

NON-PAPER
THE JAMMU & KASHMIR DISPUTE – A LEGAL APPRAISAL

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EXECUTIVE SUMMARY

Jammu and Kashmir dispute, unfinished agenda of the partition of the Indian subcontinent, is also one of the oldest issues on the agenda of the UN Security Council. India has denied Kashmiris their inalienable right to self-determination granted to them by the UN Security Council resolutions.

Self-determination is one of the cardinal principles of international law enshrined in the UN Charter, General Assembly resolutions, basic human rights instruments and case law of the International Court of Justice. Apart from these general principles and settled international law and practice, several UN Security Council resolutions have explicitly recognized the right to self-determination of people of Jammu and Kashmir. Both Pakistan and India have also endorsed the fundamental principle of self-determination of Kashmiris in resolutions of UN Commission on India and Pakistan (UNCIP).

Security Council resolutions provide that the final disposition of the State of Jammu and Kashmir will be made in accordance with the will of the people expressed *through a free and impartial plebiscite* conducted under the auspices of the United Nations.

India's entire claim lies on the dubious "Accession" instrument purportedly signed by one man on behalf of millions of his subjects, whose validity is itself highly questionable from factual and legal standpoint. India's attempts at sham "elections" and "declarations" have been declared null and void by the Security Council resolutions, determining that any unilateral attempt or any action taken by the parties concerned to determine the future shape and affiliation of the entire State of Jammu and Kashmir or any part thereof would not constitute the disposition of the State in accordance with the principle of a free and impartial plebiscite.

UNSC resolutions are immutable. They can be invalidated only by fulfilment of the obligation, consent of the parties or a subsequent resolution or decision of the Security Council. None of this has happened with respect to Jammu and Kashmir. These obligations arising from the Security Council resolutions on this dispute cannot be unilaterally annulled or renounced by India citing its Constitution and internal laws.

Indian occupied Jammu and Kashmir is the most militarized zone in the world, where close to 900,000 security forces have been deployed by India to curb the legitimate struggle of the Kashmiris for their inalienable right to self-determination. These military deployments are in breach of Security Council resolutions as well as bilateral agreements. The sheer size, deployments and repressive actions of the Indian forces in the occupied Jammu and Kashmir amounts to foreign and colonial occupation.

India's occupation forces have committed massive human rights violations, widely known to international community. These violations have been documented by international media as well as in two reports of the UN High Commissioner for Human Rights in 2018 and 2019.

Further perpetuating its illegal and colonial occupation, India has taken several measures to permanently alter geographic and demographic contours of the territory, in clear breach of the Security Council resolutions. In fact, India's unilateral actions of 5 August 2019 to deprive the occupied territory of its "*special status*" have removed the fig leaf to justify India's presence in Jammu and Kashmir. The sole purpose is to turn the indigenous Muslim majority into a minority through "demographic flooding".

India has tried to justify these actions as a purely "domestic" issue. However, the UN Secretary General, in his statement on 8 August 2019, categorically stated that the "*the position of the United Nations on this region is governed by the Charter of the United Nations and applicable Security Council resolutions.*"

While the political history of Jammu and Kashmir remained mostly non-violent, the persistent refusal by India to grant the people of Jammu and Kashmir their right of self-determination, as promised in the UNSC resolutions, led to popular alienation. Despite the legitimacy of their cause, which has been duly recognized by the Security Council, the struggle for self-determination of the Kashmiri people has been brutally suppressed by the Indian occupying forces in blatant violation of international law and the relevant General Assembly resolutions. India has misused its "counter terrorism" laws to perpetuate its illegal occupation in Jammu and Kashmir and equate Kashmiris' just struggle with "terrorism".

Kashmir dispute is central cause of tensions between Pakistan and India. Several rounds of talks to resolve the issue have failed due to Indian obduracy. One spurious ground, India has refused to engage with Pakistan in multilateral considerations or bilateral processes.

However, the Kashmir dispute cannot be left unattended for multiple reasons: One, there are grave violations of human rights taking place each day in the Indian occupied Jammu and Kashmir. The international community which so vocally espouses the cause of human rights cannot be allowed to continue atrocities and crimes against the Kashmiri people. Two, there is an ever-present threat to international peace and security, due to a possible escalation of ceasefire violations along the Line of Control (LoC) into a full-fledged conflict or as a consequence of an Indian "false flag" operation. India's baseless allegations of "infiltration" across LoC are an attempt to create a casus-belli for another aggression against Pakistan. Three, the Security

Council and the UN Secretary General of the are legally and morally obliged to secure implementation of the binding UN resolutions and agreements on Jammu and Kashmir to which they are a Party.

The deteriorating human rights and humanitarian situation in Jammu and Kashmir in the wake of India's illegal and unilateral actions of 5 August 2019 has made active international engagement imperative. Pakistan and India have fought three wars over Jammu and Kashmir. A catastrophic war was avoided in February 2019 due to Pakistan's measured response to Indian aggression. Those who continue to suggest that Pakistan and India resolve the Jammu and Kashmir dispute bilaterally should be cautious not to 'lapse into escapism'.

The Jammu and Kashmir dispute cannot be forgotten. Its people are determined to secure their inalienable right to self-determination. Their struggle is a just struggle for a fundamental right guaranteed under the UN Charter, international law and the resolutions of the Security Council. Pakistan is a Party to the dispute. It will fulfil its obligations as a Party. The Government and people of Pakistan remain steadfast in their adherence to the Security Council resolutions and in our strong support to the right of the Kashmiri people to self-determination.

INTRODUCTION

The Jammu and Kashmir dispute is the unfinished agenda of the partition of the Indian subcontinent. It is also one of the oldest issues on the agenda of the United Nations Security Council. Over the years, a concerted attempt has been made by India to obscure the fundamental legal and political aspects of the dispute, in particular, to justify its occupation of Jammu and Kashmir, and to deny the Kashmiris their inalienable right to self-determination "*through a free and impartial plebiscite*" as provided by several Security Council Resolutions.

2. A similarly fallacious and equally dubious legal reasoning was employed in the wake of the illegal and unilateral Indian action in occupied Jammu and Kashmir on 5 August 2019. Notwithstanding Pakistan's legal position on the so-called 'Accession' of Jammu and Kashmir to India, the pre-meditated action to deprive the "*special status*" of the occupied territory under the Indian Constitution has removed the fig leaf to justify India's presence in Jammu and Kashmir.

3. The current study seeks to distill fact from fabrication by placing the legal aspects of the Jammu and Kashmir dispute in perspective.

SELF-DETERMINATION – A FUNDAMENTAL RIGHT

4. Self-determination has been one of the most important principles of international law and international politics of our times. It set in motion a restructuring and redefinition of inter-state relations since the beginning of the last century.¹ The notion of self-determination found the most vivid expression in the struggle against decolonization.

5. One of the central “Purposes and Principles” of the UN Charter is “*to develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples...*”.² Common article I of both the International Covenants on Civil and Political Rights and on Economic and Social Rights (1966), upholds the right to self-determination as a fundamental basis for the promotion of the objectives of both conventions.³

6. The right of self-determination was also the central principle in the Declaration on the Granting of Independence to Colonial Countries and Peoples – “The Declaration on Colonial Countries”.⁴ The incorporation of the right to self-determination in the “Declaration on Friendly Relations among States” further crystallized the notion of self-determination as customary international law.⁵

7. The resolutions of the United Nations and international practice have established the scope of the right to self-determination, and the methods and modalities for its realization. The *erga omnes* nature of the right to self-determination has been conferred by the International Court of Justice (ICJ) in a number of cases.⁶

¹ For a detailed background reference, see Antonio Cassese, ‘Self-determination of peoples: A legal reappraisal’ (Cambridge: 1995)

² Article 1(2) of the UN Charter

³ Common article 1 of the two covenants reads: “*All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*”

⁴GA Resolution 1514 (1960); Paragraph one of the Resolution provides that “*The subjection of peoples to alien subjugation, domination and exploitation “constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations, and is impediment to the promotion of world peace and cooperation”.*”

⁵GA resolution 2625 “*Declaration on principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*”, 24 October 1970

⁶See for example, ICJ Advisory Opinion on Namibia (1971), Western Sahara (1975), The East Timor Case (1991), Advisory Opinions on the Legal Consequences of the Construction of the Wall (2004) and the Chagos Archipelago (2019)

The scope and conduct of the right to self-determination has been further elaborated by the Human Rights Commission/Council, the Committee on the Elimination of Racial Discrimination and numerous prominent jurists.

8. The partition of the subcontinent was also based on the principle of self-determination. Thus, contiguous Muslim-majority areas formed the territories of Pakistan and contiguous Hindu-majority areas formed the territories of India. This principle was jointly accepted by the representatives of Muslims, Hindus and the colonial British Government. This also served as the cardinal principle for the accession into either Dominion of the over 560 Princely States in British India (which were ruled over by princes and potentates and enjoyed varying degree of autonomy under British suzerainty).

9. No trouble arose with regard to the accession of the vast majority of the Princely States to either Pakistan or India. Those States which were contiguous to India and had a Hindu majority acceded to India, with the exception of Hyderabad.⁷ Those which were contiguous to Pakistan and had a Muslim majority acceded to Pakistan, with the exception of Kashmir. One Princely State, Junagadh⁸, acceded to Pakistan which, although not contiguous to Pakistan by land, had access through a short sea trip.

10. At the initial stages, the Indian position on the Jammu and Kashmir dispute also espoused the principle of self-determination.⁹ In the 1950s, the Indian

⁷Hyderabad was a Hindu-majority state with a Muslim ruler, the Nizam. The Nizam did not want to accede to either India or Pakistan but instead to enter into a special treaty relationship with India. The Indian Government rejected this position and demanded that the State should accede to India unconditionally. The Nizam also offered to hold a plebiscite under UN supervision which was also rejected by India. In August 1948, India occupied the State in what was characterized as a 'police action'. For more details on Hyderabad's case before the Security Council, see *Eagleton, Clyde*. "The Case of Hyderabad before the Security Council", *The American Journal of International Law* 44, no. 2 (1950): 277-302

⁸Junagadh was also a Hindu-majority state with a Muslim ruler. Junagadh entered into a standstill agreement with Pakistan on 15 August 1947 and acceded to Pakistan on 15 September 1947. India demanded a plebiscite under the joint control of the Junagadh State and the Indian Government. Junagadh was forcefully occupied by India in November 1947.

⁹ In a telegram to the Prime Minister of Pakistan dated 31 October 1947, the Prime Minister of India stated: "Our assurance that we shall withdraw our troops from Kashmir as soon as peace and order are restored and leave the decision regarding the future of the State to the people of the State is not merely a promise to your Government but also to the people of Kashmir and to the world."

Government subsequently changed its position on the issue of self-determination for Jammu and Kashmir citing ‘changed circumstances’.

QUESTION OF ACCESSION

11. India claims that the accession of Jammu and Kashmir is ‘perpetual and irrevocable’. However, from the outset, the fact and validity of the alleged Accession was highly questionable for several reasons:

One, no authentic copy of the Instrument of Accession signed by the Maharajah has ever been produced by the Government of India;

Two, the Maharaja was not a free agent at the time of the so-called ‘accession’ to India (26 October 1947) as he had signed a ‘Standstill Agreement’ with Pakistan.¹⁰ This created a legal bar to the Maharaja’s capacity to alter the existing position unilaterally;

Three, on 26 October 1947, when the Maharaja allegedly signed the Instrument of Accession to India, he had lost effective control over most of the State of Jammu and Kashmir due to a popular Kashmiri uprising and was no longer competent to sign the so-called Instrument;

Four, the Maharaja’s purported action was manifestly contrary to the wishes of the Kashmiri people or, as the Indian Government itself put it in the case of Junagadh, “*in utter violation of the principles on which Partition was agreed upon and effected*”;¹¹

Five, the resolutions of the Security Council, by prescribing the exercise of self-determination by the people of Jammu and Kashmir, have conditioned, if not nullified the validity and legality of any such Accession;

Six, the so-called Instrument of Accession was at best, ‘provisional’. For example, in a telegram to the Prime Minister of Pakistan, the Prime Minister of India stated: “*Our assurance that we shall withdraw our troops from Kashmir as soon as peace and order are restored and leave the decision regarding the*

¹⁰ The Maharaj’s Government entered into a ‘Standstill Agreement’ with the Government of Pakistan, on 15 August 1947 (no such Agreement was concluded between the State of Kashmir and the Dominion of India); normally, a standstill agreement would have been a prelude to full accession.

¹¹See supra note 9

*future of the State to the people of the State is not merely a promise to your Government but also to the people of Kashmir and to the world.”*¹²

12. Even if hypothetically the fact of Accession is accepted, India’s own subsequent actions have invalidated it. The Indian Constitution provided the terms under which the Maharaja’s Accession was signed, surrendering only the limited powers for defence, foreign affairs and currency, but retaining all other authority with the State. Jammu and Kashmir was the only State which “negotiated” the terms of its membership with the Indian Union. Neither side could amend or abrogate it unilaterally, except in accordance with the terms of that pact.¹³ Over the years, while IOJ&Ks special status was reduced into an ‘empty shell’ through executive orders by successive Indian Governments,¹⁴ it was nonetheless, considered a permanent part of the Indian Constitution. The procedure for amendment or abrogation was well-nigh impossible. The unilateral and illegal action by India on 5 August was a flagrant breach not only of the ‘solemn pact’ with the Kashmiris, but also violative of the provisions of the Indian Constitution itself. By unilaterally altering the status of IOJ&K without any recourse to the Kashmiri people, India has materially breached the so-called Instrument of Accession, the Simla Agreement and UNSC resolutions.

SECURITY COUNCIL ENDORSEMENT OF THE KASHMIRIS RIGHT TO SELF-DETERMINATION

13. India took the Jammu and Kashmir dispute to the UN Security Council on 1 January 1948. Presenting its case, India claimed that it had brought a “*simple and straight forward*” issue to the Security Council: “*The withdrawal and expulsion of the raiders and invaders from the soil of Kashmir and the immediate stoppage of the fight are thus the first and only tasks to which we have to address ourselves.*”¹⁵

14. The Council refused to take a narrow and simplistic view. Chiding India that “*No party coming here to discuss a case like this can expect trends in the Security Council towards the application of force, or towards a solution which would ally the*

¹² Telegram from the Prime Minister of India to the Prime Minister of Pakistan dated 31 October 1947

¹³A.G. Noorani, ‘Article 370: A Constitutional History of Jammu and Kashmir (Oxford: 2011), page 1

¹⁴In 1964, the Union Home Minister Gulzari Lal Nanda said in the Indian parliament: “*Article 370, whether you keep it or not, has been completely emptied of its contents. Nothing has been left in it.*” Cited in Noorani, Article 370: A Constitutional History, page 2

¹⁵ S/PV.227, 15 January 1948, page 29

United Nations with one side so that it could be successful in a military attack or defence”,¹⁶ the Council’s approach was based on the clear understanding that the “*whole thing, from the preliminary measures as to the fighting, right up to the conduct of the plebiscite in the end, is all one problem*”.¹⁷

15. Accordingly, the Council and the UN Commission on India and Pakistan (UNCIP)¹⁸ created under its authority, endeavored to embody these principles into their resolutions. Beginning with Council resolution 38 (17 January 1948), requesting each side to “*inform the Council immediately of any material change in the situation*”, subsequent Council resolutions recognized that the “*final disposition of the State of Jammu and Kashmir will be made in accordance with the will of the people expressed through the democratic method of a free and impartial plebiscite conducted under the auspices of the United Nations.*”¹⁹ The UNCIP resolutions of 13 August 1948²⁰ and 5 January 1949²¹ further elaborated and expanded the ‘fair and equitable’ conditions whereby free expression for the future status of Jammu and Kashmir could be determined in accordance with the will of the people.

16. Importantly, however, under international law, the Kashmiris’ right to self-determination is neither conditional nor contingent upon Security Council resolutions. Even if there were no Council resolutions, the consent of the people would have to be summoned to provide the basis, rationale and framework for the

¹⁶Statement by the representative of the US to the Security Council, S/PV.243, 10 February 1948, page 75

¹⁷ Statement by the representative of the UK to the Security Council, S/PV.236, 28 January 1948, page 283

¹⁸ Established under the Council resolution 39 of 20 January 1948, the Commission was invested with the dual function: 1. to investigate the facts pursuant to Article 34 of the Charter; 2. to exercise, without interrupting the work of the Security Council, and mediatory influence likely to smooth away difficulties, to carry out the directions given to it by the Security Council, and to report how far the advice and directions, if any, of the Security Council, have been carried out.

¹⁹ Council resolutions 47 (1948), 80 (1950), 91 (1951), 98 (1952), 122 (January 1957), 123 (February 1957), 126 (December 1957)

²⁰ The UNCIP resolution of 13 August 1948 contained three parts: Part I (Cease-fire order); Part II (Truce agreement) and Part III (the two sides to enter consultations with the Commission to determine ‘fair and equitable’ conditions for plebiscite).

²¹ The UNCIP resolution of 5 January 1949 elaborated the plebiscite arrangements including the appointment of a Plebiscite Administrator.

disposition of the State of Jammu and Kashmir. This right of the Kashmiris is inherent as the principle for the partition of the subcontinent. As long as Kashmiris are denied this fundamental right, the plan for the independence, and partition, of the subcontinent remains unfulfilled.²²

KASHMIR “ELECTIONS”/ CONSTITUENT ASSEMBLY

17. On 27 October 1950, the National Conference political party in Kashmir proposed that a Constituent Assembly be summoned to determine the “future shape and affiliations of the State”. Consequent to the proclamation made by the Ruler, the so-called Constituent Assembly first met in October 1951 and remained in session until November 1956.

18. In March 1951, the Security Council adopted Resolution 91, underscoring that *“convening of a constituent assembly as recommended by the General Council of the "All Jammu and Kashmir National Conference" and any action that assembly may have taken or might attempt to take to determine the future shape and affiliation of the entire State or any part thereof, or action by the parties concerned in support of any such action by the assembly, would not constitute a disposition of the State in accordance with the above principle.”*²³ In fact, the Indian representative himself told the Council that while *“the constituent assembly cannot be physically prevented from expressing its opinion on this question [of accession]. But this opinion will not bind my Government or prejudice the position of this Council.”*²⁴

19. In November 1956, after the so-called Constituent Assembly fraudulently declared Jammu and Kashmir as part of India, the Security Council adopted resolution 122 (1957) reminding the parties that the *“final disposition of the State of Jammu and Kashmir will be made in accordance with the will of the people expressed through the democratic method of a free and impartial plebiscite conducted under the auspices of the United Nations.”*

20. The following facts are also noteworthy:

²²A comparable case is the British Cameroons, where plebiscites were held to decide whether the area should join Nigeria or Cameroon.

²³ Security Council Resolution 91 (31 March 1951)

²⁴ Statement by the Representative of India to the Security Council, S/PV.538, 29 March 1951, page 3

- **One**, the so-called Constituent Assembly was elected through a fraudulent vote. Seventy-three of the seventy-five members of the Assembly were elected “unopposed”. The London Times, in an editorial of September 7, 1951, entitled “No fair Vote” characterized the results as “farcical”.²⁵ Noting the entirely one-sided result of the election, Josef Korbel comments: “No dictator could do better”.²⁶ Such an illegitimate body was nothing more than a convenient surrogate for India. It could not pronounce on the status of Jammu of Kashmir, let alone ‘decide’ it.
- **Two**, presuming that the Constituent Assembly did possess authority to pronounce on the future status of Jammu and Kashmir, it did not represent the entire State of Jammu and Kashmir and surely did not speak for the people of Azad Jammu and Kashmir. A constituent ‘part’ cannot determine for the ‘whole’.
- **Three**, it is a universally accepted principle of international law that every state has to carry out its obligations arising from treaties and other sources of international law, in good faith, and may not invoke provisions of its constitution and internal laws as an excuse not to fulfill its duties. The decision by the so-called Constituent Assembly to unilaterally renege on its international obligations in express violation of Council resolutions cannot absolve India of its international obligations. This action was in specific breach of Resolutions 91 and 122 and are therefore, null and void.

LEGALLY BINDING EFFECT OF SECURITY COUNCIL RESOLUTIONS

21 India has made a disingenuous attempt to erode the legally binding nature of Council resolutions. The Indian representative made the following startling claim before the Council in 1957: “*The commitment about a plebiscite is usually spoken of as though it were the law of the Medes and Persians, but what does it amount to? It amounts to an expression of a wish on the part of the two Governments. The*

²⁵ Cited in A.G. Noorani, *The Kashmir Question*, page 58

²⁶ Josef Korbel, *Danger in Kashmir* (Oxford, 2005), page 222; Korbel was a Czechoslovakian diplomat who was India’s nominee to the UNCIP; he served as the UNCIP Chair in 1949.

*expression of a wish is far less than what may be called as an international obligation.*²⁷ This is clearly specious legal reasoning.

22. Over the years, India has also attempted to argue that the UNSC resolutions on Kashmir were only of a “recommendatory” nature. To this end, the ICJ’s advisory opinion in the *Namibia Case* (1971) is instructive:

*“It has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. Article 25 is not confined to decisions in regard to enforcement action but applies to “the decisions of the Security Council” adopted in accordance with the Charter. Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter which deals with the functions and powers of the Security Council.... the language of a resolution should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of power of Article 25, the question is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provision invoked, and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.”*²⁸

23. Notably, the UNCIP resolutions of 13 August 1948 and 5 January 1949 were accepted by both sides. India accepted them as “*international engagements*”.²⁹ These provide a framework for the resolution of the Kashmir dispute through a free and impartial plebiscite. The UNCIP resolutions are binding on both Pakistan and India under international law.

24. As for interpretation of the Security Council resolutions, Pakistan has supported the option of ‘arbitration’ or a possible referral to the ICJ to resolve divergence on interpretations. India has rejected all efforts. This has been the cause of stalemate in Kashmir.

²⁷ S/PV.763, 23 January 1957, page 10

²⁸ ICJ Advisory Opinion (June 1971), pages 40-41

²⁹ Statement by the Representative of India to the Security Council, S/PV.767, 8 February 1957, page 29

25. As India is responsible for blocking and delaying the implementation of the Security Council resolutions, it cannot take advantage of its own default by claiming that the resolutions have become inoperable. *“It 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...Mere non-enforcement of a resolution over a long period is not a sufficient basis to challenge its continued validity.”*³⁰

26. Indeed, Security Council resolutions are immutable. They can be invalidated only by fulfilment of the obligation, consent of the parties or a subsequent resolution or decision by the Council itself. None of this has happened with regard to Jammu and Kashmir. These obligations arising from the Security Council resolutions on this dispute cannot be unilaterally annulled or renounced by India.

ILLEGALITY OF INDIA’S MILITARY PRESENCE IN INDIAN OCCUPIED JAMMU AND KASHMIR

27. Today, Indian Occupied Jammu and Kashmir is the most militarized zone in the world³¹, where close to 900,000 security forces have been deployed by India to curb the legitimate struggle of the Kashmiris for their inalienable right to self-determination.

28. These military deployments are in violation of the relevant UNSC/UNCIP resolutions as well as the 1948 Karachi Agreement on a ceasefire which specifically prohibited *“introduction of additional military potential by either side into the State of Jammu and Kashmir”*.³² Subsequent Council resolutions affirmed this principle by seeking ‘demilitarization’ by both sides.

³⁰ Khan, Ali. “The Kashmir Dispute: A Plan for Regional Cooperation”. Columbia Journal of Transnational Law 31(1994): page 534

³¹ Rani Singh, Kashmir: The World's Most Militarized Zone, Violence After Years Of Comparative Calm, <https://www.forbes.com/sites/ranisingh/2016/07/12/kashmir-in-the-worlds-most-militarized-zone-violence-after-years-of-comparative-calm/#67299ebf3124>

³² Paragraph G of the “Agreement between Military Representatives of India and Pakistan Regarding the Establishment of a Ceasefire Line in the State of Jammu and Kashmir (Karachi Agreement)”

<https://peacemaker.un.org/indiapakistan-karachiagreement49>

29. In defense of its continued illegal military occupation in the Indian occupied Jammu and Kashmir, India argues that it had accepted the option of holding a plebiscite (as well as demilitarization) in Jammu and Kashmir on the condition that Pakistan would first remove all its forces from Azad Jammu and Kashmir. The argument is disingenuous and a complete distortion of facts. The essence of the earlier Commission resolutions (13 August 1948) was that the obligations of withdrawal of forces by the two sides were reciprocal and concurrent. Moreover, Pakistan has always argued that these withdrawals had to be governed by a “*Truce Agreement*” between the parties. It was India which consistently refused to co-operate.

30. The further proof of Indian refusal to demilitarize is to be found in the report of Sir Owen Dixon (UN Representative for India and Pakistan) to the Security Council, contained in Document S-1971, in which he concluded as follows:

*“In the end, I became convinced that India’s agreement would never be obtained to demilitarization in any form or to provisions governing the period of plebiscite of any such character, as would in my opinion, permit the plebiscite being conducted in conditions sufficiently guarding against intimidation and other forms of influence by which the freedom and fairness of the plebiscite might be imperiled”.*³³

31. The above facts make it clear that the persistent Indian refusal to withdraw its forces from Jammu and Kashmir despite its legal obligation to do so, and the visible opposition of the people of Jammu and Kashmir to India’s military presence, makes this presence, under international humanitarian law, a “*hostile army*” suppressing a legitimate indigenous resistance for self-determination. This status of a hostile occupying force has been established by the decades of its most brutal and systematic violations of the human rights of the people of Jammu and Kashmir, and particularly since the 1989 Kashmir uprising in response to the massacre of 100 Kashmiris peacefully protesting another fraudulent election.

32. The real aim of India’s massive military force in occupied Kashmir is to instill fear and terror among local population and thus quell their legitimate demand for self-determination. The sheer size, deployments and repressive actions of the Indian forces in Jammu and Kashmir today amounts to foreign and colonial occupation identical to the occupying armies of the former colonial powers.

³³Para 52 of Document S/1971

33. This equivalence with foreign and colonial occupation, was further reinforced on 5 August 2019 when the Indian government, unilaterally and illegally, abrogated the ‘*special status*’ accorded to the Indian occupied state of Jammu and Kashmir.

34. Through this illegal move, Jammu and Kashmir was illegally bifurcated (Jammu and Kashmir and Ladakh), and its status downgraded from a ‘state’ to a ‘union territory’. This was a blatant violation of UNSC resolutions³⁴. In light of the provisions of Council resolutions 91 and 122, these unilateral changes are “null and void” and do not change the disputed status of Jammu and Kashmir or erode the obligation of parties including the United Nations, to hold the plebiscite prescribed by the UNSC resolutions.

35. The Indian illegal and unilateral actions are also in violation of India’s own Constitution. In the past, the Indian Supreme Court³⁵ and Jammu & Kashmir High Court had effectively rejected requests for repeal of special status on the ground that those arrangements has attained “*permanence*” (after dissolution of Constituent Assembly) and cannot be revisited or amended. However, this critical safeguard was brushed aside by the Indian Government through craftily drafted maneuvers, simply changing the ‘interpretation’ of the Constituent Assembly to mean the Legislative Assembly of Jammu & Kashmir.³⁶ However, even the recommendation of the Jammu & Kashmir Legislative Assembly was not obtained by New Delhi since the Assembly had been dissolved in November 2018. Thus, the people of Jammu and Kashmir were not consulted at all in the process of making these far-ranging changes.

36. As discussed above, the Article 370 set out the terms on which Jammu and Kashmir is purported to have provisionally acceded to India. By removing this Article,

³⁴ See supra note 20

³⁵ 1 Prem Nath Kaul vs The State Of Jammu & Kashmir (1959); Sampat Prakash v. the State of Jammu and Kashmir, (1969) 2 SCR 365; State Bank of India vs. Santosh Gupta (2016); Kumari Vijayalakshmi Jha vs Union Of India & Anr (2017); Bench of judges Adarsh K Goel and R F Nariman on a petition filed by Kumari Vijayalakshmi Jha (2018) News Report Link: https://www.business-standard.com/article/current-affairs/article-370-in-j-k-it-s-nottemporary-provision-say-sc-explains-118040400305_1.html

³⁶ The Constitution (Application to Jammu And Kashmir) Order, 2019 C.O. 272

<http://egazette.nic.in/WriteReadData/2019/210049.pdf>

India has removed the fig leaf to justify its presence in Jammu and Kashmir and has nullified India's claim to Kashmir even by its own criteria.

37. Moreover, the Indian government was fully aware of the illegality of its actions. The illegal move of 5 August 2019 was accompanied by a huge security clampdown in the occupied territory, the expulsion of foreigners and non-Kashmiris, a communications blackout including the shutdown of Internet and telephone services, a total curfew and the deployment of 180,000 additional troops and detention of the entire Kashmiri leadership.

38. Subsequent actions, especially the promulgation of the so-called "Jammu and Kashmir Reorganization Order 2020" in May 2020, whereby certain categories (especially military and paramilitary forces) are provided a fast track pathway to 'domicile' themselves and their families in the State³⁷, redrawing of electoral constituencies, and the issuance of new maps (reflecting all of Jammu and Kashmir, including Azad Jammu and Kashmir, as part of India) have left little doubt that India's underlying intention is to create a new political and demographic reality in occupied Jammu and Kashmir and thus consolidate its occupation.

39. India has tried to justify these actions as a purely "domestic" issue. However, the UN Secretary General, in his statement of 8 August 2019, categorically stated that the "*position of the United Nations on this region is governed by the Charter of the United Nations and applicable Security Council resolutions.*"³⁸

40. Moreover, the Indian attempt to alter the demography of the State is a violation of the Fourth Geneva Convention (1949) which prohibits the Occupier from demographically transforming the territory in order to advance a claim of sovereignty and undermining the Occupied People's right to self-determination.³⁹

41. The sole purpose of these illegal measures is to turn the indigenous Muslim majority into a minority through "*demographic flooding*" from outside. If allowed to

³⁷According to media reports, Indian authorities have already granted domicile certificates to at least 25,000 non-Kashmiris including, among others, the Indian government officials and military personnel and their families

³⁸Statement attributed to the UN Secretary General, 8 August 2019

³⁹Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), 9 July 2004, para. 121

be fully implemented, this design to change the demographic reality in Indian occupied Jammu and Kashmir may constitute a violation of the provisions of the Genocide Convention.

FREEDOM STRUGGLE IS NOT TERRORISM – LEGITIMACY OF THE KASHMIRI CAUSE

42. While most dependent or occupied peoples have been able to exercise their right to self-determination peacefully, there are some who were forcibly denied this right and were obliged to struggle for it. The people of Indian Occupied Jammu and Kashmir have been obliged to do so.

43. General Assembly resolution 2649 (1970) “*Affirms the legitimacy of the struggle of peoples under colonial and alien domination recognized as entitled to the right of self-determination to restore to themselves that right by any means at their disposal*”. The resolution further “*Recognizes the right of peoples under colonial and alien domination in the legitimate exercise of their right to self-determination to seek and receive all kinds of moral and material assistance, in accordance with the resolutions of the United Nations and the spirit of the Charter of the United Nations.*”

44. Despite the legitimacy of their cause, which has been duly recognized by the Security Council, the struggle for self-determination of the Kashmiri people has been brutally suppressed by the Indian occupying forces in blatant violation of international law and the relevant General Assembly resolutions which state that “*all armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence...*”⁴⁰

45. As history attests, the suppression of the right of peoples to self-determination has often been justified by portraying struggles for self-determination and freedom as “*terrorism*”. Taking a cue from the colonial playbook, India has tried to tarnish the legitimacy of the Kashmir cause by portraying it as terrorism. Nelson Mandela was sentenced to life imprisonment for “*terrorism*”.⁴¹ He once famously said: “*A freedom fighter learns the hard way that it is the oppressor who defines the nature of the struggle, and the oppressed is often left no recourse but to use methods that mirror those of the oppressor.*”

46. While the political history of Jammu and Kashmir remained mostly non-violent, the persistent refusal by India to grant the people of Jammu and Kashmir their right of self-determination, as promised in the UNSC resolutions, led to popular alienation. The rigging of the 1987 “elections” in the Indian occupied Jammu and Kashmir was a watershed moment. It led to popular protests. India killed 100 peaceful protestors in Srinagar on 20 December 1989 and ignited the popular freedom struggle of the Kashmiri people. The 1989 Kashmiri uprising was similar to the African National Congress’ decision in 1964 to take up arms against the apartheid regime. The Kashmiri resistance in occupied Kashmir, just like ANC’s in South Africa, cannot be equated with “terrorism” by any stretch of the imagination. As stated above, the

⁴⁰OP 4 of the UNGA resolution 1514

⁴¹<https://globalnews.ca/news/5201623/nelson-mandela-apartheid-terrorist-south-africa/>

legitimacy of such national liberation movements for self-determination against colonial domination by all available means has been recognized by the United Nations.

47. In truth, the only terrorism being perpetrated in Jammu and Kashmir is India's "state terrorism" against the innocent Kashmiri people. Since 1990, the Indian occupation army has martyred over 100,000 Kashmiris, widowed 22,000 women, orphaned 108,000 children and raped more than 11,000 women. India's state terrorism has intensified since August 5, 2019.

48. India has misused its "counter terrorism" laws to perpetuate its illegal occupation in Jammu & Kashmir. Several Special Rapporteurs and Mandate Holders of the Human Rights Council have recently declared that India's counter-terrorism laws and actions are incompatible with human rights law.

49. The Unlawful Prevention Activities Act (UAPA) 1967, India's principal counter terrorism legislation, has been repeatedly misused to stifle the voices of dissent and resistance in the occupied Jammu and Kashmir. In recent times, the Jammu and Kashmir police has also invoked Section 13 of UAPA against people who accessed social media through VPN to bypass the internet ban imposed in the occupied territory since 5 August 2019. Similarly, cases have also been registered against independent journalists under Section 13 for '*uploading anti-national posts on Facebook with criminal intentions to induce the youth and glorifying anti-national activities*'.

50. Such blatant misuse of counter terrorism laws illustrates how these laws are being abused to perpetuate the oppression against people of Jammu and Kashmir.

THE FAILURE OF BILATERAL EFFORTS TO RESOLVE THE KASHMIR DISPUTE

51. The Jammu and Kashmir dispute is the central cause of tensions between Pakistan and India. Over the years, multiple rounds of bilateral talks on Jammu and Kashmir have failed due to Indian obduracy.⁴² When faced with the possibility of multilateral consideration of the issue, India argues that, following the Simla Agreement, Jammu and Kashmir is purely a bilateral issue. However, in recent years, India has refused to revive the composite bilateral dialogue in which the Kashmir dispute is the first agenda item. After 5 August 2019, Indian spokesmen have asserted that that the only issue for bilateral discussion is the "return" of "Pakistan occupied Kashmir" (Azad Kashmir) to India.

52. The Kashmir dispute cannot be left unattended for multiple reasons: One, there are grave violations of human rights taking place each day in the Indian occupied Jammu and Kashmir. The international community which so vocally espouses the cause of human rights cannot be allowed to continue atrocities and crimes against the

⁴² Composite Dialogue Process (1998-2008), the Peace Process initiated by President Musharraf of Pakistan and Prime Minister Vajpayee (and later PM Manmohan Singh) of India.

Kashmiri people. Two, there is an ever-present threat to international peace and security, due to a possible escalation of ceasefire violations along the Line of Control (LoC) into a full-fledged conflict or as a consequence of an Indian “false flag” operation. India’s baseless allegations of “infiltration” across LoC are an attempt to create a casus-belli for another aggression against Pakistan. Three, the Security Council and the Secretary General of the United Nations are legally and morally obliged to secure implementation of the binding UN resolutions and agreements on Jammu and Kashmir to which they are a Party.

53. The deteriorating human rights and humanitarian situation in Jammu and Kashmir in the wake of India’s illegal and unilateral actions of 5 August 2019 has made active international engagement imperative. Pakistan and India have fought three wars over Jammu and Kashmir. A catastrophic war was avoided in February 2019 due to Pakistan’s measured response to Indian aggression. Those who continue to suggest that Pakistan and India resolve the Jammu and Kashmir dispute bilaterally should be cautious not to ‘lapse into escapism’.

OBLIGATIONS OF SECURITY COUNCIL, THE UN SECRETARY GENERAL AND THE INTERNATIONAL COMMUNITY

54. While the Indian actions in occupied Jammu and Kashmir are legally void, they are not happening in a ‘void’. The BJP-RSS leadership has made no attempt to hide their agenda to consolidate the occupation of Jammu and Kashmir, to colonize it and transform it into a Hindu-majority “territory”. They call it the “Final Solution”.

55. Last year, an international organization, Genocide Alert, warned of a danger of genocide in occupied Jammu and Kashmir. Subsequent Indian actions have affirmed this grim prognosis. Since 5 August 2019, India has ‘deliberately inflicted’ on Kashmiris the inhumane conditions of a complete and crippling siege of the occupied territory, ‘forcibly transferred’ thousands of men and young boys to prisons across India, and enacted laws to enable Indian ‘settlers’ to be domiciled in occupied Jammu and Kashmir.

56. In recent years, the Council has taken important steps to hold perpetrators of grave crimes including genocide to account. It should act to prevent a similar genocide of the Kashmiri people. The Council knows from bitter experience that the failure of timely intervention – as in Bosnia and Rwanda – can lead to devastating humanitarian consequences. It can also lead to a threat to international peace and security.

57. The Council should act with decisiveness to ensure that its resolutions on Jammu and Kashmir are implemented.

58. Over the years, the Secretary General has utilized a range of measures including fact-finding missions, appointment of Special Representatives, and the use of good offices, to promote peaceful settlement of disputes. The Secretary General has the authority “*on his own initiative or at the request of the States concerned, [to] consider undertaking a fact-finding mission when a dispute or a situation exists*” as explicitly recognized by the General Assembly in its 1991 Declaration on Fact-Finding.⁴³

59. The Secretary General can avail of the full panoply of measures available to him to promote an equitable solution to the Jammu and Kashmir dispute in accordance with Security Council resolutions.

60. The Jammu and Kashmir dispute cannot be forgotten. Its people are determined to secure their inalienable right to self-determination. Their struggle is a just struggle for a fundamental right guaranteed under the UN Charter, international law and the resolutions of the Security Council. Pakistan is a Party to the dispute. It will fulfil its obligations as a Party. The Government and people of Pakistan remain steadfast in their adherence to the Security Council resolutions and in our strong support to the right of the Kashmiri people to self-determination.

⁴³UN GA resolution 46/59 (9 December 1991), para 13