Security Council Mediation and the Kashmir Dispute: Reflections on Its Failures and Possibilities for Renewal

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SECURITY COUNCIL MEDIATION AND THE KASHMIR DISPUTE: REFLECTIONS ON ITS FAILURES AND POSSIBILITIES FOR RENEWAL

Sumathi Subbiah*

Abstract: India and Pakistan's conflict over the legal status of Kashmir threatens the security of the entire region. In its early mediation efforts, the Security Council attempted, but failed, to bring about a permanent resolution. This Note argues that one reason for the failure was the Security Council's view of the dispute as primarily a political dispute without referring sufficiently to the legal framework of Indian and Pakistani claims to Kashmir. This Note further argues that, in light of this earlier failure, the Security Council could reinsert itself as a mediator by understanding this failure and by reengaging India, which has become resistant in the last thirty years to international mediation in Kashmir.

INTRODUCTION

The territorial conflict between India and Pakistan over the region of Kashmir has served as the major obstacle to relations between the two states and to regional security in South Asia. Since the two states achieved independence from Great Britain, India and Pakistan have occupied different segments of the region and fought four wars, in which Kashmir's legal status was either the main inciting factor or close to the surface of the armed conflict. In the last decade, the Kashmiri separatist movements within Indian-controlled Kashmir and the declaration of nuclear capabilities by India and Pakistan have increased tensions within the region and created a new element of distrust between the two countries.

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2 See Ganguly, Origins, supra note 1, at 1; Sengupta, supra note 1, at 12.

The gravity of the threat to the "maintenance of international peace and security" that the Kashmir conflict represents makes the situation ripe for considering renewed mediation from the United Nations (U.N.).4 The Security Council attempted to play a role in the mediation at the inception of the conflict.5 However, its recommendations and attempts at mediation failed to bring about permanent resolution.6

The Security Council has remained silent since 1965 when it last articulated recommendations and has all but abandoned its mediatory role.7 In the meantime, attempts at resolution have been left largely to India and Pakistan.8

This Note analyzes the past and present actions of the U.N. regarding the Kashmir conflict in an effort to answer (1) why the Security Council failed at the beginning of the conflict to bring a permanent solution, and (2) how to reengage India in a new mediatory process. Part I describes the historical and legal background to the Kashmir dispute, the Security Council's mediatory actions at the beginning of the conflict, and the current situation between India and Pakistan over the region. Part II analyzes how the Security Council viewed this dispute primarily as a political one—and not sufficiently as a legal one—and how this stance weakened its recommendations and contributed to the failure of Security Council mediation. Part III considers actions that the Security Council could take to break its silence by reasserting itself as an effective mediator in the current situation and reengaging India, which has become resistant to outside mediation.

I. HISTORICAL AND LEGAL BACKGROUND TO THE KASHMIR DISPUTE AND SECURITY COUNCIL MEDIATION

A. Roots of Conflict in Decolonization

The roots of the conflict over Kashmir lie in the demise of the British Empire in South Asia.9 During colonial rule, the Kashmir re-

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4 See U.N. Charter art. 3, para. 1.
6 See Khan, supra note 5, at 516.
7 See id. at 522.
8 See id. at 528–29.
region was the princely state of Jammu and Kashmir, an amalgam of five different areas with a Muslim-majority population ruled by a Hindu maharajah.\textsuperscript{10} As one of the 584 princely states within the “paramountcy” of the British Empire, Kashmir’s legal status was that of a closely held protectorate whose status was tantamount to that of a direct colony but that was not technically part of British India.\textsuperscript{11}

In 1947, when the British government transferred power and partitioned its former colonies in British India into the new states of India and Pakistan, the British government determined that the legal status held by Kashmir and the other princely states would lapse.\textsuperscript{12} In place of this legal status, the princely states, which were scattered throughout various pockets of South Asia, were given a choice to accede to either India or Pakistan.\textsuperscript{13} According to the Indian Independence Act and the British Viceroy’s strong wishes, independence from either India or Pakistan was strongly discouraged.\textsuperscript{14} Although the princely states’ choices produced heated controversy among India, Pakistan, and the people of each region, each princely state was incorporated into either India or Pakistan within two months of the official British departure and transfer of power in August 1947, except for Kashmir.\textsuperscript{15}

The ruler of Kashmir, Maharajah Hari Singh, stalled in making a decision about accession in the hopes of negotiating to become an independent state, which placed the region in a legal no-man’s-land.\textsuperscript{16} All such negotiations, however, came to a halt in early October 1947 when Pakistani “tribesmen” crossed the northern border of Kashmir with cooperation from pro-Pakistani Muslims in the northern part of Kashmir and occupied one-third of the region.\textsuperscript{17} In response to what he saw as an invasion of his state, Hari Singh appealed to neighboring India for military assistance.\textsuperscript{18}

India would not cross the border into Kashmir, however, unless Hari Singh signed the Instrument of Accession, through which Kashmir would legally accede to India and come under its sovereign con-

\textsuperscript{10} See \textsc{Ganguly, Crisis, supra} note 9, at 7; Khan, \textit{supra} note 5, at 496. Hereinafter, the region of “Jammu and Kashmir” will be referred to as “Kashmir” as it is in much of the scholarship and press. See \textsc{Ganguly, Crisis, supra} note 9, at 7.
\textsuperscript{11} \textsc{Ganguly, Crisis, supra} note 9, at 6.
\textsuperscript{12} Id. at 7–8.
\textsuperscript{13} Id.
\textsuperscript{14} Id.
\textsuperscript{15} \textsc{Ganguly, Origins, supra} note 1, at 32–34.
\textsuperscript{16} See id. at 36.
\textsuperscript{17} See \textsc{Ganguly, Crisis, supra} note 9, at 9–11.
\textsuperscript{18} See \textsc{Ganguly, Origins, supra} note 1, at 36.
In addition, although not stated explicitly in the Instrument of Accession, the Indian leadership had made broad but vague political statements suggesting that the accession would be provisional and that the people of Kashmir would have to ratify accession.20

Once Hari Singh signed the instrument, thus changing Kashmir's legal status, Indian troops entered the territory and stopped the tribal advance toward the capital city of Srinagar.21 In the process, Indian troops took control of the southern two-thirds of Kashmir.22 The Pakistani military entered the region in November 1947 to support the invading tribal parties, bringing about the first full-scale Indo-Pakistani war over Kashmir.23

B. The Security Council's Initial Mediation Attempts

With no obvious end in sight to the fighting, India approached the U.N. Security Council to lodge a complaint, pursuant to Article 35 under the U.N. Charter, invoking the Security Council's dispute resolution capacity.24

For India, the issue before the Security Council was the relatively simple one of Pakistani-supported aggression in the face of Indian sovereignty in Kashmir.25 India contended that Kashmir's accession was legally binding, bringing the entire region under Indian sovereignty and making any Pakistani or Pakistani-supported fighters "invaders."26

Within two weeks, Pakistan filed a response and counterclaim, pursuant to Article 35 of the U.N. Charter, and framed the situation in a fundamentally different way.27 First, Pakistan denied the charge of directly giving aid and assistance to the tribesmen, claiming that

19 See Ganguly, Crisis, supra note 9, at 157 (providing text of the Instrument of Accession signed by Hari Singh); Ganguly, Origins, supra note 1, at 36.
20 See Ganguly, Crisis, supra note 9, at 10 n.23, 157; Lamb, supra note 9, at 136–37.
21 Ganguly, Origins, supra note 1, at 36–37.
22 See Sengupta, supra note 1, at 12.
23 Ganguly, Crisis, supra note 9, at 11; Ganguly, Origins, supra note 1, at 37.
26 See Indian Complaint, supra note 24, at 1, 3.
they were actors independent from the Pakistani government. Second, Pakistan broadened the focus of the dispute by raising a litany of objections. One of these objections was to the validity of Kashmir’s accession to India. Pakistan claimed that the accession had occurred by “fraud and violence” and alleged conspiracy between India and Hari Singh. Pakistan argued that any arrangement between India and Hari Singh was illegitimate. Any decision about Kashmir’s legal status should thus be made in reference to the Kashmiri people’s will through a plebiscite.

Upon receiving these letters from India and Pakistan, the Security Council assumed jurisdiction to examine the conflict, pursuant to Article 34 of the U.N. Charter, and passed Resolutions 38 and 39, its first statements on the dispute. Resolution 39 established the United Nations Commission for India and Pakistan (UNCIP) on January 20, 1948. The UNCIP’s established function was (1) to investigate the facts that gave rise to the Kashmir dispute, and (2) to exercise any mediatory influence likely to smooth away difficulties, to carry out directions given by the Security Council, and to report on the progress of executing the advice and directions of the Security Council.

Before the UNCIP reached the region to follow through on its mandate, the Security Council passed Resolution 47 in April 1948, which was and still remains the Security Council’s outlined structure for a recommended permanent solution. Resolution 47 set forth a two-part recommendation consisting of demilitarization and plebiscite. The resolution called for Pakistan to secure the withdrawal of the tribesmen and Pakistani nationals from the region, after which India would have to withdraw to a military level minimally necessary to maintain law and order. Once the region had been demilitarized, a U.N.-
appointed Plebiscite Administrator would supervise a free and impartial plebiscite, through which the Kashmiri people would determine to which state they would accede. The Security Council, however, avoided mention of the Instrument of Accession, whose validity India asserted and Pakistan explicitly challenged.

Neither India nor Pakistan was fully satisfied with Resolution 47. Despite their disapproval, India and Pakistan both agreed to accept the good offices of the UNCIP to their states pursuant to Resolution 47. However, in May 1948, before the UNCIP reached South Asia to conduct investigations, regular Pakistani troops entered the northern part of Kashmir to support the tribemen and Pakistani nationals, who were occupying the area, against the Indian military. When the UNCIP arrived in July, the presence of Pakistani regular military caught the UNCIP by surprise and made it concentrate on the first and primary challenge of demilitarization.

The first UNCIP Resolution passed on August 13th of the same year reflected this development. In addition to calling for a ceasefire, the UNCIP resolution reiterated the recommendations in Resolution 47 and emphasized the importance of the withdrawal of the Pakistani military, whose presence constituted a “material change” from the situation originally presented to the Security Council. Again, however, aside from noting a “material change,” there was little mention of the Instrument of Accession, which, if valid, made any Pakistani military presence in the region an act of aggression.

India accepted the UNCIP Resolution, even though the UNCIP did not condemn the presence of the Pakistani military. Pakistan also accepted the Resolution, but with so many qualifications that the UNCIP deemed the answer as “tantamount to rejection.” First, Pakistan objected to the absence of definite details for a free plebiscite. Sec-

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40 Id. at 9–12.
41 Id. at 8–12; Pakistani Reply, supra note 27, at 9; Indian Complaint, supra note 24, at 1.
42 See Dawson, supra note 25, at 24.
43 See S.C. Res. 47, supra note 38, at 9; Dawson, supra note 25, at 25.
44 Dawson, supra note 25, at 25.
45 See id.
46 Id. at 25–26.
48 See UNCIP Interim Report, supra note 47, at 59; Dawson, supra note 25, at 26.
49 See Dawson, supra note 25, at 26; Lamb, supra note 9, at 168–69.
50 Dawson, supra note 25, at 26.
51 Id.
ond, Pakistan wanted its military withdrawal to be synchronized, both in timing and number, with the withdrawal of the Indian military.\(^{52}\)

After much deliberation, India and Pakistan eventually agreed to a ceasefire, which went into effect on January 1, 1949, exactly one year after India’s complaint to the Security Council.\(^{53}\) The ceasefire created a border that gave India two-thirds control of the region and Pakistan one-third control.\(^{54}\) However, the two states were not able to come to an agreement on the demilitarization of Kashmir.\(^{55}\) To India, this disagreement precluded further talks about a plebiscite;\(^{56}\) to Pakistan, this situation demonstrated India’s lack of commitment to a plebiscite, which Pakistan saw as the ultimate goal.\(^{57}\)

After further attempts at mediation, the UNCIP was terminated in favor of a single person vested as a U.N. Representative to conduct negotiations.\(^{58}\) Until 1958, various U.N. Representatives attempted to negotiate ways to achieve demilitarization and to conduct a plebiscite, but none came to a permanent resolution.\(^{59}\)

After this time, the Security Council seemed to abandon its mediatory role.\(^{60}\) The evidence of this shift away from its mediatory role can be seen in 1965, during the Second War in Kashmir.\(^{61}\) The Security Council passed Resolutions 210 and 211, its last statements on the Kashmir conflict.\(^{62}\) Both resolutions omitted reference to earlier Security Council or UNCIP recommendations to a permanent resolution and implicitly pushed India and Pakistan toward using mediators outside of the U.N.\(^{63}\)

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\(^{52}\) Khan, supra note 5, at 514–15.
\(^{53}\) See Ganguly, Origins, supra note 1, at 53.
\(^{54}\) See Sengupta, supra note 1, at 12.
\(^{55}\) See Ganguly, Origins, supra note 1, at 53.
\(^{56}\) See SarDesai, supra note 25, at 89–90.
\(^{57}\) See Khan, supra note 5, at 515–16.
\(^{59}\) See Ganguly, Origins, supra note 1, at 53–55. Among these attempts included those by General McNaugton, Sir Owen Dixon, Dr. Frank Graham, and Mr. Gunnar V. Jarring. See id. at 53–55, 59–60.
\(^{60}\) See Khan, supra note 5, at 516.
\(^{61}\) See id. at 521–22.
\(^{62}\) See id.
\(^{63}\) See id. at 521–23. India and Pakistan agreed to allow the Soviet Union to be the main mediator, and the negotiations resulted in the Tashkent Declaration, which returned the situation in Kashmir to the status quo ante bellum and annulled all territorial gains. See id.
C. Post-1965 Negotiations and Tensions

After 1965, India and Pakistan have almost exclusively dealt with the conflict bilaterally.\(^{64}\) The ceasefire line has become a de facto legal border called the “Line of Control” through an arrangement created by the Simla Agreement in 1972.\(^{65}\) Pakistan has repeatedly tried to raise the conflict in an international forum.\(^{66}\) However, India insists on dealing with Kashmir’s legal status bilaterally and has resisted attempts at international mediation for the last thirty years.\(^{67}\)

Since the rise of the separatist movement in the late 1980s, the stakes in Kashmir have altered and intensified.\(^{68}\) India has accused Pakistan of conducting a “proxy war” and “sponsoring terrorism” in the region by providing military support and training to the militants and by allowing infiltration across the Line of Control into Indian-controlled Kashmir, in violation of the existing bilateral treaty regime.\(^{69}\) Pakistan has denied all claims of direct military and other material support and, in turn, alleges that India has not abided by its obligations according to the Security Council resolutions.\(^{70}\) Tensions seesaw between a precarious stalemate and the brink of war, with the threat to peace ever present.\(^{71}\)

II. How the Security Council’s View of the Kashmir Dispute Weakened Its Ability to Bring Permanent Resolution

One reason for the Security Council’s failure in bringing a permanent resolution to the Kashmir conflict is the Council’s view of the conflict as political rather than legal.\(^{72}\) From the beginning, the Security Council framed the problem as primarily a political dispute rather than looking to a major legal underpinning of the dispute: the Instrument of Accession’s validity or lack thereof.\(^{73}\)

\(^{64}\) See id. at 523–24.
\(^{65}\) See Lamb, supra note 9, at 297; Khan, supra note 5, at 525–29.
\(^{66}\) See Khan, supra note 5, at 529–30.
\(^{67}\) See id.
\(^{68}\) See Ganguly, Crisis, supra note 9, at 14–16; Sengupta, supra note 1, at 12.
\(^{69}\) See Ganguly, Crisis, supra note 9, at 15–16; Khan, supra note 5, at 528–30; Sengupta, supra note 1, at 12.
\(^{70}\) See Khan, supra note 5, at 534.
\(^{71}\) See Eckholm, supra note 3, at A6; Sengupta, supra note 1, at 12.
\(^{73}\) See S.C. 47, supra note 38, at 8; Dawson, supra note 25, at 23.
The Security Council, unlike the International Court of Justice (ICJ), often deals with dispute resolution in a political mode and does not have the capacity to adjudicate on purely legal terms.\textsuperscript{74} Nevertheless, the Kashmir dispute represents a situation where the Security Council could have given a stronger voice and stiffer backbone to its binding recommendations by taking a "quasi-judicial" stance and referring to the legal basis of the conflict.\textsuperscript{75} But, by side-stepping overt references to the Instrument of Accession, which lies at the center of the legal dispute over Kashmir, the Security Council could not give a forceful rationale for its two-pronged recommendations, which ultimately weakened its recommendations for permanent solution.\textsuperscript{76}

Instead, the Security Council took a merely implicit stance that the Instrument of Accession was valid yet incomplete.\textsuperscript{77} The two-pronged plan, demilitarization and plebiscite, was one clear demonstration of this implicit stance that the Security Council articulated in Resolution 47.\textsuperscript{78} For instance, by asking Pakistan to secure the withdrawal of "tribesmen and Pakistani nationals not normally resident therein" before any withdrawal of Indian troops, the Security Council made a tacit statement accepting the textual validity of the Instrument of Accession and India's claim to sovereignty in Kashmir, even if provisional.\textsuperscript{79} However, by outlining the details of a plebiscite, the Security Council implicitly found that the plain language of the Instrument, which did not state that Kashmir's accession was provisional or that a plebiscite was necessary, was incomplete.\textsuperscript{80} Recommending a plebiscite was a way of holding India to its political commitment, even though it had made no legal obligation as such.\textsuperscript{81}

The Security Council chose not to explicitly mention the Instrument of Accession in the language of Resolution 47.\textsuperscript{82} The Security Council simply called for Pakistan to "secure the withdrawal" of the tribesmen and Pakistani nationals from Kashmir, but stopped short of

\textsuperscript{74} See Kirgis, \textit{supra} note 72, at 509–10, 528–29.
\textsuperscript{75} See Ganguly, \textit{Crisis}, \textit{supra} note 9, at 11–13; Kirgis, \textit{supra} note 72, at 527–28.
\textsuperscript{76} See S.C. Res. 47, \textit{supra} note 38, at 8; UNCIIP Third Interim Report, \textit{supra} note 58, at 77–79; Pakistani Reply, \textit{supra} note 27, at 9; Indian Complaint, \textit{supra} note 24, at 1; Kirgis, \textit{supra} note 72, at 527–28.
\textsuperscript{77} See S.C. Res. 47, \textit{supra} note 38, at 9–12; Ganguly, \textit{Crisis}, \textit{supra} note 9, at 157–59.
\textsuperscript{78} See id.
\textsuperscript{79} See S.C. Res. 47, \textit{supra} note 38, at 9.
\textsuperscript{80} See id. at 10–12; Ganguly, \textit{Crisis}, \textit{supra} note 9, at 157–59.
\textsuperscript{81} See S.C. Res. 47, \textit{supra} note 38, at 10–12.
\textsuperscript{82} See id. at 8–12.
labeling their presence as an act of aggression.\(^{83}\) Similarly, the Council called for a plebiscite without saying that the plain language of the Instrument was incomplete in reflecting India’s obligations in the region.\(^{84}\) Dealing with the situation as a political dispute requiring quid pro quo concessions, rather than legal obligations, was a more conciliatory choice that proved to be too weak to compel India and Pakistan to take steps toward a final resolution.\(^{85}\)

This lack of force behind Resolution 47 was part of the reason India and Pakistan disapproved of the resolution.\(^{86}\) India believed that the Security Council did not take into account or give credence to the legality of Kashmir’s accession to India, even if accession were only a provisional arrangement until normalcy in the region was achieved.\(^{87}\) On the other hand, Pakistan wanted to emphasize the second element of the recommendation—the plebiscite—and deemphasize demilitarization.\(^{88}\)

The purely political characterization of the conflict continued into the August 13th UNCIP Resolution of 1948.\(^{89}\) For instance, the UNCIP dealt with the entrance of the regular Pakistani military in May 1948, an overt act of aggression in India’s view, by simply calling it a “material change” in circumstances in violation of Security Council Resolution 38.\(^{90}\) The UNCIP Resolution reprimanded Pakistan but did not declare the entrance of Pakistani troops a violation of Indian sovereignty, regardless of whether that sovereignty was provisional or permanent.\(^{91}\) Although India accepted the UNCIP Resolution, it was disappointed that the UNCIP or Security Council did not condemn Pakistan for violating Resolution 38, which would have helped bolster recognition of the legality of Kashmir’s accession to India.\(^{92}\)

The entanglement of demilitarization and plebiscite thus remained unresolved.\(^{93}\) Since no return to normalcy had occurred by 1951, India constitutionally integrated into the Indian Union the portion of Kashmir that it occupied, relying on the idea that it had the le-

\(^{83}\) See id. at 9.

\(^{84}\) See id. at 10–12.

\(^{85}\) See Ganguly, Origins, supra note 1, at 53–55; Kirgis, supra note 72, at 527–28.

\(^{86}\) See Dawson, supra note 25, at 24.

\(^{87}\) See id.

\(^{88}\) See Khan, supra note 5, at 513–15.

\(^{89}\) See Dawson, supra note 25, at 25–26.

\(^{90}\) See id. at 25–27.

\(^{91}\) See id.; Lamb, supra note 9, at 168–69.

\(^{92}\) See Dawson, supra note 25, at 26; Lamb, supra note 9, at 169.

\(^{93}\) See Ganguly, Origins, supra note 1, at 53–55; Khan, supra note 5, at 514–16.
gality of the Instrument of Accession's text on its side, despite Paki-
stan's strenuous protests.\(^94\) By 1965, largely because of the political re-
alities of the Cold War and likely because of the repeated failure to de-
militarize Kashmir, the Security Council disengaged from its mediatory
efforts by conspicuously not assuming its previous mediatory role.\(^95\)

### III. Actions the Security Council Could Take to Reinsert
Itself as a Mediator

Considering the dangers to the region, renewed efforts toward
mediation appear to be an option that could save India, Pakistan,
South Asia, and the international order from further uncertainty.\(^96\)
According to Jacob Bercovitch, two of the conditions under which
mediation is likely to be used are (1) when "both parties' own conflict
management efforts have reached an impasse," and (2) when "both
parties are prepared to cooperate to break their stalemate."\(^97\) How-
ever, at this point, such mediation is only possible if the Security
Council reengages India, whose various governments have become
resistant to Security Council mediation.\(^98\)

The problem remains that, even if India admits that it has
reached an impasse over the Kashmir conflict under current bilateral
negotiation attempts, India will likely continue to resist cooperating
with Pakistan in seeking outside mediation.\(^99\) One of several reasons is
that India’s initial attempt to use the Security Council to resolve the
dispute failed to bring peace.\(^100\) However, Pakistan seems amenable to
international mediation.\(^101\) Should the Security Council act as that
mediator, it should attempt to reengage India in the mediatory pro-
cess, which entails considering why its efforts failed initially, and what

\(^94\) See Ganguly, Origins, supra note 1, at 54–55; Khan, supra note 5, at 517–20.
\(^95\) See Khan, supra note 5, at 520–22.
\(^96\) See Sengupta, supra note 1, at 12.
\(^97\) See Anthony Wanis St. John, The Mediating Role in the Kashmir Dispute Between India
and Pakistan, 21 SPG FLETCHER F. WORLD Aff. 173, 176 (1997) (quoting Jacob Bercovitch,
The Structure and Diversity of Mediation in International Relations, in Mediation in Interna-
tional Relations: Multiple Approaches to Conflict Management (Jacob Bercovitch & Jeffrey Z. Rubin eds., 1992)).
\(^98\) See Brian Farrell, The Role of International Law in the Kashmir Conflict, 21 PA. ST. INT’L
L. REV. 293, 313 (2003); Khan, supra note 5, at 528–30.
\(^99\) See Khan, supra note 5, at 528–30.
\(^100\) See Dawson, supra note 25, at 24; Farrell, supra note 98, at 300–01.
\(^101\) See Khan, supra note 5, at 527–29.
India would require for its faith to be restored in the powers of the Security Council.\textsuperscript{102}

To reengage India, the Security Council should consider refocusing the legal framework of the conflict, rather than treating the dispute in political terms as it had in earlier mediatory attempts, especially if the Security Council continues to deal with the Kashmir dispute under Article 34.\textsuperscript{103} Considering the changes of the last thirty years, referring to the Instrument of Accession's validity, while a useful starting point, does not seem to be the most realistic way to approach the conflict.\textsuperscript{104} Instead, the proper legal starting point to reengage India at this juncture should be the policing of the Line of Control, which has ripened into the de facto border in the last three decades since the Simla Agreement, the current Indo-Pakistani treaty that controls the two countries' actions in Kashmir.\textsuperscript{105}

Since the rise of the separatist movement in Kashmir, India’s major and consistent complaint against Pakistan has been its support of infiltration across the Line of Control in violation of the Simla Agreement, its current bilateral treaty arrangement.\textsuperscript{106} Interestingly, India’s current accusations are analogous to those that it lodged against Pakistan’s alleged support of the tribesmen and other “invaders” at the beginning of the Kashmir conflict.\textsuperscript{107} Pakistan’s denial of support, claiming that the infiltrators are independent actors whose movements Pakistan is not able to control officially, sounds similar as well.\textsuperscript{108} In bilateral negotiations, India has claimed that it will not make meaningful concessions to Pakistan until sponsorship, direct or indirect, of cross-border infiltration ceases.\textsuperscript{109} If the Line of Control becomes the new focus, then the Security Council could avoid its earlier mistake: first, by making a good faith effort to investigate, and then, if necessary, by denouncing cross-border infiltration across the Line of Control.\textsuperscript{110}

Taking a strong stance against cross-border infiltration does not mean that the Security Council has to grant an absolute moral superiority to the Indian case by treating Pakistan as the naked aggressor.\textsuperscript{111}

\textsuperscript{102} See id. at 529.
\textsuperscript{103} See Kirgis, supra note 72, at 527–28.
\textsuperscript{104} See Ganguly, Crisis, supra note 9, at 14–16; Eckholm, supra note 3, at A6.
\textsuperscript{105} See Lamb, supra note 9, at 297; Khan, supra note 5, at 525–29.
\textsuperscript{106} See Ganguly, Crisis, supra note 9, at 14–16; Sengupta, supra note 1, at 12.
\textsuperscript{107} See Indian Complaint, supra note 24, at 1; Eckholm, supra note 3, at A6.
\textsuperscript{108} See Pakistani Reply, supra note 27, at 2; Eckholm, supra note 3, at A6.
\textsuperscript{109} See Eckholm, supra note 3, at A6; Sengupta, supra note 1, at 12.
\textsuperscript{110} See Kirgis, supra note 72, at 527–28; Sengupta, supra note 1, at 12.
\textsuperscript{111} See Ganguly, Crisis, supra note 9, at 15–16; Eckholm, supra note 3, at A6.
Since January 2002, even Pakistan has attempted to address the supposedly unauthorized crossing over into Indian-controlled Kashmir by its nationals, particularly as to members of Islamic fundamentalist groups that incite and respond with violence in the region. However, to have the Security Council or a Security Council-mandated committee such as the UNCIP to investigate these discreet issues—the alleged crossing of the Line of Control and violation of the Simla Agreement—might give India the incentive to reengage in mediation. India has an interest in taking help from the Security Council in this respect because India’s major challenge in the region has been controlling illegal movement across the Line of Control. This investigation of, and stance against, cross-border infiltration could be a starting point for reengaging India.

CONCLUSION

The conflict between India and Pakistan over Kashmir has meandered dangerously through several phases since its inception. The Security Council attempted to use its mediatory influence at the early stages of the conflict but could not bring about a permanent resolution. One reason for its failure is that the Security Council dealt with the dispute over Kashmir’s legal status primarily as a political dispute. The Security Council weakened its recommendations by not making explicit the core legal issue of the dispute, which was the Instrument of Accession. Reference to the legal framework of accession might have made the obligations that India and Pakistan owed more explicit and more difficult to avoid.

The Security Council should now attempt to reengage India, the party resistant to mediation, by dealing with the legal aspects of the Kashmir conflict. One of these legal issues is India’s claims of Pakistani-supported cross-border infiltration over the Line of Control. India has an incentive to reinvest itself in Security Council mediation if the Security Council can make a good faith effort to investigate and take a firm stance on this issue.

112 See Eckholm, supra note 3, at A6.
113 See Ganguly, Crisis, supra note 9, at 15–16; Kirgis, supra note 72, at 527–29; Eckholm, supra note 3, at A6.
114 See Khan, supra note 5, at 529.
115 See St. John, supra note 97, at 176; Eckholm, supra note 3, at A6.