The Prospect of Third-Party Mediation of the Kashmir Dispute: Is There A Way to Re-engage India in a Facilitated Discussion?

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The Prospect of Third-Party Mediation of the Kashmir Dispute: Is There A Way to Re-engage India in a Facilitated Discussion?

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The Prospect of Third-Party Mediation of the Kashmir Dispute: Is There A Way to Re-engage India in a Facilitated Discussion?

By: Sheila Rajan

I. Introduction

The end of the Cold War appeared to mark the end of the risk of a full-scale nuclear exchange between international superpowers. However, the intractable dispute in South Asia between India and Pakistan over the region of Kashmir once again places the international community on the brink of nuclear exchange. Indo-Pak relations were chilled by the December 2001 attack by a Pakistan-based terrorist group on the Indian Parliament building in New Delhi.\(^1\) The attack resulted in nine Indian deaths, and both nations moved troops and significant weapons closer to the Kashmiri Line of Control.\(^2\) The conflict was further escalated when Pakistan tested a nuclear-capable missile. Fortunately, under international pressure, the nations backed down from what would have been their fourth war since partition in 1947.\(^3\) What will keep them at bay next time?

The grave impact escalation of this conflict could have on international peace and security mandates concerted efforts be made by both parties toward resolution. With regard to Kashmir, after the signing of the Simla Agreement, India refuses any third-party role in facilitating resolution. Bilateral approaches to negotiating settlement between India and Pakistan has yet to be conducted with a serious intent to seek peace and has led to futile political posturing rather than effective discussions. This note will propose that some form of third-party facilitation of the Kashmir peace process is the only means of breaking this entrenched stalemate.

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\(^2\) See Id.

\(^3\) See Id.
between India and Pakistan. This note will further propose a new, more comprehensive approach to mediation that will not only encourage party participation, but ensure a path to resolution that supports durable peace in the region.

Part II of this note will discuss the origin of the Kashmir conflict, focusing on the road to stalemate, by examining the historical background, U.N. attempts to mediate, and the creation of the Simla Agreement. Part III analyzes the failures of purely bilateral negotiations. Part IV makes a renewed call for mediation by examining the failures of past mediation attempts, proposing a new approach to mediation, and establishing a means of re-engaging India in the possibility of mediation.

II. Background

A. Origin of the Conflict

The historical roots leading to the present state of the Kashmir conflict are largely agreed upon; it is the interpretation of the relationship and result of these historical events that are contested. During the British occupation, Britain administered direct control over nine provinces and supervisory control over 584 princely states. Under the doctrine of paramountcy, the princely states were nominally independent and ruled by local monarchs that agreed to recognize the British Crown as the paramount power in the subcontinent.

Indian independence was won in 1947 and the question that remained was the form the independent nation would take. The Indian National Congress supported the idea of a “unified,
secular multiethnic democracy,” while the All-India Muslim League promoted a partition along religious lines. The two-nation theory of partition was adopted and on August 15, 1947 the provinces of British India were divided to create the Dominion of India and the Dominion of Pakistan. The partition created a territorial and religious divide, without provisions for the division of resources or administrative functions, such as finances, military, foreign affairs, or infrastructure. What had begun as a political contest between the Congress and Muslim League, under British oversight, began to escalate into an international struggle.

During decolonization, the princely states were handled separately in a decree set by Lord Mountbatten, the last British administrator of India. He decreed that with the lapse of British rule, the princely states would have one of three options: join with India, join with Pakistan or remain independent. The Maharaja of Kashmir, Hari Singh, forestalled his decision regarding accession for months after the partition and independence of India and Pakistan. The Maharaja was soon forced to act in the face of civil unrest in the Poonch region and armed infiltration from

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7 *Id; see also Verghese Koithara, Crafting Peace in Kashmir: Through a Realist Lens* 28-29 (2004) (It is interesting to note that Hindu-Muslim animus or religious clashing among the masses was not the primary motivation for partition, rather it was the “elites of the two communities could not agree on political power sharing.”).

8 *See Id.* at 295-96.

9 *See Id.* at 295; *see also Koithara, supra* note 7, at 28-29 (Both nations were disappointed by the result of partition; India was angry at the disruption of geographical and cultural cohesion and Pakistan was unhappy because the state they got was more “modest- in terms of size, ideological success and geographic security,” than the League had led them to expect.)

10 *See Koithara, supra* note 7, at 28-29 (The consequences of partition, including the migration of approximately 14 million people and the killing of about a quarter million people, along with the “disorderly departure” of the British that led to manipulation of the process by both sides, contributed to the violent shift in the struggle.).

11 *See Sumantra Bose, Kashmir Roots of Conflict, Paths to Peace* 30 (2003) (Mountbatten made clear that the third option of independence was mostly theoretical; he urged them to decide between the other options after considering the states “geographical embeddedness in or contiguity to India or Pakistan, and the wishes of their population of subjects.”).

12 *See id.* at 32-33 (The choice of accession was clear for the majority of states, however Kashmir had multiple unique favors pulling in both directions, including (1) its territorial contiguity with both Pakistan and India, (2) Kashmir’s 77% majority Muslim population was countered by a strong Kashmiri tie to left-wing, republican elements in the Indian National Congress, and (3) the Maharaja was a Hindu autocrat that ruled a Muslim-majority population.)
West Punjab by Pashtun tribesman.\textsuperscript{13} Pakistan joined the fray and began arming, organizing and providing logistical support to rebel tribesman.\textsuperscript{14} The Kashmiri government appealed to Pakistan to desist in supporting the “cross-border terrorism,” however Pakistan refused to take responsibility for the attacks and certified the revolt as retribution from “ethnic and religious kin across the border” for atrocities committed by Kashmiri forces against the Muslim population in Poonch.\textsuperscript{15} With the support of Pakistan and the lack of resistance from the Maharaja’s crumbling forces, the infiltrating tribesman had captured significant territory in the northern part of the Valley and had advanced within 20 miles of Srinagar.\textsuperscript{16} The Maharaja’s hand was forced and he made an emergency plea to the Indian Governor General for military assistance.\textsuperscript{17}

India agreed to provide the necessary assistance only after Maharaja Singh had properly executed the Instrument of Accession to India.\textsuperscript{18} The Instrument was signed by Maharaja Singh on October 26, 1947 and Kashmir became legally acceded to the Dominion of India upon acceptance by Lord Mountbatten the following day.\textsuperscript{19} In a personal letter addressed to Maharaja Singh accompanying the acceptance, Lord Mountbatten stated that “as soon as law and order have been restored in Kashmir and its soil cleared of the invader, the question of the State’s accession should be settled by a reference to the people.”\textsuperscript{20}

Indian troops were immediately dispatched to Kashmir and the first official Indo-Pakistan war over Kashmir was initiated.\textsuperscript{21}

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\textsuperscript{13}See id.
\textsuperscript{14}See Ganguly et al., supra note 5 at 2.
\textsuperscript{15}See BOSE, supra note 11 at 33-34.
\textsuperscript{16}See id. at 35.
\textsuperscript{17}See Ganguly et al., supra note 5 at 2.
\textsuperscript{18}See id.
\textsuperscript{19}See KOITHARA, supra note 7 at 34.
\textsuperscript{20}Farrell, supra note 4 at 298.
\textsuperscript{21}See id.
\end{flushright}
B. U.N. Attempts at Mediation

On January 1, 1948, India sought assistance from the United Nations Security Council by filing a complaint alleging Pakistan had illicitly provided assistance to Kashmiri insurgents. On January 1, 1948, India sought assistance from the United Nations Security Council by filing a complaint alleging Pakistan had illicitly provided assistance to Kashmiri insurgents. India promised to settle the issue of final accession of Kashmir in accordance with the wishes of the people, but only after the invaders had been displaced from the region. Pakistan weighed in with a counter-complaint denying any wrong doing and challenging the validity of Kashmir’s accession to India and India’s military presence in the region. The U.N. never directly addressed the issues raised in India’s complaint, but instead responded by adopting a resolution establishing the United Nations Commission on India and Pakistan (UNCIP). The proposed function of the Commission was to make findings of fact and provide mediating influence over the dispute. The United Nations passed resolution 47 which would outline the basic U.N. stance on proper resolution of the Kashmir dispute for the next 15 years. Resolution 47 delineated a three part procedure to deal with Kashmir; Part I called for Pakistani demilitarization of the Kashmir region, Part II required Indian reduction in military presence commensurate with the maintenance of law and order, and Part III proposed final resolution by an impartial U.N. administered plebiscite to determine the wishes of the Kashmiri people.

U.N. Resolution 47 mapped an idealistic approach to resolution, but the road proved difficult to follow. The nations reached political impasse on the procedure for achieving part I and II of demilitarization as a precursor to plebiscite. India refused a simultaneous withdrawal of

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22See Ganguly et al., supra note 5 at 2.
23See Ali Kahn, The Kashmir Dispute: A Plan for Regional Cooperation, 31 COLUM. J. TRANSNAT’L. L. 495, 512-13 (1994); see also Farrell, supra note 4 at 299 (India filed its complaint pursuant to Article 35 of the U.N. Charter and alleged Pakistan assisted invaders by providing military equipment, training and supplies to the invaders).
24See id. at 513.
25See id. at 299.
26See id.
27See Ganguly et al., supra note 5 at 2; see also Farrell, supra note 4 at 299.
28See Kahn, supra note 23 at 514.
troops from the Kashmir region, and instead insisted upon complete Pakistani evacuation prior to any demobilization of Indian troops. Pakistan, in response, made no attempts to demilitarize, but rather escalated the situation by mobilizing its regular troops behind armed tribesman in direct violation of the Security Council resolution. With negotiations between the nations at a stalemate, battle between the mobilized troops ensued.

The stalemate regarding demilitarization procedures persisted, but on January 1, 1949, the U.N. Commission was able to negotiate a cease-fire agreement. A few months later the parties were able to agree on the geographical location of the cease-fire line and a U.N. military observer was dispatched to supervise the line. The Commission was disbanded and mediation efforts were continued by individual U.N. representatives from 1949 to 1953. The U.N sponsored mediations focused primarily on establishing an “agreed program of progressive demilitarization” in an attempt to create an environment conducive to “the free expression of opinion for the purposes of plebiscite.”

International attempts at mediation were a failure. The first United Nations Representative in India and Pakistan (UNRIP) appointed to mediate the dispute was Sir Owen Dixon, an Australian jurist. Dixon’s suggestion of conducting a plebiscite regionally, rather than on a state-wide basis was rejected. A year later, Frank Graham, an American diplomat, took Dixon’s place. The UNSC proposed a reduction in military presence by both sides on December

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29 See id.
30 See id.
31 See Farrell, supra note 4 at 300; see also Khan, supra note 23 at 515 (The Commission reiterated its stated objectives of resolution 47 after the cease-fire was established and the proposal was eventually accepted by both parties, however, Pakistan placed such conditions on its acceptance that the Commission was forced to consider it “tantamount to rejection.”).
32 See id.
23, 1952, which was accepted by Pakistan and rejected by India. The last serious UNRIP effort to find a solution was Graham’s proposal of February 14, 1953 which was rejected by both sides. Mediation attempts continued to focus on creating optimal conditions for plebiscite, while internal and external political and societal developments were continually shifting India away from the idea of plebiscite. India’s increasing resistance to plebiscite can be attributed to several factors, including “the de facto partition of the state, the cold war, the state’s proximity to the Soviet Union and China, the United Nations’ failure to mediate, the political developments within Jammu and Kashmir and India’s resolve to retain the territories under its control.”

By the 1960’s, the U.N had failed to create the conditions necessary to conduct plebiscite, and the Kashmir issue began to fade from the U.N. Security Council radar, replaced by the pressing demands of the cold war. Frustrated with international oversight of the Kashmir issue, Pakistan once again opted for military resolution of the conflict by attempting to insight a massive uprising among the Kashmiri people against Indian occupation. The uprising was mild, and when Pakistan violated the cease-fire line, Indian troops retaliated by marching into Pakistan threatening to take over major Pakistani cities. The United Nations Security Council intervened, this time avoiding the issue of plebiscite and instead demanding each nation to return to military positions held prior to the initiation of the armed conflict. The U.N resolutions calling for a cease-fire did not suggest or offer U.N involvement in mediation of the conflict, but

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35 See KOITHARA, supra note 7 at 36.
36 Khan, supra note 23 at 516.
37 See id. at 520 (With tensions growing between the United States and the Soviet Union, the SC was unable to find international consensus on the Kashmir issue).
38 See id. at 521.
39 See id.
40 See id.
called upon the two governments to “utilize all peaceful means listed in Article 33 of the UN Charter, such as negotiation and mediation.”

The Soviet Union was accepted as mediator to a cease-fire agreement ending the second war between India and Pakistan over Kashmir. Although the resulting Tashkent Declaration did not provide a permanent settlement of the conflict, it is significant for the following reasons: (1) it explicitly reaffirmed the de facto partition of the state, (2) returned the armed forces to positions held prior to the military engagement, and (3) committed the nations to minimize tensions by discouraging harmful propaganda and agreeing to meet to discuss all matters of concern as they arise in the future.

C. The Present State of the India-Pakistan Relationship: the Simla Agreement

The Simla Agreement provides the most recent legal articulation of viable dispute resolution techniques for the Kashmir issue. The Simla agreement is a result of the 1971 war between India and Pakistan during the secession of East Pakistan to form Bangladesh. India’s approach to postwar negotiations, after this altercation, marked a significant change in position regarding international involvement in future resolution of the Kashmir issue. Pakistan entered postwar negotiations in a weak strategic position, having incurred considerable territorial and population losses. Therefore, the Simla agreement, in many ways, represents India’s interests in the best means of resolving of the Kashmir conflict.

41 See id.
42 See Khan, supra note 23 at 522; see also Farrell, supra note 4 at 304 (The significance of the recognition of the de facto partition of the state is that the line was treated in the same manner as Pakistan’s international border with India, therefore, some argue, giving the cease-fire line greater legal significance).
43 See Farrell, supra note 4 at 304.
44 See id. at 305.
The Simla agreement makes several significant alterations to the terms and conditions upon which resolution may be reached. Art. 1, sec. (ii) of the agreement requires the nations “settle their differences by peaceful means through bilateral negotiations or by any other peaceful means mutually agreed upon between them” and that neither side “unilaterally alter the situation.”\textsuperscript{45} The Simla agreement provides provisions for the temporary maintenance of peace, but does not purport to resolve the issue.\textsuperscript{46} The agreement vaguely provides for meetings by “respective Heads” to “discuss further the modalities and arrangements of the establishment of durable peace.”\textsuperscript{47} The agreement further delineates the “line of control”, rather than the cease-fire line as the recognized partition of the state.\textsuperscript{48}

The Simla agreement establishes bilateral negotiations as the primary means of dispute resolution of the Kashmir conflict. As a result of the Simla agreement neither nation may unilaterally present the conflict to the United Nations or any other outside party for assistance in resolution. Assuming both parties came to the table with a genuine interest in generating movement toward settlement by taking responsibility and making concessions, bilateral negotiations are the optimal means of reaching mutual agreement. Absent this genuine motivation, strict interpretation of the agreement indicates that a perpetual stalemate may be maintained so long as one party refuses to negotiate. The limitation on each party against unilaterally altering the status quo may be exploited by either side to freeze the situation in Kashmir. This type of stalemate will have a negative impact across the board. Pakistan will be unable to force India into discussions regarding territorial division, India will be unable to raise

\textsuperscript{45}Agreement of Bilateral Relations, July 2, 1972, India-Pak., 858 U.N.T.S 71, art. 1(ii) at 72. [hereinafter Simla Agreement].
\textsuperscript{46}See Kahn, supra note 23 at 527.
\textsuperscript{47}Simla Agreement, supra note 45, art. 4 at 73.
\textsuperscript{48}See id. art. 3(ii) at 72; see also Kahn, supra note 23 at 525-26 (the line of control takes into account territory gained by India during the war in 1971).
allegations of Pakistani cross-border terrorism in an international forum, and the Kashmiri people will be caught in the diplomatic tale spin.\textsuperscript{49}

Despite these drawbacks, the Simla agreement also marks the first articulation between the nations of their communal interest in normalizing and restoring diplomatic relations and the steps that may be taken to execute these interests. The nations agreed to the following diplomatic efforts:

(i) Steps shall be taken to resume communication postal, telegraphic, sea, land including border posts, and air links including overflights.
(ii) Appropriate steps shall be taken to promote travel facilities for the nationals of the other countries.
(iii) Trade and co-operation in economics and other agreed fields will be resumed as far as possible.
(iv) Exchange in the fields of science and culture will be promoted.
In this connection delegations from the two countries will meet from time to time to work out the necessary details.\textsuperscript{50}

Although these provisions remain largely unimplemented, the spirit of cooperation and cohesion in which the agreement was made has been gilded the “spirit of Simla.”\textsuperscript{51}

III. The Failure of Bilateralism

Bilateral attempts to resolve the Kashmir issue since the Simla agreement have been few and unsuccessful. The first meeting between heads of the nations took place ten years after the signing of the Simla Agreement.\textsuperscript{52} Indira Ghandi and Zia ul Haq met in Delhi in November 1982 and at this meeting agreed to set-up an India-Pakistan Joint Commission, but relations soon deteriorated and the Commission was never formed.\textsuperscript{53} The formation of the South Asian

\textsuperscript{49}See Khan, supra note 23 at 528-31.
\textsuperscript{50}Simla Agreement, supra note 45, art. 2(i)-(iv).
\textsuperscript{51}See Farrell, supra note 4 at 305.
\textsuperscript{52}See KOITHARA, supra note 7 at 41.
\textsuperscript{53}See id.
Association for Regional Cooperation (SAARC), in 1985, generated some success in initiating regional cooperation. But the 90’s were marked by renewed agitation in the Valley and civil uprising that India alleged was spearheaded by Pakistani military support.

In May of 1998, the nations announced to the world and each other that they were nuclear powers by conducting a series of nuclear tests. The situation was further escalated in the winter of 1998-99 when Pakistani forces occupied about 130 points along 160 kilometers of the Line of Control. This return to military tactics resulted in the Kargil Crisis, the most recent and last official war between the nations. The Kargil War was effectively restrained in July 1999, influenced by strong US and international pressure, but tensions remained high in the following years. The final straw that halted all bilateral talks occurred in December 2001, with a terrorist attack on the Indian Parliament building. India took unprecedented diplomatic measures, including the removal of ambassadors, sharp reduction of embassy staff on both sides, limits on transport, and full mobilization of the military along the border.

Bilateralism is an approach to dispute resolution that can be successful if both parties come to the table with a genuine intent to re-think and strategize resolution. This was the spirit in which the Simla agreement was created. Unfortunately, the execution of this agreement has proved that the parties have not come to the table in the same spirit. Analysts agree that durable peace in Kashmir requires systematic, continuous negotiations over a long-period of time.

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54 See id. at 42.
55 See id. at 43.
56 See id. at 44.
57 See id.
58 See KOITHARA, supra note 7 at 45.
59 See generally id. at 280 (stating “[a]ny peace process must involve a series of steps. It is impossible to agree on a quick package-deal that takes care of all differences at one go.”); see also BOSE, supra note 11 at 222 (stating “any process that seeks to deescalate protracted conflicts and then craft broadly acceptable compromises on issues of fundamental disagreement is necessarily a gradual, time-consuming endeavor, incremental in nature.”).
Without any clearly articulated schedule for meetings or mandatory methodology for negotiating, the nations have avoided discussions and maintained stalemate with no sanction. 

Furthermore, the requirement under Simla, that all actions towards resolution or alteration of the status quo be mutual makes peace easy to frustrate. When a dispute arises that initiates tension between the parties, for example during the attack on the Indian Parliament building, there is no neutral venue upon which to flush out the dispute. The only available avenue of recourse for either party is military. The Simla agreement purports to ban the use of force or threat of force to institute change in the status quo, but what is the viable alternative? If one party refuses to negotiate or discuss the dispute, the other party is banned from unilaterally imposing a method for dispute resolution. The aggrieved party is left with the choice of accepting the state of the dispute or violating the agreement.

The Simla agreement represents the first step to resolution of the Kashmir conflict by creating a legally binding commitment on the part of both nations to negotiate for peace.\(^{60}\)

Moving to the second step of resolution, the establishment of a mutually acceptable roadmap to peace, requires the peripheral facilitation of discussions by a third-party neutral.

IV. The Promise of Third-Party Mediation

Jacob Bercovitch defines mediation, in the international context, as “a process of conflict management, related to but distinct from the parties’ own negotiations, where those in conflict seek the assistance of, or accept an offer of help from, an outsider. . . to change their perceptions or behavior, and to do so without resorting to physical force or invoking the authority of law.”\(^{61}\)

\(^{60}\)See Farrell, \textit{supra} note 4 at 313.

Bercovitch identifies the following factors as benchmarks of a conflict ripe for mediation efforts, “(a) a conflict is long, drawn out or complex; (b) the parties’ own conflict-management efforts have reached an impasse; (c) neither party is prepared to countenance further costs or loss of life; and (d) both parties are prepared to cooperate, tacitly or openly, to break their stalemate.”62 The Kashmir conflict exemplifies the first two benchmarks identified by Bercovitch; in fact it is difficult to identify another international dispute that has for so long proved so resistant to resolution.

There are significant current developments that indicate that India and Pakistan may also satisfy the second two benchmarks identified by Bercovitch. Despite the long and arduous history of conflict between India and Pakistan, the 21st century marks a change in the geopolitical climate of South Asia that could render the Kashmir issue more conducive to settlement. Contributions to this renewed geopolitical climate include: an increased commitment by both nation to end transnational terrorism after the events of September 11th, movement of the Kashmir issue to the forefront of international interest after the development of nuclear power by both nations, and the agreement made by both parties at the SAARC summit in January 2004 to resume composite dialogue.63

India and Pakistan followed through with their January 2004 commitment to resume composite dialogue and by February 2004 the nations began their first formal talks in three years with Kashmir high on the agenda.64 In March 2004, India and Pakistan played a much anticipated cricket match in India’s first tour of Pakistan since 1989.65 In June 2004, India and

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62Id. at 133.
63See Koithara, supra note 7 at 52 (The last and only round of composite dialogue between India and Pakistan was held in October-November 1998).
65See id.
Pakistan renew their commitment to ban nuclear weapons testing and set up a system to warn each other of potential nuclear risks.\textsuperscript{66} In September 2004, during the United Nations General Assembly in New York, President Musharraf and Indian Prime Minister Manmohan Singh meet to discuss “options” for the resolution of the Kashmir conflict. This historic meeting resulted in a significant development in travel across and between the established LOC. In April 2005, for the first time in over fifty years, Kashmiri citizens were allowed to travel by bus from Muzaffarbad, the capital of Pakistan-administered Kashmir to Srinagar, the capital of Indian-controlled Kashmir.\textsuperscript{67} These factors are a baseboard for generating movement in this resistant conflict. The ultimate generation of movement towards resolution must come from the parties themselves.

I propose that the Kashmir conflict faces the danger of indefinite stalemate or even worse, escalation into violent conflict absent the constructive involvement of a third-party neutral at crucial junctures in the peace process. The remainder of this section will discuss the failures of previous attempts at mediation and a renewed approach to mediation that will facilitate resolution and implementation of durable peace between India and Pakistan. Finally the section will address the obstacle India poses to mediation of the dispute and a means of re-engaging India in the possibility of mediation.

A. Failure of Past Mediation Attempts

U.N attempts at mediation during the early years of the Kashmir conflict reveal several deficiencies. The United Nations as an international body was relatively new and untested and

\textsuperscript{66} See id.

\textsuperscript{67} See Nayema Ahmad and Zulfikar Ali, \textit{Guide to the Kashmir Bus Route}, BBC \textsc{world news}, April 6, 2005, at \url{http://news.bbc.co.uk/1/hi/world/south_asia/4413213.stm#top}. 
its pronouncements had yet to command the full force of the international community.\textsuperscript{68} The U.N. did not have the stature or influence that it currently holds and India and Pakistan invoked or denied its authority to best suit their positions.\textsuperscript{69} UNCIP resolutions were diplomatically accepted by both nations and then undiplomatically disregarded. India transfers blame to Pakistan for its failure to demilitarize as the impediment to effectuation of Resolution 47. Pakistan blames India for its failure to commit to a fair and free plebiscite by demilitarizing as the impediment to Resolution 47. These exchanges did very little to encourage dialogue and instead hindered settlement by solidifying each nation’s position.

Cold war era politics also had an effect on the effectiveness of early U.N mediation. Four of the five permanent members of the Security Council - China, the Soviet Union, the United Kingdom and the United States- at the time had significant self interest in the resolution of the conflict.\textsuperscript{70} China and the Soviet Union both share borders with Kashmir, while the U.K was influenced by past involvement in the subcontinent. The U.S was interested in forging stronger ties with Pakistan and India had developed a relationship with the Soviet Union.\textsuperscript{71} The split in the Security Council ensured stalemate through the veto power of the U.S. and Soviet Union.

UNRIP efforts, though well intentioned, had similar shortcomings. The UNRIP mediations focused primarily on creating an environment conducive to plebiscite. While this goal was commendable, it did not address the interests of the parties involved in the mediation and therefore was designed to fail. India was open to plebiscite, but India’s interest was in maintaining security and territory. Pakistan had expressed an interest in plebiscite, but Pakistan’s real interest was in maintaining its territorial presence in the region. Pakistan’s

\textsuperscript{68}\textit{See Farrell, supra} note 4 at 311.
\textsuperscript{69}\textit{See id.}
\textsuperscript{70}\textit{See id.}
\textsuperscript{71}\textit{See id.} at 312.
interest in plebiscite was less motivated by its desire of adopting the will of the people, than by its belief that the Kashmiri people would vote to accede to Pakistan. The resolutions, calling for demilitarization and plebiscite, reached under UNRIP mediation were unsatisfactory to both parties. The power struggle created between these nations and the entrenchment of the conflict demands that any viable resolution incorporate a win-win outcome.\footnote{See generally \textsc{Charles Hauss}, \textit{International Conflict Resolution} 6 (2001) (describes effectuation of positive-sum or win-win conflict resolution where “all parties are satisfied and open to cooperative problem-solving in general.”).}

B. A New Approach to Mediation

The key to a successful peace process for Kashmir is transferring the focus of negotiations from compromise to cooperation. Charles Hauss explains that “[i]n win-win conflict resolution, all parties are happy with the outcome because, at least over time, they all will benefit from it.”\footnote{Id. at 41.} This approach to conflict resolution involves “stepping back from the specific demands each side has to broader concerns they both share.”\footnote{Id.} The stalemate in Indo-Pakistan negotiations results from both parties maintaining hard-lined positions on contentious issue such as demilitarization, territorial partition and plebiscite. Pakistan is resistant to accepting the LOC as a permanent international boundary, while India remains poised to maintain the status quo of the LOC even if it means persisting in a stalemate indefinitely.\footnote{See \textsc{Amitabh Mattoo}, \textit{India’s “Potential” Endgame in Kashmir}, in \textit{The Kashmir Question Retrospect and Prospect} 14, 26-29 (Ganguly ed., 2003); compare \textsc{Husain Haqqani}, \textit{Pakistan’s Endgame in Kashmir}, in \textit{The Kashmir Question Retrospect and Prospect} 34, 50-52 (Ganguly ed., 2003).} A movement beyond stalemate in this protracted conflict can only be achieved by shifting from a resolution focused negotiation to a relationship focused negotiation.\footnote{See \textsc{Hauss}, supra note 68 at 41.} Herbert Kelman, a prominent mediator in the Isreali-Palestinian conflict, states “‘[t]he real test of conflict resolution...
in deep-rooted conflicts is how much the process by which agreements are constructed and the nature of the resultant agreements contribute to transforming the relationship between the parties.\(^{77}\)

This type of a progressive movement in negotiations can be facilitated by a third-party neutral mediator. There is no doubt that any hope of durable peace in Kashmir must be primarily driven by the initiative and commitment of the key players, India and Pakistan. However, given the volatile past of the two parties, the failure of bilateral negotiations thus far, and the constant threat the conflict poses to regional and global peace, the need and benefit of “low-key, indirect, and discreet” third party facilitation becomes apparent.\(^{78}\) International mediation studies indicate that anywhere from 35 to 62 percent of international conflicts resorted to mediation for resolution and of these referred conflicts 23 to 71 percent were successfully resolved.\(^{79}\) The resolution of other protracted international disputes illustrate that facilitation by a third party neutral can provide a catalyst to move parties beyond non-starter positions and deal breaking demands.

The mediation strategy that would be optimal in facilitating resolution in the Kashmir conflict is categorized by Bercovitch as a “formulation” intervention.\(^{80}\) Formulation strategies include the following specific interventions:

- choose the meeting site
- control the pace and formality of the meetings
- control the physical environment
- establish protocol
- ensure the privacy of mediation
- suggest procedures
- highlight common interests
- reduce tensions

\(^{77}\)Id.\(^{78}\)See Bose, supra note 11 at 220-21.\(^{79}\)See Bercovitch, supra note 61 at 130-31.\(^{80}\)See id. at 137.
-control timing
-deal with the simple issues
-structure the agenda
-help devise a framework for an acceptable outcome
-help parties save face
-keep the process focused on the issues
-make substantive suggestions and proposals
-suggest concessions parties can make

An effective mediator will employ the above behaviors to ensure that the parties remain focused on common interests rather than opposing positions, broaden the scope of the discussion and therefore resolution by addressing peripheral issues, maintain frequent and continuous communication before and after resolution is reached, and remain committed to resolution by highlighting the cost of failed negotiations.

Resolution of the conflict in Northern Ireland is a prime example of successful third party mediation in this type of dispute. The parties to the Northern Ireland conflict employed George Mitchell, a former U.S. senator, and other international diplomats to head negotiations. Mitchell gave fuel to negotiations at two critical junctures that pushed the parties toward agreement. Prior to the start of negotiations, the British secretary of state for Northern Ireland had demanded decommissioning as a precursor for entry into negotiations. Mitchell and his colleagues realized that this request was a nonstarter. The team was able to avert this obstacle to discussions by convincing the “British government that the parties should be allowed to participate in the talks if they[:] openly accepted nonviolence and democracy; and made a commitment to hand over weapons as part of any agreement.” The next near break in negotiations occurred at the final push toward agreement, during which Mitchell used his skills...
as a negotiator to get the participants to “stop – in his words – demonizing each other, because you cannot make peace while thinking the worst about your opponent.”\(^\text{85}\) It would be simplistic to attribute the success of conflict resolution efforts in Northern Ireland to any one factor, but it is evident from the above examples that without the contribution of a mediation team the journey to resolution would have been at the very least longer and more arduous.

The Kashmir peace process can similarly benefit from a third party mediator. A strategic intervention by a third-party neutral would involve highlighting India and Pakistan’s common interest in reducing the economic and political costs of maintaining military forces in the Kashmir region, improving international reputation by exhibiting diplomatic good-faith in reaching resolution, and moving toward normalization of relations between the nations in relation to trade, travel and goodwill. A strategy formulation approach to mediation will allow the mediator to expand the bargaining zone by incorporating creative incentives to encourage settlement and concession.

Hauss notes that “this is not work that is easily done by professional diplomats who are hemmed in by official protocol, the often antagonistic formal positions taken by their governments, and more.”\(^\text{86}\) Third parties are most effective if they remain impartial with no vested interest in the outcome of the conflict.\(^\text{87}\) This neutrality can be employed at critical moments during the negotiation to ease tensions and instill trust.\(^\text{88}\)

C. Re-engaging India in the Possibility of Mediation

\(^{85}\text{Id. at 121.}\)
\(^{86}\text{Id. at 45.}\)
\(^{87}\text{See id. at 46.}\)
\(^{88}\text{See id.}\)
A combination of complex factors has motivated India to pursue a bilateral system of negotiation with Pakistan. One significant factor is India’s mistrust of the West, including the United States.\(^9^9\) Cold War era politics led to a strategic alignment between the United States and Pakistan that incensed Indian leaders. Indian Prime Minister Jawaharlal Nehru upon hearing that the United States had incorporated Pakistan as one of its growing alliances, wrote one of his ministers: “‘the United States imagine[s] that by this policy they have completely outflanked India’s so-called neutralism and will thus bring India to her knees. Whatever the future may hold, this is not going to happen. The first result of all this will be an extreme dislike of the United States in India.’”\(^9^0\) US diplomatic policy in the 1980’s contributed to this mistrust, when the Reagan administration agreed to a multibillion dollar military and economic assistance package to Islamabad, making Pakistan one of the recipients receiving the greatest US aid.\(^9^1\) India perceives foreign powers as parties willing to use Pakistan to further their own interests.\(^9^2\)

Furthermore, India considers itself a regional superpower and feels that it is independently capable of handling regional disputes. India resents the implication that a third-party would be necessary or involved in resolving a dispute on its border.\(^9^3\) India, motivated by international as well as internal public opinion, is interested in demonstrating its strength and independence.\(^9^4\) Bilateral contacts guarantee “India a dominant position in the region, international prestige and perhaps a stronger bargaining position in resolving outstanding disputes.”\(^9^5\) Another consideration for bilateral negotiations is avoiding pressure to concede to

\(^9^9\)See Kahn, supra note 23 at 524.
\(^9^1\) See id. at 98.
\(^9^2\) See Kahn, supra note 23 at 524.
\(^9^3\) See id.
\(^9^4\) See generally Koitahara, supra note 7 at 252 (stating “that attempts at peace will invite accusations of weakness, gullibility, and sell-out.”).
\(^9^5\) See Kahn, supra note 23 at 524-25.
an unfavorable settlement. India has resolved the LOC as the de facto line of partition and is comfortable maintaining this status quo. India fears that international pressure may be applied to force India into an unfavorable settlement.

If a mediation process is proposed that addresses India’s concerns, it may be willing to accept third-party facilitation and meet the limitations of the Simla Agreement. India’s concern over impartial mediation by an official government representative is not entirely without merit. Bercovitch argues that “[w]hether we are studying ethnic, internal or international conflict, we should resist the tendency to think of mediation as a totally exogenous input, as a unique role and a distinct humanitarian response to conflict in which a well-meaning actor, motivated by altruism, is keen to resolve a conflict.”96 Furthermore, “[m]ediators are political actors; they engage in mediation and expend resources because they expect to resolve a conflict and gain something from it.”97 This impartiality may be neutralized or diffused by employing a consortium of influential countries or diplomats, chosen by both parties, to collaboratively mediate the dispute. A country or countries with a strong influential relationship with one party or the other could contribute a behind-the-scenes role, without a direct presence in the mediation team.98 SAARC may also be a possible outside influence on mediation efforts. Although the SAARC framework does not lend itself to “any discussion of bilateral or contentious issues,” the organization may be instrumental in establishing a cooperative network.99

Another vital component in re-engaging India in facilitated discussions is international pressure through UN initiatives and diplomatic influence by independent nations. The international community should remind India that if it would like to be recognized as a global

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96Bercovitch, supra note 61 at 135.
97Id.
98See Bose, supra note 11 at 221.
99Kahn, supra note 23 at 548.
player, then it must assume a greater responsibility in maintaining international security. The first step to this end, is to make good-faith efforts toward resolving contentious issues within its own backyard. India has a strong interest in maintaining and expanding its reputation in the international community. Pressure by the international community, will push India toward polishing its tarnished image and making a stronger commitment to establishing peace.

V. Conclusion

This paper has examined the origins of the Kashmir conflict and the movement toward the present stalemate in dispute resolution. It has been suggested that the failures of bilateralism can be avoided in future discussions between the nations with the constructive, unobtrusive involvement, at critical junctures, of a third-party facilitator. Third party facilitation, employing a formulative strategy can be influential in developing a peace process that avoids the pitfalls of non-starter issues and instead focuses on movement generating issues of mutual interest to both parties. Third party mediation will provide for a comprehensive, innovative conflict resolution technique that can be a path to durable peace in the Kashmir region.
List of Sources

Journals


Books


International Material


Internet Sources
