Spaeth, supra note 30, at 35 (describing how U.S. Secretary of State Colin Powell and President George W. Bush urged Pakistan to crack down on militant groups and emphasized to India how Pakistan was doing so).
33 See Laura Bradford, Path To War, TIME MAG., June 10, 2002, at 34.
34 See, e.g., Popham, supra note 31, at P8 (quoting India's Defense Minister George Fernandes, “[i]f the Western powers and China know how to keep their nuclear capabilities under control, the same holds good for India and Pakistan”).
discussing a nuclear exchange,” while Indian Defense Minister George Fernandes has said “We have not been thinking nuclear.”

Still, in the case of conventional war, what happens if a conventional ballistic missile is misidentified as one bearing a nuclear warhead? The responding country would have very little time to make this important determination, and suspicion that the missile is nuclear, correct or incorrect, might provoke a nuclear response. The reliable command and control systems as well as the lines of communication between potential nuclear opponents that helped the United States and the USSR avoid nuclear conflict during the Cold War do not exist in either India or Pakistan. Also, India and Pakistan share a border; the nuclear missiles would have a much shorter distance to travel, and therefore would allow for much less reaction time, than those during the Cold War. India and Pakistan are also engaged in sporadic small-scale conventional conflict, thus greatly enhancing the opportunities for an accidental nuclear exchange.

B. Connection to Terrorism

The danger of the current situation in Kashmir goes beyond the possibility of a nuclear exchange between India and Pakistan. Another major concern is the relationship between the conflict and terrorism. There are several fundamentalist Islamic groups in Pakistan that are known to be involved in terrorism. Much of the terrorism is aimed at India in support of either Pakistani control of Kashmir or Kashmiri independence. There is also evidence of a connection between some of these groups and al-Qaeda, the

36 See Feeley, supra note 14, at 793.
37 See id.
38 See id. at 794.
39 See id. at 793.
40 See Linda Robinson, A Timeworn Terrorism List, U.S. NEWS & WORLD REPORT, May 20, 2002, at 18 (suggesting that Pakistan could have been included in President Bush’s “axis of evil” list of states sponsoring terrorism because of its support for the Taliban and Kashmiri terrorist groups).
41 See Yonah Alexander, Terrorism In the Twenty-First Century: Threats and Responses, 12 DEPAUL BUS. L.J. 59, 70 (1999) (citing Harkat ul Mujahideen as an Islamic terrorist group based in Pakistan and dedicated to liberating India’s Kashmir and discussing the group’s relationship to training camps in Afghanistan).
42 See Schaffer & Omestad, supra note 28, at 18 (describing Pakistan’s support for Kashmiri separatist groups).
terrorist group led by Osama Bin Laden, which was responsible for the September 11, 2001, attacks on the United States. According to an expert report on post-war Afghanistan,

Pakistan ... will likely soon host more Taliban members and sympathizers than Afghanistan. While Pakistan has played a crucial role in supporting American efforts to defeat the Taliban and destroy al-Qaeda, a number of powerful government institutions are highly supportive of the objectives of the Taliban and al-Qaeda ... The Pakistani security service ... is of particular concern, as well as certain agencies and personnel involved in Pakistan's nuclear weapons program.

A clear danger exists that terrorists sympathetic to or affiliated with al-Qaeda may influence Pakistani policy or perhaps even obtain access to or control of Pakistani nuclear weapons.

Pakistan is politically unstable, and the Kashmir conflict contributes to the instability. If the instability rose to the point of Musharraf losing control of the government to fundamentalists sympathetic to the cause of terrorist groups, those groups could obtain access to the country's nuclear stockpile. These conditions greatly enhance the likelihood of nuclear conflict with India, and potentially even a nuclear terrorist attack on the United States or Europe.

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43 See Alexander, supra note 41, at 71 (citing David Johnston, Evidence is Seen Linking Bin Laden to Algerian Group, N.Y. TIMES, Jan. 27, 2000, at A1).


46 See Alexander, supra note 41, at 72 (citing intelligence reports that at least a dozen groups, in addition to al-Qaeda, "have shown an interest in acquiring or actively attempting to obtain biological, chemical, or nuclear weapons").

47 See id. at 71-72 (describing the connection between al-Qaeda and Pakistani (and other) terrorist groups, the desire to obtain nuclear weapons, and al-Qaeda's intention to attack the United States and other Western-oriented governments).
IV. THE INSUFFICIENCY OF INTERNATIONAL LAW AND RELEVANT TREATIES TO DETER A NUCLEAR CONFLICT

A. Illegality of Nuclear Weapons under Customary Law

Under international law, the use, threat of use, and testing (at least above ground) of nuclear weapons is illegal. The sources supporting such a determination include an important International Court of Justice opinion and several multilateral treaties. However, for various reasons, these sources of law either do not apply to India and Pakistan and the Kashmir conflict or would be inadequate to deter a nuclear conflict in the circumstances in which one is likely to occur.

In 1996, the International Court of Justice (ICJ) delivered an advisory opinion on the legality of the testing, use, or threat of use of nuclear weapons. The ICJ concluded that the general rule is that the use of nuclear weapons is illegal due to inherent violations of humanitarian law principles. However, the ICJ left open the possibility that the use of nuclear weapons in self-defense may be legal in situations where the very existence of the state was threatened.

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49 See Guthrie, supra note 2, at 505 (stating that the LTBT is the only treaty limiting acquisition, manufacture and possession of nuclear weapons to which India and Pakistan are parties); see also Schaffer & Omestad, supra note 28, at 18 (describing circumstances under which a nuclear exchange could occur between India and Pakistan).

50 See ICJ Advisory Opinion, supra note 48.

51 See id. ¶ 92.

52 See id. ¶ 97

[1] In view of the current state of international law and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definite conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.

Id.
Under the conditions in which a nuclear conflict would likely occur in the Kashmir conflict, both India and Pakistan could plausibly invoke the "very existence" self-defense justification for their use of nuclear weapons. An intentional and unprovoked offensive launch of nuclear missiles would be both a blatant violation of international law and a suicidal act that both nations would be unlikely to undertake. Instead, the most likely scenario for a nuclear conflict between India and Pakistan would be a case of misidentifying a conventional warhead as nuclear, or another similar miscalculation by one nation that the other had attacked it with nuclear weapons. This belief would arguably justify a nuclear retaliation as well as the ensuing retaliation for the actual nuclear attack.

The point is not whether India or Pakistan would have a good legal defense after a nuclear conflict has been initiated. If a nuclear exchange did actually occur, the last thing either nation would be worried about would be justifying themselves to the international community. India could already possess up to seventy-four nuclear weapons at five kilograms of plutonium per warhead and has a reliable intermediate-range ballistic missile. Pakistan could possess between 16-20 nuclear weapons at 20 kilograms of weapon-grade uranium per warhead and also has a reliable intermediate-range ballistic missile. Given these nuclear capabilities and the disastrous results that could come from their full utilization, neither India nor Pakistan would be expected to be concerned with compliance with international law in the wake of a nuclear conflict. The point is, rather, that regardless of any general illegality of nuclear weapons under international law, their use under circumstances of self-defense by India and Pakistan would likely not be illegal; more importantly, any such illegality would not serve as a deterrent to their use under those circumstances.

53 See id.
55 See Feeley, supra note 14, at 793.
56 See ICJ Advisory Opinion, supra note 48.
57 The conventional fighting in the year or so following partition left over one million dead and as many as ten million permanently displaced. Adam Packer, Nuclear Proliferation in South Asia, 38 COLUM. J. TRANSNAT'L L. 631, 634 (2000).
58 Guthrie, supra note 2, at 499-501.
B. Relevant Treaties

India and Pakistan are parties to only a few treaties concerning nuclear weapons. They have not signed the Comprehensive Nuclear Test Ban Treaty (CTBT), but both are parties to the Limited Test Ban Treaty (LTBT), which limits testing of nuclear weapons to underground tests. Both nations are also parties to multilateral environmental treaties that arguably limit the testing and use of nuclear weapons.

The CTBT, by which neither nation is bound, bans any party from carrying out any test explosion or other nuclear explosion. The LTBT prohibits nations from "causing, encouraging, or in any way participating in, the carrying out [of] any nuclear weapon test explosion" in the atmosphere, in outer space, or underwater. Protocol I of the Geneva Convention, to which Pakistan is a party but India is not, and the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, to which both India and Pakistan are parties, both indirectly limit the use of nuclear weapons by prohibiting the use of weapons that would cause widespread and long-term damage to the environment. Nuclear weapons clearly fall into this category.

Commentators point to the seriousness of the current situation in Kashmir to demonstrate the need for both India and Pakistan to sign the CTBT and other treaties limiting the expansion of their nuclear programs. This Note

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59 See id. at 505 (describing the nuclear weapons treaties to which India and Pakistan are parties).

60 CTBT, supra note 48.

61 LTBT, supra note 48.

62 See id.


65 Guthrie, supra note 2, at 505.

66 See Protocol I, supra note 63.

67 See ENMOD, supra note 63.

68 See Guthrie, supra note 2, at 506-07.

69 See generally id. (arguing that treaties and custom have created an international custom
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contends, though, that rather than trying to influence India and Pakistan to sign the CTBT treaty because they are engaged in a serious and protracted conflict, the proper focus should be on the necessity of ending the conflict once and for all because of the nuclear status of the two countries. This is because both countries have tenable reasons for not signing the treaties and even signing the treaties would not remove the danger so long as the conflict continues.

In the case of the CTBT, both countries point to each other’s nuclear programs, as well as that of neighboring China, as the reasons that they cannot sign. It is, of course, precisely that sort of arms race that the international community seeks to avoid. However, neither country trusts the other to sign and then comply with a test ban, and so neither will sign.

There is also an element of national pride involved for both India and Pakistan in not signing the CTBT. Being a “nuclear nation” is a status symbol that is diminished by any limit that is placed upon it. India and Pakistan not only want to compete with each other, but also with the other nuclear nations of the world. They feel that any limit on nuclear development is unfair because of the advantage to long-time nuclear powers like the United States and China, who already have stockpiles of nuclear weapons. The United

against nuclear testing and that India and Pakistan need to be persuaded so as to avoid a nuclear conflict; see also Feeley, supra note 14, at 781 (stating that it is “imperative” that India and Pakistan sign the CTBT treaty).

See Khan, supra note 1, at 497-99 (describing the Kashmir dispute as “a serious threat to the peace and security of the region” and discussing how the dispute might help cause a nuclear conflict); see also St. John, supra note 16, at 176-77 (describing the current Kashmir situation as “intolerable” and a “nuclear tinderbox” and underscoring the relationship between the Kashmir conflict and a possible nuclear exchange).

See St. John, supra note 16, at 176-77 (explaining Pakistan’s reluctance to end nuclear development because of India and India’s claims of necessity for a nuclear program, including the need for deterrence against China and the capability of response to an attack from Pakistan).

Another Asian nation, North Korea, now admits to having a nuclear weapons program. The United States suspects that Pakistan, among others, has aided North Korea in its nuclear development. See Robert Fox, Danger That Crept Up Behind Us, EVENING STANDARD (London), Dec. 27, 2002, at 5 (reporting that North Korea could be able to market nuclear weapons to rogue nations or terrorists as early as the summer of 2003, earlier than Iraq); see also Paul Haven, Pakistani PM Denies Nuclear Links, AP ONLINE, Jan. 6, 2003 (reporting that “Western media have reported allegations of possible Pakistani nuclear leaks to both North Korea and Iraq,” possibly receiving in exchange from North Korea missile technology, and also reporting that the Pakistani Prime Minister Zafarullah Khan Jamali had denied the allegations).


See Feeley, supra note 14, at 787 (describing how India and Pakistan feel that treaty limitations on nuclear development would lead to a world of nuclear “haves” and “have-nots”).
States has very little moral force in this area; as of the writing of this Note, it has not ratified the CTBT treaty.\textsuperscript{75}

V. UN RESOLUTIONS CONCERNING KASHMIR

The UN responded early and often when the post-partition fighting in Kashmir erupted in 1947, both with a series of resolutions from the U.N.S.C. and with active diplomatic mediation attempts to reach a viable solution.\textsuperscript{76} The resolutions and diplomatic efforts produced few positive results and culminated in the cease-fire agreement of 1971,\textsuperscript{77} which produced a UN-monitored Line of Control but has not ended the conflict.\textsuperscript{78} Most of the resolutions were reactions by the U.N.S.C. to military events in Kashmir.\textsuperscript{79} However, they all contained the following themes: (1) If allowed to continue, the conflict was a threat to international peace and security;\textsuperscript{80} (2) A cease-fire agreement was necessary;\textsuperscript{81} (3) Indian and Pakistani troops as well as other "unofficial" troops

\textsuperscript{75} See Lalla, supra note 64, at 104.


\textsuperscript{77} Agreement on Bilateral Relations, July 2, 1972, India-Pak., 858 U.N.T.S. 71 [hereinafter Simla Agreement].


\textsuperscript{79} Resolution 47 was the most important of the initial resolutions following the breakout of fighting in 1947 upon partition. It outlined a procedure for a plebiscite for Kashmir. See RESOLUTION 47, supra note 76; Khan, supra note 1, at 513. Resolution 80 and Resolution 91 were responses to tentative cease-fire agreements that urged the parties to agree on a demilitarization plan and reaffirmed the Security Council's commitment to the principles of Resolution 47. See RESOLUTION 80, supra note 76; RESOLUTION 91 supra note 76. Resolutions 209, 210, and 211 were responses to the second all-out war in 1965. See S.C. RES. 209, U.N. SCOR, 20th Sess., 1237th mtg. at 13, U.N. Doc S/Res/209 (1965); S.C. RES. 210, U.N. SCOR, 20th Sess., 1238th mtg. at 14, U.N. Doc S/Res/210 (1965); RESOLUTION 211, supra note 76.

\textsuperscript{80} See, e.g., RESOLUTION 47, supra note 76.

\textsuperscript{81} See, e.g., RESOLUTION OF THE COMMISSION OF AUGUST 13, 1948, supra note 76 (requesting the governments of India and Pakistan to issue separately and simultaneously a cease-fire order).
(non-military citizens from each side who were not natives of Kashmir but had entered Kashmir to join the fight) needed to be removed from the region;\textsuperscript{82} and (4) After such removal a plebiscite should be held to determine the fate of Kashmir.\textsuperscript{83}

The Resolution of the U.N.S.C. of April 21, 1948 stated that the "early restoration of peace and order in [Kashmir]" was "essential" and that the continuation of the dispute was "likely to endanger international peace and security."\textsuperscript{84} Later resolutions echoed this concern. Yet, after more than fifty years, the conflict has still not been resolved. The early resolutions were drafted long before India and Pakistan became nuclear states.\textsuperscript{85} If a conventional territorial war in the region prompted U.N.S.C. action, then certainly the possibility of a nuclear exchange between India and Pakistan is actionable, because the threat to international peace and security is greater.\textsuperscript{86}

The resolutions called for, and nominally produced, several cease-fires.\textsuperscript{87} However, military and paramilitary exchanges across the Line of Control in Kashmir occur on a constant basis even today.\textsuperscript{88} No actual cease-fire has existed for over fifty years.\textsuperscript{89}

The resolutions called for Indian and Pakistani troops to be removed from Kashmir.\textsuperscript{90} Several articles also specifically referred to the removal of peoples not "normally resident therein who have entered into [Kashmir] for the purpose of fighting."\textsuperscript{91} The failure of the parties to complete a removal of

\textsuperscript{82} See, e.g., Resolution of the Commission of January 5, 1949, supra note 76, ¶ 6b (requiring all persons, other than citizens of Kashmir, who on or since August 15, 1947 entered Kashmir for other than a lawful purpose, to leave).

\textsuperscript{83} See, e.g., Resolution 91, supra note 76 (observing that the governments of India and Pakistan had reaffirmed their desire that the future of the state of Kashmir be decided through the democratic method of a free and impartial plebiscite conducted under the auspices of the United Nations).

\textsuperscript{84} Resolution 47, supra note 76.

\textsuperscript{85} The earliest resolutions were passed by the U.N.S.C. when the post-partition conflict began in 1947. India and Pakistan both became recognized as being nuclear states due to their testing of nuclear weapons in 1998. See Guthrie, supra note 2, at 499.

\textsuperscript{86} See U.N. Charter arts. 39-51.

\textsuperscript{87} See, e.g., Simla Agreement, supra note 77.

\textsuperscript{88} See Guthrie, supra note 2, at 498.

\textsuperscript{89} See id.

\textsuperscript{90} See, e.g., Resolution 80, supra note 76 (calling upon the governments of India and Pakistan to implement their agreed upon plan of demilitarization of the State of Jammu and Kashmir).

\textsuperscript{91} Resolution 47, supra note 76; see also Resolution of the Commission of August 13, 1948, supra note 76.
troops was a major impediment to resolving the dispute. India justified the fact that no plebiscite ever took place, despite its agreement to one, on the basis that Pakistani troops never fully withdrew. Pakistan likewise justified its military presence in the region on the basis of the continued presence of Indian forces in Kashmir.

Arguably, the most important common component of the resolutions was the call for a plebiscite. From the beginning of the conflict, India had claimed that Kashmiri accession to India was a temporary solution and that once a cease-fire was established, the fate of the region would be determined in accord with the will of the people of Kashmir. Both the Indian and Pakistani governments agreed to a plebiscite on multiple occasions as a means of resolving the conflict. However, due to continued violence and occupation of the region, with each nation blaming the other for their own refusal to comply with Resolution 47, the plebiscite has never occurred.

The plebiscite solution is more desirable for Pakistan than it is for India because Kashmir is predominantly Muslim and would likely vote to join Pakistan. However, Pakistan opposed India's proposals for complying with the plebiscite provisions of the resolutions because it perceived them as unfair. Several of the resolutions themselves rejected India’s proposal to convene a “Constituent Assembly” because “the area from which such a

92 See Khan, supra note 1, at 514-15.
93 Several of the resolutions called for, and India and Pakistan agreed to, a plebiscite to determine the fate of Kashmir. See discussion infra text accompanying notes 94-97.
94 See Khan, supra note 1, at 514-15.
95 See id.
96 See id. at 513 (noting the significance of Resolution 47 and its recognition “that the question of accession of Jammu and Kashmir to India or Pakistan should be decided through the democratic method of a free and impartial plebiscite”).
97 See id. at 508-09.
98 See id.; see also Resolution 47, supra note 76; Resolution of the Commission of August 13, 1948, supra note 76; Resolution of the Commission of January 5, 1949, supra note 76; Resolution 80, supra note 76; Resolution 91, supra note 76.
99 See Khan, supra note 1, at 513-16.
100 See id. at 533-34. Khan supports an alternative to a plebiscite for the entire former state of Jammu and Kashmir, which would likely result in the entire territory acceding to Pakistan, which India will likely never agree to. The alternative is to transform the current line of control into an international boundary and then to have a plebiscite for the Valley of Kashmir only. While this would still likely result in the Valley acceding to Pakistan, it would mean less territorial transfer and therefore it would be more likely that India would agree to the measure.
101 See id. at 517-18.
Constituent Assembly would be elected is only a part of the whole territory of Kashmir.102

The various U.N.S.C. resolutions have accomplished very little toward achieving a permanent resolution of the Kashmir dispute between India and Pakistan.103 The situation is still a threat to international peace and security. There has been no permanent withdrawal of troops or cease-fire,104 nor has there been a plebiscite to determine Kashmir's fate.105

The past U.N.S.C. resolutions are arguably still binding on India and Pakistan, obligating them to abide by their agreements with the UN to withdraw, cease-fire, and hold a fair and impartial plebiscite.106 However, a new U.N.S.C. resolution focusing on the new threats to international peace and security, specifically the heightened tensions and the development of nuclear weapons by both nations, would have both more legal clarity and more political force.107 Also, a new resolution would be vital to securing the involvement of the United States, since the existing resolutions provide no specific authorization for either diplomatic or military intervention by any Member States, including the United States. This new resolution could reaffirm the basic ideas of the prior resolutions while providing more definite consequences if either nation fails to comply.

102 RESOLUTION 91, supra note 76; see also RESOLUTION 122, supra note 76 (stating that any action that the Constituent Assembly may have taken or might attempt to take to determine the affiliation of Kashmir would not constitute a disposition of the State).
103 See Khan, supra note 1, at 511.
104 See Guthrie, supra note 2, at 498.
105 See Khan, supra note 1, at 514-23.
106 See id. at 534

[I]t is bad jurisprudence to construe a resolution as invalid simply because the state to which it was directed could for decades successfully defy the will of the Security Council. A Security Council resolution remains legally binding until it is repealed, either directly or through a subsequent incompatible resolution.

107 See id. at 534 (noting the length of time since the last resolution calling for a plebiscite and the lack of enforcement of that resolution); see also id. at 540 (noting the failure to resolve the dispute bilaterally, the escalating military conflicts, and the development of nuclear weapons as factors giving rise to a legal obligation for India and Pakistan to resubmit the dispute to the Security Council).
VI. KASHMIR: A GREATER THREAT THAN IRAQ

In November of 2002, the U.N.S.C. passed a resolution reinstating inspections of Iraq's weapons of mass destruction capabilities. The resolution gave Iraq a deadline for full compliance and provided that any failure would be reported back to the U.N.S.C., which would then subject Iraq to "serious consequences." Because this Note suggests there is a greater legal justification for U.N.S.C. action in Kashmir than there was in Iraq, and proposes the U.N.S.C. take action to resolve the dispute, it is useful to compare the relative threat posed to international peace and security by Iraq prior to the U.S.-led war there in 2003 and that of Kashmir.

A. Nuclear Weapons

One of the major justifications for action against Iraq was the possibility that its leader, Saddam Hussein, was attempting to develop weapons of mass destruction, including nuclear weapons. There is very little evidence, however, that Iraq was close to achieving these goals, particularly with respect to nuclear weapons. On the other hand, India and Pakistan both openly possess nuclear weapons and are engaged in daily military conflict. Therefore, the threat of a nuclear incident arising from the Kashmir conflict is far more definite and imminent than was that of Iraq.

108 See RESOLUTION 1441, supra note 6.
109 Id. The deadline for an Iraqi report was December 8, 2002, which they met by filing a declaration the United States found unsatisfactory. Betsy Pisik, U.S. Rejects Iraqi Arms Report; White House Says Weapons of Mass Destruction Were Left Out, WASH. TIMES, Dec. 14, 2002, at A1. A deadline of January 27, 2003 was set for Hans Blix, the head of UN weapons inspections in Iraq, to report on his findings; his report found no "smoking gun" proving the presence of weapons of mass destruction but also found significant lack of cooperation on the part of the Iraqi regime. See Bob Kember & Howard Witt, U.S. Not Ready to Back Off Hussein; U.N. Finds No Arms; White House Sees Other Evidence, CHI. TRIB., Jan. 9, 2003, at 1.
110 See Saccha Baggili, IAEA Chief Deems Weapons Inspections in Iraq "Inconclusive", WMRC DAILY ANALYSIS, Jan. 7, 2003 (discussing the lack of a nuclear "smoking gun" in UN weapons inspections and the impact on the legal justification for war with Iraq).
111 See id.
112 See Guthrie, supra note 2, at 498-501.
B. Terrorism

Another possible justification for action in Iraq was its alleged support of terrorism. There is some proof that Iraq has supported Palestinian suicide bombers in Israel by paying rewards to their families. However, the link between Iraq and al-Qaeda remains less than definite. In comparison, there is a solid connection between al-Qaeda and several of the Pakistani terrorist groups operating in Kashmir. As long as the Kashmir conflict continues, there will be terrorist groups who want either independence or accession to Pakistan of Kashmir. To the extent that these groups are allied with al-Qaeda, the Kashmir conflict endangers international peace and security through its relationship with terrorism at least as much, if not more, than the Saddam Hussein regime did prior to the war.

C. Ongoing Conflict

The United States perceived Iraq as a threat to international peace and security because of its development and use of chemical and biological weapons and possible attempts to develop nuclear weapons. Saddam Hussein had also demonstrated a willingness to be an aggressor. However, there was no active military conflict occurring in Iraq when the United States began the recent war. In Kashmir, a fifty-six year old conflict continues to produce frequent casualties, both civilian and military. The unstable

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113 See Kember & Witt, supra note 109 (discussing U.S. intelligence reports that Iraq may have shipped chemical weapons to Syria, a major sponsor of the radical group Hezbollah, and fears that the weapons could be passed on to terrorists for use against Israel or other targets).

114 See Max Boot, Exploiting the Palestinians: Everybody's Doing It, WKLY. STANDARD, Jan. 13, 2003 (stating that Saddam Hussein has paid an estimated $20 million over the past two years to families of Palestinian “martyrs”).

115 See Toxin Find Brings Fears Home, NEW ZEALAND HERALD, Jan. 9, 2003 (discussing longstanding British skepticism of U.S. assertions of a possible link between al-Qaeda and Saddam Hussein, and the doubts raised by the recent discovery of al-Qaeda agents in the U.K. with ricin, a deadly chemical weapon known to be used by an Islamic militant group based in Kurdish-controlled northern Iraq).

116 See Alexander, supra note 41, at 71.

117 See RESOLUTION 1441, supra note 6.


119 See, e.g., India Proposes Expansion of Embassies to Pakistan, REUTERS ENG. NEWS SERV., Sept. 23, 2003 (reporting a surge in violence despite attempts at peace by the
dynamics of this conflict, particularly between two nuclear nations, presents a greater threat to international peace and security than the unsubstantiated fear that Iraq may be developing weapons of mass destruction.120

D. Political Instability

Before the war, Iraq was perhaps a threat to international peace and security, but it was not politically unstable. In fact, the intervention on the part of the U.S.-led coalition that removed Saddam Hussein greatly increased the instability in Iraq; the United States is still in control of Iraq as an occupying power and the political future of Iraq is uncertain.121

In contrast to the political stability of Iraq prior to the war, both India and Pakistan have political problems that are exacerbated by their current conflict; Pakistan is particularly unstable.122 The democratically elected Pakistani government was overthrown in 1999 and replaced with a military regime led by the new President (formerly General) Pervez Musharraf.123 There is pressure from within and outside the country to have Musharraf relinquish his position to a new democratically elected regime, but despite some small moves

governments of India and Pakistan, specifically referring to a villager killed by militants and a soldier and seven militants killed in separate gun battles; Press Digest-Pakistani Newspapers, REUTERS ENG. NEWS SERV., Sept. 22, 2003 (reporting the killing of eighteen people in violence in Kashmir, including four civilians in a liquor shop bombing); India Says Pakistani Shells Kill Three in Kashmir, REUTERS ENG. NEWS SERV., Sept. 21, 2003 (reporting three civilians killed and five wounded in an artillery attack across the Line of Control by Pakistani troops and also reporting Indian troops firing on Pakistani forces, with no reported casualties); Indian Troops Battle Kashmir Rebels, Five Dead, REUTERS ENG. NEWS SERV., Sept. 20, 2003 (reporting five militants killed in a battle with Indian troops, as well as three militants and two soldiers killed in a separate clash).


in that direction, he does not seem willing to do so anytime soon. While a democratic regime may seem preferable to a military one, it might actually destabilize Pakistan. At any rate, Musharraf is confronted with a difficult situation as long as he remains in control. He must balance the need to cooperate with the United States and the rest of the international community concerning the "war on terror" with the pressure from Islamic fundamentalists that want him to take a strong stand against the United States and India.

Both politically and economically, India is far more stable than Pakistan, but still has significant sources of potential instability. India is a secular democracy, but much like Pakistan, it has to balance the interests of relations with the West with appeasement of religious fundamentalists, in India's case Hindus. The Kashmir conflict is a drain on the scarce resources of both

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124 In October 2002, a prime minister, Zafarullah Khan Jamali, was democratically elected. Under Pakistani law, he also had to survive a November vote in the lower house of Parliament, and then a vote of confidence from the entire Parliament on December 30, 2002, both of which he did. However, Jamali is not in complete control of the government. Musharraf remains President and retains the power to override the legislature and to dismiss Jamali's government. Jamali is in power for five years, but is subject to any number of confidence votes, which the legislature can demand by a simple majority vote, and possible dismissal by Musharraf. See Munir Ahmad, Pakistan's Prime Minister Survives Confidence Vote in Parliament, ASSOCIATED PRESS NEWSWIRE, Dec. 30, 2002.

125 See Pakistan: Opposition Leader Rules Out Plans to Destabilize Government, BBC MONITORING, The News web site, Jan. 4, 2003, available at 2003 WL 4131973 (discussing the possible destabilizing effects of a democratic opposition party and reporting that the party leader claimed there were no plans to destabilize the new Jamali government, even though it is viewed as a mere continuation of Musharraf's military regime).

126 See Howard Witt, Terror War Has U.S. in Dubious Alliances, CHI. TRIB., Sept. 4, 2002, at P1 (discussing U.S. praise for Musharraf for his assistance in the war on terrorism and the simultaneous U.S. hope that Musharraf will keep his promise to prevent Pakistani militants from attacking India in Kashmir).


128 See generally UNITED STATES CENTRAL INTELLIGENCE AGENCY, WORLD FACT BOOK, INDIA GOVERNMENT 2001 (2001), available at http://workmall.com/wfb2001/india/india_government.html (last visited Sept. 5, 2003) (describing India as a federal republic with universal suffrage, and also enumerating the numerous political parties and pressure groups, including
countries, as neither can afford an all-out war. However, neither government can politically afford to ignore the conflict either. Internal pressures cause both governments to issue hardline rhetoric about the conflict, which the governments may or may not be able to support.

None of the above is meant to suggest that Iraq was not a threat to international peace and security prior to the 2003 U.S.-led war. Rather, this Note compares the relative threats of the two situations to highlight the fact that while Iraq was indeed a threat, the current situation in Kashmir is a larger one, in need of greater international attention. The U.N.S.C. issued Resolution 1441 in response to the Iraqi situation, and was asked to pass another resolution explicitly authorizing the use of force. If the situation in Iraq was serious enough for the U.N.S.C. to consider Chapter VII action, so is the current situation in Kashmir.

religious, militant, and separatist groups); see also Ashok Sharma, *Hindu Nationalists Hope to Consolidate Gains in Four State Elections*, ASSOCIATED PRESS NEWSWIRES, Jan. 11, 2003 (reporting that Hindu nationalist party Bharatiya Janata viewed its massive victory in Gujarat state as a mandate for "Hindutva," or "Hindu-ness," which implies the tenets of Hindu should govern India, a secular nation since independence from Great Britain in 1947).

See Guthrie, supra note 2, at 503 (stating that twenty-four percent of Pakistan’s total budget for 1996-1997 was spent on defense and arguing that spending on continued nuclear tests might bankrupt Pakistan).

See Feeley, supra note 14, at 798-99 (discussing the feeble state of both India and Pakistan’s economies, particularly due to economic sanctions, and discussing the degenerative effect that increased military spending and economic sanctions would have on both economies and stability in the region, and instead endorsing economic incentives to halt nuclear escalation); see also id. at 792 (stating that “neither country can afford nuclear testing and buildup costs, nor a nuclear exchange”).

See id. at 783 (discussing the role of religion on both sides of the conflict).

See B. Muralidhar Reddy, *No Chance for Accidental N-War with India*, THE HINDU, Jan. 11, 2003 (reporting that Musharraf, after causing alarm by stating that India shouldn’t expect “conventional” war if it was to cross the Line of Control, was seeking to reassure the world that there was no chance of an “accidental” nuclear war with India, and also quoting Musharraf as saying that Pakistan was not ready to “grant any more concessions” to India on the Kashmir issue); see also id. (reporting Indian Defense Minister Georges Femandes’ warning in response to Musharraf’s comments that Pakistan would cease to exist in the event of a nuclear war).

VII. THE NEW CUSTOM OF U.S. IMPLEMENTATION OF U.N.S.C. RESOLUTIONS

U.N.S.C. resolutions made pursuant to Chapter VII of the UN Charter are theoretically binding on all member states. However, to be effective, the resolutions must be enforced. The Charter authorizes both the use of "measures not involving the use of armed force," such as economic sanctions or third-party diplomacy, as well as "action by air, sea, or land forces as may be necessary to maintain or restore international peace and security" as means of enforcing resolutions. The Charter also makes it incumbent on member states to "make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities." U.N.S.C. resolutions are helpful in maintaining international peace and security only to the extent that member states offer this type of assistance in enforcing them.

Some member states are in a better position than others to provide the resources for enforcing U.N.S.C. resolutions. In the current post-Cold War world order, the United States is in the best position of all. Throughout the 1990's, beginning with the Persian Gulf War, the United States has offered resources, both military and non-military, to enforce or implement U.N.S.C. resolutions on multiple occasions. If it can be shown that a general practice

134 See U.N. CHARTER art. 25.
135 U.N. CHARTER art. 41.
136 U.N. CHARTER art. 42.
138 See OECD, ITALY—ECONOMIC OUTLOOK, GDP: TOP TEN COUNTRIES, at http://www. italytrade.com/french/pages/info/econo.php#3 (charting the world's top ten GDP's in 1998, with the United States leading at $8.491 billion, more than double second place Japan ($3.963 billion)) (last visited Sept. 8, 2003).
of using the United States as the enforcement mechanism for U.N.S.C. has become accepted as law, then it can be said that the practice constitutes a rule of customary international law.

A. State Practice

In the late 1980s and early 1990s, two major events occurred that caused a shift in the way that the United Nations handled the resolution of conflicts. The first was the dissolution of the Soviet Union, which effectively ended the Cold War between it and the United States. This left the United States as the world’s sole “superpower.” Second, Iraq invaded and attempted to annex its neighbor Kuwait. In response, the U.N.S.C. passed a resolution setting a deadline for Iraqi withdrawal. In the event of non-compliance, the U.N.S.C. authorized the use of “any means necessary” to accomplish
withdrawal.\textsuperscript{145} When Iraq ignored the deadline, the United States led an allied force in the Persian Gulf War, which resulted in expulsion of Iraqi forces from Kuwait.\textsuperscript{146}

The operation in Kuwait was the first authorization of force to counter hostilities by member states under Chapter VII of the UN Charter by the U.N.S.C. since the Korean Conflict.\textsuperscript{147} It was also the first time that one member state, the United States, was given primary control over implementation of the resolution.\textsuperscript{148}

The next major use of Chapter VII authority by the U.N.S.C. was in response to internal strife in Somalia in 1993.\textsuperscript{149} At the time, warlords were dueling for control of the country at the expense of the population.\textsuperscript{150} In response to calls from the U.N.S.C., member states sent humanitarian aid to alleviate the suffering of the civilian population.\textsuperscript{151} However, the warring factions would not allow the food to arrive at its intended destination.\textsuperscript{152} The U.N.S.C. authorized the member states to use force to ensure delivery of the humanitarian aid.\textsuperscript{153} These forces were ultimately led by the United States.

In 1991, the constituent republics of the Yugoslav Federation (Yugoslavia) began one by one to secede and declare themselves independent states.\textsuperscript{154} The republic of Serbia and Montenegro attempted to stop this trend by using the federal Yugoslav army and armies made up of Serb minorities in the republics to militarily force the republics to remain in the federation.\textsuperscript{155} Croatia and Slovenia won short battles for their independence.\textsuperscript{156} In Bosnia, on the other hand, thousands of Muslims and Croats were slaughtered in "ethnic cleansing" perpetrated by the Bosnian Serbs with the assistance of Slobodan Milosevic, the leader of Serbia and the president of the newly formed Federal Republic of Yugoslavia.\textsuperscript{157} In April 1993, NATO began enforcing the "no-fly zone"

\textsuperscript{145} \textit{Id.}
\textsuperscript{146} \textit{See Operation Desert Storm, Chronology: Important Events, supra note 143.}
\textsuperscript{147} \textit{See Shenk, supra note 138, at 251.}
\textsuperscript{148} \textit{See id. at 249.}
\textsuperscript{149} \textit{See Resolution 794, supra note 140.}
\textsuperscript{150} \textit{See United Nations, Department of Public Information, Somalia UNOSOM I, supra note 140.}
\textsuperscript{151} \textit{See id.}
\textsuperscript{152} \textit{See id.}
\textsuperscript{153} \textit{See id.; see also Resolution 794, supra note 140.}
\textsuperscript{154} \textit{See Way, supra note 140.}
\textsuperscript{155} \textit{See id.}
\textsuperscript{156} \textit{See id.}
\textsuperscript{157} \textit{See id.} Serbia and Montenegro formed the Federal Republic of Yugoslavia in April 1992.
over Bosnia that the U.N.S.C. had established in October 1992. For two and a half years, the U.S.-led force maintained the no-fly zone and performed air strikes in support of UN peacekeeping operations.

The trend of a U.S.-led allied force carrying out U.N.S.C. resolutions continued in 1994 in Haiti. In 1991, a military coup had ousted the democratically elected government in Haiti. Between 1991 and 1994, the UN and the Organization of American States made various diplomatic efforts at reinstating the overthrown government. In 1994, the U.N.S.C. authorized the use of force to resolve the situation. The United States organized a multinational force and threatened action under the authorization of the resolution. The U.S.-led force implemented the resolution with very little resistance from the military leadership of Haiti.

The United States was called upon again in 1998 to enforce a U.N.S.C. resolution dealing with the conflict in the former Yugoslavia. Kosovo, a region in southern Serbia, had long enjoyed a high degree of autonomy within the former Yugoslavia but had lost much of that autonomy when the Yugoslav leader, Slobodan Milosevic, brought Kosovo under the direct control of Belgrade. In 1998, Serbian police forces and Kosovar ethnic Albanians, who make up a majority of the population in Kosovo but a minority in Serbia, came into open conflict. Intense diplomatic efforts were made to diffuse the conflict, and these were supported and encouraged by the U.N.S.C. When diplomatic efforts ultimately failed, a U.S.-led NATO force operated an “air verification” mission and, after the air strikes ended the conflict, operated a


See id.; see also RESOLUTION 816, supra note 140.

See Way, supra note 140.


See id.

See RESOLUTION 940, supra note 140.

See UNITED NATIONS MISSION IN HAITI, supra note 160.

See id.

NATO’s Role in Relation to the Conflict in Kosovo, NORTH ATLANTIC TREATY ORGANIZATION, at http://www.nato.int/kosovo/history.htm (last visited Jan. 12, 2003).

See id.

See RESOLUTION 1160, supra note 140; RESOLUTION 1203, supra note 140.
The availability of U.S. diplomatic and military resources was instrumental in ending Milosevic's ethnic cleansing campaign.

The operations led by the United States in Iraq, Somalia, Bosnia, Haiti, and Kosovo were the most significant uses of Chapter VII authority by the U.N.S.C. in the 1990s. However, there was a significant amount of U.N.S.C. Chapter VII action in the 1990's that did not fall within the U.S.-led enforcement paradigm, most notably regional peacekeeping efforts in West Africa (ECOWAS) and East Timor. However, state practice that is unanimous or that cuts in only one direction is not necessarily required to establish a rule of customary international law. The prevailing trend of using the United States to enforce major U.N.S.C. resolutions represents a substantial state practice that, when coupled with the general acceptance of such practice as law, is sufficient to establish a rule of customary international law.

Like the NATO operation in Kosovo, the 2003 U.S.-led war in Iraq did not have explicit authorization from the U.N.S.C. Unlike Kosovo, there was significant overt opposition to the use of force by the United States and its allies in Iraq. Many U.N.S.C. members, including permanent members France, Russia, and China, wanted the inspections regime that had been reinstated by Resolution 1441 to continue. France was the most vocal opponent of the use of force; it explicitly stated that Resolution 1441 did not

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168 See RESOLUTION 1203, supra note 140; RESOLUTION 1244, supra note 140. The NATO operation in Kosovo was somewhat controversial because no U.N.S.C. resolution explicitly authorized the use of force. See CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 218 (2003). The need, or lack thereof, for explicit authorization of the use of force in U.N.S.C. resolutions, is unclear and was also an issue with the 2003 U.S.-led war in Iraq. See CNN.COM, supra note 133; see also Bush, Address to the Nation from the Oval Office, supra note 7.

169 See, e.g., The Paquete Habana, 175 U.S. 677 (1900). The court found that prevailing state practice and consent created a rule of customary international law exempting unarmed commercial fishing vessels from capture as prizes of war, despite the existence of contrary state practice. Id.

170 See RESOLUTION 1441, supra note 6 (stating that "serious consequences" would flow from Iraqi failure to comply with the resolution, but not authorizing the use of force explicitly).

171 See, e.g., Andrew Moravcsik, Striking a New Transatlantic Bargain, FOREIGN AFFAIRS, July 1, 2003, at 74 (discussing European opposition to the U.S.-led war in Iraq).

172 See, e.g., World Deeply Divided on U.S. Ultimatum on Iraq, DOW JONES INTERNATIONAL NEWS, Mar. 18, 2003 (stating that Indonesia, India, France, Mexico, and China had expressed regret over the United States' ultimatum on Iraq, and specifically quoting the premier of China as saying that inspections "must continue").
authorize the use of force and that it would veto any proposed resolution that did give such an authorization.\textsuperscript{173}

The implications of the recent war in Iraq and the diplomatic lead-up to the war are not yet entirely clear. On its face, the war can be viewed as simply another example of the United States enforcing a U.N.S.C. Chapter VII resolution (Resolution 1441) with force, and therefore yet another example of state practice supporting the custom that this Note suggests. However, given the debate in the U.N.S.C. leading up to the war, it is difficult to characterize the war in that way; indeed, despite claims to the contrary, it is difficult to believe that even the United States felt it was acting under U.N.S.C. authorization. The United States seemed to claim that it could do whatever it wanted, or more accurately, what it needed, to do to maintain its security, with or without U.N.S.C. authority. To the extent that the United States was acting on this legal basis, the recent Iraq war is state practice that is contrary to the custom.

\textbf{B. Opinio Juris}

Assuming that a practice of U.S.-led enforcement of U.N.S.C. resolutions has been established, it must further be shown that this practice has been generally accepted as law. Acceptance is shown by evidence of states behaving as if they are bound by the rule.\textsuperscript{174} In the case of the U.S./U.N.S.C. resolution enforcement rule, acceptance is demonstrated by U.N.S.C. votes, participation in U.S.-led enforcement by other states, and acceptance of U.N.S.C. resolutions authorizing the practice by the affected states.\textsuperscript{175}

The fact that the U.N.S.C. continues to vote to authorize the United States to enforce its resolutions is evidence of acceptance, at least by those states participating in the votes, of the practice as law.\textsuperscript{176} The U.N.S.C. is made up of five permanent members—the United States, the United Kingdom, France,

\textsuperscript{173} See Michael J. Glennon, \textit{Why the Security Council Failed}, FOREIGN AFFAIRS, May-June 2003 (discussing France’s threat to veto any resolution authorizing the use of force against Iraq).
\textsuperscript{175} See ICJ Advisory Opinion, \textit{supra} note 48 (using UN General Assembly votes as evidence in deciding whether a custom regarding the illegality of nuclear weapons had developed); \textit{see also} Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. United States) (Merits), 1986 I.C.J. 14 (June 27) (citing the practice of the parties as evidence of acceptance by each of the existence of a customary rule).
\textsuperscript{176} See \textit{supra} note 175.
Russia, and China—and ten other members elected by member states to two-year terms.\footnote{See U.N. CHARTER art. 23.} Thus, a significant number and variety of member states have voted to authorize the practice of U.S.-led enforcement of major U.N.S.C. resolutions.\footnote{The non-permanent members at the time of RESOLUTION 678, \textit{supra} note 140, concerning Iraq were Canada, Colombia, Ethiopia, Finland, Malaysia, Cote d'Ivoire, Cuba, Romania, Yemen, and Zaire. \textit{See SECURITY COUNCIL, ELECTED MEMBERS OF THE SECURITY COUNCIL: 1946-PRESENT, at http://www.globalpolicy.org/security/membship/mem2.htm (last visited Sept. 7, 2003). At the time of RESOLUTION 794, \textit{supra} note 140, concerning Somalia, they were Austria, Belgium, Ecuador, India, Zimbabwe, Cape Verde, Hungary, Japan, Morocco, and Venezuela. \textit{See id.} At the time of RESOLUTION 940, \textit{supra} note 140, concerning Haiti, they were Brazil, Djibouti, New Zealand, Pakistan, Spain, Argentina, Czech Republic, Nigeria, Oman, and Rwanda. \textit{See id.} At the time of RESOLUTION 1160 and RESOLUTION 1203, \textit{supra} note 140, concerning Kosovo, they were Costa Rica, Japan, Kenya, Portugal, Sweden, Bahrain, Brazil, Gabon, Gambia, and Slovenia. \textit{See id.} At the time of RESOLUTION 1244, \textit{supra} note 140, concerning Kosovo, they were Bahrain, Brazil, Gabon, Gambia, Slovenia, Argentina, Canada, Malaysia, Namibia, and the Netherlands. \textit{See id.}} Of particular significance is the fact that no permanent member vetoed any of the votes, despite some political and ideological objections by certain members.\footnote{See, e.g., John Quigley, \textit{State Responsibility for Ethnic Cleansing}, 32 U.C. DAVIS L. REV. 341, 383 (1999) (describing China's abstention from the vote on action in Kosovo on the grounds that it was primarily an internal Yugoslav matter). \textit{But see} BRADLEY \& GOLDSMITH, \textit{supra} note 168 (suggesting that the reason no resolution was passed authorizing force was a threatened veto by either Russia or China).} This indicates that either those members feel politically pressured to support the practice or they realize the importance of having an enforcement mechanism to legitimate U.N.S.C. resolutions. In either case, it demonstrates that the permanent members feel bound to allow the practice, either by voting for a resolution or abstaining from a vote.\footnote{See I. Maxine Marcus, \textit{Humanitarian Intervention Without Borders: Belligerent Occupation or Colonization?}, 25 HOU$.$ J. INT'L L. 99, 105 (2002) (citing the increased willingness since the end of the Cold War of the U.N.S.C. to cooperate on Chapter VII action, specifically referring to humanitarian intervention).} France's threat to veto any resolution allowing the U.S. to use force in Iraq somewhat undermines their previous pattern of acceptance. It is unclear at this point whether the custom has met its demise, or whether France's objections were instead limited to the factual context of the Iraq situation.

Further evidence of the acceptance of the practice of U.S. enforcement of U.N.S.C. resolutions is found in the degree of participation by member states in assisting the United States in its enforcement. States from every corner of the globe participated in the Persian Gulf War of 1991. Troops and equipment from many nations also participated in the operation in Kosovo and would...
likely have participated in the recent war in Iraq if it had been explicitly authorized by the U.N.S.C. The fact that states are willing to donate their resources and put the lives of their soldiers in danger to support the U.S. enforcement of U.N.S.C. resolutions is evidence of acceptance of the practice as law. It is interesting to note that in the recent war in Iraq, which was not explicitly authorized by the U.N.S.C., only a handful of member states assisted the United States.

The use of force was necessary in the Persian Gulf War and in Kosovo because the respective parties failed to comply with resolutions. In Haiti and Somalia, there were challenges against the legitimate government, thus making it difficult to claim that the affected state had agreed to the resolution. In general, states that have been the object of U.S. enforcement have not objected to the legitimacy of U.S. enforcement, but rather have maintained merely that they were not in violation of the resolution in the first place.

C. Arguments Against Using the United States to Enforce U.N.S.C. Resolutions

There are reasons that a custom of U.S. enforcement of U.N.S.C. resolutions is undesirable, both from the U.S. perspective and from that of the international community. From the U.S. perspective, the responsibility that would come with a custom of U.S.-led enforcement of all major U.N.S.C. resolutions may produce too large of a burden on the United States. From the international perspective, there is fear that such a regime will address threats to international peace and security only when it directly serves U.S. interests to do so, or that the United States will use its authority to bully the world. There is also the concern that the U.N.S.C. structure, with the five permanent members having a veto, could undermine the ability of the United States to act in certain situations. Each of these objections will be examined in turn.

First, there is a contingent in the United States that feels that the United States already takes on more than its share of support for the operations of the

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181 See Resolution 678, supra note 140; Resolution 1203, supra note 140.
182 See United Nations, Department of Public Information, Somalia UNOSOM I, supra note 140; United Nations Mission in Haiti, supra note 160.
183 See, e.g., Bryan Schwartz & Susan Waywood, A Model Declaration on the Right of Secession, 11 N.Y. Int'l L. Rev. 1, 44 (1998) (describing how Iraq justified its aggression toward Kuwait by claiming that it was part of Basra under Ottoman rule, and had been illegitimately separated from Iraq by the British during colonial rule).
A practice of U.S. enforcement of U.N.S.C. resolutions would likely add to that burden. The response to this position is that the United States is the most prosperous and powerful nation in the current international community, and along with the rights that such power brings comes responsibility.

Second, there is apprehension among many members of the international community that the United States is a “world bully” and that any action it takes purportedly in the name of international peace and security would only be taken to secure U.S. interests. The operations in Iraq and Haiti arguably support this assertion, while it is less clear that those in Somalia and Kosovo do. Many point to the failure of the U.N.S.C. to act in Rwanda, where thousands died in genocidal civil strife, as a prime example of the ineffectiveness of the U.N.S.C. There were, however, legal reasons that the U.N.S.C. failed to act in Rwanda, and Kosovo has perhaps introduced a customary norm of humanitarian intervention even in wholly internal matters. Also, the U.S. enforcement custom was new and not yet fully developed at that time. At any rate, the effectiveness of the custom is dependent upon the United States viewing the achievement of international peace and security as being in its own interest. The increasingly interdependent and global nature of the world’s economic and political structures provides the impetus for this to occur.

Lastly, the danger remains that other permanent members of the U.N.S.C. might use their veto power to undermine the effectiveness of the custom. However, those members did not do so during the 1990s while the custom was being established. With the end of the Cold War, the permanent members seem much less likely to use the veto simply to thwart a political foe; if a veto were to be used under the current regime, it would likely be for a legitimate concern counseling against Chapter VII action, and thus would simply be an example of a U.N.S.C. mechanism working as it was designed to work. As mentioned above, it is unclear which category France’s recent veto threat falls

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into, and therefore whether it represents a threat to the effectiveness of the custom. The custom is far more likely to survive and to be effective if the United States works within the U.N.S.C. rather than attempting to use it as a rubber stamp for whatever it desires to do.

D. Summary

The practice of U.S.-led enforcement of U.N.S.C. resolutions, combined with the acceptance of this practice as law, establishes it as a rule of customary international law. The existence of this custom creates an opportunity for the U.N.S.C. and the United States to work together to resolve the Kashmir dispute. Because of the threat that the dispute poses to international peace and security, the U.N.S.C. and the United States should act to eliminate it.

Most of the state practice discussed above involved the use of U.S. military force to implement a U.N.S.C. Chapter VII resolution. However, force is not needed in all cases, and ideally would not be necessary to resolve the Kashmir situation. In the recent past, there have been several examples of Chapter VII diplomatic solutions by the U.N.S.C., which were then backed by force only if not corrected. This was the situation in Bosnia, where the United States, through NATO, had negotiated a cease-fire under Chapter VII authority. Force only became necessary when the negotiated cease-fire was not observed.

To resolve the conflict in Kashmir, the U.N.S.C. could pass a resolution under Chapter VII demanding diplomatic negotiations between India and Pakistan and authorizing a U.S. envoy to mediate the talks. If determined efforts to reach a solution proved successful, the United States would have primary responsibility, in conjunction with India and Pakistan themselves, for overseeing the implementation of the agreement. If necessary, the United States would also have to be willing to lead a peacekeeping force to ensure that the agreed upon solution remained in place.

VIII. CONCLUSION

India and Pakistan have been involved in a dispute over the Kashmir region for about fifty-six years. The conflict is a continuing threat to international peace and security. Upon the end of British colonial rule, each princely state decided to accede to either India or Pakistan, or to become an independent state. Kashmir initially opted for independence but then acceded to India in exchange for Indian military assistance against invading Pakistan, thus beginning a conflict over Kashmir that has lasted until the present day. In
recent years, the tensions have heightened with increased engagements across
the Line of Control and with the development and testing nuclear weapons by
each nation.

The nuclear aspect of the conflict makes it a matter of concern not only for
the region but also for the entire world. The relationship of the conflict to
terrorism also underscores its nature as a conflict of international concern. It
is in the best interest of the entire world for the conflict to be resolved both
quickly and finally.

The use of nuclear weapons is generally illegal under international law
except in cases of self-defense in which the very existence of a state is
threatened. It is under precisely these circumstances that a nuclear exchange
would be most likely between India and Pakistan. Since international law is
an insufficient deterrent to nuclear conflict, and because there are political
conditions which make it highly unlikely that both nations will sign the CTBT,
the Kashmir conflict needs to be resolved to avert a possible nuclear show-
down over Kashmir.

The United Nations Security Council was asked to authorize the use of
force against Iraq to enforce U.N.S.C. resolutions regarding its development
of weapons of mass destruction. Kashmir is a greater threat to international
peace and security than Iraq was prior to the 2003 U.S.-led war because both
India and Pakistan have nuclear weapons, there is a more definite link between
the Kashmir conflict and terrorism, there is an ongoing military conflict in the
region, and the conflict contributes to current domestic political instability in
the two countries. The U.N.S.C. was involved in the Iraq situation, and since
the Kashmir situation poses a greater threat, the U.N.S.C. should move it to the
forefront of its agenda, as should the United States.

For action taken by the U.N.S.C. to be effective, it must be supported by
resources and enforcement from member states. Since the end of the Cold War
in 1990, a new custom has developed within the U.N.S.C. of authorizing a
U.S.-led coalition to enforce major resolutions. The state practice that has
established this custom include the Persian Gulf War, the humanitarian
mission in Somalia, the enforcement of the no-fly zone in Bosnia, the action
to replace the democratic government in Haiti, and the peacekeeping operation
in Kosovo. Evidence of acceptance of this practice as a customary rule is
found in U.N.S.C. votes, in participation in U.S.-led actions, and in acceptance
of U.N.S.C. resolutions by affected states. The unique position of the United
States as the world's sole superpower and the custom that has subsequently
developed present a singular opportunity for the United Nations and the United
States to work together to resolve the Kashmir dispute.