



Human Rights in Kashmir



Report of a Mission

International Commission of Jurists
Geneva, Switzerland

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ISBN 92 9037 088.2

Table of Contents

List of Acronyms	I
Preface	II
Map	VI
Chapter 1 Introduction	1
The ICJ Mission's Programme	1
Methodology	2
The Indian Government	4
Pakistan and Azad Kashmir	5
Conclusion	5
Chapter 2 The Land and the People	6
Chapter 3 Historical Background	9
Historical Background to 1947	9
Historical Background 1947-1949	11
Historical Background 1950-1965	15
Historical Background 1965-1982	21
Historical Background 1982-1990	27
Chapter 4 The Uprising in Kashmir - Origins and Attitudes	32
The Alienation of Kashmir	32
Indian and Kashmiri Attitudes	33
Political Aims - Kashmir, India and Pakistan	36
Chapter 5 Human Rights and the Rule of Law: India	40
International Human Rights and Humanitarian Law	40
National Laws/Policies and Practices	43
Judicial System and Related Institutions	48
State Apparatus	49
Constraints upon Freedom of Speech/Expression	50
Constraints upon Freedom of Assembly and Political Activity	51
Chapter 6 Misconduct by Government Forces and Personnel	53
Published Reports – Indian	53
Published Reports – International	56
Conclusions from the Reports	59
Extra-Judicial Executions	59
Killings of Non-Combatants	60
Torture	60
Disappearances	62
Rape	62
Assaults	63
Destruction of Property and Theft	64
Constraints upon Personal and Family Life	64
Other Concerns	65

	Jammu	65
	Conclusion	66
Chapter 7	Misconduct by Militant Groups	67
	Structure of Militant Groups	67
	Communal Violence	68
	Killings	68
	Torture and Rape	69
	Kidnapping and Hostage-Taking	69
	Destruction and Theft of Property	70
	Constraints upon the Media	70
	Constraints upon Freedom of Assembly and Political Activity	72
	Cultural Constraints	72
	Extortion and Bribery	72
	Other Concerns	72
Chapter 8	Protection and Assistance of Civilians in Jammu and Kashmir	73
Chapter 9	Azad Kashmir and the Northern Areas	75
	Political Position of Pakistan	75
	Support and Assistance of Militant Groups	76
	Constitutional and Legal Process	76
	Access to Information in Jammu and Kashmir	78
	Refugees and Displaced Persons	78
	The Northern Areas	79
	Conclusions and Recommendations	81

Appendices

Appendix 1	An Analysis of the Concept of Self-Determination	84
Appendix 2	Response of the Government of India	99
Appendix 3	Response of the Government of Pakistan	148
Appendix 4	Note on Sources	167
Appendix 5	United Nations General Assembly Resolution 1514 (1960)	169
Appendix 6	United Nations General Assembly Resolution 2625 (1970)	172
Appendix 7	United Nations Security Council Resolution 47 (1948)	186
Appendix 8	United Nations Security Council Resolution 91 (1951)	193
Appendix 9	Article 370 of the Constitution of India	198

Acronyms

BSF	Border Security Force
CRPF	Central Reserve Police force
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
ICRC	International Committee of the Red Cross
JKLF	Jammu and Kashmir Liberation Front
PUCL	Peoples Union for Civil Liberties
TADA	Terrorist and Disruptive Activities (Prevention) Act

A note on language

This report attempts as far as possible to use neutral or balanced language. For geographical areas, the description employed by the controlling power has been used: thus, «Jammu and Kashmir» for the Indian-controlled part of the former princely State of that name, and «Azad Kashmir» for the area known by that name on the Pakistani side of the Line of Control. There is some possibility of confusion because «Jammu and Kashmir» is also the description of the former princely State as a whole. Where the entire State is referred to, the description has been qualified by phrases such as «the former princely State» or «Jammu and Kashmir within its 1947 boundaries». It is hoped that it will be clear from the context whether the reference is to the entire State or to the Indian-controlled part of it. The expression «Kashmir» or «the Valley of Kashmir» means the region of that name under Indian control and does not include Azad Kashmir. The word «militants» has been used to describe the armed opponents of Indian rule in Kashmir, in the belief that this word avoids the value judgments implicit in words such as «terrorists» or «freedom fighters».

Transliteration into English of names of individuals, places and groups is not an exact science and the source material used contains a number of variations (such as Abdullah/Abdulla or Poonch/Punch). The version which appears most often in the source material has been used, but consistency cannot be claimed.

Preface

A mission of the International Commission of Jurists (ICJ) visited India and Pakistan, and both the Indian and Pakistani controlled sections of the State of Jammu and Kashmir, from 16 to 30 August 1993. The members of the ICJ mission were: Sir William Goodhart QC (United Kingdom), Dr. Dalmo Dallari (Brazil), Ms Florence Butegwa (Uganda), and Professor Vitit Muntarbhorn (Thailand), all distinguished jurists, chosen for their integrity, learning, and independence of mind.

The impetus for the appointment of the mission came from the concern felt by the ICJ over the reports of human rights abuses committed in the course of the current disturbances in Jammu and Kashmir. These disturbances, which are centred in the Valley of Kashmir, began in 1988. By the end of 1989 they had become, in effect, a low-level civil war which has continued with no great change of intensity up to the present day, and which has cost several thousand lives.

The ICJ is very grateful to the Governments of India and Pakistan for the assistance they accorded its mission. The members of the mission were the first representatives of any international human rights organisation to be authorised by the Indian Government to visit Kashmir since the start of the disturbances.

We are also very grateful to those individuals and organisations who assisted, talked and gave information to the mission. Some of those whom the mission met in Srinagar did so at personal risk of being targeted by militants. Without their assistance, this mission would not have been possible.

The ICJ would especially like to thank those who assisted the mission in India and Pakistan. They coped tirelessly with arrangements which were always complex and sometimes difficult. Needless to say, they bear no responsibility whatsoever for the views expressed in this report.

The ICJ regrets the length of the interval between the visit of the mission and the publication of its report. This is due to the fact that the preliminary draft of the report had to be sent to the Governments of both India and Pakistan for their comments. Meetings then

followed between Sir William Goodhart QC, head of the mission, and the representatives of both governments in Geneva in June 1994. The text of the report has been extensively revised in the light of the points made by those governments, though the fundamental conclusions of the ICJ mission have not been altered. This has inevitably led to some delay. However, it should be pointed out that it is normal practice for the ICJ that authors of reports sponsored by the organisation make changes, whenever appropriate, in the light of the comments submitted by the parties concerned.

The Governments of India and Pakistan have submitted lengthy comments on the final report sent to them at the end of December 1994. Their unedited responses are set out as Appendices 2 and 3.

The ICJ regrets that the Indian Government has chosen to interpret the serious criticisms of its actions in the Report as evidence of bias on the part of the members of the Mission.

The ICJ also regrets the assertion by the Government of Pakistan that the final text of the Report lacks objectivity. It is not the case that, as alleged, the original draft has been drastically changed. While it is true that the final text is somewhat more critical of Pakistan - particularly in relation to constitutional rights in Azad Kashmir and the Northern Areas - it is no less critical of India.

Appendix 1 to the report contains an analysis of the concept of self-determination by the members of the mission. There are few topics in international law today which are more controversial. One distinguished jurist, Professor Richard Falk, has declared that self-determination of peoples is a concept "variable in content, resistant to generalisation, dependent on context and intensely contested".¹ So it has proved in the case of Kashmir.

The existence of the peoples' right to self-determination in international law cannot be denied. It is reflected in the Charter of the

1 R.Falk, "The Content of Self-determination", in R. McCorquodale and N. Orosz (eds.), *Tibet: The Position in International Law*, 1994, Serindia, London, 81 at 82.

United Nations² recognised in the common article one of the International Covenants,³ accepted in opinions of the International Court of Justice⁴ and reflected in the theory and practice of international law.⁵

Nevertheless, there are many controversies about the right which remain to be settled. Who is a "people" for the purposes of this peoples' right?⁶ How is the "self" defined by reference to territorial boundaries or other criteria? How does the right find expression in the context of international law and practice where its exercise may endanger peace and security,⁷ disturb the international community,⁸ present a risk of secession or the questioning of settled international boundaries?

A glance at the world today will disclose the importance of this issue, both for international law and for international peace and security. Many of the missions of the International Commission of Jurists in the past (and others now in prospect) have concerned complaints about the unfulfilled promise to the peoples' right to self-determination.

It is the intention of the ICJ, in the near future, to convene a high level international conference of legal experts to throw further light

2 Charter of the United Nations, Article 1. See also Article 76.

3 International Covenant on Civil and Political Rights, Article 1; International Covenant on Economic, Social and Cultural Rights, Article 1.

4 See International Court of Justice, Opinion on Namibia, International Court of Justice Reports, 1971, 16,31 and Opinion on Western Sahara, International Court of Justice Reports, 1975, 12, 31ff.

5 See eg. H.Hannum, «Rethinking Self-determination», 34 *Virginia J Int.L* 1 (1993); C.Tomuschat, «Self-determination in a Post-Colonial World», in C.Tomuschat (ed) *Modern Law of Self-determination*, 1993, Kluwer, 1; M. Koskenniemi; «National Self-determination Today: Problems of Legal Theory and Practice», (1994) 43 *ICLQ* 241.

6 See eg. UNESCO, Meeting of Experts on Further Study of the Rights of Peoples, Paris, February 1990, Report. Cf. *Mandla (Sewa Singh) v Dowell Lee and Ors.* (1983) 2AC 548 (HL), 562

7 A. Etzioni, *The Evils of self-determination*, in *Foreign Policy*, 89: 21 (1992-3); R.S. White, «Self-determination, Time for a Re-assessment?», (1981) 28 *Netherlands Int.L.Rev.* 147; C. Mindersma, Legal Issues Surrounding Population Transfers in Conflict Situations" (1994) *Netherlands Int.L.Rev.* 31

8 Boutros Boutros-Ghali, *An Agenda for Peace*, UN Doc. A/47/277/S24111 (17 June 1994), 5, Paris

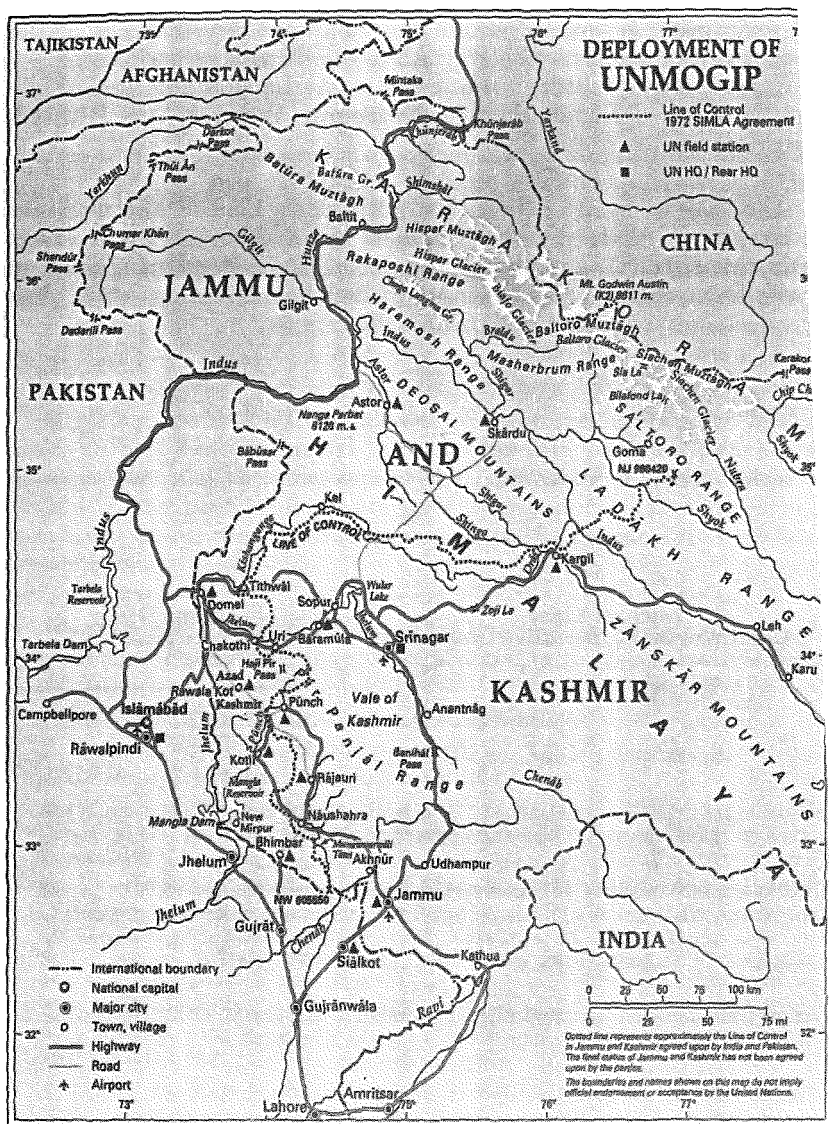
upon the concept of self-determination of peoples. The conference will examine the ways in which the emancipatory features of the concept can be realised whilst avoiding the disruptive and sometimes even destructive features that have sometimes accompanied the rhetoric of self-determination. In due course, therefore, the ICJ will contribute further to this debate.

The ICJ wishes to express its gratitude to Danish Development Assistance (DANIDA), the Swedish International Development Authority (SIDA), and the Diakonische Werk der Evangelischen Kirche Deutschland (EKD), whose financial contributions enabled us to undertake this project and publish the report.

Michael Kirby
Chairman of the Executive Committee

Adama Dieng
Secretary-General

March 1995



Chapter 1

Introduction

The ICJ Mission's Programme

The members of the ICJ mission were the first representatives of any international human rights organisation to be authorised by the Indian Government to visit Kashmir since the start of the disturbances. The Indian Government was more than willing to discuss the issues with the ICJ mission. The mission began with three days of meetings in Delhi, where access was given to the most senior civil servants in the Home, Defence and Foreign Departments and to senior officers in the Army and the para-military forces involved in Kashmir (the Border Security Force, BSF and the Central Reserve Police Force, CRPF). The mission, while in New Delhi, also met the Home Minister, representatives of human rights organisations, politicians, Indian and foreign journalists, and diplomats.

After visiting Delhi, the ICJ mission spent two days in Srinagar and two days in Jammu. Regrettably, the Indian authorities severely restricted its movements in Srinagar. The ICJ mission had been assured in Delhi that it would be allowed to hold meetings in a hotel in central Srinagar, to which anyone who wished to meet the mission would have access. However, this assurance was overruled by Lt. Gen. Zaki, the Governor's security adviser in Srinagar, who also refused to allow the members to accept an invitation to visit the Bar Association's offices in the Court precinct. As a result, the ICJ mission had to hold its meetings in a State guest house in a military cantonment outside Srinagar. Although many of those who had been asked to meet the members of the ICJ mission agreed to come to the guest house, one or two refused to enter Government property and the mission was deprived of the chance to meet others who were not on the list of invitees but might have wished to come forward. The reason given for the restrictions was that, as soon as the presence of the mission in central Srinagar was known, a demonstration would be organised by the militants with the objective of displaying to the mission the extent of anti-Indian feeling. Although it is possible that this might have occurred, the ICJ mission felt that the security restrictions were excessive and limited greatly the scope of the

dialogue which it had wished to pursue. The ICJ mission was, nevertheless, able to meet members of the Bar Association, politicians (both pro and anti-government), human rights groups and journalists, as well as the Governor and several of his senior advisers. It was not, in the circumstances, possible to meet any active militants in Srinagar although many of those whom the mission met were openly opposed to Indian rule.

No restrictions were imposed in Jammu, where the ICJ mission met representatives of local organisations and visited refugee camps occupied by Kashmiri Pandits (Hindus) who had fled from Kashmir. The ICJ mission then returned to Delhi briefly for further discussions with the Government. After an overnight stop in Lahore and meetings with Pakistani human rights groups, the mission continued to Islamabad, where it met representatives of the caretaker Government in office pending the election. The mission also spent two days visiting Muzaffarabad and other places in Azad Kashmir, where it met members of the Azad Kashmir government, representatives of both the pro-Pakistan and pro-independence elements of the militant movement, and local lawyers. It also visited camps for Muslim refugees from Kashmir.

Methodology

Despite the Indian Government's previous refusal to allow international human rights organisations to visit Kashmir, a great deal of information has come out of Kashmir, both on the general situation and on human rights issues. To its credit, the Indian Government has not tried to exclude foreign journalists from Kashmir except for the period of January to May 1990. Journalists have considerable freedom of movement and are able to meet militant leaders. Foreign diplomats frequently visit Srinagar. Representatives of some international human rights organisations, such as Asia Watch and the *Federation Internationale des Droits de l'Homme*, have visited Kashmir clandestinely by posing as tourists. (Surprisingly, Kashmir is not a restricted area for foreign visitors to India and a few tourists still go there). Several national human rights organisations in India have sent missions to Kashmir and published their reports. There are many local human rights groups which publish reports.

Inevitably, much of the published information, particularly from local groups, is highly partisan and unreliable. The main problem is not so much getting information as evaluating it. For this reason, the ICJ mission decided at the outset that it would not undertake direct investigation of individual cases. Even if the ICJ mission's activities in Srinagar had not been restricted, it would not have had time to investigate more than a handful of cases. The documentation read by the members of the ICJ mission made it obvious that some abuses of human rights had taken place; the Indian Government does not deny this. The members of the ICJ mission therefore felt that the main task was to try to assess the quality of the information and to form a view on the scale of abuse, rather than to verify individual cases of abuse.

For the purposes of this report, breaches of human rights arising out of the present disturbances in Kashmir can be divided into three categories. The first category consists of cases where the Indian Government or its representatives have been exercising powers which are authorised by the local law but do not comply with international norms; an example is detention without trial under the Jammu and Kashmir Public Safety Act 1978. The second category consists of actions, such as torture in the course of investigation of suspects, which contravene both the local law and international human rights norms but which the Indian Government or its representatives have condoned or which they have failed to take effective steps to prevent or punish. It is this second category of abuses which has given rise to most of the publicity, but this should not be allowed to obscure the importance of the first category. The third category consists of human rights abuses by the militants. Legal purists may argue that human rights are basically rights of individuals against oppression by the State and that, since the militants in Kashmir are not the State, they may be guilty of crimes but cannot be guilty of abuses of human rights. However, in the interests of balance and fairness, the ICJ mission felt that it was impossible to exclude criticism of the actions of the militants from this report.

The ICJ mission, after careful consideration, concluded that it would not be possible to report on the human rights situation in Jammu and Kashmir without taking into account the question of the right to self-determination, both because self-determination is itself a fundamental human right and because a claim to be entitled to exercise a right of self-determination lies at the heart of the present trouble.

This report, after a short chapter on the geography and ethnology of Jammu and Kashmir, continues with a chapter on the historical background, ending in May 1990. While this chapter may seem long in the context of the report as a whole, the members of the ICJ mission believe that the present problems, and in particular the issue of self-determination, can only be understood if the critical events of 1947-1948 and the subsequent developments are adequately explained. The next chapter includes an analysis of the causes of the disturbances and an assessment of the current attitudes of the people of Kashmir and of the Governments of India and Pakistan.

The following chapters of the report deal with breaches of human rights other than self-determination, divided into the three categories mentioned above. These chapters are followed by a chapter on Azad Kashmir and the Northern Areas and a final chapter containing the conclusions of the ICJ mission. An analysis of the concept of self-determination by the members of the ICJ mission is contained in Appendix 1. It summarises the principles of self-determination in international law and applies those principles to Jammu and Kashmir.

The Indian Government

This report contains a number of serious criticisms of the Indian Government. The ICJ mission does so with regret. Except for the problems in Srinagar mentioned above, the officials whom the ICJ mission met were helpful, courteous and frank. The Indian Government is conscious of the human rights problems arising out of misconduct by its armed forces and other personnel and of the damage which such misconduct is causing to India's international reputation. Some positive steps had already been taken at the time of the ICJ mission's visit. For example, the training in human rights given to the Indian Army has been much improved and appears to be of high quality. Procedures for the handling of local inhabitants who become caught up in search operations have been improved. The Government's handling of the siege of the Hazratbal Mosque (which occurred some months after the ICJ mission's visit) appears from press reports to have been both sensitive and effective.

Much, however, remains to be done. The problem arises, as mentioned above, not only from unauthorised misconduct but from powers and immunities given to the authorities by the laws of India.

These must be dismantled if compliance with human rights obligations is to be achieved. Finally, the Indian Government appears to be totally immovable on the fundamental question of self-determination.

Pakistan and Azad Kashmir

The ICJ mission did not attempt to make a detailed study of human rights in Azad Kashmir or the Northern Areas. This does not mean that problems do not exist. However, the ICJ mission was concerned primarily with abuses of human rights arising out of insurgency and there is no state of insurgency in Azad Kashmir or the Northern Areas.

This report discusses the ICJ mission's understanding of the views of the Pakistani Government and of the extent to which the militants are receiving assistance from across the line of control. Senior officials and ministers in Pakistan discussed the issues freely with the ICJ mission. However, the mission was surprised by the fact that even at this level there appeared to be significant misconceptions about aspects of the situation in Kashmir - for example, the Government appeared to be unaware of the extent to which foreign journalists and diplomats in India had access to Kashmir.

Conclusion

Recent years have been a tragedy for Kashmir. One aspect of the tragedy manifested itself to us on a fine summer evening in Kashmir, looking out from an empty Pari Mahal over an empty Dal Lake, once swarming with activity. Another aspect manifested itself in the refugee camps of Jammu and Azad Kashmir, where victims of the tragedy demonise each other and maimed men and assaulted women are presented to tell their well-rehearsed stories. It is hoped that this report will make some contribution to the easing and eventual ending of that tragedy.

Chapter 2

The Land and the People

The political, religious and linguistic complexities to be found within the boundaries of the former princely State of Jammu and Kashmir (as they existed in 1947) almost match the complexities of the Indian sub-continent itself.

The territories of the former State stretch from the Punjab plain to the Karakoram mountains. They are now divided between three different nations - India, Pakistan and China. China occupies two areas of land once claimed by Jammu and Kashmir - a district known as Aksai Chin (consisting of high-altitude and almost uninhabited desert) and a small strip of land to the north of the Karakoram watershed. Pakistan has conceded these areas to China, but India still maintains its claim to them. Of the remainder, India is now in occupation of an area of 138,942 square kilometres, with a population (according to the 1981 census) of 5,987,389. Pakistan controls an area of 78,114 square kilometres, with a population of 2,542,000 (1981 figures).

The part of the State of Jammu and Kashmir now controlled by India comprises three very different regions - Kashmir, Jammu and Ladakh. The Kashmir Region (area, 15,948 square kilometres; 1981 population, 3,134,904) is centred on the Valley of Kashmir. The Valley is world-famous for its natural beauty, its pleasant summer climate, and the gardens and buildings created by the Moghul emperors. It is a thickly-populated, fertile area of orchards and paddy fields, formed by the bed of what was once a vast lake and surrounded by high mountains. Kashmir is a culturally homogeneous area with a distinctive character and traditions known as 'Kashmiriyat'. Ninety-eight per cent of its people are Muslim. The local spoken language is Kashmiri (though, as in Pakistan, Urdu is used as the written language). According to the 1981 census statistics, Kashmiri is the first language of 90% of the people, though there is a minority who speak Pahari (a language similar to Hindi) in the north and west of the Region. The Sunni branch of Islam is dominant, and

is locally influenced by the mystical philosophy of Sufism. The Kashmiris were, until very recently, regarded as a notably peaceful community with none of the martial traditions of groups such as the Sikhs or Rajputs. Until 1990 (see chapter 3) there was a significant Hindu minority in Kashmir, totalling some 300,000 people. These Hindus (known as the Kashmiri Pandits and mainly of the Brahmin caste) were ethnically and linguistically the same as their Muslim neighbours, being descended from those inhabitants who had resisted conversion to Islam. (The Nehru family are Kashmiri Pandits by descent, though their ancestors left Kashmir in the eighteenth century). Srinagar is the main city of Kashmir; other towns include Sopore, Baramulla and Anantnag. It is the Valley of Kashmir which is the centre of the current disturbances.

To the south of Kashmir, and separated from it by the Pir Panjal Mountains, lies the Region of Jammu (area: 26,293 square kilometres; 1981 population: 2,718,113). Of the six districts into which the Region is divided for administration, the Dogri-speaking Hindu community is dominant in Jammu and Kathua Districts and the southern part of Udhampur District. Poonch and Rajouri Districts, at the western end of the Region, are inhabited mainly by Muslims speaking Pahari. The mountainous and relatively remote Doda District in the north-east of the Region is mixed, with Muslims outnumbering Hindus by about 3 to 2. About 55% of the population of Doda speak Kashmiri; most of the rest speak Hindi dialects. There is a high level of violence in Doda, but the rest of the Region (including the Muslim majority areas) is relatively peaceful.

The Ladakh Region lies to the east of the Kashmir Region. It is large but very thinly populated (area, 96,701 square kilometres; 1981 population, 134,372). Most of it is too high, cold and dry for cultivation. Its only direct link with Kashmir is over the Zoji La which, at more than 3,500 metres, is closed by snow for much of the year. The Region is divided into two districts, Kargil and Leh. The people of Kargil are mostly Balti-speaking Shia Muslims. The people of Leh are mainly Ladakhi-speaking Buddhists and are ethnically Tibetan. Across the Region as a whole, there is a small majority of Buddhists - about 52% to 48%. There is long-standing hostility between the Muslim and Buddhist communities, which in 1989 led to some fairly serious disturbances. However, this has very little connection with the troubles in the Valley of Kashmir.

The parts of the former State of Jammu and Kashmir controlled by Pakistan comprise Azad Kashmir and the Northern Areas. Azad (meaning «free») Kashmir is a relatively narrow strip of land to the west of the Indian-controlled part of the State. It contains about two million people, mostly living in villages or small towns in the mountains. They are overwhelmingly Muslim and mostly Pahari-speaking, having closer cultural links with the people of the western part of Jammu Region than with the Valley of Kashmir. Azad Kashmir is nominally autonomous and has its own President, Prime Minister, Parliament and Supreme Court. Its capital is the small town of Muzaffarabad. However, Pakistan is responsible for its foreign relations and defence and subsidises its finances. The relationship between Pakistan and Azad Kashmir is, in theory, similar to that between British India and the State of Jammu and Kashmir before independence.

The Northern Areas consist of a long section of the upper Indus valley, together with wild and remote districts such as Gilgit, Hunza and Baltistan. They include most of the Karakoram Mountains and the recently-built Karakoram Highway which links Pakistan with the Xinjiang (Sinkiang) region of western China. The inhabitants of the Northern Areas are overwhelmingly Muslim, though mainly of the Shia branch. They speak Balti and other local languages and have little in common with the people of the Valley of Kashmir. The Northern Areas are under the direct administration of the Pakistan Government.

Chapter 3

Historical Background

Historical Background to 1947

It is impossible to understand what is happening in Jammu and Kashmir without understanding why it is happening. This requires a brief account of the history of the territory for the last 150 years.

The Golden Age of the Valley of Kashmir was the period of Moghul rule, from the late 16th to the early 18th century. This was replaced in the mid-18th century by the brutal rule of Afghan chieftains, who were in turn ejected by the Sikh armies of Ranjit Singh in 1819. In the following year Ranjit Singh gave one of his commanders, Gulab Singh, the territory of Jammu and conferred on him the title of Raja. At about the same time Ranjit Singh gave Gulab Singh's brother Dhyani the small territory of Poonch.

Gulab Singh was not a Sikh but a Dogra. The Dogras are a Hindu community settled in the Jammu area. Gulab Singh had imperialist ambitions of his own, and in 1834 he subjugated and annexed Ladakh. Following the death of Ranjit Singh in 1839 there was a series of wars between the Sikhs and the expanding power of Britain, during which Gulab Singh remained neutral. By the treaty of Lahore on 9 March 1846 the Sikhs ceded Kashmir and other territories to the British Government as a consequence of their inability to pay the indemnity of 15 million rupees demanded by the British. By the treaty of Amritsar, a week later, the British transferred Kashmir to Gulab Singh in return for the payment by the latter of half the indemnity. Thereby the princely State of Jammu and Kashmir was brought into existence, and Gulab Singh became its first Maharaja.

Like the other princely States of India, Jammu and Kashmir was subject to British paramountcy. This involved British control of defence, foreign relations and communications. The State retained

internal autonomy in theory but in practice the Government of British India exercised a good deal of control, particularly after the appointment of a permanent British Political Resident in 1885.

For some time after 1846, the extent of the Maharaja's control to the north of the River Indus was uncertain. It was not until 1860 that Gilgit was finally incorporated into the State. In 1870 Hunza, further to the north, entered into a treaty relationship with Gulab Singh's son and successor, Ranbir Singh, but there was a rebellion in Hunza in 1888. Meanwhile, the Government of British India was becoming concerned with the perceived threat to the northern frontier of India from China and, increasingly, Russia. As a result, a British force recaptured Hunza in 1892. The frontier areas, though effectively under British control, remained nominally under the administration of the Maharaja until 1935, when all the territories north of the Indus were leased to the Government of British India for a term of 60 years. In 1940 the State of Poonch (which, as mentioned above, had been granted to Gulab Singh's brother) was effectively incorporated into Jammu and Kashmir. Thus the State achieved its 1947 boundaries, though from 1935 to 1947 the lands north of the Indus were under direct British rule and not under the administration of the Maharaja.

In 1931 there were large-scale protests among Kashmiri Muslims against the autocratic rule of Maharaja Hari Singh (the great-grandson of Gulab Singh) and reported interference with Muslim worship in Jammu. These culminated in a riot outside Srinagar Gaol on 13 July 1931, when over twenty demonstrators were killed by the police. One of the leaders of the protest movement was the young Sheikh Mohammed Abdullah, who was to dominate Kashmiri politics for the next 50 years.

In 1932 Sheikh Abdullah and other Muslim leaders formed a political party called the Muslim Conference. In 1939 the Muslim Conference was dissolved and reconstituted as a secular party named the National Conference. Sheikh Abdullah became actively involved with the Congress movement and became a personal friend of Jawaharlal Nehru. In 1941, however, some of the more conservative Muslims revived the Muslim Conference, which became associated with M. A. Jinnah's Muslim League. In the spring of 1946 Sheikh Abdullah launched the «Quit Kashmir» movement, calling for the expulsion of the Maharaja. Sheikh Abdullah was (not for the first time) arrested and gaoled. Elections to the State Legislative Assembly

were held in January 1947, based on communal constituencies and a limited franchise. These were boycotted by the National Conference, and the Muslim Conference won all the Muslim elected seats that they contested.

Historical Background 1947-1949

In February 1947 the British Government announced that it would give independence to India by June 1948. In March 1947 Lord Mountbatten took office as the last Viceroy, and in June he announced that the date of independence would be brought forward to 15 August 1947. With great reluctance, Nehru and the Indian National Congress accepted the inevitability of partition. Three provinces of British India - Sind, Baluchistan, and the North-West Frontier Province - became part of Pakistan. Two more provinces - Punjab and Bengal - were partitioned between India and Pakistan amidst scenes of appalling communal violence and bloodshed.

Under British rule, India had been divided between British India, under the direct control of the Viceroy's Government, and a patchwork of more than five hundred princely States (including Jammu and Kashmir) over which the Viceroy exercised rights of paramountcy. Under the Indian Independence Act, paramountcy lapsed on 15 August 1947 and it was then up to the ruler of each State to decide whether to accede to India or Pakistan - or, in theory, to remain independent. In practice, for almost all States, independence was not an option. Serious problems arose in only three cases - Jammu and Kashmir, Hyderabad, and Junagadh. Hyderabad, the most populous of the princely States, had a Muslim ruler and a largely Hindu population and was entirely surrounded by Indian territory. The ruler wished to remain independent but the State was occupied by Indian forces and incorporated into India in 1948. The Muslim ruler of Junagadh - a small State in Gujarat with a largely Hindu population - immediately acceded to Pakistan. In October 1947 Indian forces entered Junagadh, and a plebiscite was held in February 1948 which supported accession to India (though Pakistan never officially recognised the accession).

The Maharaja of Jammu and Kashmir procrastinated. He refused to discuss the issues with Lord Mountbatten when the latter visited Srinagar in June 1947. At the last moment, the Maharaja tried to

persuade both India and Pakistan to enter into a Standstill Agreement – an arrangement to preserve the *status quo* on trade, communications and services pending a final decision on accession. Pakistan accepted a Standstill Agreement but India did not.

Following partition there were serious disturbances in Jammu and Poonch. Many Muslims were driven out of Jammu. There was a Muslim revolt in Poonch, which probably received some assistance from sympathisers in Pakistan. At this time, however, the Valley of Kashmir was relatively quiet and there were no communal disturbances there.

It is more than likely that, originally, the Maharaja had hoped to be able to maintain the independence of his State. The rising in Poonch seems to have persuaded him that he would have little hope of retaining his position in a State which had acceded to Pakistan and that independence was not feasible. He appointed a strongly pro-Indian Prime Minister, M. C. Mahajan, who took office in mid-October. However, the Maharaja had still not taken a final decision when, on 22 October 1947, Pathan tribesmen invaded Kashmir from Pakistan, apparently with logistical support from the Government of Pakistan.

On 24 October, the rebels in Poonch declared independence as Azad Kashmir and the Pathans advanced to within 30 miles of Srinagar. They met with little resistance from the Jammu and Kashmir State forces, many of whom were Muslims from Poonch who changed sides. However, the Kashmiri Muslims did not rise in support of the invaders – at least in part because of the gross misbehaviour of the Pathans in Baramulla, which they treated as a conquered rather than a liberated town. On the same day, the Maharaja asked for Indian military assistance. The Indian Government insisted on the Maharaja signing the Instrument of Accession before sending help. The Maharaja signed the Instrument on 26 October and sent it to Lord Mountbatten as Governor-General of India. On 27 October, Mountbatten replied to the Maharaja in a letter accepting the accession and containing the following words: «... consistently with their policy that in the case of any State where the issue of accession has been the subject of dispute, the question of accession should be decided in accordance with the wishes of the people of the State, it is my Government's wish that as soon as law and order have been restored in Kashmir and her soil cleared of the

invader the question of the State's accession should be settled by a reference to the people».

Indian troops were airlifted into Srinagar on the morning of 27 October. They quickly stabilised the situation and by about the middle of November had recaptured the rest of the Valley of Kashmir, though thereafter the fighting became a stalemate and Pakistan Government forces became directly involved. In the north, the Gilgit Scouts under their British commanding officer declared for Pakistan on 3 November and began to push up the Indus valley towards Ladakh. Meanwhile, under Indian pressure, Sheikh Abdullah (who had been released from prison at the end of September) was appointed head of the Jammu and Kashmir Emergency Government on 29 October. Mahajan nominally remained Prime Minister until March 1948, when he was replaced by Sheikh Abdullah as head of an interim government which replaced the Emergency Government.

On 1 January 1948, the Indian Government submitted to the Security Council of the United Nations a complaint against Pakistan under Article 35 of the Charter of the United Nations. This was followed by an anodyne resolution of the Security Council on 17 January calling on the Governments of India and Pakistan to take measures to improve the situation, and a further resolution on 20 January establishing a commission to investigate, mediate and report on the situation in Jammu and Kashmir.

A much more important resolution (resolution 47 (1948)) was adopted on 21 April 1948. This resolution noted «with satisfaction that both India and Pakistan desire that the question of the accession of Jammu and Kashmir to India or Pakistan should be decided through the democratic method of a free and impartial plebiscite». The Commission was instructed «to proceed at once to the Indian subcontinent and there place its good offices and mediation at the disposal of the Governments of India and Pakistan with a view to facilitating the taking of the necessary measures, both with respect to the restoration of peace and order and to the holding of a plebiscite, by the two Governments ...»

The resolution then recommended to the Governments of India and Pakistan certain measures which the Council regarded as «appropriate to bring about a cessation of the fighting and to create proper conditions for a free and impartial plebiscite to decide whether

the State of Jammu and Kashmir is to accede to India or Pakistan». These measures included the withdrawal of the tribesmen and Pakistani regular and irregular forces. When these had been withdrawn, Indian forces should be reduced to the minimum strength required for the maintenance of law and order. The Government of India should undertake «that there will be established in Jammu and Kashmir a Plebiscite Administration to hold a plebiscite as soon as possible on the question of the accession of the State to India or Pakistan». The State should delegate to the Plebiscite Administration (to be led by an Administrator nominated by the Secretary General of the United Nations) all necessary powers, and the Government of India should make its forces available to the Plebiscite Administration. The Security Council Commission should send observers to the State and should certify to the Security Council whether the plebiscite had in fact been free and impartial. Meanwhile, all major political groups should be invited to share in the administration of the State, political prisoners should be released, and refugees should be encouraged to return.

It is to be noted that the resolution considered no possibilities other than the accession of the State as a whole to either India or Pakistan. In particular, the possibilities of either independence or the partition of the State between India and Pakistan were ignored.

On 3 June 1948 the Security Council reaffirmed its earlier resolutions and directed the Commission to proceed immediately to Jammu and Kashmir. On 13 August the Commission published its proposals, which called for an immediate cease-fire to be followed by a truce agreement. The proposed truce agreement differed from the Security Council resolution of 21 April 1948 in one important respect - namely, that the territories on the Pakistani side of the cease-fire line were not to be occupied by Indian forces but were to be administered by their local authorities under the supervision of the Commission. The Commission proposed that the Governments of India and Pakistan should «reaffirm their wish that the future status of the State of Jammu and Kashmir shall be determined in accordance with the will of the people» and should «agree to enter into consultations with the Commission to determine fair and equitable conditions whereby such free expression will be assured.»

The Indian Government gave a qualified acceptance to the Commission's proposals. It was not acceptable to Pakistan, which was

concerned that the continued presence of even limited Indian forces in the politically crucial Valley of Kashmir might influence the result of a plebiscite. However, following some Indian military successes in the autumn of 1948 - including the capture of the city of Poonch and the halting of the Pakistani advance into Ladakh - a cease-fire was agreed. It took effect on 1 January 1949, though an agreement delineating the cease-fire line was not reached until 27 July. On 5 January 1949 the Commission published detailed proposals for the operation of the Plebiscite Administration, and in March 1949 the well-known American admiral, Chester Nimitz, was appointed the Plebiscite Administrator. However, the Indian Government was reluctant to give up control over the interim administration of Jammu and Kashmir, which it believed it was entitled to exercise by virtue of the Maharaja's accession.

The Maharaja's rule did not long survive the cease-fire. Sheikh Abdullah remained deeply hostile to him and, under pressure from the Sheikh and the Indian Government, the Maharaja (while not formally abdicating) handed over his powers to his 18-year old son, the Yuvraj Karan Singh, on 20 June 1949.

Historical Background 1950-1965

The end of the first Kashmir War was followed by constitution-making, both in India and in Jammu and Kashmir. Article 1 of the Indian Constitution, adopted in January 1950, deemed the State of Jammu and Kashmir to be an integral part of India. However, Article 370 of the Constitution, under the cross-heading «Temporary Provisions with respect to the State of Jammu and Kashmir», conferred on the State a degree of autonomy unique among the States of India. In particular, the power of the Indian Parliament to legislate for Jammu and Kashmir was restricted to Defence, Foreign Affairs and Communications. Union legislation on other matters could be applied to Jammu and Kashmir only with the concurrence of the government of the State. The President of India was given power to abrogate or modify Article 370, but only on the recommendation of the Constituent Assembly of Jammu and Kashmir. It was not made clear whether this power was to remain exercisable, and if so what (if any) consent was needed to its exercise, after the Constituent Assembly had completed its duties, Article 370 being regarded as «temporary».

In October 1950 the General Council of Sheikh Abdullah's party, the National Conference, called for the convening of a Constituent Assembly to determine the future shape and affiliations of the State of Jammu and Kashmir. The Yuvraj formally called an election for a Constituent Assembly in April 1951. In theory, its members were to be elected by secret ballot on the basis of universal suffrage, but Sheikh Abdullah rigged the election by ensuring that nominations of candidates of other parties were rejected. The Praja Parishad - a party with considerable support among the Hindus of Jammu - boycotted the election after the nomination of many of its candidates had been rejected.

Two independent candidates were nominated for constituencies in the Valley of Kashmir, but both withdrew under pressure before the election. Representatives of the National Conference were returned in all 75 seats without a vote being cast, except in two constituencies in Jammu where independent candidates contested the elections.⁹

The Constituent Assembly met in October 1951. At its opening Sheikh Abdullah delivered a speech recommending accession to India, and rejecting accession to Pakistan or independence. Thereafter, however, the paths of Sheikh Abdullah and the Indian Government began to diverge. The aim of the latter was to secure the permanent accession of Jammu and Kashmir to India, with the State having the same relationship to the Union Government as the other constituent States. The aim of the Sheikh was to secure the greatest possible degree of autonomy for Jammu and Kashmir and the greatest possible power for himself as its leader. As both Jagmohan¹⁰ and Prof. Lamb¹¹ agree, what the Sheikh really wanted was independence. The Sheikh himself made this clear in a discussion with Warren Austin, the Ambassador of the United States of America to the United Nations, on 28 January 1948. Given that independence was politically impossible at the time, Sheikh Abdullah leaned towards cooperation with India rather than Pakistan because of his

9 See Puri, *Kashmir Towards Insurgency*, pp. 44-45; Korbelt, *Danger in Kashmir*, Princeton University Press 1954, revised edition 1966, pp. 221-222; Bhushan, *State Politics and Government, Jammu and Kashmir* (Jay Kay Book House, 1985), pp. 94-96.

10 Jagmohan, *My Frozen Turbulence in Kashmir*, Allied Publishers Ltd. (3rd. Edition, 1993)

11 Lamb, Alastair, *Kashmir-A Disputed Legacy*, Roxford Books (1991)

past conflicts with the Muslim Conference and Muslim religious leaders in Kashmir and because of his personal links with Nehru. In addition, it must have been clear to him that if the State acceded to Pakistan, the enthusiasm of the Kashmiris for autonomy would have been much reduced.

In July 1952, the leaders of the National Conference reached an agreement in Delhi with Nehru and the Indian Government about the future of the relationship between Jammu and Kashmir and India. The hereditary rulership of Jammu and Kashmir was to be replaced by an elected Head of State, to be known as the Sadar-i-Riyasat. Laws which reserved rights of land ownership in the State to citizens of the State were to be retained (as they still are). The State would have its own flag. The power of the President of India to declare emergency rule could be exercised only at the request or with the concurrence of the State government. The residuary powers under the Indian Constitution were to be vested in the State and not (as with all other States) in the Union Government.

The Delhi Agreement involved substantial concessions to Sheikh Abdullah and gave Jammu and Kashmir a degree of autonomy which no other State has been granted under the Indian Constitution. The motive, presumably, was to secure the Sheikh's support for accession.

The Delhi Agreement was partially implemented in November 1952 when the Constituent Assembly elected the former Yuvraj, Karan Singh, the first Sadar-i-Riyasat. However, Sheikh Abdullah delayed implementation of the rest of the Agreement. In November 1952, the Sheikh ordered the arrest of two leaders of the Praja Parishad - an act which heightened the already considerable tension in Jammu, where the Praja Parishad had been campaigning for the separation of Jammu from Kashmir and the abolition of the special status of Jammu and Kashmir. The Praja Parishad had close links with the leading Hindu political party in India, the Jana Sangh, whose President, Dr. S. P. Mookerjee, tried to enter Jammu in May 1953. He was arrested and died in detention in Srinagar a month later. Though his death was probably due to natural causes, it led to an upsurge of anger in India against Sheikh Abdullah. Meanwhile, the Sheikh had raised the question of independence again in widely-reported discussions with Adlai Stevenson (statesman and American Presidential candidate in 1952 and again in 1956) when the latter visited Srinagar in May 1953. He set up a Working Committee of the

Constituent Assembly to consider a wide range of options for the future of the State. At a meeting of the Committee in May 1953 he denounced the Delhi Agreement and advocated independence for the Valley. The Sheikh hinted at the possibility of independence in public speeches in July.

These activities not only disturbed the Indian Government but caused divisions within the National Conference. As a result Karan Singh, acting in great secrecy and in cooperation with representatives of the Indian Government and with Sheikh Abdullah's Deputy, Bakshi Ghulam Mohammed, dismissed Sheikh Abdullah on the night of 8-9 August 1953 and ordered his arrest. Bakshi Ghulam Mohammed replaced him as Prime Minister. There were disturbances which, according to official records, resulted in 70 deaths (and according to other accounts many more) but these were quickly suppressed and were followed by relative calm in both Kashmir and Jammu. Bakshi Ghulam Mohammed declared that the State was a permanent part of India and proceeded to implement the rest of the Delhi Agreement.

Meanwhile, the United Nations had continued its concern with Jammu and Kashmir. In March 1950 the UN appointed Sir Owen Dixon, the distinguished Chief Justice of Australia, its representative in India and Pakistan. In the course of his mission Sir Owen raised with the Prime Ministers of both countries the possibility of regional plebiscites, either throughout the various regions within the State or in the Valley of Kashmir alone, leading to a partition of the State. Nehru showed interest in the plan, probably believing that Sheikh Abdullah could ensure a vote for India in a plebiscite in the Valley. However, the plan was rejected by both Sheikh Abdullah himself and by the Pakistani Prime Minister, Liaquat Ali Khan. Dixon, in his report to the United Nations in September 1950, rejected the idea of a plebiscite of the entire State, saying: «The interest of the people, the justice as well as the permanence of the settlement, and the imperative necessity of avoiding another refugee problem, all point to the wisdom of adopting partition as the principle of settlement and of abandoning that of an overall plebiscite. But in addition the economic and geographic considerations point in the same direction.» However, the Dixon plan – probably the best hope then available for a peaceful and permanent solution to the Kashmir dispute – fell to the ground.

The Security Council returned to the issue with its resolution 91

(1951) on 30 March 1951. This affirmed that any determination of the future shape and affiliation of Jammu and Kashmir by the proposed Constituent Assembly would not constitute a disposition of the State in accordance with the principle (embodied in the Security Council's earlier resolutions) that the final disposition of the State should «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». The resolution called for the appointment of a new Representative and for India and Pakistan to cooperate with the UN in demilitarising the State. It decided to retain the small group of military observers which had been sent to monitor the cease-fire in 1949 (and which has continued to do so ever since). On 29 May 1951 the Security Council approved the text of a letter to be sent to the Governments of India and Pakistan expressing concern at the recent summoning of the Constituent Assembly by the Yuvraj. Dr. Frank Graham, a former American Senator, was appointed the UN representative. He produced detailed plans for demilitarisation which were approved by a Security Council resolution of 23 December 1952 but were never implemented.

In October 1956 the Constituent Assembly adopted a constitution for Jammu and Kashmir which declared (contrary to the Security Council's resolution 91 of 1951) that the State «is and shall be an integral part of the Union of India». On 24 January 1957 the Security Council reaffirmed that resolution. However, a resolution calling for the study of a proposal for a UN force in Kashmir was vetoed by the USSR. The UN sent the Swedish diplomat Gunnar Jarring to report on Kashmir, but he was unable to make any concrete proposals.

During the debate on the 1951 Resolution, the Indian representative at the UN, B.N. Rau, had said: «My government's view is that while the Constituent Assembly may, if it so desires, express an opinion on this question it can take no decision on it.» However, Indian acceptance of the principle of self-determination through a plebiscite in Jammu and Kashmir eroded when, in 1954, Pakistan entered into a military pact with the USA and began to receive American weapons. On 29 March 1956, Nehru, in a speech to the Indian Parliament, formally withdrew the offer of a plebiscite.

In spite of the Indian Government's change of position and the

adoption of the State Constitution, Sheikh Abdullah continued to call for a plebiscite through the 'Plebiscite Front' founded by his close associate, Mirza Afzal Beg. In January 1958 the Sheikh was released, but his outspoken support for a plebiscite led to his re-arrest in April. Elections to the Legislative Assembly of Jammu and Kashmir were held in 1957 and 1962. On each occasion the National Conference (i.e. Bakshi Ghulam Mohammed's supporters) won all or nearly all the seats in Muslim majority areas, with the Praja Parishad winning a handful of seats in Jammu. Both elections are regarded as having been heavily rigged.

In October 1963, Bakshi Ghulam Mohammed retired and was succeeded by the ineffective Khwaja Shamsuddin. Just before his retirement he announced a number of changes of symbolic, if not practical, importance - notably the alteration of the title of Head of State from *Sadar-i-Riyasat* to Governor and of the Head of Government from Prime Minister to Chief Minister, to conform with the practice in other Indian States. This, together with the extension of a number of provisions of the Indian Constitution to Jammu and Kashmir, emphasised the increasing pressure for absorption of the State into the Indian Union.¹²

Violent disturbances broke out in Srinagar at the end of December 1963, following the theft of a holy relic, a hair supposed to have come from the head of the Prophet Mohammed, from the Hazratbal Shrine. The relic was mysteriously returned to the shrine a week later, though disturbances continued for another month, until the returned hair was declared genuine by religious leaders. Following the disturbances, Shamsuddin was removed and replaced by G. M. Sadiq, an associate of Sheikh Abdullah who was, however, acceptable to the Indian Government. In April 1964, Sheikh Abdullah was released from prison. However, later that year the State government agreed to the extension to Jammu and Kashmir of Articles 356 and 357 of the Indian Constitution - a crucial step which enabled the President of India to impose presidential rule in the State without the prior approval of the State legislature. In March 1965, while Sheikh Abdullah and Mirza Afzal Beg were abroad, leaders of their Plebiscite Front were arrested in Srinagar. Sheikh Abdullah,

12 Puri, in *Triumph and Tragedy of Indian Federalism*, p. 151, refers to 28 Presidential Orders between 1954 and 1977 extending provisions of the Indian Constitution to Jammu and Kashmir. He also lists, in Appendix L, 262 central government statutes made applicable to the State up to 1973.

while out of the country, did a number of things which upset the Indian Government, including meeting with the Chinese Prime Minister Chou En-lai (China had of course defeated India in the Assam War of 1962 and was sympathetic to Pakistan). As a result, Sheikh Abdullah and Mirza Afzal Beg were once again arrested and detained on their return to India in May 1965. Rioting and civil disobedience followed in Kashmir. At about this time, Pakistan began a policy of active intervention in Kashmir which led to the war described in the next section.

Historical Background 1965-1982

In early 1965, the relationship between India and Pakistan deteriorated sharply as a result of skirmishes in the desolate Rann of Kutch. In Jammu and Kashmir, the re-arrest of Sheikh Abdullah and Mirza Afzal Beg led to rioting and a civil disobedience campaign sponsored both by the Plebiscite Front and by the rival pro-Pakistan Awami Action Committee, led by Mirwaiz Mohammed Farooq. The Pakistan Government, thinking that it could gain advantages from instigating a rising in the Valley of Kashmir, began to train and arm irregulars who started to infiltrate the Valley. However, Pakistan overestimated the willingness of the people of the Valley to join a revolt and underestimated the Indian Army, following its humiliation by the Chinese in 1962. By August 1965, some thousands of irregulars had crossed the border and in that month Pakistan committed regular forces to their assistance. However, the Pakistanis received little support from the people of Kashmir. On 1 September, Pakistani forces, including tanks, launched an attack across the southern end of the cease-fire line with the apparent aim of cutting the link from India to Kashmir through Jammu. On 6 September, India extended the war by launching an attack towards Lahore in the Pakistani State of Punjab. By resolutions of 4 and 6 September, the Security Council called on India and Pakistan to cease hostilities and by a resolution of 20 September it ordered them to do so. They complied with this order and a cease-fire took effect on 23 September, though minor incidents continued along the cease-fire line for several months. An offer by the USSR to host talks between India and Pakistan was accepted by both parties. Talks opened in Tashkent on 3 January 1966 between President Ayub Khan of Pakistan and Nehru's successor as Prime Minister of India, Lal Bahadur Shastri.

Agreement was reached on 10 January (Shastri died suddenly on the following day and was succeeded by Indira Gandhi). The main element of the agreement was that both sides should withdraw to their pre-war boundaries (including the cease-fire line in Jammu and Kashmir). No attempt was made to reach a permanent settlement of the Kashmir question.

Although the Kashmiris had not risen in revolt during the war, agitation continued. Following a pro-plebiscite demonstration in Srinagar in October, Mirwaiz Mohammed Farooq and his colleagues were arrested. With the entire opposition leadership under arrest, the Sadiq government secured comfortable re-election in 1967. The elections were, as before, rigged through the control of nominations. Following the election, Karan Singh was offered a cabinet post in Delhi and resigned as Governor. By the end of 1967, the Indian Government had decided that conditions had stabilised enough to permit the release of Sheikh Abdullah and the other imprisoned leaders. The Sheikh continued to follow an equivocal line, calling for a plebiscite and making friendly gestures to Pakistan but never expressing support for its 1965 intervention. He revived the Plebiscite Front, which adopted as its policy a semi-federal State of Jammu and Kashmir with the option of independence or accession to Pakistan. In January 1971, Sheikh Abdullah, his son-in-law G. M. Shah, and Mirza Afzal Beg were banned from Jammu and Kashmir (though not placed under arrest). Many leaders of the Plebiscite Front were detained, and the Front itself was declared unlawful.

In December 1971, a third war broke out between India and Pakistan. On this occasion it was triggered by Indian support for the independence movement in East Pakistan. Fighting spread to Jammu and Kashmir, where neither side made significant gains. Elsewhere, however, the Indian Army was swiftly victorious. A cease-fire was agreed on 17 December and East Pakistan achieved independence as Bangladesh.

On 28 June 1972, the President of Pakistan, Zulfikar Ali Bhutto, and Mrs. Gandhi met at Simla. The outcome of this meeting was the Simla Agreement of 3 July 1972. It included the following statements:

«That the two countries are resolved to settle their differences by peaceful means through bilateral

negotiations or by any other peaceful means mutually agreed upon between them. Pending the final settlement of any of the problems between the two countries, neither side shall unilaterally alter the situation and both shall prevent the organisation, assistance or encouragement of any acts detrimental to the maintenance of peaceful and harmonious relations ...

«That the basic issues and causes of conflict which have bedevilled the relations between the two countries for the last 25 years shall be resolved by peaceful means.

«That they shall always respect each other's national unity, territorial integrity, political independence and sovereign equality.»

The agreement contains two specific references to Jammu and Kashmir. These are:

«In Jammu and Kashmir, the line of control resulting from the cease-fire of December 17, 1971, shall be respected by both sides without prejudice to the recognised position of either side. Neither side shall seek to alter it unilaterally, irrespective of mutual differences and legal interpretations. Both sides further undertake to refrain from the threat or the use of force in violation of this line ...

«Both Governments agree that ... the representatives of the two sides will meet to discuss further the modalities and arrangements for the establishment of durable peace and normalisation of relations, including ... a final settlement of Jammu and Kashmir».

The Simla Agreement is a document of great importance in relation to Jammu and Kashmir. It involves a recognition of the cease-fire line as the *de facto* boundary between the areas controlled by India and by Pakistan, and a renunciation of the use of force either to change that boundary or to subvert the regime on the other side of the boundary. On the other hand, Jammu and Kashmir is recognised as an issue requiring «settlement» and the claim of India to *de jure* title

to Jammu and Kashmir (or at least the Indian-occupied part of it) is not acknowledged. The agreement requires the existing disputes between the countries to be settled bilaterally (and therefore, by implication, to the exclusion of reference to third parties such as the UN except with the consent of both India and Pakistan). However, the people of Jammu and Kashmir were not parties to the Agreement and it would seem that the Agreement cannot, in their absence, override any rights which they (or any section of them) may have in international law.

G. M. Sadiq, the Chief Minister of Jammu and Kashmir, died in office in December 1971 and was succeeded by Syed Mir Qasim. The latter won the State elections in March 1972, with small numbers of seats going to the pro-Pakistan Jamaat-i-Islami and, in Jammu, to the Jana Sangh (which had succeeded the Praja Parishad as representatives of the Hindus). Subsequently the detained political leaders were released and in June and July 1972 Sheikh Abdullah, Mirza Afzal Beg and G. M. Shah were allowed to re-enter the State. The ban on the Plebiscite Front was withdrawn in January 1973.

Sheikh Abdullah continued to follow an ambivalent line. While maintaining that the people of Jammu and Kashmir had a continuing right to self-determination, he condemned Pakistani criticism of the Indian Government. In 1974, Sheikh Abdullah and Mirza Afzal Beg entered into discussions with the Indian Government, which in February 1975 resulted in an agreement known as the Kashmir Accord. The main provisions of the Accord were:

- «1. The State of Jammu and Kashmir which is a constituent unit of the Union of India shall, in its relation with the Union, continue to be governed by Article 370 of the Constitution of India.
- «2. The residuary powers of legislation shall remain with the State; however, [the Indian] Parliament will continue to have power to make laws relating to the prevention of activities directed towards disclaiming, questioning or disrupting the sovereignty and territorial integrity of India or bringing about cession of a part of the territory of India or secession of a part of the territory of India from the Union or causing insult to the Indian

National Flag, the Indian National Anthem and the Constitution.»

The Accord also contained provisions for the review by the State government of legislation made by the Union Parliament and applied to the State, but any amendment or repeal of such laws would require the assent of the President of India, which «would be sympathetically considered» but could be withheld.

The Accord represented on the face of it a substantial surrender by Sheikh Abdullah. His aim of restoring the State to its constitutional position at the time of his removal in 1953 largely failed. Article 370 of the Indian Constitution was indeed retained, but the various extensions of Indian legislation to the State since 1953 were not effectively clawed back. Mirza Afzal Beg was unable even to persuade the Indian Government to restore the symbolically important titles of *Sadar-i-Riyasat* and Prime Minister. Above all, Article 2 of the Accord involved the recognition of the permanence of the State's accession to India and the renunciation of any claim to independence or accession to Pakistan. Even so, the Accord was condemned by the *Jana Sangh* - and also, on opposite grounds, by Bhutto and Mirwaiz Mohammed Farooq.

The Kashmir Accord should probably be seen as a consequence of the 1971 War.¹³ Pakistan's catastrophic defeat and dismemberment meant that it was no longer a serious threat to the Indian position in Kashmir. Sheikh Abdullah's bargaining position was greatly weakened. If Pakistan had accepted the *status quo* by the Simla Agreement, Sheikh Abdullah and the Kashmiris had little alternative but to do the same. The Kashmir Accord does not seem to have damaged the Sheikh's popularity; Balraj Puri says that he received a hysterical welcome on his return from exile in 1975.¹⁴

Sheikh Abdullah's reward for accepting the Accord was his return to power. On 25 February 1975 he was elected as leader of the State's ruling Congress Party and Chief Minister in place of Syed Mir Qasim. However, he refused to join the Congress Party and instead revived the old National Conference, into which the Plebiscite Front

¹³ See the discussion in Puri, *op.cit.*, pp. 170 *et seq.*

¹⁴ *Op.cit.*, p. 178.

was merged. There followed a period of some political confusion, with Sheikh Abdullah leading a government supported by the Congress Party while also leading an opposition party. In March 1977, Congress withdrew its support. Sheikh Abdullah persuaded the Governor to dissolve the Assembly and call an election.

The 1977 election is widely regarded as the most free and fair election in the history of the State. Sheikh Abdullah's National Conference won a clear victory with 47 of the 76 seats overall (including 39 out of 42 in the Valley of Kashmir). Congress won only 11 seats (all of them in Jammu) and the Janata Party – basically an ill-assorted coalition which had some support from Mirwaiz Mohammed Farooq – won 13 seats, including two in the Valley.

None of the parties or candidates in the 1977 election questioned the fact of accession to India.¹⁵ It is clear that the Indian Government would not have tolerated any overt challenge to accession by any of the parties contesting the election. However, Article 370 does appear to have been an issue. The manifesto of the National Conference attacked the erosion of Article 370, and claimed the right to reject any extension of the Indian Constitution or Union laws to Jammu and Kashmir after 9 August 1953 (the date of the coup against Sheikh Abdullah). Balraj Puri claims that a threat of abrogation by the Jana Sangh swung the Valley behind the National Conference, and that Sheikh Abdullah threatened secession from India if Article 370 was abrogated.¹⁶ In any event, there can be no doubt as to the genuineness of popular support for the Sheikh, notwithstanding his acceptance of the Accord.¹⁷

During his final years in office the ageing Sheikh became more authoritarian and determined to entrench his family in power. Mirza Afzal Beg, his oldest ally, broke with him in 1978 and set up his own

15 *Op.cit.*, p. 190.

16 *Op.cit.*, p. 140.

17 A pro-Pakistani activist is reported as having said, much later, «We always disagreed with Sheikh Saheb but it was hard to quibble with him in 1975. Despite differences, one doesn't quibble with a man who had spent most of his political life in jail while fighting for his people.» (Reported by Ashutosh Varshney in *Perspectives on Kashmir*, ed. Thomas, p. 232) For a contrary view of the fairness of the election, see Prem Nath Bazaz, *Democracy through Intimidation and Terror* (1978).

short-lived party. The Sheikh relied increasingly on his able and powerful wife, Begum Akbar Jehan Abdullah, and his sons, Tariq and Farooq, and son-in-law G. M. Shah. On 8 September 1982 Sheikh Abdullah, the «Lion of Kashmir», died, to be succeeded as Chief Minister by his son, Dr. Farooq Abdullah.

Historical Background 1982-1990

Dr. Farooq Abdullah's relationship with the Indian Government was uneasy. A month after his father's death he secured the passage through the State's Legislative Assembly of a highly controversial Resettlement Bill, providing for the resettlement of Kashmiris who had fled to Azad Kashmir or Pakistan. However, Dr. Abdullah agreed to accept a reference to the Supreme Court of India for a decision on the constitutionality of the Bill. (The decision had still not been delivered by 1993). Proposals for an alliance between the National Conference and Indira Gandhi's Congress (I) in the State elections of 1983 collapsed. In the event the election became a fight between them, with the National Conference winning 46 seats (mainly in the Valley of Kashmir) and Congress (I) winning 26 seats in Jammu. The extremist Muslim party in Kashmir and Hindu parties in Jammu were overwhelmed. The 1983 election is regarded as the only election apart from 1977 which was reasonably fair.

Rioting took place in Kashmir in late 1983 and 1984. One riot forced the abandonment of a cricket match between India and the West Indies in Srinagar in October 1983. In February 1984 the murder of an Indian diplomat in England by Kashmiri nationalists and the execution in India of the Kashmiri militant Maqbool Butt raised tension higher. The Indian Government became concerned that the serious violence which had erupted in the Indian Punjab might spread to Kashmir. As a result, Mrs. Gandhi decided that Jammu and Kashmir needed a strong Governor and appointed Jagmohan to that office in April 1984.

Meanwhile, Dr. Abdullah was facing a challenge to his leadership from his brother-in-law G. M. Shah, who was intriguing with Congress (I). The National Conference split into two factions which held separate party conventions in May 1984. On 2 July G. M. Shah and the other leaders of his faction had a secret meeting with Jagmohan, asking him to appoint Shah as Chief Minister. Jagmohan

would have preferred to impose Governor's Rule, but when his request for authority to do so was refused by the Indian Government he appointed Shah as Chief Minister without waiting for the Legislative Assembly to pass a vote of no confidence in Dr. Abdullah. Shah thereupon took office with the support of a bare majority in the Assembly, consisting of Congress (I) and 13 members of the National Conference.

The appointment of Shah as Chief Minister was a disaster. A majority composed mainly of Congress (I) members from Jammu, together with a faction of National Conference members who had seceded from the main body of the party, was inevitably seen in the Valley of Kashmir as lacking any kind of political legitimacy. Shah's dependence on Congress (I) and Jagmohan's by-passing of normal constitutional procedures in appointing him led to Shah being seen as a puppet of the Indian Government, and the belief that Article 370 of the Indian Constitution (to which Jagmohan was strongly opposed) gave Jammu and Kashmir some degree of effective autonomy was shattered. Furthermore, Shah's administration proved to be exceptionally incompetent and corrupt (Jagmohan describes it as having virtually gone on a looting spree). Eventually, after serious communal rioting which Shah was unable to control, Congress (I) withdrew its support. On 7 March 1986 Jagmohan dismissed Shah, suspended the Legislative Assembly and imposed Governor's Rule.

Jagmohan temporarily restored order and had some success in making the State administration more honest and efficient. However, permanent Governor's Rule was not envisaged and Rajiv Gandhi (who had become Prime Minister of India following his mother's assassination) entered into discussions with Dr. Farooq Abdullah, which resulted in the latter's re-appointment as Chief Minister in November 1986. Elections were held in March 1987. These resulted in Dr. Abdullah's National Conference winning 38 seats (mainly in the Valley of Kashmir) and Congress (I) winning 24 seats in Jammu. Dr. Abdullah became the leader of a National Conference - Congress (I) coalition. The fairness of these elections is highly suspect, with allegations of vote-rigging by the National Conference and intimidation of candidates of the opposition Muslim United Front.

In August 1988 there was a series of bomb explosions in Kashmir and eight rioters were killed by police. These events marked the opening of a campaign of violence by the militant Jammu and

Kashmir Liberation Front (JKLF). Over the next few months there were frequent explosions, demonstrations and political strikes, though few deaths. New militant groups began to emerge. The State government appeared to be ineffective and powerless.

Jagmohan's term of office ended on 12 July 1989. There was a serious incident the following day, when two members of the CRPF and four bystanders were killed. Strikes and explosions continued, particularly on Indian Independence Day (15 August). There were attacks on National Conference and Congress (I) leaders. On 14 September Tikka Lal Taploo, a leading Kashmiri Pandit and the President of the State branch of the Bharatiya Janata Party (BJP - a Hindu Nationalist party which has become the main opposition party in the Indian Parliament) was assassinated outside his house in Srinagar. Strikes, explosions and attacks by militants continued through September and October. On 4 November the retired judge N. K. Ganjoo, a Kashmiri Pandit who had sentenced Maqbool Butt to death, was assassinated. Unrest spread to the Doda district.

Elections for the State's members of the Lok Sabha (the lower house of the Indian Parliament) were held on 22 November 1989. As the result of a boycott organised and enforced by the militants, the turnout in many places in the Valley was a mere one per cent, five votes only being cast in Sopore town and none at all at many polling stations.

In an incident which drew international attention to Kashmir, the JKLF kidnapped Dr. Rubaiya Sayeed, daughter of the Indian Home Minister, on 8 December. Although the kidnapping was condemned by several Muslim leaders, the JKLF threatened to kill Dr. Sayeed unless a number of leading militants were released from prison. The State government gave way and released them, giving an important propaganda victory to the militants.

Violent incidents increased further. A leading Kashmiri Pandit journalist, Prem Nath Butt, was assassinated in Anantnag on 27 December. Thirteen people were killed on 8 January 1990. On 19 January the Indian Government (with V. P. Singh of the Janata Dal as Prime Minister) sent Jagmohan back to the State as Governor. He immediately declared Governor's Rule and Dr. Farooq Abdullah resigned. On 21 January Jagmohan reached Srinagar and ordered a crackdown. A massive protest procession marched through Srinagar

that day; it was fired on by the CRPF, with (according to Jagmohan) 12 deaths, though other estimates place the number at 60 or more. Further disorder and more deaths occurred on the 22nd. On 25 January four Indian Air Force officers were shot dead by militants in Srinagar. On the 26th foreign media correspondents were placed under severe restrictions, and Kashmir was effectively closed to the foreign media until after Jagmohan's removal from office in May. On 13 February Lassa Kaul, the head of Srinagar Doordarshan (TV) was murdered by militants from the JKLF - an event which emphasised the militants' aim to get control of the media. On 19 February Jagmohan dissolved the Legislative Assembly (for which new elections have never been held). At least 17 people were killed in incidents on 1 March.

Over the early months of 1990 the Kashmiri Pandit community began to flee from the Valley of Kashmir. In all, it is estimated that about 250,000 out of the original total of 300,000 have left. The circumstances in which this exodus came about are controversial. Some groups have accused Jagmohan of encouraging the flight for propaganda reasons. Jagmohan has denied this, and we see no reason to doubt his word. The motive attributed to him seems far-fetched. A number of leading members of the Pandit community had been killed by the militants, and some 70 Hindus in all had been killed in Kashmir between December 1989 and May 1990. It is true that (with one exception which occurred much later) there have been no communal killings such as occurred in the Punjab, when ordinary Hindus were killed simply because they were Hindus. (The exception was a massacre at Kishtawar in Doda district on 14 August 1993, when 16 Hindus were removed from a bus and shot). However, the killing of leading Pandits, coupled with threats which were published in militant-controlled newspapers, is more than sufficient to account for the panic and flight of the Pandits.

On 6 April Mushir ul-Haq, the Vice-Chancellor of Kashmir University, and his personal assistant were kidnapped by the Jammu and Kashmir Student Liberation Front. They were murdered four days later. Professor ul-Haq was a well-respected progressive Muslim and it is not clear why he was killed. An even more important murder was that of Mirwaiz Mohammed Farooq, who was shot dead on 21 May by three unidentified young Kashmiris. The motives of his killers remain wholly obscure. The Mirwaiz (who had been, as mentioned above, the leader of the pro-Pakistan Awami Action Committee) was

extremely popular, both as a religious and political leader. His death led to immediate and violent protests, with at least 25 people being killed by the CRPF. This caused international protests. On 24 May, Jagmohan was dismissed by the Indian Government and replaced by G. C. Saxena.

Chapter 4

The Uprising in Kashmir - Origins and Attitudes

The Alienation of Kashmir

As appears from the summary of the historical background, the present disturbances, which began in 1988 and by the spring of 1990 had become virtually a low-level civil war, are far more serious than the occasional riots and demonstrations of earlier years. Why did this happen? And why did it not happen earlier?

To begin with, it is by no means certain that in 1947 a majority of Kashmiris (as opposed to non-Kashmiri Muslims elsewhere in the State) wished to accede to Pakistan. Nehru's belief that India should achieve independence as a united secular State was supported by many Muslims; indeed in 1947 the solidly Muslim North West Frontier Province had a Congress government and in a plebiscite only voted by a narrow majority in favour of joining Pakistan. It is very possible that a plebiscite in the early years in Jammu and Kashmir would have produced a majority in favour of accession to India, at least if Sheikh Abdullah had been willing to back it. He might well have done so, though he would probably have insisted on Jammu and Kashmir being allowed to retain a significant measure of autonomy as the price for his support.

Whatever the position in the early years may have been, India's refusal to allow a plebiscite and its policy of chipping away at the autonomy given to Jammu and Kashmir by Article 370 of the Indian Constitution led to increasing resentment in Kashmir. But Sheikh Abdullah - despite his exclusion from power from 1953 to 1975, and his imprisonment or exile for much of that period - never entirely cut his links with India. Although he was willing to play the Pakistan card as a tactical manoeuvre, he never seems really to have wanted accession to Pakistan. He wanted independence and, failing that, autonomy under Indian paramountcy.

Such was the dominance of this extraordinary man that it can be argued that he distorted the political process in Kashmir and that the tilt of his own policy towards India (even if that tilt was slight and not continuous) concealed the depth of underlying hostility to India. The Sheikh's standing as a national hero, gained by his leadership of struggles against both the Maharaja and the Indian Government, enabled him to win support for policies of cohabitation with India which would not otherwise have been accepted.

The Sheikh's successors inevitably lacked his personal prestige. Furthermore, they squandered his political inheritance by incompetence, corruption, election rigging and family squabbles. The decision of G. M. Shah in 1984 and Farooq Abdullah in 1986 to take office with the support of Congress members from Jammu saddled them both with the label of Indian puppet. By 1989 the State government was adrift with no power, no policy, and no shred of popular support in the Valley of Kashmir. Into this vacuum moved the militants.

Indian and Kashmiri Attitudes

The public attitude of almost all Indian politicians and most of the media towards the Kashmir uprising can be summed up in two catch phrases which are constantly repeated: «Pakistan's proxy war» and «the shadow of the gun». The first of these implies that the uprising was instigated and is being maintained wholly or mainly by Pakistan. The second implies that the apparent hostility of Kashmiris to India is the result of terrorist pressure by the militants and that Kashmiris would settle down as willing and peaceful citizens of India if that pressure was removed. The members of the ICJ mission believe that the first of these catch phrases is only partially true and the second is an illusion.

Although the Pakistani Government officially denies giving assistance to the militants, nobody doubts that the militants have been receiving a great deal of cross-border help. The extent of Pakistani Government involvement is unclear, but at the very lowest the Government is turning a blind eye to activities which it could have inhibited. It is clear that the Pakistani security service (the ISI), if not the Government itself, has been giving active assistance. There is no doubt that the weapons used by the militants are coming from

Pakistan. Following the run-down of the war in Afghanistan, northern Pakistan is awash with second-hand weapons which can be bought on the black market. However, they still cost money; it was said that the price of a modern automatic rifle might be as much as 500 U.S. dollars. The Indian Government claims to have captured some 11,000 rifles in Kashmir, as well as smaller numbers of other weapons, representing an investment of several million dollars before taking into account the weapons still in the hands of the militants. The militants have been raising funds from Kashmiri communities outside India as well as from within Kashmir itself, by both extortion and other means. (The ICJ mission was told that Government funds officially allocated for development projects in Kashmir are often split between Government officials and the militants). However, it is very possible that financial help for the militants may have been coming from official sources in Pakistan.

It is also clear that military training is taking place on the Pakistan side of the border. Considerable numbers of Kashmiris have been apprehended by Indian forces either trying to leave Indian-occupied territory for training or on their way back. The Indian Government claims to have identified the location of a large number of training camps in Azad Kashmir and Pakistan. However, it must be borne in mind that these are not traditional camps with barracks, parade grounds and rifle ranges. Training is elementary and may amount to no more than a few days of training in basic weapons-handling. The camps themselves are probably very simple and capable of being closed down and moved to other locations at very short notice.

Pakistani involvement appears to have been reactive and opportunist, unlike 1965 when Pakistan deliberately (and unsuccessfully) set out to foment unrest in Kashmir. It is in Pakistan's interest to keep the pot simmering, in the hope that the financial pressure of maintaining a large Indian army in Jammu and Kashmir will force a withdrawal (though Pakistani claims of 300,000 to 500,000 Indian troops in the State seem a gross overestimate). However, the lesson of 1971 has been learned and Pakistan is clearly unwilling to take steps which might provoke a full-scale war with India.

A relatively small number of militants come from outside Kashmir. Recent Indian figures indicate that 42 aliens have been

captured and 156 killed up to June 1994, with a further 121 having been identified as active. About half of these are Afghans, with most of the rest being citizens of either Pakistan or Azad Kashmir, and with insignificant numbers coming from other Islamic States. No members of the Pakistani regular armed forces have been involved, though two of the dead are said to have been ISI agents. Alien involvement appears to have been negligible until the spring of 1993, but to have increased subsequently. The withdrawal of Pakistan's support would certainly make life more difficult for the militants. There is, however, no reason to believe that it would bring the conflict to an end.

As for opinion in Kashmir, it seems wholly unrealistic to assume that hostility to India is the result of enforcement by terrorist guns. It is no doubt true that, as in any similar situation, most ordinary people in Kashmir want above anything else to be left alone to get on with their lives in peace. It is also true that, as recorded elsewhere in this report, the militants have been murdering opposing political leaders and those whom they believe to be informers. However, given the overwhelming advantages which Indian forces in the Valley of Kashmir have over the militants in numbers, equipment, mobility and communications, the ICJ mission believes it would be impossible for the militants to have maintained their activities without at least the tacit support of the community among whom they live. Indeed, the fact that there have been many occasions when local communities have demonstrated against the militants as the result of their killing innocent people indicates that support is not just due to submission to force.¹⁸ There is little doubt that it is now the wish of the overwhelming majority of the people of the Valley of Kashmir to sever their links with India. This is plainly true of educated Kashmiris; both the doctors and the lawyers are openly and vehemently hostile to India, and the hospitals in particular are regarded as hotbeds of militancy. The National Conference is wholly discredited, and those of its former leaders who still live in Kashmir (including the aged Begum Abdullah) do so under constant security protection. Even the State Police are so riddled by support for the militants that they cannot be entrusted with anti-insurgency functions.

18 A recent example was the demonstration in Anantnag against the killing by a militant group on 19 June 1994 of the Mirwaiz Qazi Nissar. An Indian government publication, *'Profile of Terrorist Violence in Jammu and Kashmir'* (March 1994) records over 100 such occasions.

Political Aims - Kashmir, India and Pakistan

If the Kashmiris are united in their wish to secede from India, they are far from united as to what should happen after secession. There is a sharp division between those who support accession to Pakistan and those who want independence. This division is reflected among the militant groups, with one of the two main groups (the JKLF) supporting independence and the other (Hezbul-i-Mujahuddin) supporting accession to Pakistan. There is an uneasy alliance between them. Representatives of both groups told the ICJ mission that they would fight the Indians together and that the question of independence or accession to Pakistan would be settled democratically after freedom had been won. However, there is clearly a potential for conflict between them. There is a widespread belief that Hezbul was responsible for the murder in April 1993 of a leading supporter of the JKLF, Dr. Guru, a well-known surgeon, following a story leaked to an Indian newspaper that he had been involved in discussions with the Deputy Home Minister of India. In the present circumstances it is impossible to judge whether independence or accession has the greater support, but clearly there is considerable support for each. (In Azad Kashmir, whose people are mostly non-Kashmiri Muslims, the balance of opinion is in favour of accession).

For India, Kashmir has an enormous symbolic importance. It is difficult to overestimate the depth of passion which many Indians feel on the subject.

For the BJP and other Hindu communal groups, it is largely a matter of simple nationalism – «what we have, we hold». But for more complex reasons, Kashmir arouses equally strong feelings among liberal-minded opponents of communalism. These feelings are rooted in the belief that India was before 1947, and should have remained, a single historic and political entity and that partition was a tragedy. At times since 1947, there have been secessionist movements in the non-Hindi-speaking States of South India, in some parts of North East India and, more recently, among some of the Sikhs of Punjab. There is a fear that concessions to Kashmir could lead to a revival of support for secession elsewhere. Many centralists, like Jagmohan, are strongly opposed even to the limited degree of autonomy given to Jammu and Kashmir under the Indian Constitution.

Furthermore, many leading people in Indian public life are genuinely committed to Nehru's vision of India as a secular nation and believe that the secession of India's only Muslim majority State would destroy what remains of this vision, with possibly horrendous results for the Muslim minority in the rest of India (which outnumbers the Muslims of Pakistan). As has been seen at Ayodhya, Hindu-Muslim communal violence remains a serious danger.

Many Indians are deeply critical of the abuses of human rights which have been committed by the security forces in Kashmir. Indian human rights groups such as the People's Union for Civil Liberties (PUCL) have been in the forefront of exposing these abuses. But even among these groups, there is an almost universal refusal to contemplate the possibility that Kashmiris may have a right to self-determination and should be allowed to exercise it. As Ashutosh Varshney says: «Being the only Muslim-majority State in India, Kashmir has been, and remains more so today, central to India's efforts to keep its secularism alive. Keeping Kashmir in India may have led to a tragedy; letting Kashmir go, however, means a tragedy of greater magnitude – a possible Hindu-Muslim blood bath in North and East India. The prospect of nation-wide violence that may ensue frightens India's secular politicians, intellectuals and a large section of India's middle class. Not only is Kashmir a prisoner of the larger context. Even those wanting communal peace in India have become prisoners of Kashmir.»¹⁹

Given this degree of commitment to the retention of Kashmir within the Indian Union, and the strength of India's military position as compared with Pakistan's, it is difficult to see serious concessions being made over Kashmir. There would probably not be much difficulty in India giving up its *de jure* claim to territory on the far side of the Line of Control. Any further concessions, however, would lead to accusations of treachery from the Hindu communal groups and would cause a political storm in New Delhi. Compared to that, the continuing cost, bloodshed and international opprobrium resulting from Indian counter-insurgency actions in Kashmir may seem an acceptable price to pay. If any compromise can be found which might

19 'Three Compromised Nationalisms' in Perspectives on Kashmir, ed. Thomas, p. 203.

be acceptable both to India and to the people of Kashmir, it would seem to lie in the retention of Indian sovereignty while granting full autonomy (including responsibility for internal security but not for foreign relationships or external security) to the Valley of Kashmir. This would in a sense be a return to the original concept of Article 370 of the Indian Constitution, operating in a more limited area (Jammu and Ladakh being excluded) but in a strengthened form.

The attitude of Jammu is also important but is often neglected.²⁰ Before 1947, rule of the State by a Dogra Maharaja, most of whose Ministers were also Dogras, meant that power was concentrated in the hands of the Dogras of Jammu. The events of 1947 meant a transfer of power within the State from Jammu to Kashmir, which has led to concerns about the under-representation of Jammu in the State Assembly and the State Government. The Dogras, as a minority community within the State as a whole, are (not surprisingly) strongly centralist and firmly opposed to any special status for Jammu and Kashmir. There is little reason to believe that Balraj Puri's proposal for a federal State of Jammu and Kashmir within a federal Union of India is likely to find widespread support among the Hindu population of Jammu.²¹ Bitterness has been increased by the presence in Jammu of several thousand Kashmiri Pandit refugees still living in squalid camps.

The official position of Pakistan is that the UN resolutions should be implemented and that the entire State of Jammu and Kashmir within its 1947 boundaries (excluding the parts occupied by China) should vote in a plebiscite with a choice only of accession to India or Pakistan. This appears, however, to be a negotiating position. In practice there is little doubt that Pakistan would accept (and perhaps even prefer) a solution which left the Hindu majority areas of Jammu, and probably also the Buddhist majority areas of Ladakh, as part of India. Nor is it likely that Pakistan would rule out a solution involving full independence for the State, provided that the Northern Areas remained with Pakistan. There does not appear to be any

20 See 'Jammu: Autonomy Within an Autonomous Kashmir?' in *Perspectives on Kashmir*, by Reeta Chowdhary Tremblay, p. 153.

21 See Puri, *Simmering Volcano: a Study of Jammu's Relations with Kashmir* (1983)

significant difference between the main political groups in Pakistan on policy towards Kashmir, and it was not an important issue in the 1993 general election. It is, however, unlikely that Pakistan would be willing to accept a compromise leaving India with any degree of sovereignty over the Valley of Kashmir.

Chapter 5

Human Rights and the Rule of Law: India

Human rights and the Rule of Law have been greatly jeopardised by various national laws and their implementation by governmental personnel in Jammu and Kashmir. These range from distortions created by the laws themselves to malpractices at the operational level. The shortcomings are discussed below.

International Human Rights and Humanitarian Law

International standards of human rights pertain to Jammu and Kashmir as elsewhere. Significantly, the 1948 Universal Declaration of Human Rights establishes universal benchmarks in relation to civil, political, economic, social and cultural rights for measuring the practices of States against international norms.

In regard to India, it is all the more significant that the country is also a party to the 1966 ICCPR which reinforces universal standards in the civil and political field, closely linked with the Rule of Law. The human rights propounded in this instrument include the right to self-determination, the right against arbitrary arrest, security of the person, freedom from torture, and equality before the law. India is also a party to the 1966 ICESCR and the 1965 International Convention on the Elimination of All Forms of Racial Discrimination. Regrettably, Pakistan has not become a party to either the ICCPR or the ICESCR.

At the time of accession to the ICCPR, India showed her reluctance to accept the totality of human rights standards by entering reservations to Articles 9 (right against arbitrary arrest and detention), 19 (freedom of expression), 21 (right of peaceful assembly) and 22 (freedom of association). Articles 19, 21 and 22 were made subject to reasonable restrictions referred to in Article 19 of the Constitution of India.

Of particular concern has been the failure of India to abide by the standards set by the ICCPR because of a variety of legislative discrepancies dealt with below. These have been aggravated by numerous malpractices on the part of governmental personnel operating in Jammu and Kashmir, documented extensively by both national and international sources.

The criticisms lodged against India have emerged from many quarters, including the Human Rights Committee established by that Covenant to monitor compliance with international standards. At the presentation of India's second periodic report to the Human Rights Committee in 1991, several members of the Committee were dissatisfied with the implementation of the Covenant in Indian law and practice. In effect, India had failed to notify the Committee of various derogations resulting from a number of national laws inconsistent with the Covenant, even though it was obliged to do so by the Covenant. As noted by several members of the Human Rights Committee:

«The National Security (Amendment) Act and the Terrorist and Disruptive Activities (Prevention) Act entailed derogations from rights under the Covenant. Although occasioned by an emergency, those acts had not been proclaimed as emergency legislation. (The Committee member) wished to know why that was so, and why they had not been notified as derogations from the Covenant, as required by the Covenant itself. She noted, moreover, that no time-limit had been specified by the Covenant itself.»²²

«(The Committee member) too was concerned that certain laws abrogating rights - such as the Armed Forces (Special Powers) Act and the Terrorist and Disruptive Activities (Prevention) Act - in effect established a continual state of emergency, but had not been proclaimed as emergency legislation in accordance with Article 4 (3) of the Covenant and were not subject to any time limit. The Armed Forces (Special Powers) Act, in particular, had been in effect for 33 years.

22 United Nations Document CCPR/C/SR 1039 (April 1991), p.9, para. 39.

Moreover, like other similar legislation, it gave public officials an immunity from prosecution that ran counter to the Covenant.»²³

«(Another member remained concerned about) the implementation of the Covenant in these so-called disturbed areas, the extraordinarily great number of arbitrary killings, widespread arbitrary arrests in some states, the excessive powers given to security forces, including authority to shoot to kill suspected law breakers and failure to bring to trial a number of alleged police offenders.»²⁴

In substance, India has treated the situation of Jammu and Kashmir as a state of emergency but has avoided classifying it as such in international terms, thereby obstructing the call for accountability and transparency inherent in the comments of the Human Rights Committee.

On another front, India is a party to the four 1949 Geneva Conventions on humanitarian law which establish basic rules concerning international and non-international armed conflicts. Of particular relevance to the situation in Jammu and Kashmir is Article 3, found in all four conventions, which pertains to protection accorded to those taking no active part in the hostilities in non-international armed conflicts. It prohibits the following:

- a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- b) Taking of hostages;
- c) Outrages upon personal dignity.

India has been reluctant to classify the conflict in Jammu and Kashmir as a non-international armed conflict under the Geneva

²³ *Ibid.*, para. 42.

²⁴ Amnesty International Doc. ASA 20/05/93 (March 1993), p.3.

Conventions for fear of internationalising the Kashmir issue. At the time of the ICJ mission's visit to India, it had not allowed the International Committee of the Red Cross (ICRC), a key international organisation, offering protection and assistance in such situations, to operate in Jammu and Kashmir. This has regrettably prevented access to affected parties and has impeded the quest for assistance and protection of innocent persons. The ICRC was allowed to visit Kashmir in the spring of 1994, but it is believed that its freedom of movement was restricted.

National Laws/Policies and Practices

When it was promulgated, the Indian Constitution recognised from the outset the special position of Jammu and Kashmir – that entity was not seen as an integral part of India but was vested with a degree of autonomy. By Article 370, the powers of the Indian Union in regard to Jammu and Kashmir were limited to «matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India; namely Defence, External Affairs and Communications». Jammu and Kashmir is also the only State in the Indian Union which has its own Constitution.

This special status of Jammu and Kashmir has been eroded in recent times by legislative and executive encroachment from India; Article 370 has been diluted by India so as to confer greater powers upon itself to administer Jammu and Kashmir.

Despite this situation, it may be noted that the Indian Constitution, together with the Criminal Code, guarantees many of the rights propounded by international instruments. Articles 4, 21 and 22 of the Constitution provide for equality before the law, the right to life and the right against arbitrary imprisonment, while sections 330 and 331 of the Criminal Code prohibit torture. Chapter 5 of the Code of Criminal Procedure stipulates various rules which the police have to follow when arresting and detaining people.

In practice, these guarantees have been jeopardised by various draconian laws which have proved to be detrimental to human rights in Jammu and Kashmir. These are:

a) Jammu and Kashmir Public Safety Act 1978

By this Act, the Government may detain a person «with a view to preventing him from acting in any manner prejudicial ... to the security of the State and the maintenance of public order».²⁵ Detention without charge is possible for up to one year where there is a threat to public order and up to two years where there is a threat to the security of the State. According to the Act, the order must be communicated to the arrested person not later than five days after the arrest, but in 1990 the State Governor amended this so as to exempt the authorities from the need to inform the detainee of the grounds of detention. The law was also changed so as to enable the authorities to detain persons from Jammu and Kashmir in places outside the State, thereby making access to the persons more difficult. The law also reinforced the impunity of State authorities by stating that «no suit, prosecution or any other legal proceeding shall lie against any person for anything done or intended to be done in good faith».²⁶

This law has led to hardships among those arrested under its scope. Its highly discretionary tone undermines efforts to discover the whereabouts of arrested persons and the quest for *habeas corpus*. It has also been applied sequentially with other laws, discussed below, so as to ensure the re-arrest of a person; even if a person is released from the umbrella of another law, the person may still be apprehended under this law.

b) Terrorist and Disruptive Activities (Prevention) Act (TADA) 1987

The Act established special courts or «designated courts» to try those arrested for terrorist acts and disruptive activities. It confers broad discretion upon the authorities to arrest persons and to try them. The term «disruptive activities» is defined as including:

« ... any action, whether by act or by speech or through any other media or in any other manner

²⁵ Section 8 (1).

²⁶ Section 22.

- 1) which questions, disrupts ... the sovereignty or territorial integrity of India, or
- 2) which is intended to bring about or supports any claim for the cession of any part of India or the secession of any part of India from the Union ...»²⁷

In principle, detention without charge is possible for 180 days.²⁸ However, in many cases this period has been exceeded.

The TADA contains several objectionable provisions. Its definition of «disruptive activity», as mentioned above, extends to cover any speech, article or other act which «supports any claim ... for the secession of any part of India from the Union». This is a blatant contravention of the right to freedom of speech. Advocacy of secession, not involving incitement to violence, is plainly legitimate and the Indian Government has not sought to justify TADA by notifying a derogation under the ICCPR. Furthermore, conviction for such an offence involves a minimum sentence of five years' imprisonment.

TADA also contains provisions which contravene the presumption of innocence. Thus, evidence that the fingerprints of the accused were found at the site of the offence, or a confession by a co-accused implicating the accused, are not merely evidence against the accused – they give rise to a presumption of guilt. Anyone who gives financial assistance to a person «accused or reasonably suspected of» a terrorist offence is presumed (unless the contrary is proved) to be guilty of conspiracy to commit that offence.²⁹ All proceedings under TADA are *in camera* unless the Public Prosecutor requests otherwise.³⁰ Bail is only permitted if the court is satisfied that there are reasonable grounds for believing that the accused is not guilty – a condition which, at the stage of the bail hearing, is virtually impossible to satisfy.³¹ In practice, a substantial number of bail

²⁷ Section 4.

²⁸ At the time of the mission's visit, the authorised period was one year.

²⁹ Section 21.

³⁰ Section 16 (1).

³¹ Section 20 (8).

applications under TADA have been granted: recent figures indicate that 13,851 bail applications have been made of which 9,570 have been granted. Government sources have suggested that many bail applications have been granted because judges are intimidated into signing bail forms.

The two «designated courts» in the State are those of Srinagar and Jammu, but for a while the operations of the court in Srinagar were suspended, thereby making life more traumatic for those seeking bail and trial close to home. The fact that they had to go to Jammu rather than Srinagar was clearly an obstacle placed by the authorities against the right of the accused to due process of law; access to judicial remedy and expeditiousness of hearing were impeded by the jurisdictional shift to the special court in Jammu.

Concurrent use of several statutes means that even if one is released under this Act, one may be arrested again under other laws, such as the Public Security Act already mentioned.

c) Armed Forces Special Powers Act 1990

This Act gives the Governor or the Central Government power to declare the whole or part of the State to be a disturbed area and to authorise the use of the armed forces in aid of the civil power. Such a declaration may be made not only for the prevention of terrorist acts but also for the prevention of «activities directed towards disclaiming, questioning or disrupting the sovereignty and territorial integrity of India or bringing about ... secession of a part of the territory of India from the Union».³² A power in these terms can be used to authorise the use of the military to suppress legitimate political activity and can not possibly be justified.

In a disturbed area, any member of the armed forces down to and including non-commissioned officers can authorise the use of lethal force in circumstances which include contravention of any law prohibiting the assembly of five or more persons or the carrying of «things capable of being used as weapons».³³ This involves a potential

³² Section 3.

³³ Section 4.

infringement of the right to life. No prosecution can be brought against anyone «in respect of anything done or purported to be done in exercise of the powers conferred by this Act» without the leave of the Central Government.³⁴

d) Other laws

Other laws have been promulgated or revived recently with negative impact on human rights. In February 1992, an ordinance was issued under Article 370 of the Indian Constitution extending presidential rule in relation to Jammu and Kashmir from the previous period of three years to four years; this prolonged the use of presidential rule as opposed to reversion to an elected system. In July 1992 the Indian Parliament passed the Jammu and Kashmir Legislature (Delegation of Power) Bill which transferred parliamentary powers to deal with that State to the President of India. In 1992, the Jammu and Kashmir Government also recommended that the central government should revive a variety of old laws so as to be able to administer the region more closely. These included the Jammu and Kashmir Criminal Law Amendment Act, which permitted the confiscation of property of unlawful bodies without the need to seek approval from a designated tribunal.

The fact that Srinagar has been under continual curfew for the past three years has also meant great imposition upon daily life and potential arrest of those who break the curfew. As noted by one non-governmental source:

«For more than three years there is continuous night curfew in the State, and in addition to it day curfews ... are also imposed whenever the public gives a call for observing a protests day against the atrocities or to hold large processions in order to demonstrate for the right of self-determination. ... As per the order of D.C. Srinagar, night curfew was lifted within the municipal limits from 2-2-1993, but after two days the order was revoked. The state is under continuous curfew from 1-1-1990 till 1-3-1993.»³⁵

³⁴ Section 7.

³⁵ *Report on Violations of Human Rights in the Kashmir State* Part VI (Srinagar, Executive Committee of the Jammu / Kashmir Bar Association, 1993), p. 29.

The cumulation of these statutes and related practices imply that the authorities can act very subjectively and with impunity in arresting and detaining persons, thereby derogating from international human rights standards and the Indian Constitution. This has been aggravated by the fact that when there have been petitions for *habeas corpus*, the court proceedings have been slow and ineffective. Thousands have been held *incommunicado* since the recent spate of troubles started in 1990; according to one estimate, some 5,000 persons were detained in the Kashmir valley in 1993.

Judicial System and Related Institutions

The judicial system in Jammu and Kashmir is almost dysfunctional. Courts face long delays and have failed to address many bail applications; they are fearful of governmental pressure, on the one hand, and of that of militant groups, on the other. According to the Kashmir Bar Association, from 1989 to 1993 more than 5,000 *habeas corpus* petitions were filed, but fewer than 500 cases were decided by the High Court of Jammu and Kashmir. As the time limit for detention is generally two years, the period of detention lapses after this time. Yet, in practice, in many cases the person continues to be detained.

At the time of the visit of the ICJ mission, not a single trial of anyone charged with an offence arising out of the disturbances had yet taken place, in spite of the fact that some (for example, those charged with the murder of the Air Force officers in January 1990) had been under arrest for well over three years.

On another front, the authorities may seek to circumvent the local judiciary by moving the accused out of the region to another State in India. The plight of the detainee is highlighted by the Kashmir Bar as follows:

«After protracted proceedings the High Court on 25 April 1990 quashed the detention of the detainee namely Wali Mohammad Jammu (Hiranagar) and ordered his release. The court order was served on the Superintendent, Central Jail, Jammu (Hiranagar) where the detainee had been lodged at the time of his detention. ... The detainee had been shifted to Central

Jail, Coimbatore (State of Tamil Nadu) on 12-4-1990. Accordingly, an application was filed before the High Court seeking the implementation of the directions by the superintendent, Central Jail, Coimbatore. The order of the court has since been communicated to him. But to date the detainee has not been released and continues to be in detention. ... There are no means of communication between the detainees lodged in jails outside the State of Jammu and Kashmir and their family members residing in the State.»³⁶

It should be noted that a National Human Rights Commission has been established in India. State governments may also set up State commissions. While the initiative is welcomed, it is the substance rather than the form which counts. The Commission will only be able to address those rights which are enforceable in India as distinguished from the totality of rights advocated in the International Covenants.

State Apparatus

The executive and parliamentary powers in Jammu and Kashmir are, in effect, exercised by India through the appointed Governor. As there is currently no operational electoral system and no Parliament, it is the executive which governs Jammu and Kashmir, and the creeping jurisdiction of the Indian Union is ever-present. For instance, in 1993 the Indian Parliament passed the budget bill for Jammu and Kashmir and extended presidential rule over the region by means of Article 356 of the Constitution of India, even though this eroded the special status of Jammu and Kashmir stipulated in Article 370 of that Constitution.

Law enforcement is shared between the army and para-military personnel, primarily the BSF and the CRPF. The local police are relegated to menial roles rather than law enforcement in security-related situations.

³⁶ *Habeas Corpus Unrealised* (Srinagar, Executive Committee of the Jammu / Kashmir Bar Association n.a.), p. 16.

In recent years, the complaints concerning human rights violations have targeted the army and para-military personnel, especially the BSF and CRPF. The Army has become increasingly conscious of the need to improve its image, and has placed greater emphasis on human rights education with various «do's and don'ts», e.g. there is a prohibition against torture and brutalisation of operations; there is a call to use minimum force, respect the Rule of Law and fully respect the rights and duties of all citizens, and only employ police women to search women. The ICJ mission was also shown extracts of instructions on human rights given to army personnel as part of their training. Recent complaints have been against the para-military rather than the military, particularly in those situations where they cordon off areas and subject civilians and civilian property to search and resultant abuses. A great failing concerning those who perpetrate crimes is that the culprits enjoy a degree of immunity under the national laws mentioned earlier, which diverge markedly from international standards.

The authorities have been tardy in instituting proceedings against governmental personnel who commit abuses against the people and have created an aura of impunity surrounding officials who violate human rights. As a result of many complaints voiced by non-governmental organisations, there is now greater willingness to institute proceedings in this regard, but the authorities still refuse to reveal the names of those found to be guilty. They base this practice upon the claim that the families of officials who are found to be guilty of human rights violations would be harmed by militant groups if the identity of the officials is not protected. The ICJ mission found this argument unconvincing, as many of the families concerned live elsewhere in other areas of India and are unlikely to be affected by the threats of militants; geographically they are hardly accessible to retaliation from militant groups. There is thus no justification for refusing to reveal the identity of perpetrators of human rights violations.

Constraints Upon Freedom of Speech / Expression

Particularly in the 1990-1991 period when the current spate of problems started in Jammu and Kashmir, there were numerous restrictions on freedom of speech imposed by the authorities. For example, in January 1990, some 20 foreign journalists were placed

under house arrest in Srinagar and were escorted out of the region later. In April 1990, the Government closed three Urdu language newspapers on the grounds that they had published materials to incite the public. In 1991, the Governor of Jammu and Kashmir resorted to the 1971 Newspaper Incitements to Offences Act, whereby a district magistrate may restrict media from carrying material resulting in «incitement to murder and other offences». The punishment permitted included forfeiture of newspapers as well as printing equipment.

Although the electronic media is government-linked, it too has been affected by negative governmental action. In February 1990, employees of the State-run television Doordarshan resigned *en masse* in protest against government efforts to censor them.

It is evident that the media are under pressure from three sources - the Government, militant groups, and Hindu fundamentalists. During the visit of the ICJ mission to Jammu and Kashmir, governmental pressure on the media had relaxed. Foreign journalists were allowed into the region again, and the press seemed to enjoy latitude of expression; it was openly critical of the Government and was not visibly impeded by the Government. However, as will be seen below, the pressure from militant groups was highly visible.

It should be noted that India entered a reservation to the right to freedom of expression when she acceded to the ICCPR; such a right was made subject to the Indian Constitution and «reasonable restrictions». In view of the comments of the Human Rights Committee above, it can be posited that several restrictions, particularly in the 1990-1991 period, were not reasonable and were imposed too subjectively.

Constraints Upon Freedom of Assembly and Political Activity

Freedom of assembly and political activity has been curtailed by the various security-related laws already noted. Curfews have taken their toll in preventing people from assembling. In 1990 the Governor used the 1983 State Criminal Law Amendment Act to ban the operations of various political organisations. Interestingly, in 1993 a number of police of the Jammu and Kashmir Police force were dismissed for fomenting a strike against harassment and victimisation of the police.

On various occasions, those exercising their right to association and assembly have been arrested. For example, in 1990, lawyers of the Jammu and Kashmir Bar went on strike in protest against violations by the security forces and denial of legal redress to the people. The police arrested them subsequently.

Overt political activity among the various political parties remains low key. The fact that there is no functional State assembly and that elections have been shelved for many years attests to the lack of political participation by the people of Jammu and Kashmir in the formal political channels at this point in time. However, the fact that groups still demonstrate from time to time and call strikes to protest against governmental action indicates that political activity is alive, although not manifested through formal channels.

There are a number of active political parties in Kashmir, all of which are pro-militant. The National Conference and other pro-Government parties have little support and in any event would not be allowed to operate by the militants. However, the active political parties are weak because of their small size, the absence of any real prospect of elections, and the domination of activities by the militants. At least thirteen parties operating in Kashmir are members of the Tehreek-e-Hurriyet-e-Kashmir, an umbrella organisation based in Azad Kashmir, and there are several other parties which do not belong to it. (A tendency to form large numbers of small organisations is a notable feature of Kashmir – it applies not only to political parties but to human rights groups and newspapers.) They are also restricted by the fact that overt support for secession, even by peaceful means, is illegal under TADA – a clear breach of human rights.

Chapter 6

Misconduct by Government Forces and Personnel

Published Reports – Indian

As mentioned above, there is a great deal of published information relating to human rights abuses in Kashmir. Some of it is highly partisan and unreliable. However, some very impressive reports have emanated from Indian human rights groups based outside Kashmir itself. These include the PUCL, whose former president is the distinguished lawyer and former judge of the Bombay High Court, V.M. Tarkunde; the Committee for Initiative on Kashmir; the Coordination Committee on Kashmir; and the South Asia Human Rights Documentation Centre.

Published reports of investigations include the following:

- (A) *Kashmir Aflame*, Vol. I, published in August 1990 by the Jammu and Kashmir People's Basic Rights (Protection) Committee. (This is a Srinagar-based organisation whose chairman, Mufti Baha-ud-Din Farooqi, is a former Chief Justice of the Jammu and Kashmir High Court. The mission believes that its reports are reasonably reliable.) Specific incidents reported on include:
 - (i) looting, arson and beatings by para-militaries in Sopore on 25/26 June 1990;
 - (ii) severe beatings, sexual molestation and looting at Wadwam village during a crackdown on 30 June 1990;
 - (iii) four killings, many beatings and arson by the CRPF at Watmagam village on 10 July 1990;
 - (iv) six killings, many injuries and looting in Baramulla on 14/15 July 1990.

- (B) *Kashmir Aflame*, Vol. II, published in October 1990. Incidents reported on include:
- (i) 25 killings; 10 to 15 rapes; torture and arson at Pazi Pora on 10/11 August 1990 by the army;
 - (ii) looting and arson at Putshai by the army on 14 August 1990 (the inhabitants having fled);
 - (iii) three killings and arson rendering 450 people homeless by the BSF in Sopore on 19/20 September 1990.
- (C) Report published by the Coordination Committee on Kashmir, July 1991, based on several visits to Kashmir. Incidents reported on include:
- (i) 5 killings, 91 houses burned at Kawadara, Srinagar, on 7 October 1990;
 - (ii) 2 killings, 40 houses burned at Noor Bagh, Srinagar on 8 October 1990;
 - (iii) 1 killing, 7 houses burned at Ram Bagh, Srinagar on 12 October 1990;
 - (iv) 75 shops burned at Sangrama, Sopore on 15-17 October 1990;
 - (v) 14 shops burned on 17 October 1990 at Chhana Khan, Sopore;
 - (vi) 12 killings, 12 houses burned at Kalarus, Kupwara on 20 October 1990;
 - (vii) 25 killings; 31 houses, 55 commercial buildings and 300 shops burned at Handwara on 2 October 1990;
 - (viii) 19 killings at Khanyar, Srinagar on 8 May 1991;
 - (ix) 17 killings at Chhota Bazar, Srinagar on 11 June 1991.
- (D) *Human Rights Situation in the Kashmir Valley*, published by the Coordination Committee on Kashmir, October 1992 (the members of the investigating group included V.M.

Tarkunde and Balraj Puri). Incidents reported on include:

- (i) interviews with 22 men alleging torture during a crackdown on 14 May 1992 in villages near Lar;
 - (ii) 13 killings in 'cross-fire' in Sopore on 13 April 1992;
 - (iii) burning of 16 homes in Sopore on 24 January 1992;
 - (iv) 3 non-combatants killed, 22 arrested and tortured during crackdown at Nanihal on 25 April 1992;
 - (v) two killings, four rapes, and 53 homes burned at Hilar Bahi on 5 December 1991.
- (E) Report published by the Coordination Committee on Kashmir, November 1992. Incidents reported include:
- (i) gang rape at Shopian, 10/11 October 1992;
 - (ii) 10 killings, three rapes, arson and looting at Batekote on 1 October 1992;
 - (iii) three killings, arson at Sopore on 27 October 1992.
- (F) Report published by the South Asia Human Rights Documentation Centre, January 1993, reporting at least 45 killed and 200 buildings burned in Sopore on 6 January 1993.
- (G) *Kashmir – a Report to the Nation*, published by the PUCL and Citizens for Democracy (undated – report of a mission in May 1993).

This reports on the incident at Lal Chowk, Srinagar, on 10 April 1993 when six civilians were killed and 40 to 50 buildings burned, as well as the Sopore incident of 6 January 1993. The Report concludes that custodial deaths are a serious problem. It finds that the bulk of the local police are sympathetic to the militants and are entrusted only with «harmless» jobs such as traffic control.

Published Reports – International

Several international human rights organisations have published reports on Kashmir. None of these organisations has been officially allowed to send representatives to Kashmir, but they have either acted through Indian citizens or through foreigners visiting Kashmir purportedly as tourists. Taking a selection of them in chronological order:

- (A) *Kashmir under Siege*, Asia Watch, May 1991. This reports, in addition to several of the incidents mentioned above,
- (i) the summary killing by the BSF of seven militants after they had surrendered at Pushwari on 16 March 1991;
 - (ii) 12 killings and many injuries at Pattan on 1 August 1990;
 - (iii) a number of deliberate killings, reported at pp. 46-56;
 - (iv) 10 killings at Mashalli Mohalla Hawal, Srinagar on 7 August 1990;
 - (v) instances of torture (pp. 66-78);
 - (vi) assaults on civilians (mainly in the course of crackdowns and searches) (pp. 78-88).

The Report also deals with the most notorious and controversial incident in the whole of the insurgency – the alleged mass rape at the village of Kunan Pashpora on 23 February 1991 (pp. 88-91 of the Report). This is discussed more fully below.

- (B) *India – Torture, Rape and Deaths in Custody*, Amnesty International, March 1992. This deals with the widespread use of torture throughout India in the investigation of ordinary crime as well as insurgency. Allegations of torture and rape in Jammu and Kashmir are set out at pp. 19-24, and the Report contains the names of 23 men alleged to have died in custody up to October 1991 (the Indian authorities say that many of these deaths can not be verified). It must be said, however, that the statement (at p.

21 of the Report) that «rape is practised as part of a systematic attempt to humiliate and intimidate the local population» is not, in the view of the ICJ mission, borne out by the evidence, which indicates that rapes have been the result of indiscipline rather than system.

- (C) Report published by the *Fédération Internationale des Ligues des Droits de l'Homme* (FIDH), January 1993. The Report was written by P.M. Varadarajan, a law lecturer at Oxford University who visited Kashmir as an ordinary Indian citizen. Mr Varadarajan describes (at pp. 6-7) a typical crackdown on a village or an urban district. Specific incidents reported on, in addition to some of those mentioned above, included civilian killings, beatings and arson in the course of crackdowns or military operations at Panzan on 29 December 1991; Bugam on 6 June 1992; Dayalgam on 17/18 June 1992; Srinagar on 2 July 1992 (six dead); Nasrullah Pora on 13 July 1992 (ten dead); Ishber on 16 July 1992 (seven dead); Haran on 20 July 1992 (three rapes); Tral on 13 and 15 August 1992 (ten dead); Lal Bazar, Srinagar on 31 July 1992; Barzala, Srinagar on 19 August 1992; and Ari Bagh on 19 August 1992.

The report also deals with a number of individual cases, including that of Mian Abdul Qayoom, the president of the State Bar Association. Mian Abdul Qayoom (whom the mission met in Srinagar) was arrested on 30 July 1990 and ordered to be detained for two years under the Jammu and Kashmir Public Safety Act 1978. When the Bar Association obtained an order for his release on a *habeas corpus* petition, he was re-detained under TADA. When his release on bail was ordered, he was detained once more under the Public Safety Act. Shortly before the period of detention was due to expire he was re-arrested under TADA, before being finally released (following a lawyers' strike in Srinagar) on 23 February 1992.

The Report contains, in its Appendices,

- (i) the names of 199 persons claimed to have been untraced following arrest (compiled by the late Dr. Guru);

- (ii) a list of 186 non-combatants (mostly named) claimed to have been killed in July and August 1992 (compiled by the late H.N. Wanchoo);
 - (iii) a list of ten alleged rapes (and ten other sexual assaults) in July 1992 (compiled by Mr Wanchoo);
 - (iv) the names of 19 men claimed to have been killed in custody in August 1992.
- (D) '*The Crackdown in Kashmir*', Physicians for Human Rights / Asia Watch, March 1993. The Report states (at p. 3):

«Methods of torture include severe beatings, electric shock, suspension by the feet or hands, stretching the legs apart, burning with heated objects and sexual molestation. One common form of torture involved crushing the leg muscles with a heavy wooden roller.» 37 torture victims have suffered kidney failure, and three of them have died as a result.

The Report details a number of incidents in which security forces are alleged to have prevented medical personnel from transporting the wounded, have refused to permit medical care to be given to the wounded, have raided hospitals and have detained or harassed health workers. It is, however, true that (as the Indian Government's comments on the Report point out) that many of the hospital staff are active supporters of the insurgency and are providing help to the militants, sometimes on hospital premises.

- (E) Report published by Amnesty International, April 1993, on the killings at Sopore on 6 January 1993.
- (F) '*Rape in Kashmir*', published by Asia Watch and Physicians for Human Rights, May 1993, reporting on the alleged mass rapes at Kunan Poshpora and Shopian (see above) and on a number of other cases (including two rapes at Haran on 20 July 1992 and three at Gurihakhar on 1 October 1992) as well as rapes by militant groups.

Conclusions from the Reports

None of the reports listed above (with the exception of '*Kashmir Aflame*') comes from a source within Kashmir or a Muslim country. All of them come from well-respected Indian or international human rights groups. Some of the reported incidents can be explained by the Indian Government. These must inevitably be balanced by other incidents which have not come to the attention of the investigators. The weight of the evidence makes it clear that there have been grave breaches of human rights by the Indian security forces in Kashmir. The various kinds of breach are analysed below.

Extra-Judicial Executions

The deliberate killing of people in police or military custody is simple murder and is the most serious of all the allegations against the security forces. The ICJ mission has no doubt that such killings have occurred on a significant scale. What is far more difficult is to estimate the numbers, particularly as the security forces often claim that the victim has been killed in «crossfire». Estimates given to the mission varied between about 50 and 350 a year. Information given to the mission by the Kashmir Bar Association identified 10 custodial killings in the first half of June 1993, 17 deaths in the second half, and 13 in the first half of July. However, these figures can not be regarded as wholly reliable, since they are based on newspaper reports and the Bar Association is not an impartial source. Figures collected by the human rights activist H.N. Wanchoo showed 15 custodial killings in July 1992, 19 killings in August, 37 in September and 47 in the first half of October (coinciding with 'Operation Tiger', a major anti-militant drive by the security forces). Even the lowest estimate of 50 a year is inexcusable.

There is, however, no evidence that the Indian authorities have set up death squads or are carrying out a policy of assassination of prominent militant supporters. Three recent killings have given rise to suspicion – those of Dr. Farooq Ashai, Dr. A.A. Guru and Mr Wanchoo. Dr. Ashai was killed by the CRPF, but in circumstances which do not clearly show that he was personally identified as a target. Dr. Guru, a leading JKLF supporter, is believed to have been killed by an extremist militant group following newspaper reports that he had met a representative of the Indian Government. Mr

Wanchoo's human rights activities were undoubtedly a thorn in the flesh of the Government, but a militant group is suspected of the killing, and a suspect was arrested in April 1994.

Killings of Non-Combatants

The number of deaths related to the insurgency in Kashmir has been running at about 2,000 a year. Many hundreds of these killings every year are innocent non-combatants killed by security forces. Mr Wanchoo's figures were 79 in July 1992, 96 in August, 79 in September and 57 in the first half of October.

Some of these are simply people in the wrong place at the wrong time. A high proportion of the killings are, however, due to misbehaviour and indiscipline by the security forces. The reports show many killings due to panic (for example, shooting in response to the noise of a tyre burst) or anger (killings following the death or injury of a member of the security forces).

Torture

Numerous incidents of torture committed by government personnel have been documented by a variety of sources. As noted by Amnesty International:

«It is impossible to gauge the true extent of torture in Jammu and Kashmir. In July 1991, unofficial sources estimated that 15,000 people were being detained without trial in the State. Many of those detained since 1989 have alleged after their release that they were tortured or ill-treated in custody. On November 1991, Dr. Kazi Massrat, the chief casualty officer at the Medical College Hospital, Srinagar, told a British journalist: 'I must have treated 250 torture victims last year.' He said they included men who had been forced to drink large quantities of fluid after having their penises tied tightly. Earlier, in June 1990, recently released villagers from the community of Haihama-Payerpora, Kupwara District, told another British journalist how they were tortured while detained by the Indian army.

When interviewed they still bore massive bruises, burns from electrodes and heated rods, cuts and rope sores.»³⁷

Torture is virtually a matter of routine use in interrogation. The forms of torture range from electric shocks to beatings, other forms of violence and sexual abuse. To prevent hospitals from documenting torture evidenced by patients' symptoms, since 1990 medical records have been removed from hospitals.

The authorities use torture for a variety of reasons:

«Torture is practised to coerce detainees to reveal information about suspected militants or to confess to militant activities. It may also be used to punish detainees who are believed to support or sympathise with the militants and to create a climate of political repression. The practice of torture is facilitated by the fact that detainees are generally held in temporary detention centres controlled by the various security forces, without access to the courts, relatives and medical care.»³⁸

The situation is aggravated by the fact that under the various security-related laws noted earlier, forced confessions are admissible in trials. The fact that detainees do not have expeditious access to courts also renders itself open to abuses prior to court hearings.

To underline the pervasiveness of the problem, one non-governmental source notes that most detainees taken into custody by security forces are tortured. Doctors and other medical personnel are at times tortured to reveal details about patients who are suspected militants. These practices are clearly in breach of the ICCPR, especially as the rights against torture is absolute and non-derogable. This is bolstered by the United Nations Code of Conduct for Law Enforcement Officials and the Indian Penal Code and Criminal

37 *India: Torture, Rape and Deaths in Custody* (London, Amnesty International, 1992), p. 20.

38 *The Crackdown in Kashmir* (Boston/New York, Physicians for Human Rights / Asia Watch, 1993), p. 3.

Procedure Code. Although the Indian Constitution does not have a specific provision against torture, Article 21 of the Constitution, which guarantees «personal liberty», has also been interpreted as prohibiting torture.

Disappearances

These practices occur sporadically. Most of the disappearances do not involve killing but arise because a detainee has been held *incommunicado* or been moved out of the State without notice. This is compounded by the fact that the applications for *habeas corpus* are not responded to effectively by the courts.

International focus has been provided by the United Nations Working Group on Enforced or Involuntary Disappearances, whose 1992 report noted:

«Reports indicated that in Kashmir numerous persons allegedly disappeared after shoot-outs with security forces. In one reported case in Phazpora, Kashmir, several persons allegedly disappeared when army personnel attacked the locality, killing 25 civilians, most of whom were working in the fields, and setting fire to more than 50 homes.»³⁹

These practices are in breach of general principles of human rights, such as security of the person, reinforced by the ICCPR.

Rape

The most serious allegation relates to the village of Kunan Poshpora, where it is alleged that at least 23 women were raped by soldiers of the 4th Rajputana Rifles on the night of 23/24 February 1991. The District Magistrate visited the village on 5 March and reported the allegations to his superiors on 7 March, asking for an enquiry. No adequate official enquiry was held. The army

39 United Nations Document E/CN.4/1992/18, p. 45.

subsequently invited the independent Press Council of India to investigate the incident. A committee, led by the distinguished journalist B.G. Verghese (but not including any woman), concluded that the incident was a hoax set up to frame the army. The ICJ mission interviewed Mr Verghese and are satisfied that he is an honourable man who would not have announced a conclusion which he did not believe to be true. However, the Press Council report has been widely criticised.⁴⁰ The committee rejected the allegations mainly on the ground of inconsistencies in the women's stories and variations in the number of rapes alleged to have taken place. However, these points are also consistent with attempts to exaggerate a genuine incident. If the incident was entirely a hoax, it was a remarkably elaborate one which the Indian authorities assisted by failing to carry out a quick and effective investigation. The ICJ mission therefore concludes that, while mass rape at Kunan Poshpora may not have been proved beyond doubt, there are very substantial grounds for believing that it took place.

The Indian Government was initially slow to take action against members of the security forces accused of rape, apart from one case where a Canadian tourist was raped. In recent months, it appears that more action has been taken. Many rapes took place in the course of crackdowns, where men and women in the districts being searched were separated. Changes in crackdown procedure – including the presence of women members of the security forces with the units conducting the crackdowns – appear to have had some effect in reducing the number of rapes. There is no evidence that the government has encouraged rape or used it as a deliberate policy. It would indeed have been insane to do so, as nothing would be more calculated to strengthen support for the militants.

Assaults

Innumerable assaults have been witnessed in Jammu and Kashmir. Many are in relation to the cordon-and-search operations which often end in violence. Particularly vulnerable groups include women and children.

40 B.M. Sinha, «Verghese Committee Report: How Reliable?», *Mainstream* (7 September 1991), p. 15.

Doctors and other medical personnel have also been assaulted and harassed by security forces while trying to help the injured. The patients themselves have been assaulted while undergoing treatment and have at times been prevented from receiving medical care. These assaults have taken place when security forces raid hospitals.

The malpractices are in breach of international human rights principles, including security of the person, which are guaranteed by the ICCPR and local laws.

Destruction of Property and Theft

As the Reports mentioned above make clear, there are many incidents of arson by the security forces. These have led to hundreds of houses and shops being burnt, along with other property such as barns and haystacks. There have also been many cases of looting and theft.

Constraints Upon Personal and Family Life

In substance, there is a state of emergency in Kashmir, and this undermines much of daily personal and family life. The curfews and instances of violence already noted prevent children from attending school. The abuses committed by government forces against men and women disrupt personal and family life continually. Health services have also been affected by raids and curfews, resulting in depletion of health personnel, particularly in rural areas. The situation is now aggravated by the fact that militants are increasingly violent towards innocent civilians.

In this context, it can be surmised that there can be no reversion to normalcy unless the root causes of the Kashmir problem are dealt with. The alienation felt by the general population against occupation by Indian troops was ubiquitous during the visit by the ICJ mission and this was linked with the issue of self-determination as the *sine qua non* for peace in the Kashmiri setting.

Other concerns

During the visit of the ICJ mission to Kashmir, other concerns were expressed by those who met the mission. Instances of corruption and to a lesser extent, extortion were mentioned in the discussions concerning abuses by governmental personnel. For example, it seems that some governmental channels print literature for militant groups for the sake of money. Some governmental officials may also be involved in the trade in arms across the frontier, the arms ultimately landing up with militant groups. Projects at the State and local level are also likely to be occasions for profiteering by some officials. Personal stakes and vested interests thus aggravate the violence in Kashmir. This undermines governmental credibility and brings forth an adverse reaction from the local population.

Jammu

The situation in Jammu is very different from that in Kashmir. Poonch and Rajouri, the Muslim majority districts of Western Jammu, were centres of militant activity in 1947 and 1965 but have remained largely peaceful in recent years. The ICJ mission was told that there had been 10 to 15 killings and some harassment by security forces, but clearly the scale of the problem is far less than in Kashmir. Since the middle of 1992, there has been considerable militant activity in Doda district, but the area is remote and there has not been much information about human rights violations except for the Kishtawar bus massacre which was carried out by a militant group.

In Jammu city and surrounding areas, there are few human rights problems. Mainstream Indian political parties, such as Congress (I), the BJP, Janata Dal and the Communists, operate freely, as does the National Conference, though because of the absence of elections they act in something of a vacuum. The local English-language newspapers have few problems. There is some government pressure but it is of a fairly harmless type, such as the threat to withhold official advertising.

Conclusion

The ICJ mission believes that the Indian Government is genuinely anxious to improve its human rights record in Kashmir. Breaches of human rights are not in its interest. As one report said: «The frequent military crackdowns, the inhuman torture of innocent persons, the indiscriminate shooting at people, the frequent thefts, and the occasional rapes committed by the security forces have increased the disgust and resentment of the people in the valley.» There is, however, a long way still to go to overcome indiscipline and misconduct by the security forces (particularly the BSF), the persistent and regular use of torture in interrogation, and the practice of extra-judicial execution.

Chapter 7

Misconduct by Militant Groups

During the visit of the ICJ mission to Jammu and Kashmir, it was evident that militant groups had increasingly become violators of human rights. Although such groups can not become signatories to international human rights instruments, it is important that they abide by the universal human rights norms posited by these instruments. In particular, the message of the ICCPR and Article 3 of the Geneva Conventions are as pertinent to the conduct of militant groups as they are to government personnel.

Structure of Militant Groups

One of the striking features of the insurgency in Kashmir is the very large number of militant organisations involved. Many of them are small, shadowy and short-lived. They are divided into two main groups – those supporting an independent Kashmir and those supporting accession to Pakistan. The leading organisation in the former group is the JKLF. Other organisations in this group include the Jammu and Kashmir Student Liberation Front, Mahaz-e-Azadi and the Kashmir Mujahidin Liberation Front. The leading pro-accession organisation is Hizbul Mujahideen. Others active or formerly active are the Islami Jamiat Tulba, the Muslim Students Federation, the Hezbe-Ullah, the Hezbe-Islami, the Muslim Janabaz Force, the Islamic Tehrik-e-Tulba, the Allah Tigers, the Zia Tiger Force, the Islamic Students' League and the Jammu and Kashmir People's League. There are also groups which claim to be militants but are in fact using this claim as a cover for extortion, blackmail and other criminal activities.

The result is that militants commit acts of violence not only against the security forces and those who are believed to cooperate with them but, on occasion, against members of rival militant groups as well.

Communal Violence

The one serious incident of communal violence took place in Kishtawar on 14 August 1993, when unidentified militants separated 16 Hindus from the other passengers on a bus and shot them dead. This incident was denounced by both the JKLF and Hizbul and has not been repeated. Otherwise, there have been none of the horrifying mutual massacres which were a feature of the recent Sikh separatist campaign in Punjab.

Part of the reason for the absence of communal violence is that, except in Doda, the militants are operating in a community which is almost entirely Muslim. As mentioned above, most of the Kashmiri Hindu community, which up to then had lived on very good terms with their Muslim neighbours, fled from the Valley in early 1990. The assassination of a number of leading Hindus and threats of violence by the militants were enough to persuade the Hindu community to flee. There can be no doubt that the flight was welcomed by militants who saw the Hindus as potential supporters of the security forces. The small Sikh community in Kashmir has suffered relatively little violence, but a number of Sikhs serving in the police or other government services have been murdered.

Killings

The murder (often accompanied by torture) of informers and others who are believed to cooperate with the government is a common feature of insurgency and has occurred on a substantial scale in Kashmir. The Indian Government has published a list of 139 incidents (some involving multiple killings) in Kashmir and a further 20 in Doda, up to the end of March 1994, in which people have been allegedly murdered by militants. A large number of these cases probably arise out of the killing of informers and others who have refused to cooperate with the militants or out of inter-group disputes. The Government has also published a list of 90 prominent citizens who have allegedly been assassinated by militants (there is some overlap between the two lists). In addition to those whose names appear elsewhere in this Report, the list includes more than 20 National Conference leaders or activists, several other politicians (including former members of the State Legislative Assembly), and a number of prominent local businessmen. A considerable number of police and civil servants have been murdered.

Disputes between militant factions appear to have been the reason for the murder of a number of leading figures who were not supporters of the Indian Government. These include Mushir ul-Haq (the Vice-Chancellor of Kashmir University), the Mirwaiz Mohammed Farooq, Dr. Guru and, more recently, the Mirwaiz Qazi Nissar.

Many of the earlier incidents are described in the Asia Watch Report, *Kashmir under Siege*, at pp. 130-143. A particularly notable example was the murder on 13 December 1990 of the 87-year-old Maulana Mohammed Sayeed Masoodi, a former general secretary of the National Conference, by the Hezbe-Ullah.

Torture and Rape

There have been many incidents of torture and rape by militants, often as a preliminary to murder. Victims of rape are often family members of alleged informers or opponents of the militants. There have also been some reports of forced marriages.

Kidnapping and Hostage-Taking

Militants have used kidnapping as a technique on many occasions. There are several motives: to extract concessions from the Government; extortion; or as a preliminary to killing. The Indian Government publication, 'Profile of Terrorist Violence in Jammu and Kashmir', reported 511 incidents involving 751 individuals up to March 1994. 214 of the victims had been killed and 360 released, the others being still in captivity or untraced. The first and most prominent kidnapping was that of Dr. Rubaiya Sayeed (see page 25), the daughter of the then Home Minister of India. She was kidnapped by the JKLF on 8 December 1989 and released five days later in exchange for the release from prison of five JKLF members. Examples of those released alive include Vijay Kumar Kaul, director of the Regional Institute of Science and Technology, kidnapped on 4 September 1991 and released following payment of a ransom, and Dr. A.K. Dhar, director of the Regional Research Laboratory, kidnapped on 16 January 1992 and released in exchange for three militants. Professor Abdul Ahad Wani, head of the Law Department of Kashmir University, was kidnapped on 4 September 1993. He was

released after 14 days but kidnapped again on 31 December 1993 and killed. Twelve foreigners, either working in Kashmir or visiting as tourists, had been kidnapped, including a group of seven Israelis who escaped after overpowering their captors. Two British tourists were kidnapped by a minor militant group in a widely-publicised case in the summer of 1994 and released after pressure from other militant groups.

As reported in the 1991 Asia Watch Report on Kashmir, the policy of kidnapping and killing is openly espoused by militant groups:

«During a freedom-struggle against a ferocious and powerful enemy like India, it might occasionally become necessary to organise operations like kidnapping and execution of hostages, hijacking etc. in order to achieve our objectives.»⁴¹

Destruction and Theft of Property

Militant groups have been involved in arson and other forms of property destruction in Kashmir. The Government claims that between 1988 and March 1994 there were over 2,800 incidents, involving 955 Government buildings, 454 educational buildings, 6,058 houses, 279 bridges and 903 shops. These figures may include cases (particularly with houses and shops) where security forces attributed to militants fires started by themselves or by accident, but there has clearly been considerable destruction by militants. There has also been widespread theft and robbery by militants, both to raise funds for militant purposes and for personal profit.

Constraints Upon the Media

During the ICJ mission's visit to Kashmir, it became evident that the militants imposed great constraints upon the media, and in particular on the press. There are (or were at the time of the ICJ mission's visit) no less than 24 newspapers published in Srinagar (one

41 *Kashmir under Siege* (New York, Asia Watch, 1991), p. 135

in English and the rest in Urdu). There are continual threats against the press if they do not publish the statements of militants or if they are seen as pro-government. Newspapers which displease militant groups are punished by being ordered to stop publication for a time, by threatening vendors to prevent sales, by burning copies, or by destruction of printing presses. In serious cases, death threats are issued and one editor, Mohammed Shabon Vakil, of Al-Safa, was murdered on 23 April 1991 because he had written editorials opposing political strikes. In practice, the press is either supportive of the militants or so intimidated that lesser threats are sufficient to ensure compliance. The representatives of local newspapers who met the ICJ mission seemed more fearful of militant threats than of governmental influence. One person expressed this view during a meeting with the ICJ mission: «Newspapers here do not express views. ... They print only statements from militant organisations.»

Ironically, whereas newspapers are able to expose the crimes committed by Government forces, they are more fearful about exposing the crimes committed by militant groups because of potential negative consequences. Their quandary is compounded by the fact that they are generally unable to ask for Government protection, as this would be seen as a biased act or an act inviting further trouble from opposition groups. In an extraordinary reversal of the normal position in similar situations, it is the militants rather than the Government who are restricting freedom of the press.

The militants have no control over the Srinagar television (Doordarshan), which is run by the Indian Government and reflects the official outlook. However, Lassa Kaul, the highly respected director of Srinagar Doordarshan, was murdered on 13 February 1990 after refusing to comply with militant demands. The present director lives under full-time security protection and has survived five or six attempts on his life. One programme in a series called 'Bible Stories' was not broadcast in Kashmir because it offended fundamentalist groups who issued death threats to local Doordarshan employees. The newsroom was shifted from Srinagar to Jammu from 1990 until July 1993. Two days after it returned, the news editor was kidnapped, though subsequently released. On 2 November 1993, Mohammed Shafi, a prominent Radio Kashmir newsreader, was murdered, and on 25 November 1993, S.P. Sing, the Doordarshan station engineer, was murdered.

Constraints Upon Freedom of Assembly and Political Activity

The use of threats and intimidation by militant groups limits the freedom of others to assemble and to become involved politically. Militant groups are not known for being tolerant towards politicians who diverge from their views. Several, as mentioned above, have been murdered, and others (including Sheikh Abdullah's widow and the rest of his family still in Kashmir) live under constant security protection. Even though it is almost certain that no party supporting an accommodation with India would now win significant support in Kashmir, the militants are not prepared to tolerate the existence of any party whose views they disagree with. Political parties have thus become largely dysfunctional.

Cultural Constraints

There is concern that the more extreme militant groups are seeking to destroy the tolerant tradition of Kashmiriyat and to replace it with the kind of Islamic fundamentalism that has developed in some parts of the Muslim world. This has been evidenced by the pressure which has been placed on women to wear the burqa and chador. This has, however, by no means been entirely successful.

Extortion and Bribery

Large sums are extracted by militants from both individuals and organisations in Kashmir. It was suggested to the ICJ mission, for example, that a large proportion of the money provided for public works in Kashmir ends up in the pockets of the militants. Conversely, there are reports of militants bribing members of the security forces to ignore border-crossing and other militant activity.

Other Concerns

Young men come under strong pressure to join militant groups, whether they wish to or not. At times, children have been used to lay traps for government forces – for example, by being given grenades and told to throw them at the security forces.

Chapter 8

Protection and Assistance of Civilians in Jammu and Kashmir

Sadly, it is the civilians who are the clearest losers in the armed conflict in Kashmir. They are often in the crossfire between governmental troops and militant groups. The instability in the region and the continual curfews disrupt daily life; children are unable to go to school consistently, access to hospitals is limited, displacement and dislocation take place in the search for safety and the satisfaction of basic needs. The disruption of hospitals because of Government action and militant threats affects the accessibility and quality of medical services.

Women and children are particularly vulnerable and are victimised by both the Government and the militants; many have been killed and assaulted by these protagonists. Equally disturbing is the rising intolerance towards the rights of women. This is visible in the following observation:

«Now there is a new threat to the Kashmiri woman. The Muslim fundamentalist organisations have been trying to introduce burqa and chador as a part of their Islamisation programme. Notices are printed in the local papers warning the women that severe action will be taken if they do not maintain purdah. ... The Kashmiri woman is not faced only with growing oppression of fundamentalism, she has become the target of military violence.»⁴²

⁴² *Kashmir Imprisoned: A Report* (Delhi, Committee for Initiative on Kashmir, 1990), p. 44.

The instability in the region has led to the displacement of a large number of Hindus or Kashmiri Pandits. In 1989-1990, some 90,000 Pandits left the Kashmir valley for fear of attacks on their safety. To date some 250,000 out of 300,000 are estimated to have left. A number of these displaced persons are now in camps in Jammu and Delhi. Muslims and members of other religious denominations have also fled the Valley of Kashmir. A number of Muslims have sought refuge in Azad Kashmir; and this is dealt with below.

The ICJ mission visited several camps housing the Pandits in Jammu; the plight of the camp inhabitants was often distressing. Most had been accustomed to the cool climate of the Valley of Kashmir. Now they were housed in tents and buildings in areas which were extremely hot. Although facilities had been provided by the Indian Government, several needs were unsatisfied. Lack of proper sanitation and clean drinking water, cramped housing, limited schooling and insufficient occupational activities made life all the more difficult.

An interesting case in point was that many of the displaced wished to build their own homes in the camp, but were not allowed to do so. Instead, outside contractors were brought in to build habitations. There was a pervasive suspicion that some officials were profiteering from these arrangements and corruption was rife in regard to the money allocated for helping the displaced. During the visit of the ICJ mission, it was also evident that some political parties were trying to canvass votes by handing out gifts to these displaced persons. This struck another note as regards the need to protect displaced persons from manipulation for political purposes, as well as protection from militant threats.

On another front, the Kashmir conflict has taken a toll among the educated, and particularly among medical personnel. Many have fled to other parts of India or Pakistan. Those that remain in the Valley of Kashmir are in a precarious situation. In trying to help the sick and needy, they become the targets of both government forces and militant groups who fail to divorce political concerns from humanitarian considerations. In this context, it is the civilians who are hurt most, and it is they who are regrettably the pawns in a vicious game.

Chapter 9

Azad Kashmir and the Northern Areas

Political Position of Pakistan

The status of Azad Kashmir may be described as follows:

«Azad Kashmir is neither a sovereign State nor a province of Pakistan but rather a «local authority» with responsibility over the area assigned to it under the cease-fire agreement.»⁴³

Azad Kashmir arose from the division of the Dogra principality of Jammu and Kashmir into three sectors in 1947-1949: Jammu and Kashmir in the Indian Union; the Northern Areas (Gilgit and Baltistan) under Pakistan administration; and Azad Kashmir. A government was set up in Azad Kashmir in 1947, «defining itself as a war council whose sole objective was the liberation of Jammu and Kashmir from the Dogra dynasty and Indian authorities.»⁴⁴ After the Simla agreement in 1972, Pakistan began to administer Azad Kashmir more closely; there is a ministry of the Pakistani Government which deals specifically with Azad Kashmir and much development aid has been poured into the region by Pakistan.

The Azad Kashmir Government considers itself to be a «provisional government», with Pakistan in charge of external relations. In substance, it is not a sovereign government.

As an ambivalent reflection on the issue of self-determination for Jammu and Kashmir, it is interesting to note the Constitution of the

⁴³ L.E.Rose, «The Politics of Azad Kashmir», in R.G.C.Thomas (ed.), *Perspectives on Kashmir* (Boulder, Westview Press, 1992), p. 235-236.

⁴⁴ *Ibid.*

Islamic Republic of Pakistan 1973, whose Article 257 provides the following:

«When the people of the State of Jammu and Kashmir decide to accede to Pakistan, the relationship between Pakistan and that State shall be determined in accordance with the wishes of the people of that State.»

Support and Assistance of Militant Groups

The issue is highly sensitive. Throughout the visit of the ICJ mission to India, the involvement of Pakistan and the use of Azad Kashmir as a conduit for the supplies of militant groups operating in Jammu and Kashmir were alleged by the Indian authorities. During the visit of the ICJ mission to Pakistan, the Pakistani authorities indicated that Pakistan was willing to provide «diplomatic, moral support» to Kashmiris, as it considered the territory to be disputed. A representative of the Pakistan parliamentary human rights committee stated that «Pakistan does not send any armed forces into the Kashmir valley.» The Azad authorities added that the borders were sealed; therefore, it would be difficult to use Azad territory to infiltrate into Jammu and Kashmir.

To the ICJ mission it was evident that the border between Azad Kashmir and Jammu and Kashmir remains porous. Arms could also be channelled from Afghanistan into Jammu and Kashmir in the vicinity.

The ICJ mission met several representatives of militant groups in Azad Kashmir to sound out their views on the future of Kashmir. The presence of these groups on Azad terrain pointed to an affinity with operations in neighbouring Jammu and Kashmir.

Constitutional and Legal Process

Until 1960, there was no democratic element in the Government of Azad Kashmir, which was effectively run by the Ministry of Kashmir Affairs and Northern Areas in Islamabad. Between 1960 and 1970, there was a form of indirect democracy, with a State Council elected by members of local bodies who were themselves

directly elected. This was replaced in 1970 by what is, in theory, a democratic political system. The present Constitution was adopted in 1974. It provides for an elected Assembly of 48 members, of whom 28 are elected by the residents of Azad Kashmir, 12 are elected by Kashmiris resident in Pakistan, and 8 are elected by other groups. There is also, however, an Azad Kashmir Council, based in Islamabad, chaired by the Prime Minister of Pakistan and with members drawn from the Assemblies of both Pakistan and Azad Kashmir, which exercises very extensive powers.⁴⁵

Some features of the Constitution are disturbing. In particular Clause 4 of the Constitution, which provides for the protection of fundamental rights, is subject to significant exceptions. Thus preventive detention may be ordered without disclosure of grounds or the right to be brought before a magistrate.⁴⁶ No person or political party «shall be permitted to propagate against or take part in activities prejudicial or detrimental to the ideology of the State's accession to Pakistan».⁴⁷ Freedom of speech may be restricted in the interest of «friendly relations with Pakistan».⁴⁸ The Oath of Office of a member of the Legislative Assembly requires the member to swear loyalty to «the cause of accession of the State of Jammu and Kashmir to Pakistan».⁴⁹ Thus, there is no freedom to advocate that Kashmir should become independent, or that Jammu should be omitted from a plebiscite. No person professing such views could become a member of the Assembly. In 1991, a candidate was disqualified by an election commissioner because he subscribed in his nomination form to «freedom of Jammu and Kashmir State» rather than accession of the State to Pakistan, and his disqualification was upheld by the High Court.⁵⁰ These restrictions are wholly unacceptable.

The record of elections is mixed. The rules applied to the 1988 election seriously hampered opposition parties. The 1990 election,

45 The Azad Jammu and Kashmir Interim Constitution Act 1974, cl. 31 (2) and Third Schedule.

46 *Ibid.*, cl. 4 (4) (2) (3).

47 *Ibid.*, cl. 4 (4) (7) (2).

48 *Ibid.*, cl. 4 (4) (9).

49 *Ibid.*, cl. 23 (1) and First Schedule.

50 Aftab Hussain v. Azad Jammu and Kashmir Legislative Assembly (1991).

won by the Azad Kashmir branch of Benazir Bhutto's Pakistan People's Party, was reasonably fair, but the election held in 1991 suffered from violence and intimidation.⁵¹

Access to Information in Jammu and Kashmir

During the ICJ mission's visit to Azad Kashmir it was evident that the media there was closely linked with Pakistan. Information from Jammu and Kashmir was conveyed directly through the border areas via local mass media and word of mouth. The influx and outflow of people from Jammu and Kashmir, evidenced by the presence of refugees, provided further room for fresh information from the Valley of Kashmir.

Refugees and Displaced Persons

There are different groups of refugees from Jammu and Kashmir in Pakistan and Azad Kashmir. A number are now living in various areas throughout the country. More specifically, there are a number of refugee camps in Azad Kashmir which house refugees. In one area, some 8,000 persons are in seven refugee centres. There are also those temporarily displaced from the line of control which separates Azad Kashmir from Jammu and Kashmir; some 24,000 persons are in this category.

The ICJ mission visited various camps in Azad Kashmir. Although the basics of livelihood were provided by the local authorities, various needs were still to be satisfied. The educational system for children needed improving, and the problem of sanitation and lack of occupational facilities was pervasive. It was evident that the camps were highly politicised; some of the inhabitants moved in and out the camps easily to re-enter Jammu and Kashmir. This has implications for the security and impartiality of the camps. How to depoliticise the camps remains an ongoing challenge, especially as the Indian authorities claim that the camps are a training ground for militants.

51 Rose, *op.cit.*, pp. 241-243.

The Northern Areas

The Northern Areas consist of wild, remote and mountainous lands, with a population of about 1,200,000. They have a complex history and, though in theory part of the territories of the Maharaja of Kashmir, in practice they were mainly governed (up to 1947) by the British or by local tribal leaders. During the war of 1947-48, they came under the control of Pakistani forces.

Initially, they were treated as part of Azad Kashmir, but in 1949, the Government of Azad Kashmir agreed to transfer the administration of the Northern Areas 'temporarily' to the Government of Pakistan. Since then, the Northern Areas have had a quasi-colonial status. The Areas are not formally part of Pakistan. They are administered by the Ministry for Kashmir Affairs and the Northern Areas, based in Islamabad. There is no constitution for the Northern Areas and no constitutional rights. Instead of a High Court, there is a single Judicial Commissioner who sits as the sole appellate judge and confirms death sentences. There is an elected Northern Areas Council, but it has no powers. The territory is very backward; in 1983, the literacy rate was said to be only 14 per cent overall, and a mere 3.5 per cent among women.⁵² There is no local newspaper.

In March 1993, the High Court of Azad Kashmir, in a startling decision, declared that the Northern Areas were part of Azad Kashmir and ordered the Government of Azad Kashmir to resume administration of them. This decision was not acceptable to the Governments of either Azad Kashmir or Pakistan, and it has been appealed to the Supreme Court of Azad Kashmir. At the time of writing, the appeal had not yet been decided.

Some reforms were announced by the Bhutto Government in April 1994. However, these are inadequate. The Minister for Kashmir Affairs and the Northern Areas will be *ex-officio* Chief Executive. The Northern Areas Council will have 24 elected members and two reserved seats for women nominated by the Chief Executive. The Council will have some powers, but it is not clear how extensive they will be. The Council will elect a Deputy Chief Executive who will, however, have only such powers as are delegated by the Chief

⁵² *The Muslim*, 13 December 1983.

Executive. The Judicial Commissioner will be replaced by a High Court.

The complete absence of democracy and constitutional rights in the Northern Areas is patently unacceptable. The most natural solution – the incorporation of the Northern Areas into Pakistan, either as a separate State or as an addition to the North West Frontier Province – has been rejected. This is mainly because Pakistan fears that incorporation of the Northern Areas could be seen as a counterpart of India's incorporation of Jammu and Kashmir into the Indian Union and would weaken the claim that the former princely State should vote in a plebiscite as a single unit. The alternative – that the Northern Areas and Azad Kashmir should be reunited, as the Azad Kashmir High Court ordered – would create practical problems and would not be welcome to the Shia majority in the Northern Areas, who do not wish to become part of a Sunni-dominated Azad Kashmir and would prefer separate statehood in Pakistan. There was sectarian violence between Sunni and Shia in 1988, 1992 and 1993.

The recent reforms are a step in the right direction but fall far short of giving the inhabitants of the Northern Areas rights equivalent to those of the citizens of Pakistan. Urgent steps should be taken by the Government of Pakistan to remedy this situation.

The ICJ mission did not visit the Northern Areas and is unable to report on the extent to which human rights are in practice observed there.

Conclusions and Recommendations

This report has endeavoured to highlight the human rights situation in Jammu and Kashmir by placing it in the context of root causes as well as the call for remedies. The concerned authorities are invited to implement the following proposals effectively and expeditiously:

1. Both the Indian authorities and the militant groups should abide by international standards of human rights and humanitarian law. In this respect, the Indian Government should amend its security-related laws to guarantee the standards voiced by international instruments, including the presumption of innocence, access to independent and effective courts, due process of law, and sanctions against violators of human rights.

Both the Indian security forces and militant groups should end extra-judicial killings, torture and other malpractices which are pervasive in Jammu and Kashmir.

2. Governmental authorities in India should ensure that those who have perpetrated crimes in breach of international human rights standards and humanitarian law are brought to justice and do not enjoy immunity from prosecution. The identity of the perpetrators should be revealed and publicised. Compensation and rehabilitation should also be provided to affected parties.
3. The ICJ mission welcomes the greater emphasis now placed by the Indian army on training its personnel in human rights. This needs to be extended and maximised for para-military personnel and other governmental sectors, with continual in-service training and monitoring to prevent abuses from arising.
4. While the establishment of a human rights commission in India is welcomed, it is essential that the commission be

vested with powers and personnel to act objectively, independently and effectively. Jurisdiction over human rights violations in Jammu and Kashmir should be complemented by effective remedies. It is imperative that it be accessible to all target groups.

5. The ICRC should have full access to Jammu and Kashmir and should be able to visit detainees, as well as to accord international protection and assistance.⁵³
6. The constructive role of non-governmental organisations and community initiatives in monitoring human rights abuses in Jammu and Kashmir should be recognised and supported by the national and local authorities in India.
7. The needs of refugees and displaced persons should be responded to more effectively in Delhi, Jammu and Azad Kashmir. These entail more facilities for sanitation, education and occupation. The persons concerned should be protected from manipulation by opportunists, and should be permitted to involve themselves in self-help programmes, such as building their own homes, to strengthen their self-esteem.
8. The particular needs of women and children should be attended to in Kashmir in order to protect them from harm and provide rehabilitation when necessary. This requires the availability of gender-sensitive programmes and community-based interventions so as to support these groups. Such interventions need to be supported and protected by the Indian Government and to have access to outside resources.
9. Pakistan has no right in international law to supply material assistance to the militants in Kashmir. The Government of Pakistan should take steps to prevent the supply of weapons, finance and training facilities to the militants by non-government sources, as well as discontinuing any supply from official sources.

⁵³ A statement made by the Indian delegation at the 50th session of the UN Commission on Human Rights in March 1994 stated that a visit to Jammu and Kashmir had been offered to the ICRC which they had accepted.

10. The inhabitants of the Northern Areas should be given full democratic rights under a constitution. The Constitution of Azad Kashmir should be amended to remove restrictions on human rights.

* * *

Appendix 1

An Analysis of the Concept of Self-Determination

Principles

The self-determination of peoples is an established human right. The concept played a significant part in the post-World War I settlement (leading for example to plebiscites in a number of disputed border areas, and to the introduction of the mandate system), even though no reference was made to self-determination in the League of Nations Covenant.

After the Second World War, the concept began to acquire much greater importance. The Charter of the United Nations, it is true, makes only a peripheral reference to self-determination. Article 1.2 of the Charter states as one of the purposes of the United Nations:

«To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.»

There is a similar reference in Article 55, relating to Economic and Social Cooperation. The expression «self-determination» does not appear in the Universal Declaration of Human Rights, adopted in 1948. However, from 1952 onwards the General Assembly of the United Nations adopted a series of resolutions proclaiming the right to self-determination. The two most important of these are Resolution 1514 (XV) of 14 December 1960 and Resolution 2625 (XXV) of 24 October 1970.

In the 1950s and 1960s, the right of self-determination was seen almost exclusively as part of the process of decolonisation. It was not envisaged as giving, in any circumstances, a right of secession to part

of a self-governing State. Resolution 1514 is entitled «Declaration on the Granting of Independence to Colonial Countries and Peoples». It includes the following statements of principle:

- «1. 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 an impediment to the promotion of world peace and cooperation.»
- «2. 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.»

However, the resolution subsequently states:

«Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.»

It is thus apparent that the reference to all peoples having the right of self-determination cannot be read as giving an automatic right of self-determination to any group which could reasonably be regarded as constituting a «people».

By the time of Resolution 2625, in 1970, with the process of decolonisation far advanced, the emphasis had become less overtly anti-colonial. The resolution adopted a document entitled «Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States». In a section entitled «The principle of equal rights and self-determination of peoples», the Declaration states:

«By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural

development, and every State has the duty to respect this right in accordance with the provisions of the Charter.»

«Every State has the duty to promote, through joint or separate action, realisation of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, ... bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle as well as a denial of fundamental human rights, and is contrary to the Charter ...»

«The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people ...»

The section continues:

«Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.»

«Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.»

The Declaration concludes with a statement that «the principles of the Charter which are embodied in this Declaration constitute basic principles of international law».

The General Assembly is not a law-making body and its

resolutions are not normally regarded as having the force of law. However, the statement just cited may be taken, in the context, as a recognition by the member States of the United Nations that the principles set out in the Declaration represent the state of the law as it had developed by the date of the Declaration.

Resolution 2625 is worded in a way which does not exclude (though equally it does not endorse) the possibility that a right of secession may exist if the central government is not conducting itself «in compliance with the principle of equal rights and self-determination of peoples.» It has been suggested by some writers that a right of secession may (or at least should) exist in cases of oppression severe enough to amount to abuse of sovereignty; see, for example, Buchheit.⁵⁴ Professor James Crawford⁵⁵ describes as a possible category of «self-determination units» «entities part of a metropolitan State but which have been governed in such a way as to make them in effect non-self-governing territories». If such a right exists, it must logically be based on something more than the refusal to agree to secession or reasonable security measures to suppress a campaign of violence by secessionists.⁵⁶ However, it is doubtful whether a right of secession exists at all and it is clearly not at the present time a generally accepted principle of international law.⁵⁷ Ironically, the only example of non-consensual secession leading to the establishment of independence and international recognition between the Second World War and the break-up of Yugoslavia was the secession of East Pakistan in 1971 to form Bangladesh - a result largely brought about by Indian intervention.

In 1966, the General Assembly of the United Nations adopted the International Covenants on Civil and Political Rights (the ICCPR) and on Economic, Social and Cultural Rights (the ICESCR). Article 1 of each of the Covenants states:

54 Buchheit, *Secession*, 1978.

55 James Crawford, *The Creation of States in International Law*, (1979) p. 100.

56 Buchheit, *op.cit.*, pp. 235-238.

57 See Hannum, *Autonomy, Sovereignty and Self-Determination* (1990), pp. 45-49 and 471-473; Oppenheim's *International Law* (9th Edn., ed. Jennings & Watts), p. 290.

«1.1 All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. ...

«1.3 The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.»

The Covenants came into force in 1976. They take effect as treaties and (unlike resolutions of the General Assembly) are binding in international law on the ratifying States, subject to any reservations at the time of ratification. Pakistan has not yet ratified the Covenants. India ratified both Covenants on 10 April 1979. Upon doing so, however, it declared a reservation in the following terms:

«The Government of the Republic of India declares that the words «the right of self-determination» appearing in [Article 1] apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation - which is the essence of national integrity.»

According to the «anti-colonial» interpretation of the two Covenants, the Indian reservation is merely restating what is in any event an inherent limitation on the operation of Article 1. According to the broader view, the reservation restricts what would otherwise be the effect of Article 1. It is clear, in any case, that the ratification of the Covenants cannot be treated as having conferred on any «peoples» within India a right of secession. Such a right would only exist if a right of secession had become recognised as a principle of international law independent of obligations under the Covenant.

The Vienna Declaration, adopted by the UN World Conference on Human Rights on 25 June 1993, repeated Article 1.1 of the Covenants and continued:

«Taking into account the particular situation of peoples

under colonial or other form of alien domination or foreign occupation, the World Conference on Human Rights recognises the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realise their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realisation of this right.

«In accordance with [Resolution 2625], this shall not be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinctions of any kind.»

Finally, it should be noted that, as Resolution 2625 makes it clear (and see also Resolution 1514 (XV) of 14 December 1960), the exercise of a right of self-determination may result in association with, or integration into, another State rather than independence. Where independence is unrealistic or not wished for, it need not be offered as an option.

Application to Jammu and Kashmir

In applying these principles to Jammu and Kashmir, three questions arise. They are:

- (1) Did the peoples of Jammu and Kashmir acquire a right of self-determination by reason of the partition of India and its immediate aftermath?
- (2) If so, has that right subsequently been exercised or extinguished?
- (3) Has any further right of self-determination arisen as the result of subsequent events?

If it appears that a right of self-determination does exist, then it must be decided whether the State of Jammu and Kashmir within its 1947 boundaries forms a single self-determination unit (to adopt Professor Crawford's ugly but useful expression) or a number of units, and it must also be decided how that right can be exercised.

a Did the peoples of Jammu and Kashmir acquire a right of self-determination in 1947-1948?

The members of the ICJ mission believe that the circumstances of partition and its aftermath did give rise to such a right.

Once the principle of partition had been accepted, the ICJ mission believes that it was incumbent on the British Government to ensure, as far as possible, the division of India in accordance with the will of its constituent peoples. So far as British India was concerned, this principle was recognised by the appointment of the Radcliffe Commission to decide on the line of partition in Punjab and by the holding of plebiscites in the North West Frontier Province and Sylhet. In the case of the princely States, the decision on accession was formally given to the princes rather than the people. Although the constitutional reasons for this are understood, the members of the ICJ mission do not think that this could be regarded as giving the rulers the right to override the wishes of their people in deciding whether to accede to India or Pakistan. Even given the relatively undeveloped state of the law of self-determination in 1947, the wishes of the people of the princely States should have had priority. This was certainly the view that was adopted by the Indian Government as justifying its actions in Junagadh and Hyderabad.

The Indian Government made its acceptance of the accession in October 1947 of the Maharaja of Jammu and Kashmir conditional on «a reference to the people» (see p. 13 above). This constituted a recognition by the Indian Government of the right of the people of the State to decide on the question of accession. The existence of this right was recognised by the Security Council of the United Nations by its resolution 47 (1948) (see p. 13 above) and, even more clearly, by resolution 91 (1951) (see p. 19 above) which affirmed that the final disposition of the State should be «made in accordance with the will of the people expressed through the democratic method of a free and impartial plebiscite.»

India's acceptance of Resolution 47 (1948) was stated by Nehru to be conditional on the withdrawal of Pakistani forces from territory within the 1947 boundaries of the State of Jammu and Kashmir, in accordance with the terms of that Resolution. Pakistani forces have, of course, never been withdrawn. However, the right at issue is the right to self-determination of the people of Jammu and Kashmir, and not of the people of Pakistan. The failure of successive Governments of Pakistan to comply with the recommendations of the Security Council can not, in the view of the ICJ mission, be taken to have prejudiced the rights of the people of Jammu and Kashmir.

It is the conclusion of the ICJ mission, therefore, that the people of the State of Jammu and Kashmir had a right, at the time of partition, to decide whether to accede to India or Pakistan. That right was recognised by both the Indian Government and the United Nations. That right is fully in accordance with the conventional principle of self-determination (and with India's subsequent reservations to the ICCPR and the ICESCR), since it arises out of the right of an entity emerging from foreign domination to choose for itself which of the successor States to join. (A comparable case was the British Cameroons, where plebiscites were held to decide whether the area should join Nigeria or Cameroun). The right is quite distinct from the much more debatable right of secession from an established independent State, and it does not constitute a precedent for the secession from India of any other part of its territories.

b Has the right of self-determination been exercised or extinguished?

At first sight it would seem obvious that, since there has never been a plebiscite or referendum, the right of self-determination has not been exercised. However, some Indian commentators have argued that subsequent events have given rise to the indirect exercise by the peoples of Jammu and Kashmir of the right of self-determination, or else have extinguished that right.

The first event which, it is alleged, amounted to the exercise of the right was the adoption by the State's Constituent Assembly, in October 1956, of a Constitution which declared that the State «is and shall be an integral part of the Union of India» (see p. 19 above). Had the Constituent Assembly been a properly democratic body, there would have been some force in the argument that the adoption of a

Constitution including a declaration in those terms constituted an exercise of the right of self-determination in favour of accession to India. However, the Constituent Assembly was elected in a manner which deprived it of all democratic legitimacy (see p. 16 above). The Security Council in Resolution 91 (1951) denied the authority of the Constituent Assembly to decide on the future affiliation of the state, and it reaffirmed that resolution in January 1957, after the adoption of the Constitution (see p. 19 above).

It has also been argued that the effect of the Simla Agreement of July 1972 (see pp. 22-23 above) was to make the settlement of the future of Jammu and Kashmir exclusively a matter for bilateral negotiations between India and Pakistan, thus effectively excluding any exercise of self-determination by the peoples of Jammu and Kashmir except to the extent that the exercise was agreed by both India and Pakistan. As an interpretation of the meaning of the Simla Agreement, this may well be correct. The Simla Agreement is clearly binding on Pakistan and deprives the Pakistan Government of *locus standi* to intervene in Jammu and Kashmir. However, the peoples of Jammu and Kashmir were not parties to the Agreement and neither India nor Pakistan, both of which had conflicts of interest with the peoples of Jammu and Kashmir can be regarded as having authority to bind them. The members of the ICJ mission do not see, therefore, how the Simla Agreement can be regarded as having deprived the peoples of Jammu and Kashmir of any rights of self-determination to which they were entitled at the time of the Agreement.

There is more force in the argument that Sheikh Abdullah's acceptance of the Kashmir Accord in February 1975 (see p. 24 above), which acknowledged Jammu and Kashmir as a constituent unit of the *Union of India*, followed by his election with a clear majority in the largely free and fair State elections of 1977, constituted the acceptance by the people of permanent accession.

It is, however, very difficult to regard the 1977 election as a positive exercise of the right of self-determination. Accession to India was accepted, but as a *fait accompli* rather than a positive choice.

Could the result of the election be regarded as an abandonment of the right of self-determination? There can be little doubt, in principle, that a right of self-determination can be abandoned without having been exercised. What is far from clear is the answer to the question –

in what circumstances, and by what methods, can a right of self-determination be abandoned?

There is little or no literature on this precise subject. On the analogous subject of the extinction of States, however, it has been said: «The presumption – in practice a strong one – is in favour of the continuance, and against the extinction, of an established State.»⁵⁸ In the view of the ICJ mission, a similar presumption applies to the extinction or abandonment of a right of self-determination. It is therefore probably correct to say that the abandonment of a right of self-determination will normally be a process extending over a considerable period of time. In this context, Sheikh Abdullah's acceptance of the Kashmir Accord and his election in 1977 can be seen as the start of a process of acceptance by the people of Jammu and Kashmir of their integration into the Republic of India. But to treat those events as the end, as well as the beginning, of the process would, in the view of the ICJ mission, place too little weight on the importance of the principle of self-determination.

The process of abandonment, in the view of the ICJ mission, required a substantial period of willing cooperation between the central government and the people of Kashmir. The period of cooperation can be regarded as continuing up to – but not beyond – 2 July 1984, when Jagmohan dismissed Farooq Abdullah's ministry.⁵⁹ The Kashmir Accord involved an acceptance by the Indian Government of the permanence of Article 370. The appointment of Jagmohan, a passionate opponent of Article 370,⁶⁰ as Governor was provocative, and his dismissal of Farooq Abdullah represented a breach of the spirit of the Kashmir Accord.⁶¹ The ICJ mission does not believe that, by July 1984, the abandonment of the right of self-determination had become final and irrevocable.

58 Crawford, *op.cit.*, Chapter 17.

59 See p. 24 above. Jagmohan provides a lengthy apologia for his actions in Chapter 7 of *My Frozen Turbulence in Kashmir*.

60 See *My Frozen Turbulence in Kashmir*, Chapter 6.

61 Balraj Puri says that «the dismissal of Farooq conveyed that even if the people wished to remain with India, they would not be free to choose their own government», *Kashmir: Towards Insurgency*, p. 34.

The ICJ mission therefore concludes that the right of self-determination to which the peoples of Jammu and Kashmir became entitled as part of the process of partition has neither been exercised nor abandoned, and thus remains exercisable today.

c Has any further right of self-determination arisen?

In view of the ICJ mission's conclusion that a right of self-determination arose at the time of partition and is still exercisable, it is not strictly necessary to consider whether a separate right of self-determination has arisen by reason of later events. However, that issue will be dealt with briefly.

The test whether later events could have given rise to a separate right of self-determination must, be the same as the test for the existence of a right of secession. If such a right exists at all, it arises only in cases where an entity can be regarded as non-self-governing or where there is oppression amounting to abuse of sovereignty.

Neither of these conditions can be regarded as having been satisfied in the period up to 1989. Although the central Government interfered frequently in the running of the State, the level of interference cannot be regarded as sufficient to have rendered Jammu and Kashmir a non-self-governing entity. Nor is there any evidence of real oppression during that period. On the contrary, it was suggested to the ICJ mission that Jammu and Kashmir was treated rather more favourably, at least in terms of financial support from the central Government, than other Indian States.

The situation since 1989 has caused the ICJ mission more concern. There have been serious abuses of human rights, analysed in some detail below. However, it is doubtful whether, in themselves, they amount to a sufficient level of oppression to trigger a right to self-determination. They are certainly less serious than the abuses of human rights by the Pakistani Government in East Pakistan in 1971.⁶²

62 See ICJ Staff Study, *The Events in East Pakistan*, 1972).

Perhaps more important in this context, Jammu and Kashmir has been under Governor's Rule or President's Rule for a continuous period of more than five years. This gives rise to the question whether it has now become a non-self-governing territory entitled on that ground to a right of self-determination. The members of the ICJ mission do not think that this point has been quite reached as yet. Although no attempt is being made to identify a deadline, the ICJ mission believes that if President's Rule continues for a substantial further period, it will become increasingly arguable that Jammu and Kashmir is a non-self-governing territory and that its people have acquired, on that ground, a right of self-determination separate and distinct from the right arising at the time of partition.

The Modalities of Self-Determination

The original concept envisaged in the Security Council resolutions (see Chapter 3 above) was that there should be a single plebiscite covering the whole of Jammu and Kashmir within its 1947 boundaries, and that the plebiscite should offer a straight choice between accession to India or to Pakistan. The resolutions did not contemplate separate plebiscites in different parts of the State, nor did they offer independence as an alternative.

As long ago as 1950, Sir Owen Dixon pointed out the drawbacks of an overall plebiscite. Nothing in the intervening period has made such a plebiscite any more realistic. If implemented, it would be disastrous. It is now virtually certain that a majority vote of the State as a whole, given a choice between India and Pakistan, would be for Pakistan. But the Hindu majority areas of Jammu would never accept their transfer to Pakistan, and even if such a transfer did take place it would simply reproduce the present problems in reverse.

The State of Jammu and Kashmir is an extremely heterogeneous area (see Chapter 2) assembled by conquest or purchase by Gulab Singh in the first half of the 19th century and linked by little more than the rule of his Dogra dynasty. For the purposes of the right of self-determination, the State must be regarded as containing not one but several peoples, some of whom live on both sides of the Line of Control. Identifiable units are the Valley of Kashmir; the Hindu areas of Jammu Region; the Pahari-speaking Muslim areas of Azad Kashmir and Western Jammu; the Shia Muslim areas of the

Northern Areas and Kargil; and the Buddhist district of Leh. Even this classification does not provide a solution for the exceptional problems of Doda District.

The fact that the right of self-determination, as originally recognised, contemplated treating the 1947 State of Jammu and Kashmir as a single self-determination unit does not mean that the right can only be exercised in that manner. Indeed, for the reasons given above, it is essential that the right should not be exercised by the State as a single unit.

Again, the fact that independence was not contemplated as an option in 1947-48 and may not have been practicable at that date does not mean that it must now be ruled out. A right of self-determination must be exercised in the light of circumstances at the date of its exercise, even if circumstances were different when the right arose. Self-determination can be exercised in a number of ways, which may include full independence, an association of a greater or lesser degree with another State, or integration into another State.

The heterogeneity of the State would however make it very difficult to contemplate independence for the State as a whole within its 1947 boundaries. The Hindu population of Jammu region unquestionably wishes to remain part of India. Indeed, the link between Kashmir and Jammu is itself a substantial cause of the present problems. Opposition to Article 370 has been largely fuelled by the Hindus of Jammu, who fear - with some justification - that autonomy would lead to the oppression of Jammu by Kashmir. The Buddhists of Ladakh, squeezed between Muslims to the west and Chinese-occupied Tibet to the east, also wish to remain under Indian protection. The Northern Areas have only tenuous historical and cultural links with the rest of Jammu and Kashmir.

Independence for the Valley of Kashmir would be a possibility. It has a population of more than 3 million people. It would be homogeneous in culture, language and religion. It would have a potentially effective economy based on agriculture and tourism.

But independence would also create new risks and problems. Unless both India and Pakistan were prepared genuinely to respect its independence - an unlikely prospect given the history - an independent Kashmir would be likely to become the scene of a

contest for power and influence between India and Pakistan. This could be as destabilising as the present situation.

Rights of self-determination are not, of course, exercisable in an ideal world. If the people of Kashmir are willing, for the sake of peace, to accept something less than a free choice, that acceptance could still be an exercise of the right of self-determination. For example, if the Indian Government and representatives of the people of Kashmir were able to agree on the restoration of full internal autonomy to Kashmir while retaining Indian control of defence and foreign affairs – a solution supported by a number of those interviewed by the ICJ mission – a referendum approving that solution would be a valid exercise of the right of self-determination.

The Role of Pakistan

If, as the ICJ mission has concluded, the people of Kashmir have a right of self-determination, it follows that their insurgency is legitimate. It does not, however, follow that Pakistan has a right to provide support for the militants. Resolution 2625 (XXV) declares that peoples who are seeking to exercise a right of self-determination in the face of forcible action «are entitled to seek and to receive support in accordance with the purposes and principles of the Charter». It has been said by Professor Crawford that «assistance by States to local insurgents in a self-determination unit may, possibly and exceptionally, be permissible».⁶³ Emphasis must, however, be on «possibly and exceptionally», and it is highly doubtful whether military assistance can be regarded as lawful under the Charter unless authorised by the United Nations itself.⁶⁴ In any event, the provision of military assistance would be in breach of obligations accepted by Pakistan under the Simla Agreement. The ICJ mission therefore concludes that Pakistan should discontinue any support of a military nature (including the provision of finance for military purposes) for the insurgency in Kashmir and should take reasonable steps to

63 Crawford, *op.cit.*, p. 118.

64 *Oppenheim's International Law*, Vol. I (9th Edn, ed. Jennings & Watts), p. 289. See also Bothe, «The Legitimacy of the Use of Force to Protect Peoples and Minorities» in *Peoples and Minorities in International Law* (ed. Brölmann, Lefeber and Zieck, 1993), p. 289.

prevent such support being provided within or through Pakistan by non-government sources.

Conclusions

Regarding the right of self-determination:

- (a) The peoples of the State of Jammu and Kashmir acquired a right of self-determination at the time of the partition of India.
- (b) That right has neither been exercised nor abandoned and therefore remains capable of exercise.
- (c) The right belongs to the peoples of the State and not to Pakistan, and is therefore not affected by acts of the Government of Pakistan.
- (d) The State of Jammu and Kashmir comprises a number of different units which should be allowed to exercise the right of self-determination separately.
- (e) Full or limited independence for Kashmir is a possible option.
- (f) The parties should be encouraged to seek a negotiated solution to be put to the peoples of the State for ratification in a referendum.

Both India and Pakistan should recognise and respond to the call for self-determination for the peoples of Jammu and Kashmir within its 1947 boundaries, inherent in the relevant United Nations resolutions. The United Nations should re-activate its role as a catalyst in this process.

Appendix 2

Response of the Government of India Preliminary Comments

1. The ICJ Mission's report ostensibly on «Human Rights in Kashmir» transgresses by tangents into blatantly political areas and partisan conclusions. It starts with a pre-determined conclusion, basically on the issue of so-called «self-determination» in Jammu & Kashmir (J&K), and cuts and tailors every aspect of history and the situation to demonstrate it as a proposition of law. It ends up making sweeping generalisations and the most arbitrary determinations on a most difficult, controversial and complex subject of international law, regardless of the possible dangerous and destructive consequences on given situations. The report comes through as a document of patent and pronounced bias, lacking in objectivity, historical perspective and accuracy, and one where the pre-conceived conclusion is sought to be established through contrived and artificial reasoning and sometimes by apparently simplistic naivety.

2. The Mission's objective as conveyed to the Government of India was to study the human rights situation in J&K. This, however, has been grossly transgressed, as the core of the report deals with history and politics to focus on the issue of «self-determination» (purely as a political act) on the plea that it is a basic human right and the underlying cause of the situation in the State. Leaving aside the legal aspects of the issue for the present, honesty of intent demanded that the purpose of the Mission be declared to the host Government. By not doing so, it pre-empted the Government from exercising its discretion of saying «NO» to the Mission; or if it had still decided to accept it, denied it the opportunity to discuss the relevant issues with the entire Mission. When this was pointed out after the initial draft report was received, the Government of India had been assured an opportunity of discussing and placing the issues before the ICJ or the ICJ Mission. Unfortunately, it only had an opportunity to talk to the author and draftsman of the report Sir William Goodhart, and not the

other members. A plethora of information was provided to him, which has mainly been used only to excise some of the exceedingly obvious and blatant marks of bias. Thus the elementary principle of fair hearing was violated despite repeated requests. It is axiomatic that those who decide must hear, and those who hear must decide.

3. Right at the outset, an attempt has been made to project as if the Mission had been confined to a «Military Cantonment», and the visit was severely restricted. By its own admission, the Mission was able to meet virtually all the persons it had indicated and also others including members of the Bar Association, politicians (both pro and anti-Government), human rights groups and journalists. Further, the Mission had not indicated any other specific programme and requirements before the visit, and the reasons and suggestions about various possible venues for the meetings had been discussed with them at length. The observations in the report are thus a gross misrepresentation.

4. There is almost nothing in the report which would have called for a visit to India and Pakistan, because the observations are based almost entirely on selective readings, published reports and documents, hearsay, and an entirely subjective interpretation of all these. The effort to lend greater real time authenticity and respectability to the Mission by deceitfully involving the Government of India, and artfully covering Pakistan in the exercise is wholly condemnable.

5. We say «artfully covering» Pakistan because the report virtually glosses over the situation in Pakistan Occupied Kashmir (POK) and confines itself almost entirely to the rest of the Indian State of J&K. The explanation given for this is that the Mission was only concerned with the study of human rights concerns arising out of insurgency, and there was no insurgency in POK. Strangely enough, here the question of «self-determination» as a basic human right and indeed even the relevance of the politico-historical developments in that part of J&K have been completely overlooked and ignored. In the event statements and subjective declarations have also been made which show unusual interest and bias towards one of the parties such as :

«...it is virtually certain that the vote of the entire State would lead to a majority for accession to Pakistan» (an

assertion which is not borne out by anything else in the report itself; and is contrary to a statement of the Pakistan Prime Minister herself in an interview to the New York Times of 15 May 1990); and «Nor is it likely that Pakistan would rule out a solution involving independence for the State....» (again a statement which is in direct contrast to the repeated assertions in this regard at all levels of Pakistani leadership).

6. The taint in the Report is also evident from the terminology used in various places. In Chapter 2 titled 'Land and the People', for example, it says that «India is now in occupation of an area of 138,942 square kilometers» and «Pakistan controls an area of 78,114 square kilometers» - this is in the face of the fact that J&K had acceded to India while Pakistan's presence in any part of it has absolutely no legal basis. In this context, it may also be pointed out that the map of the State on page IX shows J&K as a separate entity with an undefined status of boundaries, and the area illegally ceded by Pakistan has been shown as a part of China.

7. Initially, the report had relied as its sources essentially on two books written by Prof. Alastair Lamb and Dr. Jagmohan, the former Governor of Jammu and Kashmir. The justification given was that they gave different perceptions/interpretations of history and that each is viewed with favour by Pakistan and India respectively. This argument was flawed and wholly misconceived. While the Government of India has never sought to draw upon any particular book or historian to state its case, which rests on hard facts and principles, Pakistan has certainly tried to use Prof. Alastair Lamb singularly and blatantly in its propaganda. Indeed Prof. Lamb was contracted by Pakistan to co-author a book with a researcher of a Pakistani front organisation, to try and prove that the Instrument of Accession was never signed. The argument advanced by the author of the report might have been understandable (even if still not acceptable) if it had come from a historian, but hardly so from a jurist purportedly looking at the situation of human rights and the Rule of Law. After this glaring point was brought to the notice of the author of the report, a much richer bibliography has now been cited. This was obviously for cosmetic purposes as the treatment of facts and the refrain of the report remains essentially the same.

8. The Mission has also failed to keep in mind that unlike Pakistan, India is an open society; its Constitution and legal system are committed to the protection of the Rule of Law; and its political culture encourages criticism and political debate. In doing so it has lost sight of the objectives and commitment of the ICJ itself as an institution. In fact, the initial draft report had gone to the extent of indiscriminately affronting and insulting some of the major institutions of democracy and the Rule of Law in India. These included the Supreme Court of India, which was in a most casual manner, accused of passing orders at the behest of the Central Government; and the National Human Rights Commission about which it was almost superciliously and without substantiation observed: «...In substance, therefore, there is the danger that the Commission will be used to give the Government an unjustifiable 'clean bill of health' .» The author backtracked and removed these remarks when it was pointed out that they were nothing but evidence of anti-India prejudice, but the bias remains though some visible blemishes have been removed.

9. Serious doubts about the whole exercise of the Mission also arise by the manner in which it has been consistently used since even before any draft had seen the light of the day. This included references to it by the Pakistani delegation in the U.N. Human Rights Commission in January-March, 1994 and leaks to the Press which led ICJ itself to issue a Press Release on 22 June, 1994, in which it regretted the attempts of the Pakistan Government to influence the result of the ICJ Mission in favour of one of the parties involved. It also deplored leaking to the Press of an early Draft Report calling it «a breach of trust which we strongly condemn». Despite this, the orchestrated leakages by the Pakistan Government continued. According to the Pakistani Daily, the Nation of 15 December, 1994, the Pakistani Foreign Minister clarified that all they wanted to do was to get «one or two articles published about the basic findings... as a kind of build up».

10. Given the report's blatant bias, the Government of India would ordinarily have rejected it out of hand without any further comments. However, since the Mission involved the Government of India deceitfully in its exercise, we find it in order to also comment on some of the other aspects though, due to space constraints imposed on us, justice can hardly be done. Indeed a much more comprehensive response has had to be drastically summarised.

Introduction

11. By the Indian Independence Act of 8 July, 1947 two independent dominions of India and Pakistan were created out of the erstwhile British India. Apart from the area under the direct control of the British Administration, the territory of pre-partition India also included over 560 Princely States, over which the British Crown exercised Paramountcy. Under the above Act it was provided that Paramountcy would lapse, and the Princely States would accede to either one of the Dominions. The State would be deemed to have acceded to the Dominion, if the Governor General signified acceptance of an Instrument of Accession executed by the Ruler of the State.

12. In the case of J&K, before the Ruler (Maharaja) could take a decision, it was invaded by Pakistan tribal raiders with the active aid and connivance of the Pakistan authorities and Army. Unable to protect the State against the invasion the Ruler executed the Instrument of Accession in favour of India on 26 October, 1947. With its acceptance on the same day by the Governor General, the State of Jammu and Kashmir became an integral part of the Dominion of India.

13. Indian forces were rushed to the State, and swiftly drove out the invaders from the Valley and certain other parts of the State. So as to prevent enlargement of the conflict, the Government of India took the matter to the Security Council on 1 January, 1948, and requested it «to call upon Pakistan to put an end immediately to the giving of such assistance which is an act of aggression against India.»

14. Pakistan has, however, refused to this day to vacate the aggression and remains in illegal occupation of nearly one-third of the State, hereinafter referred to as Pakistan Occupied Kashmir (POK). Given the above peculiar circumstances which obtained in the State around the time of accession, the Governor General, after accepting the Instrument of Accession, had by a separate letter, which did not impinge in any manner on the fact of the Accession, conveyed to the Maharaja the «wish» of the Government of India that «as soon as law and order have been restored and her soil cleared of the invaders the question of the State's accession should be settled by reference to the people.»

15. While these conditions did not come about due to Pakistan's continued intransigence, the people of the State, which had lawfully acceded to and become part of India, could not indefinitely be left in a limbo and outside any organised framework of governance. Accordingly, as provided in the Indian Constitution and demanded by the largest party in the State, the National Conference, a popularly elected Constituent Assembly was convened in 1951. The Assembly after ratifying the accession adopted a Constitution for the State of J&K in 1957 which, inter alia, declared the State to be an integral part of India. This was followed by the initiation of a regular democratic process in the State, by which the people could have their own popular/representative Government. Since then as many as seven General Elections have been held in the State under its own Constitution and Election Law.

16. The State had a Muslim majority. Pakistan, which saw its raison d'être solely in terms of a theocratic Muslim State, in stark contrast to the plural, democratic and secular State of India, believed that J&K had to become a part of Pakistan by any means. Ironically, it also realised, that despite the Muslim majority in the State, a plebiscite regarding accession, if held, would not be in Pakistan's favour. Its aim, therefore, was to try and gain time to consolidate its stranglehold in POK, let a state of uncertainty prevail in J&K, and use this to create conditions there which could work to its advantage.

17. The direct involvement of the Pakistani authorities and army in the planning and execution of the so-called tribal invasion, has been documented even in books written by senior Pakistani army officials who were directly involved («Raiders in Kashmir» by Major Gen. (Retd) Akbar Khan). Thereafter, even as a stalemate continued in the U.N. on account of Pakistan's intransigence, things in Kashmir had not gone the way Pakistan wanted them to, and it started looking again for desperate solutions. As documented in his book «Memoirs» by Lt. Gen Gul Hassan Khan, former Commander-in-Chief of the Pakistan Army, around 1963 the Government of Pakistan again decided to train the locals in Kashmir to enable them to embark upon sabotage; train and induct guerrillas in the State to disrupt conditions in the Valley and eventually arm the locals; and, to follow this up with a direct attack by the Pakistani army. This was a clear repetition of the events of 1947, and once again it failed. Lt. Gen. Gul Hassan significantly noted later that the type of operation planned by the Pakistan Government «required protracted preparation and some special equipment to facilitate its activities.»

18. Pakistan fought yet another disastrous war with India in 1971. In the same year its whole philosophy of creating and maintaining national identity only on the basis of religion suffered a body blow with the separation of Bangladesh (the erstwhile East Pakistan), where Pakistan had let loose unbridled oppression and political suppression. With India, Pakistan entered into the Shimla Agreement in 1972, which effectively provided for the settlement of all problems between the two countries by peaceful means through bilateral negotiations.

19. J&K, meanwhile, had remained peaceful and economic development had moved apace. On the political front, in 1975 there was an Accord between the Central Government and Sheikh Abdullah, the leader of the National Conference, in which inter-alia the fact of the accession of J&K to India being final was reiterated. This was followed in 1977 by elections, widely acknowledged as being totally free and fair, in which the same National Conference won a handsome majority, including nearly all the seats in the Valley. The same verdict was returned in the 1983 elections after Sheikh Abdullah's demise a year earlier.

20. Despite, its earlier failures, and its having signed the Shimla Agreement, Pakistan had not reconciled to its inability to annex Kashmir. Right from the mid-eighties, taking advantage of the availability of the vast training infrastructure, funds and weaponry, in the wake of the situation in Afghanistan, Pakistan, through the ISI (Pakistani Intelligence) and certain subverted dissident elements in J&K, started trying to provoke communal disturbances in the State; and a drive for mobilisation, subversion and exfiltration of locals for training and battle-inoculation in Afghanistan in the name of preparation for 'Jehad'. The aim was to launch a full-scale «Proxy War», through such elements, when the time was considered ripe. All this is widely documented by various international sources, including the former Pakistan Army Chief, General Mirza Aslam Baig (Selig Harrison - «South Asia and the United States; A Chance for a fresh start: Current History Magazine, March, 1992); and Brig. Haroon Rashid in his book titled «Fateh», which is a biography of the former ISI Chief, General Akhtar Abdul Rehman.

21. Developments at the international level, particularly the withdrawal of the former Soviet Union from Afghanistan, provided the opportunity to Pakistan to launch its «Proxy War». On the one

hand, they used this to propagate a so-called 'freedom struggle' in the guise of 'Jehad'. On the other, they diverted and infiltrated huge quantities of weapons and equipment, and thousands of trained militants into J&K to launch large-scale violence in 1988-89, when in the words of Brig. Haroon Rashid, «...The Kashmir Plan had to be prematurely implemented following the untimely death of General Zia's most likely successor, General Akhtar in the air-crash of August 17, 1988».

22. The events since 1988-89 need to be seen in this background. The violence in the State since then has been characterised by the elimination of political leaders, workers and their relatives to prevent all democratic political activity and create a total vacuum; the killing of civil and local police officials to paralyse and isolate the administration; intimidation of the judiciary to create a breakdown of the legal system; attacks on and killing of the intelligentsia, including educationists, lawyers, doctors and even religious leaders, to silence dissent; the targetted killing of members of the Hindu minority community which has led to the exodus of over 250,000 members of the community resulting in a change in the very demographic profile of the area and blatant religious cleansing; use of indiscriminate violence against innocent civilians generally to create terror; and, selective killing of media persons and attacks on media installations to cause, not merely a breakdown of independent journalism, but also to force the media to act as a mouth-piece.

23. A clear pattern emerges from all this viz. destruction of all institutions of democracy and representative government; paralysis of local governance and consequent chaos; propagation of unbridled fundamentalism; creation of a situation where mass confrontation with law enforcement agencies could be enforced at will; and, through all this to try and demonstrate that there was pervasive dissatisfaction and «indigenous insurgency» of massive proportions. The lessons of 1963-65 had obviously been learnt well by Pakistan and this time they had prepared an elaborate strategy of subversion. For some time it would have appeared that the objectives were being achieved as planned. However, the wheel appears to have turned full circle. While violence has continued, and there is no let up in support from across the border, there is a marked qualitative change in the situation and even in attitudes. The people have been able to see through the game, and the euphoria, that had been deceitfully built up in the initial stages, has substantially given way to disillusionment and even anger

both with Pakistan and the activities of the militants. While Government has acted firmly with the terrorists, it has also consciously been able to cause the security forces to act with the maximum of restraint and discipline in the circumstances. In contrast, the militants have continued their brutalities on innocent civilians, and even stepped up attacks on targetted groups like politicians, the media, and the local administration and Police.

24. Inter-gang and group clashes and rivalries have escalated sharply, both over turf and in terms of ideological polarisation. The pro-Independence JKLF, on whose shoulders Pakistan had launched its campaign, and whose leaders and members have in more recent times been threatened and attacked by the pro-Pakistani groups, as also some other prominent secessionist elements, have distanced themselves even from the so-called umbrella organisation of the militant groups, the All Party Hurriyat Conference (APHC). In recent months some secessionist leaders have called for an end to the gun culture, and for the return of the Hindu minority community to the Kashmir Valley. While such persons have been under threat from certain militant groups, they have evoked a positive response from the people. Significantly, in the wake of all these developments over the past more than one year, efforts to infiltrate foreign nationals/mercenaries into the State have been stepped up by Pakistan. It is the foreign mercenary groups like the Harkat-ul-Ansar and the Laskar-e-Toiba, along with other fundamentalist pro-Pakistan groups like Hizb-ul-Mujahideen and Jamait-ul-Mujahideen, etc., who have been almost entirely in the forefront of violent activities over the past year or so. This includes, after a gap of 3 years, the abduction of 2 foreigners in June and 4 in October, 1994.

25. Several steps have been taken by the Government to create conditions conducive to normalisation and restoration of the political process and the democratic institutions. These include determined and sustained measures to reactivate the local administration; step-up and accelerate the pace of economic and development activity; release of persons who had been in custody (over 1000 in 1994 alone) , including a number of prominent secessionist leaders; commencement of work relating to revision of the electoral rolls under the supervision of the Election Commission and work for delimitation of Constituencies as provided in the State Constitution. All these measures have had a positive impact on the situation, and a wide ranging public debate is now underway marking the beginning of the

reactivation of the political process. Various political parties and their leaders have also been seen to be more active in the past few months.

26. Clearly the Mission which visited the State in August, 1993, appears to have remained frozen in time. Unfortunately, the tenor of the report almost makes it look that, that is the way they would like things also to remain.

Historical Background

27. Although, the report is full of significant omissions, distortions and selective use and interpretation of facts, space constraints compel us to refer only to a few important aspects.

28. While referring to the accession of the Princely States, the obtaining legal position as indicated earlier has been acknowledged. But the examples of two States viz., Hyderabad and Junagadh have been cited to try and make out a case that the legal dispensation provided in the Indian Independence Act was not binding, apart from advising the British, nearly 50 years after the event, what they should or should not have done.

29. The situation in both these cases was completely different from J&K. Unlike the latter, where the largest and most popular party backed the accession to India, in both these States, the overwhelming majority of the people were opposed to the Ruler's decision. Both these territories were entirely/substantially embedded within the territory of India, with no geographical contiguity with Pakistan. In the case of Junagadh, the State also had enclaves in neighbouring Princely States who had acceded to India and vice-versa. The attempt of the Mission, therefore, to cite the example of two out of over 560 States to challenge the Indian Independence Act of 1947, and establish separate legal principles to support its own laboured thesis on J&K can only be called simplistic. It is also tantamount to challenging the very basis of the creation of India and Pakistan themselves. It is also significant that while referring to Hyderabad

and Junagadh, the report conveniently omits mention of the fact that accession of Bahawalpur was forced on the Ruler of the State by Pakistan, and that the Khan of Kalat, who had revolted against accession, was arrested and detained by Pakistan authorities.

30. While talking of the actual accession (page 9), the report tries to make out that it was coerced, and while referring to the Maharaja having signed and sent the Instrument of Accession to the Governor General, it omits any mention of its acceptance. Instead, in an effort to show that the accession was conditional, it tries to make out that Lord Mountbatten sent a letter to the Maharaja in reply to the Instrument, which had already been accepted as a separate and complete act. As already stated, the letter expressed the «wish» of the Government to take certain steps provided certain conditions were met, which has not happened to this day because of Pakistan's continued occupation of PoK. Clearly, it was this letter which was a conditional statement of the policy of a sovereign Government to a section of its people, and not the Instrument of Accession. It could not, therefore, create any international commitment or any conditionality. As for the internal policy commitment, if any, this was fully discharged in the area in the control of India by convening a Constituent Assembly and consequent actions.

UN Resolutions

31. The report cites UN Resolutions partially and selectively to tailor them to the thesis propounded by the Mission. It dwells mainly on certain Resolutions which had not been accepted either by India or Pakistan or by both. India accepted only UNCIP Resolutions of 13 August 1948 and 5 January 1949 which together provided for a Ceasefire, a Truce Agreement requiring Pakistan's withdrawal from the whole of J&K and a Plebiscite, in that order. The implementation of plebiscite was clearly contingent upon vacation of aggression by Pakistan. Pakistan made impossible the holding of a plebiscite because far from vacating aggression, it has blatantly gone on to consolidate its armed strength and hold in PoK.

32. The report's failure to focus on these two seminal Resolutions, and Pakistan's non-vacation of aggression together with its arbitrary assertion that India refused to allow a plebiscite in spite of its own observation that «it is very possible that plebiscite in the earlier years

would have produced a majority in favour of accession to India», is another glaring instance of bias. Similarly, while picking up from Sir Owen Dixon's reported suggestion for regional plebiscite to make its own dangerous and divisive recommendations, it totally ignores his clear observation that both the tribal invasion and subsequently the involvement of Pakistan forces in the State were a violation of International Law (Security Council official records, Fifth year, s/1791 and add 1, part 21) and his report to the Security Council advocating bilateralism for settlement of this matter rather than third party intervention. It also fails to take cognisance of the UN mediator, Gunnar Jarring's report of 29 April 1957 to the Security Council wherein he stated, «In dealing with the problem under discussion as extensively as I have during the period just ended, I could not fail to take note of the concern expressed in connection with the changing political, economic and strategic factors surrounding the whole of Kashmir question, together with the changing patterns of power relations in West and South Asia. The Council will, furthermore, be aware of the fact that implementation of international agreements of an ad hoc character, which has not been achieved fairly speedily, may become progressively more difficult because the situation with which they were to cope has tended to change». The report furthermore completely ignores the fact that all the UN Resolutions cited are under Chapter VI and are, therefore, recommendatory and not binding.

Shimla Agreement

33. The report also refers to the Shimla Agreement (page 22-23 and page 92 of Appendix I) as a document of great importance in relation to J&K. It acknowledges that it requires existing disputes between the countries to be settled bilaterally and therefore «to the exclusion of reference to third parties such as the UN except with the consent of both India and Pakistan»; thus also «effectively excluding any exercise of self-determination by the peoples of Jammu and Kashmir except to the extent that the exercise was agreed by both India and Pakistan». It also states that «the Agreement is binding on Pakistan and deprives it of *locus standi* to intervene in Jammu and Kashmir». However, it then seeks to create confusion through statements like the claim of India to de jure title to Jammu & Kashmir was not acknowledged, and that since the people of the State were not parties to the Agreement it could not override any rights they may have in international law. The implications of Pakistan not having any

locus standi in J&K has not only not been examined, but has been altogether ignored. It has also been ignored that the Agreement was signed between two sovereign Governments, where the Government of India represented all its people including J&K, and the Agreement was ratified by the Parliament which included representatives of J&K.

Constituent Assembly and Elections

34. The report has mentioned that «at the opening of the Constituent Assembly (in October, 1951), Sheikh Abdullah delivered a speech recommending accession to India.» What has not been stated are the reasons given by Sheikh Abdullah for this to the Assembly. These *inter-alia* included: the fact that the legality of the accession had not been questioned; with India there was no danger of revival of feudalism and autocracy, and the Indian Constitution repudiated the concept of a religious State; the argument of Pakistan being a Muslim State is only a screen to dupe the common man; from the modern political angle, religious affinities alone do not and should not determine political alliances of States; the likely fate of the one million non-Muslims in the State for whom there was no place in Pakistan; the lack of a Constitution in Pakistan, and the denial of the right of self-determination; and, reasons pertaining to the economy and markets, etc.

35. An attempt has, however, been made to dismiss the Constituent Assembly alleging that Sheikh Abdullah rigged the elections by ensuring that nominations of candidates of other parties except the National Conference were rejected. Besides, the unwillingness to acknowledge the overwhelming presence and popularity of the National Conference (even as the Mission has silently given the right to the Muslim Conference in PoK to actually enter into an agreement to virtually cede parts of the State to Pakistan), it has significantly not been stated who the other parties were whose candidates were allegedly not allowed to stand. The attempt to cast aspersions on the popular character of the Assembly hinges on the boycott of the elections by the Praja Parishad, which notably was a party that wanted complete integration of the State with India, without any special provisions. From all available evidence there were no controversies or complaints about the elections, except those pertaining to the Praja Parishad. The Report itself provides no

evidence, nor does it mention the comprehensive document brought out by the State Government to rebut the charges even of the Praja Parishad, including the reasons for rejection of nominations of certain candidates (a copy of this was made available to the author of the report). All this shows a wholly arbitrary determination tailored to the predetermined conclusions of the report as expressed on page 91 of Appendix I: «Had the Constituent Assembly been a properly democratic body, there would have been some force in the argument that the adoption of the Constitution» including a declaration that the State «is and shall be an integral part of the Union of India... constituted an exercise of the right of self-determination in favour of accession to India.»

36. At another level, the report seeks to dismiss the Constituent Assembly by referring to Security Council Resolutions of 30 March, 1951 and 24 January, 1957. We have already dealt with the actual position and effect of the various resolutions earlier. These two resolutions were also not accepted by India. Apart from this, even in the light of the practical shape that proceedings in the U.N. took, it would, at best, be naive to suggest that they operate to supercede all constitutional and political developments in the State from 1951 to this day.

37. The Report also dismisses virtually all the elections, that have been held in the State as rigged. Without joining issue on the facts, and without accepting the allegations, we would only like to ask what in practical terms did this mean? If the Government of India rigged the elections (by manipulation of nominations as alleged), why was it that the electorate participated in them with successively heavy turnouts; who was it that was prevented from coming into power; what did the genuinely aggrieved parties do to seek redress under the provisions of the States' own Representation of the People Act, 1957, which provided for remedies; and, what did the participation in the elections, and even winning of a few seats, by the most rabidly anti-Indian and pro-Pakistan group, the Jamat-e-Islami, from 1972 onwards (page 24) imply? These aspects have been ignored completely by the Mission.

38. The report then refers to the «Kashmir Accord» of 1975. It acknowledges that the Accord re-stated the fact of the finality of the accession of the State to India and once again set at rest any questions to the contrary. It also acknowledges that the Accord was followed by

the most free and fair elections in 1977 in which the party, whose leader signed the Accord, gained an outright victory, including nearly all the seats in the Kashmir Valley. It states that «There can be no doubt as of the genuineness of popular support for the Sheikh, notwithstanding his acceptance of the Accord.» Astoundingly, after all this, the report traverses the ground tangentially to claim that it would be difficult to accept the 1977 elections as a positive exercise of the right of self-determination because it was already an accomplished fact. This could only be described as an example of convoluted and circular reasoning.

39. The report makes almost a passing reference to the elections of 1983, which it calls reasonably fair», but without any attempt at reflection on the fact that the results of the 1977 elections were repeated, even though Sheikh Abdullah's towering presence was no longer there (he died in 1982); the «extremist Muslim Party in Kashmir and Hindu Parties in Jammu were overwhelmed»; and, that certain parties like the Peoples' Conference had actually opposed the Accord in its platform for the elections.

40. While dealing with the political developments after 1983, an attempt has been made to show how some of these viz. the imposition of Governor's Rule in 1986 (without regard to the fact that this possibility inhered in the Constitutional provisions since over ten years prior to the Accord) and the appointment of Dr. Jagmohan (called a passionate opponent of Article 370 -page 93 of Appendix I), as Governor, represented a shattering of autonomy and breach of the spirit of the Accord. There is reference also to alleged rigging and intimidation of the opposition Muslim United Front candidates in the 1987 elections. The whole exposition appears to be aimed to show how the developments of these 3-4 years created grounds for the development and building up of a legitimate insurgency (page 97 Appendix-I).

41. Reference has been made to rioting in 1983-1984 (that is immediately after the extremist parties had been trounced in the elections), the killing of an Indian Diplomat in U.K. in 1984, and communal rioting in 1986; a series of bomb explosions in August, 1988 (without mentioning that this followed immediately on the death of the then Pakistan President Gen. Zia-ul-Haq); emergence of new militant groups; the opening of a violent campaign by the JKLF; frequent explosions, demonstrations and strikes; and, the features of

violence described earlier in para 22. What is curious and surprising is that all the above activities have been virtually endorsed as legitimate as would be seen from the unqualified reproduction of the following observation (page 70) : «...the Policy of kidnapping and killing is openly espoused by the militant groups: 'During a freedom struggle against a ferocious and powerful enemy like India, it might occasionally become necessary to organise operations like kidnapping and execution of hostages, hijacking, etc. in order to achieve our objectives.» It has also been ignored that such acts have not been occasional but rampant and endemic.

The Uprising in Kashmir:

Origins and Attitudes

42. The report raises a crucial question here: «... the present disturbances which began in 1988 and by the spring of 1990 had become virtually a low level civil war, are far more serious than the occasional riots and demonstrations of earlier years. Why did this happen? And why did it not happen earlier?»

43. The second question, which is of crucial importance, has been virtually left unanswered in the report. This aspect of the whole issue has instead been obfuscated by a laboured and contorted description of events since the beginning. The fact is that the democratic/secular polity of India and the actual realisation, by the people of J&K of all those elements, which were enumerated in Sheikh Abdullah's address to the Constituent Assembly in 1951, constituted the reason for continued peace in the State till 1988, and the refusal of the people to fall for or cooperate with the continuous machinations of Pakistan prior to 1988.

44. The Mission seeks to answer the first question in a most casual and sweeping manner by asserting that India's refusal to allow plebiscite, and its policy of chipping away at the autonomy given to J&K by Article 370 of the Constitution led to increasing resentment

in Kashmir. On the important question of why and how this could have led to violence of massive proportions, rather than any efforts to find democratic accommodation within the constitutional framework, the report is almost silent, except for a few remarks of the type referred to in para 40. No attempt has been made also to find out what exactly might have been done by way of erosion of autonomy under Article 370, particularly after the Accord of 1975. The apparent justification sought to be provided for the so-called «low level civil war», therefore, just cannot be sustained even on the basis of the averments made in the report.

45. The report, however, does refer to the «Proxy War», in this context, but calls it «a catch phrase» and «a half truth». It tries to dismiss it by saying that the Pakistani involvement is reactive and opportunistic unlike 1965, when it was deliberate, and that the withdrawal of Pakistani support would certainly not bring the «conflict» to an end. These observations fly in the face of observations in the report that Pakistan is providing weapons, funds and training; that it is in Pakistan's interest to keep the «pot simmering»; that Pakistan has learnt the lesson of 1971 and would not like to provoke a full scale war (a clear admission of the «Proxy War»); that Afghan and Pakistani nationals are involved in the State; and, most tellingly the statement (page 39) that «it is unlikely that Pakistan would be willing to accept any compromise leaving India with any degree of sovereignty over the Valley of Kashmir.»

46. While it is not the case of the Government of India that there are no problems, or causes for dissatisfaction, and presently even alienation, among sections of the people in J&K, the contextual reality of Pakistan's scheme of sabotage and subversion, as brought out earlier, and the above-mentioned observations of the Mission itself (though they have been grossly underplayed in the report, e.g. recovery of over 15000 sophisticated weapons and apprehension/killing of nearly 300 foreign nationals/mercenaries) would show that Pakistan's so-called opportunistic involvement was in fact pre planned, and is now strategically aimed to try and ensure that there is no internal democratic solution to the problems that might be there. In fact, the repeated statements of Pakistani leaders in various fora in the very recent past which seek to deny, defy and even prevent any possibility of elections in the State are more than a clear admission of this. The question, therefore, arises who is stating the «half truth» ?

47. The report also refers to another alleged Indian «catch phrase» *viz.* «the fear of the gun». It calls this «an illusion» and asserts that «it seems wholly unrealistic to assume that hostility to India is the result of enforcement by terrorist guns.» An attempt has been made to show that the militants have massive public support, due to which they have been able to maintain their activities despite the advantages of security forces in terms of numbers, equipment, mobility and communication. It has been conveniently ignored that this is not a conventional war. The import of the Mission's own observations regarding killings by the militants of politicians, professionals, religious leaders, innocent civilians and officials of the police and local administration, as also of extortion to raise funds, has also been brushed under the carpet. All this is particularly relevant considering the daily threats which are now being given to the people, and particularly Government officials and politicians, as the public debate regarding the likelihood and possibility of elections grows and advances. The case of the Government of India is certainly not that hostility to India is the result of terrorist guns, but that they prevent people from articulating their real feelings thus also preventing legitimate and genuine public participation in the resolution of their real and perceived problems.

Human Rights and the Rule of Law: India.

48. The report says that while acceding to the ICCPR, India showed her reluctance to accept the totality of human rights standards by entering reservations on certain articles with reference to reasonable restriction in the provisions of the Indian Constitution. The report refers to criticisms by some members of the Human Rights Committee at the presentation of India's periodic report in 1991, mainly with reference to some of the National Laws, which allegedly constitute derogations which have not been declared, as such.

49. The ICCPR, itself provides for member-States to enter reservations or declarations, and a large number of countries have done so, besides others, such as Pakistan, who have not acceded at all. The observation regarding India's «reluctance», is therefore

completely uncalled for. It is also significant that India's reservations/declarations refer to the elaborate provisions in its own Constitution for the protection of Fundamental Human Rights. By the very fact of India's accession to ICCPR, the entire legal regime, which is already subject to judicial scrutiny and enforcement within the country, becomes fully transparent at the international level.

50. It is, therefore, utterly surprising and unacceptable that the report uses the deliberations and criticism in the Human Rights Committee, which we contest, to stretch the argument, in a most tenuous manner to conclude that «In substance, India has treated the situation of J&K as a state of emergency but has avoided classifying it as such in international terms, thereby obstructing the call for accountability and transparency inherent in the comments of the Human Rights Committee.»

National Laws/Policies and Practices

51. The specific Laws referred to in the report are the J&K Public Safety Act, 1978(PSA), the Terrorist and Disruptive Activities Prevention Act (TADA), the Armed Forces (Special Powers) Act, and certain provisions of the Constitution which have been incorrectly referred to as «Other Laws».

52. As regards the PSA, it has been alleged that it permits the authorities to detain a person without informing him of the grounds of detention, and enables them to shift detainees to other parts of the country (both these are alleged to have been provided by amendments to the Act in 1990). With reference to the latter, a hypothetical proposition has also been made that the local Judiciary could be circumvented by moving the accused outside the region. Firstly, no amendment has been made at any stage to exempt the authorities from the need to inform the detainees of the grounds of detention. As for shifting of detainees outside this State, this is an earlier provision from 1986 which was only renewed in 1990. The allegation regarding circumvention of the Judiciary is completely hypothetical, and is also not borne out from the details of the specific incident cited (pages 48-49) to try and substantiate this imputation. The further allegation that the detainee in question was not released despite Court orders is also untrue.

53. As regards TADA, we would not like to go into a detailed explanation of the criticism mentioned in the report, due to constraints of space. We would only like to say here that TADA is a temporary enactment and subject to review by Parliament every two years; the Supreme Court of India has upheld the Constitutional validity of the Act with the exception of one section which was struck down; and there are inbuilt provisions for judicial safeguards and review within the Act. Committees have also been set up, on the directions of the Supreme Court, at the level of both the Central and the State Governments to review all cases which are registered under the Act. What is significant in the present context is the fact, admitted in the report, that out of 13581 bail applications moved nearly 10,000 have been granted. This would show that judicial relief is easily and liberally available and applied, even in J&K.

54. The report also alleges that the broad definition of 'Disruptive Activity' under the Act, is a blatant contravention of the Right to Freedom of Speech, together with the assertion that «Advocacy of secession is a legitimate political activity.» Questioning or disrupting the sovereignty and territorial integrity of the country and calling for secession is tantamount to inciting a revolt against the State and can hardly be called legitimate political activity, and provisions of the law by which it is made an offence cannot be said to contravene the Right to Freedom of Expression. We, therefore, reject this assertion completely.

55. As regards the Armed Forces (Special Powers) Act, the main allegations made are that it has been in effect for 33 years, that it provides immunity from prosecution, and, that it enables «military suppression» of «legitimate political activity» since apart from terrorist activities an area could be also declared 'disturbed' for prevention of activities questioning the sovereignty and integrity of the country or bringing about secession. The first allegation is completely incorrect. The Act is/has been enacted at different times for different areas, and even when on the Statute Book, comes into force only after the area may be declared «a disturbed area» due to conditions there at any given time. In J&K the Legislation was enacted in 1990. As regards the nature of activities referred above, the position, as stated with reference to TADA earlier is reiterated. Further, it may be mentioned that, in practical terms, if such activities are organised on a scale sufficient to warrant the declaration of an area as a «disturbed area», they are inevitably accompanied by acts of

violence, sabotage and terrorism. The observation in the report is thus largely theoretical. In any case, as mentioned in the report itself, use of the Armed Forces under the Act is in «aid to the civil power» and not under any Martial Law regime; the Act only makes the normal police powers exercisable by members of the Armed Forces, within the same laid down rules and procedure. Hence the question of «military suppression» does not arise. Notwithstanding all this, the very fact that the Mission was able to meet people who openly expressed secessionist views, shows that there is no suppression at all. As for the allegation that the Act provides immunity, it may be stated that no such inference flows from the relevant provisions, as mentioned in the report. The requirement of obtaining sanction for prosecution from the Government is in line with the principle of protection of public servants against malicious and vexatious litigation for acts done in the course of duty, as enshrined in Section 197 of the Criminal Procedure Code, which has never been called in question. The same principle underlies similar provisions in the Acts mentioned in the report. They provide protection, and not immunity, and invocation of the provision in specific cases if contested, is not beyond judicial scrutiny.

56. The report makes a most startling observation (page 43) that «When it was promulgated, the Indian Constitution recognised from the outset the special position of J&K - that entity was not seen as an integral part of India but was vested with a degree of autonomy», with the powers of the Union Government being confined by Article 370 to matters pertaining to Defence, External Affairs and Communications. Apart from the completely unwarranted observation regarding the nature of the relationship between the Union of India and J&K, the Report has also omitted that Article 370 also provided for extension to the State of provisions of the Indian Constitution and laws pertaining to other subjects/matters, with the concurrence of the State Government. The observations are thus a deliberate distortion even of the Indian Constitutional provisions.

57. On page 47 it is stated that other laws «have been promulgated or revived recently with negative impact on human rights». These allegedly include provisions for prolonging the period of Presidential Rule in relation to J&K as opposed to reversion to an elected system; and, the passing in July 1992, of the J&K Legislature (Delegation of Powers) Bill, which transferred Parliamentary powers to deal with that State to the President of India. These are not «other laws» but

constitutional provisions and acts pertaining to a situation where imposition of President's Rule in a State becomes necessary, because the Government in that State cannot be run in accordance with the Constitution, and not to deprive people of a Constitutional/Democratic system of governance. In J&K such a situation arose due to large scale violence, in which *inter-alia* deliberate efforts were made to demolish and destroy every institution and pillar of democratic and Constitutional governance. As for the elections, as stated earlier, it is certain sections of the militant groups, who are trying by every means to thwart the Government's efforts to restore the democratic institutions in the State.

58. When a State is under President's Rule, the power to take care of its legislative requirements vests in Parliament. However, mainly due to the fact that Parliament is not continuously in session, it has been considered necessary to delegate this power to an appropriate Constitutional Authority viz. the President. However, provision exists for a Consultative Committee, comprising Members of both Houses of Parliament, to examine legislative proposals of the State Government as may be necessary. A further safeguard has been provided, in the case of J&K only, that any Act passed by the Parliament, or enacted by the President, on behalf of the State legislature, during President's Rule, will automatically lapse after one year of the end of President's Rule, unless it is ratified before that, with or without any amendments, by the State Legislative Assembly.

State Apparatus

59. The report says that the responsibility for law enforcement is primarily shared by the Army and the Para-Military personnel, and «the local police are relegated to menial roles.» This assertion is not only totally false but also highly provocative and even abusive. The local police has regularly continued to perform vital duties concerned with the security situation, including maintenance of law and order; guarding of and provision of security to vital installations against militant attacks; escort and mobile guard duties; intelligence functions and, progressively, direct involvement in actual anti-militant/terrorist operations.

60. Government has had to have recourse to use of para-military and other security forces since the local police have not traditionally

been equipped to deal with militancy, which has involved the use of highly sophisticated and lethal weaponry. Moreover, being local, individual members of the police force are naturally much more exposed to the militants' intimidation.

Constraints upon Freedom of Speech/Expression

61. Some instances have been cited about alleged restrictions imposed by the authorities on the freedom of speech (press) in 1990-91. Even as cited, they merely indicate certain measures which may have been taken four years ago, temporarily and sparingly and not as a sustained routine, within specific provisions of the law. Further, the report admits both the freedom of access and latitude of expression that is available to the media in J&K. Among other observations, to this effect, it states : «In an extraordinary reversal of the normal position in similar situations, it is the militants rather than the Government who are restricting freedom of the press».

62. Despite the above, however, the report contends that the media are under pressure from three sources - «the Government, the militant groups and Hindu Fundamentalists». The first is clearly self-contradictory, the import of the second has not been recognised; and, the third is wholly unsubstantiated and without any basis. Still more shocking is the conclusion of the Mission that «....India entered a reservation to the right to freedom of expression when she acceded to the ICCPR; such a right was made subject to reasonable restrictions. In view of the comments of the Human Rights Committee, it can be posited that several restrictions, particularly in the 1990-91 period, were not reasonable and were imposed too subjectively». This extraordinarily argued hypothesis is not only contrary to the thrust of the Mission's own observations, but is totally irrelevant and another sign of its apparently uncontrollable urge to condemn.

Constraints upon Freedom of Assembly and Political Activity

63. The main points made are that freedom of assembly and political activity have been curtailed by the various security related laws; curfews have taken their toll in preventing people from assembling; and the operations of various political groups were banned.

64. Nothing said about the security-related laws would automatically imply that freedom of assembly and political activity have been curtailed. Laws only prescribe the powers and procedures by which certain steps for maintenance of peace and public order can be ensured by the concerned authorities. The right to assemble, protest, and even demonstrate, is fully recognised under the Indian Law, but it is not an unbridled right, and it is the responsibility of the State to ensure that such freedom of association and demonstration, etc. does not lead to breach of peace and violence. It is a fact that curfew had to be frequently imposed, mainly in the town of Srinagar, particularly in the early phases of the ongoing violence. The aim was not to curtail the freedom of assembly, as such, but to maintain peace and check possibilities of such assemblies being used and provoked by the militants, to engineer violence and confrontation with the law enforcement agencies and possible harm to civilian life and property. There are innumerable examples where the latter actually happened. At any rate instances of imposition of curfew have dropped sharply in the past couple of years, and today it is a rarity rather than a routine as the report appears to suggest. As for the outlawing/banning of operations of various, so-called, political organisations, it may only be pointed out that this is not an arbitrary exercise of State authority but is done under the law, in the light of their activities, and is subject to judicial confirmation and review. In J&K, a few organisations nearly all of which are mentioned in the section of the report dealing with misconduct by militant groups, were declared unlawful in 1990. It is unbelievable that action taken under the law to ban the operations of groups engaged in organised terrorist activity is cited as evidence to support an assertion that freedom of assembly and political activity is being curbed.

65. In the context of political activity, some loaded and even astounding observations/insinuations have been made. It is stated that there are a number of active political parties in Kashmir, all of which are pro-militant, while the National Conference and other pro-

Government parties have little support, and in any event would not be allowed to operate by the militants.

66. The report does not throw any light on the nature of the support base, or following of the so-called pro-militant parties. The severe internal contradictions and open conflicts within various groups have also been largely ignored. On the other hand, the observations about the conventional parties almost show a wish and endorsement that they should not be able to function; and a simplistic assumption that they have no political support. The latter is despite the acknowledgement in the report of the killing of a large number of leaders and activists of the National Conference and other politicians including former MLAs. Clearly there was a need to ask why this was so if they had no support or political potential? Significantly all such parties have been referred to as pro-Government. Apparently, this means parties who do not want secession, which makes the attempt to dismiss them, and the tolerance for attempts of the militants to decimate them, much more serious.

Misconduct by Government

Forces and Personnel

67. The report lists some reports of Indian and international human rights organisations and alleged incidents, mostly without any details, cited in them. Based almost entirely on such citations, it has been concluded that there have been grave breaches of human rights by the Indian security forces in Kashmir. This is despite the observation in the report (page 2) that «Inevitably, much of the published information, particularly from local groups, is highly partisan and unreliable.»

68. It may be mentioned that the Government of India has regularly given detailed responses to the reports of a number of organisations, particularly the Amnesty International and Asia Watch/Human Rights Watch. Apart from giving detailed replies to

specific allegations brought out in them, it has been particularly pointed out that the main sources on which the reports have tended to rely are precisely the kind of reports which the Mission calls partisan and unreliable, and that it is of the utmost importance to try and recognise the not so fine line between genuine information and outright propaganda and disinformation while using such evidence. We have also expressed serious reservations about how all the details provided about specific allegations have been dealt with, considering also that the same allegations have been repeated in subsequent reports, almost 'en passant', without any reference to the information provided.

69. The above should show that merely citing reports of international human rights organisations, does not necessarily inject the conclusions with a greater degree of truth and accuracy, because they themselves could be victims of the propaganda and, motivated and unreliable information.

70. In the above background, as also due to space constraints, it is neither necessary nor feasible to give details about all the incidents/allegations cited. The factual position regarding some of the specific allegations/incidents quoted in some detail in the report or repeated in the citations are, however, briefly given in the following paragraphs:

71. In the incident at Sopore on 6 January 1993, 42 persons were reportedly killed and a number of buildings destroyed in fire, in an action between militants and the security forces after the militants had attacked a security force unit killing one and injuring another personnel and taking away a LMG. A serving High Court Judge was appointed to conduct an inquiry and the Police investigation was taken up by the Central Bureau of Investigation. Unfortunately, due to threats by the militants there was no cooperation with the Judicial Inquiry or the Police investigation. However, based on a preliminary Inquiry conducted by the BSF authorities 10 persons, including the Commanding Officer, were placed under suspension and the concerned unit was moved out. The Staff Court Inquiry conducted since blamed 19 persons, including four supervisory officers, who will now face Court Martial proceedings.

72. In an incident at Lal Chowk, Srinagar, on 10 April 1993, the militants had set on fire a big building, a part of which had been just

vacated by a security forces picket. The militants then prevented fire tenders from coming in by resorting to firing in the area. There were a few civilian casualties and a number of buildings were burnt in this incident. In an enquiry by the Divisional Commissioner, no culpability on the part of any specific security forces personnel could be established. The police case registered in the matter also came to a similar conclusion.

73. The report deals at some length with alleged mass rape at the village of Kunan Pashpora on 23 February 1991, and states that no adequate official enquiry was held. It refers to an inquiry by a Committee of the Press Council of India, led by the distinguished Journalist B.G. Verghese, which concluded that the incident was a hoax set up to frame the army. The ICJ Mission interviewed Mr. Verghese and were satisfied that he is an honourable man who would not have announced a conclusion which he did not believe to be true. However, thereafter, it says that the Press Council report has been widely criticised and concluded that, while mass rape at Kunan Poshpora may not have been proved beyond doubt but there are very substantial grounds for believing that it took place.

74. The remark about the wide criticism of the report, appears to be based entirely on a single article by one Mr. B.M. Sinha. In his criticism of the report of the Verghese Committee about the incident, Mr. Sinha has, *inter alia*, cited certain observations and recommendations of the Divisional Commissioner, Mr. Wajahat Habibullah, who also inquired into the allegation, to try and show that even he could not reject the rape charge. Actually Mr Habibullah, had concluded that:

«while the veracity of the complaint is thus highly doubtful, it shall need to be determined why such a complaint was made at all. It is possible that the people of the village had acted under militant pressure and that the long delay in making the report was a result of their not being able to withstand this. That elements wishing to discredit the Army as brutal, the civilian administration as ineffective and the Government of India as uncaring have orchestrated a campaign on the issue, is also evident. This came in the face of growing goodwill for the Army among the public and improved civil-military liaison».

75. The police investigation, by the Superintendent of Police of the district, himself, also concluded that the case could not be substantiated and suffered from serious deficiencies, inherent defects and legal flaws. The position as brought out in these three separate inquiries/investigations had been brought out in our responses to Asia Watch and Amnesty International, etc., to which apparently the author did have access. His conclusions, therefore, show a certain pre-disposition.

76. Quoting the Report of FIDH, the case of the detention of Mian Abdul Qayoom, the President of the State Bar Association has also been dealt with at some length. We have, in our earlier referred replies, given the antecedents and activities of the so-called Bar Association and how a section of it headed by the President has openly associated with certain militant organisations and has consistently indulged in intimidation of the bar and the bench alike. Mian Abdul Qayoom is associated with the Jamat-e-Islami, which is the front organisation for the militant outfit Hizb-ul-Mujahideen. His activities were found to be prejudicial to the security of the State, and he was detained under an order dated 23.2.1991 when the organisation stood outlawed. However, the detention order was quashed by the High Court and he was released.

77. An Asia Watch/Physicians for Human Rights report has been cited to make sweeping allegations of harassment, assault and even detention of medical personnel and prevention of transportation and treatment of injured persons. The Government, in its detailed comments, on this report had, while mentioning that some elements had been subverted, pointed out how doctors and medical personnel had been terrorised and even killed by the militants in a bid to obtain coerced cooperation in their activities. Several illustrations of the use of hospital premises and ambulances in acts of abduction and killing of medical personnel and others, and attacks on security forces, had been cited, along with details of searches conducted in certain hospitals leading to large recoveries of weapons, etc. Details regarding specific allegations had also been provided. Unfortunately, all this has been glossed over and, in fact, the Government's comments have been distorted and selectively quoted to try and demonstrate pervasive support for and involvement of medical staff in the so-called «insurgency». Elsewhere in the report it has been alleged that health services have been affected by raids resulting in depletion of health personnel, particularly in rural areas. We

completely reject this; the so-called raids are an extremely infrequent phenomenon based on specific information. Depletion of personnel has taken place, not as alleged, but on account of the exodus of the minority community which had many health professionals. However, the Government has taken steps to fill the vital gaps in health infrastructure caused by the terrorist violence, including substantial augmentation of ambulatory services, filling up vacancies, reactivation of the Red Cross Societies and involvement of NGOs to ensure the normal functioning and provision of health services to the people. This is in addition to widely availed medical services provided by the security forces themselves.

Extra-Judicial Executions

78. It has been stated that the Mission has no doubt that such killings (custodial deaths) have occurred on a significant scale, while acknowledging that it is far more difficult to estimate numbers. Allegations of custodial deaths by their very nature, could be extremely difficult to establish or otherwise. This is particularly so in the context of security operations involving frequent armed encounters between militants and the security forces. It may also be mentioned here that, as wanton orchestrated propaganda and disinformation about alleged massive human rights excesses, in the form of so-called 'genocide', large scale burning and looting of property, the use of rape as a weapon of war, etc. has got progressively exposed, and militants have come under increasing pressure quite substantially due to the flow of better information from the people, the propaganda plank has shifted essentially to alleged custodial deaths (simultaneously, the same allegations pertaining to the past years, mainly 1990-92, continue to be reproduced to create a dramatic effect and condemn the Government). In the majority of cases the allegations relate to armed militants. It may be pointed out that out of 78 alleged incidents mentioned in the latest report of Human Rights Watch/Asia mentioned earlier, 58 instances in respect of which details were provided related to alleged custodial deaths. In as many as 33 instances the concerned persons were terrorists who died in the course of actual operations, and arms and equipments were also recovered; in 9 cases no such incidents had occurred or on inquiry were not substantiated; in 4 cases death had occurred due to illness; in 2 cases innocent civilians had died in crossfire and *ex-gratia* relief of Rs. 100000 was given to their next of kin; one person had been arrested and was later released on bail on orders of the Court;

and, in 6 instances cases had been registered by the Police and were under investigation.

Killings of Non-Combatants

79. The report says that many hundreds of those killed each year are non-combatants. The very use of this terminology, as distinguished for example from the simple term «civilian», creates a deep suspicion that the Mission would like to see the militant/terrorist groups as legitimate combatants/belligerents (elsewhere it tries to invest them with the status of being political parties). It is stated that «Some of these are simply people in the wrong place at the wrong time. A high proportion of the killings are, however, due to misbehaviour and indiscipline by the security forces.» Such a sweeping generalisation is totally contrary to the facts and wholly unsubstantiated, though some unfortunate incidents have admittedly taken place. In the environment that has been created by the no-holds barred «proxy» war, without any rules, which is being waged by another country in J&K, it will be foolhardy to say that incidents of the type mentioned above cannot occur. Indeed there are examples of such occurrences from all over the world. The important point is that the Government has acknowledged such instances, and far from brushing them under the carpet, has initiated inquiries and proceedings against those personnel who may have been found guilty of any transgression, notwithstanding that there may have been grave provocations even in such instances, including attacks on and killing of security force personnel. Such instances have remained exceptions and aberrations, and not the rule.

Torture

80. The report has almost taken as the gospel truth the observations made in an Amnesty International report which was publicly challenged and rebutted by the Government of India, to conclude that «Torture is virtually a matter of routine use in interrogation». An unnamed non-Governmental source has also been quoted to say that most detainees taken into custody by security forces are tortured to underline the «pervasiveness of the problem.» We would like to reproduce what Dr. Kazi Masarat, who has been mentioned in the Amnesty Report in this regard had to say in the matter in a letter to State Government: «I have been never

interviewed by Amnesty International regarding atrocities on people of Kashmir. I think this whole matter is fallacious, arbitrary, unfair and based on unreasonableness.» He called this episode as having been based on «misinformation, misrepresentation and impersonation». Though Amnesty did not mention any direct contacts with Dr.Masarat, his response is nevertheless instructive. Significantly, while referring to an observation in the same report of Amnesty International, that «rape is practised as a part of a systematic attempt to humiliate and intimidate the local population «the Mission says that «this is not borne out by the evidence». All this points to the need for caution in simply citing reports and drawing sweeping conclusions.

Disappearances

81. The report mentions that these occur sporadically, and mostly do not involve killing but arise because a detainee has been held *incommunicado* or moved out of the State without notice. On the other hand it refers to a 1992 report of the UN Working Group on Enforced and Involuntary Disappearances which says that numerous persons allegedly disappeared after shoot-outs with security forces and mentions an alleged incident in Phazpora, Kashmir in this context.

82. According to inquiries, the above mentioned incident involved an encounter with the militants after an army column had been ambushed. In this 12 militants were killed, while a large number escaped; 4 army personnel and a «spotter» or informer accompanying them were injured (the latter succumbed to his injuries later); and, several weapons were recovered. The same day after the operation, the army conducted a thorough search of the area, alongwith around 30 villagers of Pazipora, in which the above 12 bodies were recovered and handed over to the Police. Later it was alleged that 12 more bodies had been found. These were neither handed over to the police, nor was any post mortem done, and they were said to have been quietly buried, thus raising serious questions about the story. Clearly no issue of disappearance appears to have been involved.

83. A significant aspect of this incident also, was that allegations of rape were raised after senior officers, including the Divisional Commissioner, had already visited the site personally the next day. As

in the case of Kunan Poshpara the numbers varied, and according to one inquiry report a doctor, who said she had examined 5 women after about a week of the incident, stated that they «were all definitely victims of rape», but that she herself was yet to prepare the reports till several days after the examination. The Divisional Commissioner stated that during his visit to the village no one raised the issue of any rape. It would be instructive here to read excerpts of the report of Mufti Baha-ud-Din Farooqi, former Chief Justice of the State High Court, and Chairman of the J&K People's Basic Rights (Protection) Committee in 'Kashmir Aflame' Vol. II, which is mentioned with commendation regarding reliability on page 54 of the report. The excerpt, as quoted in the report of the Press Council of India says: «The jawans (soldiers) were seen carrying bottles of liquor in pockets and guns in hands.. 20 to 30 women were lodged in a spacious house ... the jawans pounced on them like vultures 10/15 robust, attractive and healthy women (were) isolated between the ages of 7 years and 50 years. (emphasis added).... One group of lusty soldiers tore their clothes to shreds and rendered them nude. A bonfire was made of their garments ...and (they) were raped one by one ...after crying slogans of «Jai Hind'....» The quality and likely veracity or reliability of the report can be left to be judged without saying anything more.

84. As for *incommunicado* detention, since no specific examples are given, no specific comments can be offered. In practice every effort is made to ensure that the relatives of persons detained are informed. District level committees have also been set up to look into and screen all cases of apprehensions, and are also accessible to the families of detainees. A few months ago, the State Government has also supplied a complete list of detainees to the National Human Rights Commission as desired by them.

85. The report also makes some references to allegations of rape, assaults, destruction of property and constraints upon family life. It is not considered necessary to give any separate comments on these, because they have already been dealt with earlier, except to point out the wholly arbitrary assertions made in the context of the last aspect above, that there is a state of emergency in Kashmir, and it can be surmised that there can be no normalcy until the root causes of the «Kashmir problem» are dealt with. The clear attempt to carry politics on the back of human rights is unfortunate.

Misconduct by Militant Groups

86. The report on page 3 says: «Legal purists may argue that human rights are basically rights of individuals against oppression by the State, and that, since the militants in Kashmir are not the State, they may be guilty of crimes but cannot be guilty of abuses of human rights. However, in the interests of balance and fairness, the ICJ Mission felt that it was impossible to exclude criticism of the actions of militants from the report.» This is a most extraordinary statement. On the one hand it implicitly shows agreement with the basic proposition stated above, notwithstanding the explicit declaration of the World Conference on Human Rights and resolutions of the UN Commission on Human Rights and the UN General Assembly (unless of course the ICJ Mission believes that there is nothing of terrorism in the acts of the 'militants' described in their own report); on the other, the statement regarding «balance and fairness» means, by the most liberal interpretation, that the Mission equates the «terrorists» with the «State». A report, reeking of bias could as well have done without this Chapter if the sole intent was to show fairness and balance, rather than to demonstrate how the so-called «Misconduct of Militant Groups» impinges on the human rights situation and what this could mean with reference to the responsibility of the State to curb such activities as indicated in the Declaration/resolutions referred to above. The attitude and approach of the Mission becomes even more explicit from the following illustrations.

87. After saying (page 30) that the «killing of Pandits (minority Hindu community) coupled with threats which were published in militant-controlled newspapers is more than sufficient to account for the panic and flight of the Pandits», the report goes on to say (page 46) that: «there can be no doubt that the flight was welcomed by militants who saw the Hindus as potential supporters of the security forces». Thus an acknowledgement of religious cleansing has been converted into a passive factor of convenience and advantage to the perpetrators.

88. On page 70, the report refers to the kidnapping of two British tourists «in the summer of 1994», by a «minor militant group». It is significant that it was not a «minor» but a major, predominantly mercenary group, based in Pakistan, the Harkat-ul-Ansar, which was responsible for this and later in the year, for kidnapping of 4 foreign nationals in Delhi. On both occasions the release of three Pakistani

nationals of this group was demanded. It is also significant that mention of this group has been omitted in the paragraph pertaining to the structure of the militant groups.

89. While talking of the large scale destruction of infrastructure and property by the militants, the report slips in the observation that: «These figures may include cases... where security forces attributed to militants, fires started by themselves...»

90. As the last illustrative example, the following observations would merit particular attention: «Militant groups are not known for being tolerant towards politicians who diverge from their views. Several, as mentioned above, have been murdered ... Even though it is almost certain that no party supporting an accommodation with India would now win significant support in Kashmir, the militants are not prepared to tolerate the existence of any party whose views they disagree with».

91. In the face of the above, the Government of India is left with no other option but to ask the question: «are the jurists the advocates for the 'militants'?».

Azad Kashmir and the Northern Areas

92. The title, as well, as contents of this Chapter, are misleading and betray the bias of the report. The assertion that «Azad Kashmir arose from the division of the Dogra principality of J&K into three sections in 1947-1949: J&K in the Indian Union; the Northern Areas (Gilgit and Baltistan) under Pakistan Administration; and Azad Kashmir», (page 75) overlooks Pakistan's illegal occupation, through aggression, of a part of J&K, and the subsequent fraudulent break up of this area to bring the Northern Areas (which by admission in the report were part of J&K till 1949) under direct administrative control from Islamabad. By doing this, Pakistan changed the territorial status of the area unilaterally and in blatant violation of the UN Resolutions.

93. The inherent bias in the report also accounts for it finding as 'startling' the Azad Kashmir High Court judgement of March 1993 which, *inter alia*, asserted that the Northern Areas were a part of J&K, that its annexation by Pakistan was violative of the UN Resolutions, and of the right of self-determination of the people of area, and that the Government of Azad Kashmir should secure the administration of the Northern Areas.

94. The report notes that the Constitution of Pakistan provides that : «When (emphasis added) the people of the State of J&K decide to accede to Pakistan, the relationship between Pakistan and that State shall be determined in accordance with the wishes of the people of that State». But while doing so, it merely calls it an ambivalent reflection on the issue of self-determination, rather than forthrightly condemning it as pre-determination.

95. While, on the one hand, recognising that the so-called Azad Kashmir does not enjoy any democracy and that in de facto terms it is governed directly from Islamabad, the report, as a further evidence of bias, attempts to soften this by stating that in theory «the relationship between Pakistan and Azad Kashmir is.....similar to that of British India and the State of J&K before independence». Accordingly, instead of dealing with the implications of its own observations on the ground realities in the so-called Azad Kashmir, which show how Pakistan has continued to consolidate its power and to deny democracy, the report goes out of its way to try and project that Pakistan has maintained a status quo there in keeping with the position in 1947.

96. The report also states that «after the Shimla Agreement of 1972, Pakistan began to administer Azad Kashmir more closely and much development aid has been poured into the region by Pakistan.» Two aspects of this merit attention. The question arises why Pakistan began to administer the area more closely after the Shimla Agreement? This appears to be a clear suggestion that Pakistan believed the Shimla Agreement as leading to a territorial settlement with India on the issue of J&K, notwithstanding the fact that they have since tried to renege from any obligations under the Shimla Agreement. At a different level, the observation again shows how the direct and close control of the Pakistan Government over the area of the so-called Azad Kashmir, rather than being criticised in the context of the major concern of the Mission regarding self-determination, has

almost benignly been shown merely in terms of flow of development assistance. It is also necessary to contrast this with the various observations made in the report in the context of the Indian State of J&K, while trying to deride every aspect of the political, constitutional and all other developments in that State. The bias of the author could not come out in a more telling manner.

97. The Report also notes disturbing restrictions in the so-called Azad Kashmir Constitution regarding the protection of fundamental rights, including preventive detention without disclosure of grounds or a right to be brought before the Magistrate. More importantly, it notes that under the Constitution «No person or political party shall be permitted to propagate against or take part in activities prejudicial or detrimental to the ideology of the State's accession to Pakistan». Also, freedom of speech may be restricted in the interests of «friendly relations with Pakistan». The Oath of Office of a Member of the Legislative Assembly requires the Member to swear loyalty to the cause of accession of the State of J&K to Pakistan.

98. While calling the above restrictions wholly unacceptable, and talking about election rules hampering opposition parties, and the election held in 1991 having suffered from violence and intimidation, the report is in substantive terms silent on their constitutional import. It refrains from acknowledging that for Pakistan so-called «self-determination» for J&K means «pre-determination» that it has to accede to Pakistan. Instead, it explains without demur that «there is no freedom to advocate that Kashmir should become independent and that Jammu should be omitted from a plebiscite» (significantly the expression «Kashmir» has been defined on page I of the report to mean «the Valley of Kashmir» in the Indian State of J&K.). The only implication of this convoluted logic is that the Mission believes that the Constitution of the so-called Azad Kashmir, is not only in order so far as PoK is concerned, but also extends to the Indian State of J&K!!

99. With reference to the Northern Areas the report admits «the complete absence of democracy and constitutional rights» and then goes on to say ,»that the most natural solution - the incorporation of the Northern Areas into Pakistan..... has been rejected». It is stated that this is mainly because Pakistan fears that incorporation of the Northern Areas could be seen as a counterpart of India's incorporation of J&K into the Indian Union and would weaken the

claim that the former princely State should vote in a Plebiscite as a single unit». The fact is that in order to maintain the fig leaf that Pakistan did not do anything by way of aggression or in violation of the UN Resolutions, an apparently lesser evil has been perpetrated by way of denying it any status at all and keeping it virtually as a «non-self-governing territory» in the non-legalistic, but fullest sense of the term. The virtual endorsement of this situation by the Mission is compounded by the attempt made in the report to place Pakistan's annexation of Northern Areas at par with accession of the State of J&K to the Indian Union and to propound that the area should now be formally incorporated into Pakistan. The Mission seeks to justify this by saying that the majority in the Northern Areas is Shia, while the majority in so-called Azad Kashmir is Sunni, and sectarian differences would create practical problems if the Northern Areas were to revert back to Azad Kashmir. This logic is difficult to comprehend because, not only is the area of the so-called Azad Kashmir Sunni dominated, but so is Pakistan itself. Further, it clearly shows that the Mission in its utterly and dangerously divisive view of self-determination (in this case pre-determination by the Mission), would not like to confine itself merely to religion, but go further down to religious sects.

Conclusions and Recommendations

100. It is not feasible to repeat the conclusions and recommendations of the Mission or offer detailed parawise comments. We will, therefore, like to make some general observations on the same.

101. The report equates the militants with the Government while urging both to abide by international standards, and end abuses. The sheer scale and dimension of the activities of the militants, and its impact both on the human rights situation, and the environment in which the police and security forces have to deal with violence, have been almost wholly ignored. This is a significant omission in terms of any attempt at objective or even «balanced» understanding of the

situation. While appreciating the consciousness and anxiety of the Government regarding human rights, and also some of the steps taken by it, the report indulges in sweeping generalisations some of which even contradict its own observations like acknowledgement of improved «procedures for handling of local inhabitants who become caught up in search operations». We have already dealt with various observations and criticisms in the relevant sections, and would like to emphatically reiterate that sweeping conclusions about alleged pervasive abuses and malpractices are quite unwarranted. Concern for the protection of fundamental human rights lies at the core of India's open, secular and democratic polity, which has elaborate mechanisms for human rights protection, and a political system that encourages public debate and transparency. Above all, the Government is acutely aware that in Kashmir, it is dealing with its own citizens. Accordingly, notwithstanding that what it faces is an internalised external aggression posing grave security problems (a fact which the Mission has refused to recognise or condemn), it has exercised the utmost restraint; and has not hesitated to punish transgressions by security force personnel. So far nearly 225 members of the security forces have been proceeded against. Punishments include imprisonment up to 12 years dismissal from service, and various forms of departmental action including suspensions/arrests pending inquiry in a number of cases.

102. In addition, constant efforts are being made to upgrade the human rights situation apart from the measures already specified in the report. Human rights Cells have been set up both the Central Government and State Governments to continuously monitor the scene and contrary to the suggestion in the report, considerable emphasis is being placed on human rights education in cooperation with the ICRC. The ICRC has already visited J&K and contrary to what is stated in the report, no restrictions were placed on their movement. Indeed they were most appreciative of the cooperation extended to them. Further dialogue with ICRC continues . As also observed in the report, J&K was never closed to foreigners and transparency has been further extended. In 1994 over 8000 foreigners including 119 foreign journalists, 67 diplomats, 13 parliamentarians and others concerned with human rights, visited the State. ICJ was the first international NGO, purportedly concerned with human rights, which was invited to visit the state. The tenor of the Mission's reporting as brought out in these comments could in fact lead to a setback, rather than help, to promote still greater transparency. However, the Government of India considers this to be an aberration

and will not put brakes on its own policy on this account.

103. Having said the above, we are constrained to say that in the whole exercise human rights have ended up becoming hostage to a clearly political agenda. Conclusions have been determined first followed by attempts to find arguments and tailor facts. All this was used to expound dangerous «principles» and destructive political prescriptions, heavily biased in favour of one of the parties, and rooted in regressive, absolutist and divisive ideology. Evidently in a bid to contain the damage and maintain the context of the exercise, as it was meant to be, the ICJ has now appropriately put the separate section on «Self-Determination» in an appendix. However, this has not been able to purge the report of its bias and essentially political focus. The very first sentence of the Conclusions of the report says that it seeks to place the human rights situation in J&K in the context of «root causes as well as the call for remedies». To find the root causes the Mission has scanned history, and alternatively tried to freeze it or even re-write it to suit their version of the remedy. In the process, human rights have been made to assume a cosmetic function to help complete the picture and make the product look good. Since the ICJ itself has relegated the Mission's thesis on issues like «Self-Determination» in an appendix we don't need to say much about it here, except to observe that it makes out a proposal for artificial division of people, on the basis of religion and implicitly endorses the ideas of «ethnically pure» enclaves, «Bosnianization» and even «ethnic cleansing», which are the absolute reverse of any efforts to seek ways to promote the Rule of Law in an increasingly shrinking pluralistic global order, and could, perhaps, never be the objective of the ICJ itself.

Appendix I – Self-Determination

Since the ICJ Mission has expounded on the concept and doctrine of self-determination, in relation to J&K, the Government of India has obtained the independent opinion on this point of Prof. M.H. Mendelson, QC, a well-known expert on Public International

Law. Due to space constraints, only a summary of the same is enclosed in the annexure to our comments. Accordingly, we will not go into details of the theory and doctrine of «Self-determination», as selectively, superficially and casually dealt with in the report and will only make some brief comments.

To start with, a hypothetical question has been posed: did the people of J&K acquire a right of self-determination in 1947-1948? As already stated, under Indian Independence Act, 1947, the choice of accession lay with the Rulers of Princely States. To debate it in terms of a theory of self-determination, yet to evolve, as done in the report is at best academic speculation. Once the accession was complete with the acceptance of the Instrument of Accession by the Governor General, the second question posed in the report : whether the right of self-determination has been exercised or extinguished in the period after 1947, does not arise. Posing the question is simply calculated to re-open a settled question by creating ambiguity. The third question posed in the report, whether a fresh right of self-determination has arisen, is simply preaching secession, which indeed seems to be the pre conceived aim of the entire exercise. Reference has been made in the context of the third question to President's Rule in the State. It has not been considered that in States with a unitary structure, there is no concept of provincial Government. However, this does not create grounds for dubbing integral parts of territory of such State as «Non-Self Governing Territory», as, according to the Report, J&K could arguably become in the future on account of continued Central Rule. The description would be more apt for Pakistan Occupied Kashmir as already demonstrated. Thus, the framework for discussions chosen by the Mission is inherently flawed and misconceived.

Almost the sole argument that runs through the entire report is that, since the State of J&K has a Muslim majority, it should have become a part of Pakistan, notwithstanding what its people thought about this. This is compounded by the fact that the report actually tries to create divisions, purely on the basis of religion, even where there are none. For example, it artificially divides the Ladakh region into the districts of Leh (Buddhist majority) and Kargil (Muslim majority), and the western areas of the Jammu region from the rest of it (because of their Muslim majority) into artificial self-determination units, without any regard for the fact that there is no such demand from any of these areas. It advocates independence for the Kashmir

Valley on the ground that it is homogenous in culture, language and religion (page 96 of Appendix I). The latter would suggest that, in the view of the Mission, the minorities either do not exist there or have no right of existence or any say and stake in their status. The Mission thereby virtually endorses the blatant religious cleansing that has been perpetrated by the pro-Pakistan, fundamentalist, and terrorist groups in that area. While recommending the division of J&K solely on grounds of religion, in the name of self-determination, the ICJ Mission, not only tries to resurrect the pernicious «Two Nation Theory» but, ignores the fact that India has a larger Muslim population than Pakistan, and that its narrow recommendations, if taken seriously, could have the potential for a revisitation of the holocaust of communal violence that accompanied the partition of the Indian sub-continent, apart from being an anti-thesis to the whole concept of plural, multi-ethnic and multi-religious States. If attempts are made to promote a thesis favouring the break-up of such States on grounds of ethnicity or religion, there would be, as cautioned by the UN Secretary General in the Agenda for Peace «...No limit to fragmentation and peace, security and economic well-being for all would become even more difficult to achieve». Indeed this was reiterated conclusively and unambiguously in the Vienna Declaration adopted at the World Conference on Human Rights, 1993, which lays down in para 2, that the right of self-determination «shall not be construed as authorising or encouraging any action which would impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and the self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind».

The central thesis propounded in the report is that Muslim majority areas of the State of J&K, cannot and should not remain part of a secular State of J&K and must, therefore be first separated and then allowed to secede. This is despite the observation in the report (page 87 of Appendix I): «However, it is doubtful whether a right of secession exists at all and it is clearly not at the present time a generally accepted principle of international law». It is also instructive, in this context, to note the observations of Mr. Asbjorn Eide, the Expert of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his report presented at the 46th Session of the Sub-Commission in August, 1994 : «...The purpose of minority protection is not and should never be to create

privileges or to endanger the enjoyment of human rights, on an equal level, by members of the majority. This is not purely a theoretical issue. ...Members of the national majority sometimes constitute a numerical and vulnerable minority within those regions of a country where the national minority group is in a majority position..». He further states that the right to self-determinationmeans the aggregate collectivity of several ethnic and linguistic groups which comprise the aggregate population of the State to govern themselves. The right to self-determination in this context is not a question of achieving statehood for in these cases statehood already exists, nor does it represent any challenge to the territorial integrity of the State, but it expresses the right of the whole people to continue to govern itself through a representative Government, freely elected through participation by members of all groups in society.

Besides bringing out the inherent flaw in the thesis propounded by the Mission, this would also show that there is nothing unique or extraordinary in the fact of a Muslim majority State having chosen to stay in India and not joining Pakistan as demanded by the latter, on this sole criterion, to this day, a proposition now surprisingly endorsed by the ICJ Mission.

The report finally states in the conclusion to Appendix I: «Both India and Pakistan should recognise and respond to the call for self-determination for the people of J&K within its 1947 boundaries, inherent in the relevant United Nations resolutions. The United Nations should re-activate its role as a catalyst». This apparently even-handed and gratuitous advice to India and Pakistan is neither straight nor innocent. It contradicts the recommendation of the Mission that the State should be divided, on religious considerations, into separate «self-determination units», including one which should be straight away incorporated into Pakistan, all of which is totally against the relevant UN Resolution (notwithstanding the fact that the resolutions themselves are no longer relevant). It also hides the blatant attempts in the body of the report to legitimise Pakistan's actions in J&K in gross and blatant violation of international law, and, at the relevant time, of the UN Resolutions; and actually seeks to give it a status and *locus standi* in J&K. This is despite its own observation at another place in the report that : «The Shimla Agreement is clearly binding on Pakistan and deprives the Pakistan Government of *locus standi* to intervene in J&K».

Re: Self-Determination in Jammu and Kashmir
Summary of Opinion of Professor Maurice Mendelson, Q.C.

1. The International Commission of Jurists is shortly to publish *Human Rights in Kashmir: Report of a Mission*, Appendix 1 of which examines and makes recommendations with regard to self-determination in the Indian State of Jammu and Kashmir («JK»). I was shown the Report in draft and asked by the Government of India («GOI») for my independent opinion on the Appendix. I understand that GOI intend to publish my Opinion of 24 January 1995 in full; but they have asked me to summarize it for incorporation into a brief Government response which is to be annexed to the published Report.

2. I shall not comment as such on the application of the principle of self-determination to those parts of the former princely State of JK now under Pakistani control, as the main thrust of the Report concerns the Indian State of JK and detailed consideration would take us far beyond issues of self-determination. Nor am I asked to comment on allegations of other breaches of other human rights. I shall, however, allude to both topics so far as they are relevant to the question of self-determination. I understand that many of the Mission's assertions of historical fact and human rights violations are contested by GOI; however, for the purposes of my Opinion it was convenient to proceed on the basis of the Mission's account of the facts, though without prejudice to the question of its accuracy.

3. Self-determination as a *political* principle has a long history, but it is purely with the legal position that we are concerned here. The relevant discipline is public international law. (In this context it seems fair to point out that only one of the members of the Mission appears to be a specialist in this field.) What the Report asserts is that the inhabitants of JK have a positive right of self-determination, the exercise of which India is obliged to concede and facilitate, and that this includes the right to secede from India and become independent

or apparently even to join Pakistan - though this last possibility is glossed over. In my view, this is wrong in law. I cannot, in the space available, do more than outline my reasons; for more detail and for the authorities on which I rely, reference should be made to the complete Opinion.

Self-Determination in General

4. Before attempting to apply the principle of self-determination to the case of JK, it is necessary to have a correct understanding of it. The authorities are agreed that it is one of the most (perhaps the most) controversial and uncertain topics in international law in modern times. After a period of considerable indeterminacy, it is now accepted that self-determination is a legal right, but its lineaments remain uncertain. These uncertainties include the content of the right, the identity of the «people» who possess it, and the nature of the «self» in question. So far as concerns the content of the right, as a concept it can have both «internal» and «external» aspects. Internal aspects are said to include the right of a people to choose their own form of government, and the (more controversial) right to democracy. External aspects may include the (undisputed) right of sovereign equality of States, and the right to self-government, i.e. the right of a group subjects of a State to opt for independence, union with the «parent» State or another country, or some form of self-rule short of independence. This right to self-government is enjoyed by colonial peoples but, as we shall see, it is much more doubtful in other cases. The identity of the «people» who possess the right, and of the «self» which is supposed to exercise it, is also problematic and varies according to the substantive content of the right. In its internal aspect the bearer of the right seems to be the people of the whole State. So far as concerns the external aspect, inasmuch as this means sovereign equality it can only be the people of the State as a whole, acting through their government, who can enjoy the right. But in the case of the right to independence etc., it must logically mean a *fraction* of the inhabitants. On the other hand, it is clear that not every fraction possesses this right; most States today comprise more than one ethnic group, and if any such fraction had the right to secede, the international community as we know it would disintegrate. As we shall see, the system has set its face against this: it has accepted the right of colonies to external self-determination, but not other ethnic (or religious or linguistic) groups.

5. The Report fails in various ways to take proper account of the historic evolution of the principle. The legal consequences of an event or transaction have to be judged according to the law as it stood at the time the event or transaction took place. Specifically, if international law in 1947 did not impede the accession of JK to India, the fact that it might do so if the accession occurred today (which is anyway questionable) is irrelevant. Many things have happened in history which, if they occurred today, would be illegal: but States are understandably unwilling to throw everything back into the melting pot. This rule is well-established in the decisions of international courts and tribunals and the practice of States. There are qualifications to it, but they do not apply here.

6. External self-determination was not a right under general international law before the conclusion of the UN Charter in 1945. Articles 1(2) and 55 thereof refer to «equal rights and self-determination of peoples», but the language is vague and aspirational, and for a long time many doubted whether it imposed any concrete legal obligations. In any case, the phrase in question must refer at least in part, and perhaps exclusively, to the sovereign equality of States, which certainly does not involve any right of secession. Article 73 is also couched in somewhat imprecise and aspirational language; moreover, although it does not say so in terms, it seems that only the inhabitants of colonies (and trust territories) were thought to be entitled to the right of «self-government» it proclaims. It is noteworthy that, when the General Assembly called for reports under Art. 73(e), neither the Indian princely States or other countries of a comparable status were listed by the administering powers or the Assembly in 1946-1947. This practice continued even after the Assembly arrogated to itself the right to decide whether or not a territory was self-governing. The Universal Declaration of Human Rights of 1948 made no mention of self-determination of peoples, though Art. 21 does deal with what might today be described as internal self-determination. However, the General Assembly became increasingly active in the field of decolonization, and in 1960 passed two resolutions, nos. 1514 and 1541 (XV). Since General Assembly resolutions are not normally law-making, for some time doubts were expressed, particularly in Western quarters, as to the legal effect of these two instruments. But in any case, they are concerned essentially with colonies, and specifically with what have been called «salt-water colonies»: that is, overseas possessions and not adjacent peoples, such as the Soviet «Republics» geographically contiguous to Russia. (Normally - or even invariably - the majority of the inhabitants of a

colony would be of a different «race» from that of the colonisers.) Res. 1541 specifically states that «the authors of the Charter ... had in mind that [Art. 73] should be applicable to territories which were *then known to be of the colonial type*». Moreover, Res. 1514 expressly declares that «any attempt at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with ... the Charter». In 1966 the UN adopted the International Covenants on, respectively, Civil and Political Rights and Economic, Social and Cultural Rights. Although the language of their common Art. 1 may possibly include the right of internal self-determination, so far as external self-determination is concerned the context, background and (in general) the drafting history support the view that it was colonies (and trust territories) that were envisaged, not other peoples. This view is reinforced by Art. 27 of the Civil and Political Rights Covenant which, by guaranteeing minority rights, meets many or all legitimate demands of ethnic and religious groups within a state. In any case, India made a reservation to Art. 1, the effect of which is that, in any case, the provision does not confer a right of secession on peoples within the Republic such as JK, as the Report appears to recognize. In 1970 the General Assembly adopted the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (Res. 2625 (XXV)). Once again, so far as concerns external self-determination the target is plainly colonies (as well as similar cases like South Africa and Southern Rhodesia, where a white minority oppressed a black majority). And there is yet another strong statement that the principle does not justify the dismemberment in whole or part of independent states.

7. The right of colonial peoples (and those of mandated territories) to self-determination was affirmed by the International Court of Justice in the 1970s, and by the end of the 1980s even the colonial powers had accepted it. However, the international community as a whole has continued to affirm that the right of external self-determination (particularly secession) does not extend to component parts or groups within independent sovereign States. A *possible* exception exists where the State is carrying out extreme persecution of the inhabitants of a part of its territory (sometimes described as *carence de souveraineté*); but this exception is disputed. In any case the only (possible) precedent is that of Bangladesh, where the level of persecution was very extreme and amounted either to genocide or something very close to it. Other cases, such as Biafra, Northern Cyprus, and the Bosnian Serb and Croat entities, make it

clear that the international community and international law are strongly opposed to secession, except perhaps in the most extreme cases.

Application to JK

8. Before British suzerainty over the Princely States terminated in 1947, the inhabitants of these territories had no right of internal self-determination in relation to their princes, and it is extremely doubtful whether, *under the law as it existed at that time*, they had a right of external self-determination in relation to the UK, for the reasons explained. When, on 15 August, the rulers were freed of British suzerainty, nothing in international law prohibited them from choosing to unite with the newly-independent India or Pakistan, even without consulting the wishes of their subjects. Some 560 rulers exercised their option without their legal right to do so being questioned, either at the time or later. On 26 October the Maharaja of JK opted to join India. The Report makes much of the fact that the Governor-General of (independent) India, Lord Mountbatten, expressed the wish on 27 October that the wishes of the inhabitants be consulted after the invasion of JK had been terminated and law and order restored. There are reasons to doubt whether Lord Mountbatten intended, or had the legal power, to impose conditions on accession; but even if he did and had, (a) this would not bind India under international law, and (b) the invasion he referred to has still not been terminated. In short, under international law as it stood at the time, the accession was valid; and the inhabitants of JK had no right to be consulted. Accordingly, for them to have such a right now, as the Report claims, they would have had to have acquired it subsequently. I have shown that subsequent developments in international law did not confer a right of secession on a non-colonial people such as the inhabitants of the Indian State of JK. The one possible exception is *carence de souveraineté*; but the Report rightly admits that this is controversial and in any case concedes that, even on the basis of its own allegations of breaches of human rights in the State, a level of oppression justifying secession has not been reached. Accordingly, the only remaining possible source of a right of external self-determination is certain Security Council resolutions calling for a plebiscite, by which the Report sets great store. However, these resolutions were passed under Chapter VI, not VII, of the Charter and were therefore not binding on the parties. India and Pakistan both rejected Res. 47 (1948), and India Res. 51 (1951). Admittedly,

they both accepted certain resolutions of the UN Commission for India and Pakistan which envisaged a plebiscite. However, this was expressly conditioned on other stipulations being met, including the withdrawal of Pakistani troops and irregular forces. They were never met. In any case, acceptance of a plebiscite as a means of resolving a political and military conflict between two states does not amount to an acknowledgment that the people of the territory have a legal right to one. In the end, the Security Council and UNCIP reached an impasse, and in the Simla Agreement of 1972 the two Governments seem to have taken the matter out of the hands of the UN. I agree with the Report that an agreement between the two states «could not have deprived the people of JK of any rights of self-determination to which they were entitled at the time of the Agreement»; but since, for the reasons given, they did not have any such right at that time, the argument is of no avail.

9. The Report goes on to consider whether the inhabitants of JK subsequently lost their supposed right through its exercise or abandonment. Admittedly, there has been no plebiscite or referendum; but this has not always been required in cases of self-determination. The Report therefore considers whether, on the facts, the election of a Constituent Assembly and its adoption of a Constitution confirming that JK is part of India, and/or subsequent elections, amounted to a sufficient popular endorsement. It denies this partly on the grounds that, allegedly, certain elections were «rigged». But even the Report seems to admit that the election of 1977 was reasonably fair, and this resulted in a clear victory for Shaikh Abdullah. He was an extremely popular figure who had, only two years before, signed the Kashmir Accord reaffirming the place of JK as a constituent unit of India. The authors also draw an analogy with a presumption against the extinction of States. This is ill-conceived. But since, for the reasons I have given, the populace of JK did not in 1947 have a right in international law to decide whether or not to become part of India, and since they did not subsequently acquire one, it is unnecessary to consider this issue further, since the authors have based themselves on a false premise.

10. For similar reasons, the discussion of how the right should be exercised is strictly irrelevant. However, mention should perhaps be made of some remarkable and unjustified assumptions, conclusions and recommendations. If (contrary to my view) the people of JK have a right of external self-determination, this must be the whole

people, i.e. the inhabitants of the whole of the territory formerly under the Maharaja's sovereignty. This seems to be conceded, yet the Report goes on to focus almost exclusively on the part under Indian control, to the exclusion of that under Pakistani control. Almost the only observation regarding the latter in this context relates to Pakistani support for militants. The authors then compound this error with another. They go on to recommend that «The State of JK comprises a number of different units which should be allowed to exercise the right of self-determination separately», the reason proffered being ethnic and religious diversity. The fact that, in the Mission's view, not all units may wish to become independent or join Pakistan is not to the point; according to its reasoning they must have a right to do so. But in fact, there is no warrant in law for this type of fragmentation of the «people» and, as noted above, the international community and international law have firmly set their face against the «Bosnianization» that this might entail. In a Report purporting to expound the law, the policy preferences of the authors should perhaps have been left out; but even as a matter of legal policy these recommendations are questionable. (a) If implemented, they could (as is recognized) endanger international peace and security. (b) They could (the authors' protestations notwithstanding) create a precedent for demands to break up India and other multi-ethnic, multi-denominational states, with potentially disastrous consequences not only existing structures but also for fragile inter-communal peace. (c) Breaking up JK might, in the view of the members of the Mission, help solve some political and human rights problems there; but it is likely to create others. For within each fragment defined on ethnic or religious grounds, there may well be minorities whose aspirations may not be satisfied, and whose own human rights could be seriously endangered. (d) Using religion as the sole, or a major, criterion for defining a political unit is not self-evidently desirable. It is not necessarily a person's only or most important affiliation, and there are potential human right problems here, too. Furthermore, hatred of other groups, identified on the basis of their religion, has been one of the main causes of horrific bloodshed in the sub-continent and elsewhere. Accordingly, to single out religion as the basis of a polity is not necessarily a progressive step. These are dangers to which a Mission sent by the International Commission of Jurists, of all bodies, might perhaps have been more sensitive, even apart from its very questionable legal reasoning.

Professor Maurice Mendelson, Q.C.

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2 February 1995.

Appendix 3

Response of the Government of Pakistan

Dear Mr. Secretary General,

This is with reference to your letter No. 2/64/13/I dated December 20, 1994, conveying the Final Report of the mission of International Commission of Jurists to India and Pakistan to study the human rights situation in Kashmir.

It would be recalled that on receipt of the preliminary report my Government had expressed appreciation to ICJ for the in-depth study it undertook to diagnose the causes of the problem in Jammu and Kashmir. We had sincerely hoped that the final version of the report would not only project the true picture of continuing gross violations of human rights in the Indian held Kashmir but would also elucidate and examine the root causes of the Kashmir dispute and would thus help promote a just and peaceful solution to this long festering dispute. While the Government of Pakistan still appreciates the efforts of the members of the mission to study the problem, our genuine expectations remain unfulfilled.

The Government of Pakistan has carefully studied the final version of the report and compared it with the Preliminary Report of the mission which was received in April 1994. We have been dismayed to see that the mission not only delayed releasing the report but also decided to drastically change the contents of the original report prepared in April 1994 without paying a second visit to the area. The Final Report lacks the objectivity of its predecessor, thus legitimising fears that the Mission may have come under pressure to remove or modulate sections of the original report, critical of India's actions in Kashmir.

My Government is therefore constrained to give its detailed views on the contents of the Final Report. These are listed below:

One

In Chapter 1 page 2, the first para under sub-section «Methodology» states: «To its credit, the Indian Government has not tried to exclude foreign journalists from Kashmir except for the period of January to May 1990».

This assertion is not entirely substantiated by facts. Since 1990 India has deliberately created conditions which are not conducive for the news media to cover the events in Kashmir. Several journalists have been threatened and some have been physically beaten by Indian security forces, for example, during Hazratbal crisis. Moreover, the visual media, specially international television networks, have been virtually excluded from the Indian-held Kashmir.

Two

On page 19 under sub-section «Historical Background 1950-1965» the report states, «In October 1956 the Constituent Assembly adopted a constitution for Jammu and Kashmir which declared (contrary to the Security Council's resolution 91 of 1951) that the State «is and shall be an integral part of the Union of India».

While factually correct this paragraph does not mention the fact that Shaikh Abdullah had rejected the Constituent Assembly's declaration. (The mission's Preliminary Report of April 1994 contained this reference).

Three

On page 26 under sub-section «Historical Background 1965-1982» a paragraph which did not exist in the Preliminary Report states: «None of the parties or candidates in the 1977 election questioned the fact of accession to India».

Any statement purporting to establish even the remotest link between the so called election in IHK and the exercise of the Kashmiri right to self-determination is seriously flawed and invalid. The following factors would bear this out:

- (a) The elections in IHK have never been offered as a choice to the people of Jammu and Kashmir to decide whether they want to say in the Indian Union or accede to Pakistan.
- (b) These elections could not have been a substitute for the plebiscite pledged by both India and Pakistan before the international community under the UNCIP Resolution of 13 August 1945 and 5 January 1949 whereby the Kashmiris were assured the right of self-determination through a free and impartial plebiscite to decide whether to accede to India or to Pakistan.
- (c) The Security Council through its Resolutions 91 of 30 March, 1951 and 122 of 24 January, 1957 affirmed categorically that any action by the so-called Constituent Assembly convened in the Indian Occupied Jammu and Kashmir to determine the future of the territory would not constitute an expression of the will of the people of Jammu and Kashmir through free and impartial plebiscite under the United Nations auspices. The Security Council, in its Resolution adopted on January 24, 1957, also reaffirmed and reiterated its Resolution of March 30, 1951, which states that:-

«....the 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 principles» (enunciated by the Security Council Resolutions).

- (d) The massive and indigenous Kashmiri uprising against Indian occupation is a clear manifestation of the total rejection by the people of Kashmir of the *status-quo*. Hence the Indian claims that elections in IHK constitute a substitute to the plebiscite are rooted in fiction and devoid of any legal, political or moral validity.

- (e) The people of Indian Occupied Kashmir totally boycotted the general elections organised by India in November 1989. No more than 3% of the people participated in the elections. Moreover, the dissolution of the State Legislature, elected in 1987, on the grounds that it was a creation of rigged and manipulated elections falsifies India's own argument that these elections are equivalent to the exercise of the right to self-determination by the Kashmir people.
- (f) All the elections held so far in Indian Held Kashmir have been rigged and manipulated. Even the Indian media have confirmed these elections to be farcical and meaningless. It must be kept in mind in this regard that elections held under Indian occupation are neither an expression of the free will of the people of Kashmir nor are they a substitute to the free and impartial plebiscite to be conducted under the auspices of the United Nations. Such elections have no validity in the eye of international law.

Four

In Chapter 4 under the section «Indian and Kashmiri attitudes» (Pages 33 & 35) the Report makes a number of unwarranted allegations about Pakistan's involvement in the Kashmiri uprising. These are repeated in a new chapter titled «The Role of Pakistan» in Appendix-I.

These references are totally uncalled for and baseless. Many of these are after thoughts and did not appear in the original report. It is not understood as to how the ICJ Mission could have included these observations in the final report when on the basis of its visit it had not reached these conclusions in its original report. In any case the correct position is as follows:

- (a) The uprising in Occupied Jammu and Kashmir is an entirely indigenous movement. It is a struggle by the Kashmiri people for achieving self-determination.
- (b) The Government of Pakistan extends political, diplomatic and moral support to the struggle of the Kashmiri people for the exercise of their right to self determination. Despite

tremendous pressure from the people of Pakistan, the Government has not provided material assistance to the freedom-fighters.

- (c) Since 1990, Pakistan has repeatedly called for the stationing of international observers along both sides of the Line of Control and strengthening of UNMOGIP so that the allegations of military support to the Kashmiri freedom fighters could be verified. On October 3, 1994 Pakistan requested the UN Security Council President to raise the number of UNMOGIP Observers from 35 to 200 in order to ensure that no violation of Line of Control takes place.
- (d) The Line of Control dividing the two parts of Jammu and Kashmir is one of the most heavily militarized and patrolled areas in the world. India has stationed more than 600,000 troops and para-military forces in the Occupied Valley. It is impossible to send material across the Line of Control from Pakistan.

Five

The Section dealing with «Political Aims - Kashmir, India and Pakistan» as it existed in the Preliminary Report, has been extensively revised. Essentially the revision favours the Indian view that accession of Kashmir to Pakistan will result in India's disintegration. For example, at page 36, the Report states: «At times since 1947, there have been secessionist movements in the non-Hindi-speaking States of South India, in some parts of North-East India and, more recently, among some of the Sikhs of Punjab. There is a fear that concessions to Kashmir could lead to a revival of support for secession elsewhere.»

The argument that the separation of Kashmir from India would have a kind of a domino effect has no basis. To begin with, the movement for self-determination in Kashmir cannot be categorized as secessionist. Nor could a parallel be drawn between the movement in Kashmir and the separatist movements in different parts of India. The question in Kashmir is simply that of fulfilling a commitment made long ago by the Government of India to the Kashmiris as well as to the international community. The following points bring out the

disputed nature of Kashmir, the distinctiveness of this issue, and its international dimensions:

- (a) Since the beginning, Kashmir has been acknowledged as a disputed territory. There are international obligations agreed to by India about the future of the State of Jammu and Kashmir. The UN Security Council remains seized of the Kashmir issue which remains on the Council's agenda. Presence of United Nations' Observers Group in India and Pakistan (UNMOGIP) along the Line of Control as distinguished from an international border clearly indicates the disputed nature of Kashmir. In fact the Simla Agreement (1972) between Pakistan and India also acknowledges «a final settlement of Jammu and Kashmir» as one of the outstanding questions awaiting a settlement.
- (b) By allowing Kashmir to decide its own future India will be honouring its international commitments. In case the Kashmiris decide to accede to Pakistan, it will only mean determination of the status of a territory by its people in accordance with their wishes as had been promised to them. Since Kashmir has never been an integral part of India, its accession to Pakistan will not constitute secession from India.
- (c) India claims a non-existent constitutional and legal link with Kashmir. The hollowness of this claim is all too obvious. The Maharajah's accession to India was illegal since only the people of Jammu and Kashmir can decide on this question. Further the Security Council had vide its Resolution 122 (1957) declared that any action by the Constituent Assembly of Kashmir to determine the affiliation of that State would not constitute a disposition of the State in accordance with the principle of a plebiscite.
- (d) Pakistan strictly adheres to the principle of respect for the unity and territorial integrity of States. It does not seek the disintegration of the Indian Union. What we seek is a scrupulous discharge of international commitments and recourse to concrete methods and procedures for the settlement of an outstanding dispute.
- (e) India must eschew those policies which being contrary to the

principles of international conduct, not only weaken India's moral fibre but also act as a drain on its body politic. By holding on to a land which resents its occupation and by stifling the aspirations of a people whose affiliations lie elsewhere, India is draining its resources and in the process creating unwarranted tension in relations with Pakistan.

- (f) By arguing that Kashmir is its internal problem, India is in fact saying that the Security Council has no *locus standi* in the matter. There exists an international agreement regarding the disposition of the State of Jammu and Kashmir. This involves India, Pakistan (the other party to the agreement), Kashmir (the Party most affected by the agreement) and the Security Council (the organ under whose authority the agreement was concluded). Thus India's aforementioned claim betrays its disinclination to seek a settlement of the Kashmir dispute by peaceful means. What is at stake is the right of self-determination of the people of Jammu and Kashmir as pledged to them in the United Nations Resolutions.

Another paragraph under the Section «Political Aims - Kashmir, India and Pakistan» at page 37 states: «Keeping Kashmir in India may have led to a tragedy; letting Kashmir go, however, means a tragedy of greater magnitude - a possible Hindu-Muslim blood bath in North and East India». It is highly regrettable that the ICJ mission has made such an unfortunate linkage. The question of granting the right of self-determination to the Kashmiris is entirely separate from the obligations of the Indian Government to protect its minority citizens. The following points refute this utterly untenable claim:

- (a) The Indian Government's effort to give a communal colour to the Kashmir problem constitutes a deliberate distortion of facts aimed at deflecting world attention from the valiant struggle of the people of Kashmir against illegal Indian occupation and repression.
- (b) India's assertion that Kashmir's separation would endanger the life and security of Muslims in India is yet another ploy to blackmail the world community and to avoid honouring its commitment to a free and impartial plebiscite in Jammu and Kashmir. The assertion is patently untenable and highlights

malicious Indian intentions as both the question of the resolution of the Kashmir dispute and the security and protection of minorities in India are two distinctly separate issues.

- (c) Protection of the minorities in India is the responsibility of the Indian Government. No excuse can absolve the Indian Government of this moral and legal obligation.
- (d) India's secular credentials are threatened not by the Kashmiris but by the growing wave of Hindu chauvinism all over India. This has found expression in the form of increasing influence and powers of various Hindu revivalist organizations like Shiv Sena, Vishwa Hindu Parishad (VHP), Bajrang Dal and the RSS. The representation of Hindu chauvinist forces in the Indian Parliament has also increased considerably. Rise of Hindu militancy in India has led to the worst communal riots in recent years. If India does indeed believe in democracy and secularism then it must control religious frenzy and fundamentalism projected by entrenched and organized Hindu revivalist forces in India.
- (e) Despite all the Indian hue and cry about the myth of communal spill over from Kashmir into India and efforts on the part of Indian Government to communalize the situation in Kashmir, not a single case of communal violence involving looting or arson of non-muslim property has taken place in Kashmir. The Indian Government in its bid to communalize the Kashmir crisis is forcing Kashmiri Pandits to leave the valley. In certain cases free plots, cash and other facilities have been provided as incentives for leaving the valley. Even in such cases, as reported in the Indian press, the Pandits left their houses in the custody of their Muslim neighbours. This reflects the trust and confidence which the Hindus still have in their Muslim neighbours.
- (f) Despite the Indian Government's claim of anti-minority activities of the militants, no Sikh or Christian has migrated from the valley. The struggle in the valley is against Indian occupation and not against Hindus. Despite provocations by the Indian authorities, the Kashmiris have successfully prevented the communalization of their struggle.

Six

On page 63 under Chapter 6, the Report deals with the question of rape. The Preliminary Report described the practice of rape in Kashmir as an instrument to humiliate the whole community. In the Final Report this aspect is missing. The general thrust of the section on rape has been considerably watered down. The same applies to the section on Destruction of Property and Theft which has been abbreviated.

The factual position is the one reported by the impartial international human rights organizations like the Amnesty International, Asia Watch, Physicians for Human Rights, International Federation of Human Rights etc. Some of the excerpts from these reports are reproduced as under:-

- (a) «It is impossible to gauge the true extent of torture in Jammu and Kashmir. In July 1991 unofficial sources estimated that 15,000 people were being detained without trial in the state. Many of those detained since late 1989 have alleged after release that they were tortured or ill-treated in custody. A major cause of the persistence of widespread torture in India is the failure or unwillingness of leading government officials and representatives to acknowledge that torture even exists, let alone that it needs to be vigorously tackled. The government maintains this position despite the fact that judges, journalists, expert commentators, police officers themselves, and official commissions have attested to its widespread occurrence. (Report -Amnesty International, *Torture, Rape & Deaths in Custody*, March 1992).
- (b) «Rape and ill-treatment of women by the security forces occurs throughout India. Reports of this form of torture are especially frequent in Jammu and Kashmir but meet with little or no official response to halt its occurrence. The general response is to deny that they occur. The rape and ill-treatment of women is usually reported to have taken place during counter-insurgency operations, often following attacks by an armed opposition group, when the security forces attempt to locate militants or their sympathizers. Since February 1990 these cordon and search operations (so-called because villages are completely sealed off by the security

forces before house-to-house searches take place), which previously took place in the presence of male members of the household, have been carried out increasingly after separating the men from the women, rendering the women particularly vulnerable. (Amnesty International Report *India, New allegations of rape by army personnel in Jammu and Kashmir*, January 1993).

- (c) «Although Indian human rights groups and the international press have reported on the widespread use of rape by Indian security forces in Kashmir, the use of rape in the conflict has seldom attracted much international condemnation. During the week PHR and Asia Watch conducted investigations in Kashmir, we documented 15 cases of rape, 44 extrajudicial executions, 8 cases of torture, and 20 injuries resulting from indiscriminate shootings of non-combatants by Indian army and security force personnel. Eighty percent of these violations occurred during the visit or in the ten days preceding it. We also collected documentation on a large number of abuses that had occurred in the weeks and months preceding the visit, and both organizations have continued to receive such information. Because this information comes from credible sources, we believe that these abuses have continued unabated and may, in fact, have escalated to include the killings of Kashmiri human rights activists who assisted Asia Watch and PHR and provided information to international organizations and the foreign press. (*Rape in Kashmir; A Crime of War*, May 9, 1993 by Asia Watch & Physician for Human Rights, A Division of Human Rights Watch).

The magnitude of human rights violations in Kashmir can be judged from the latest publication of the Amnesty International. In a report, released in January 1995, entitled *Summary of human rights concerns in Jammu and Kashmir*, Amnesty International has provided an indication of the massive scale on which human rights are being violated in Jammu and Kashmir.

Seven

Chapter 7, pages 67 to 72, dealing with «Misconduct by Militant Groups» in the Final Report has been considerably expanded. It is

more critical of the militants than the earlier version contained in the Preliminary Report. A new sub-section entitled «Cultural Constraints» which talks about the destruction of the tolerant tradition of Kashmiriyat and its replacement by Islamic Fundamentalism, has been added.

While agreeing with the requirement for All Parties in a conflict to observe norms of international law it may be pointed out that certain aspects of the report especially with regard to the «Misconduct by Militant Groups» are influenced by Indian propaganda. The arguments and the incidents quoted in Chapter 7 are the same which are being propagated by the Indian Government in all their bilateral contacts as well as in the international fora.

On page 72 of the report it has been mentioned that the tradition of Kashmiriyat has been replaced by Islamic fundamentalism that has developed in some parts of the Muslim world. The use of term «fundamentalist» is somewhat unfortunate. It was coined by the Indian propaganda machine in order to exploit the fear and prejudice associated with this word in the hope that this would diminish support for the Kashmir case. One would only wish that the members of the ICJ were given free excess in the Indian-Held Kashmir in order to enable them to see for themselves the stark realities existing there. It is an established fact which has been recognized even by fundamentalist Hindu parties that while there have been many instances of Hindu-Muslim riots in India, there has been absolutely none in Indian-Held Kashmir even after 1989 when an indigenous struggle had started there.

Similarly motivated is the label of «terrorist». By its use, Indian propaganda aims to undermine the sympathy and compassion of decent humanity for the humanitarian plight of the Kashmiri people and, simultaneously, to explain and justify the crimes committed by the Indian forces in the occupied State, appropriately called «terrorists-in-uniform.»

In judging the situation, a distinction is first merited between a people's struggle for freedom and a State's attempt to crush the struggle. A people who are entitled to self-determination but denied the opportunity to exercise their right and subjected to illegal occupation, are entitled to struggle for their liberation. They should of

course observe generally accepted rules. But to be taken into account in this context are the constraints of a freedom movement which is driven underground by state repression and therefore deprived of the chance for organization and maintenance of discipline. A freedom movement cannot, therefore, be equated with a State and held accountable in law or equity for excesses by individuals, which may be actuated by outrage at the atrocities by occupation forces against their kith and kin. The blame for such a situation lies with the occupying power which proscribes peaceful protest and prohibits political organization while perpetrating most barbaric atrocities on a forcibly occupied people. In contrast, the excesses committed by the forces of state, acting on its behalf and under its authority, qualify to be condemned as State terrorism.

In addition it needs to be noted that criminal elements everywhere exploit any opportunity to further their own nefarious ends. Moreover, in Kashmir the occupying power has infiltrated the ranks of the freedom fighters and uses its agents for the commission of terrorist acts which are then blamed on the Kashmiris. Girish Saxena was credited, during his incumbency as Indian Governor of Kashmir from 1990-93, in having master-minded this sinister scheme.

Eight

The Mission has expressed opinions on interpretations of the Simla Agreement regarding settlement of disputes between India and Pakistan which, though of an incidental nature, do not seem to be correct, and call for the following comments:

- (a) The selected quotations from the Simla Agreement, on pages 22-23 of the Report, omit a vital part which is accorded priority in paragraph 1(i) of the Agreement, namely «That the principles and purposes of the Charter of the United Nations shall govern the relations between the two countries;» This high priority underscores the general conclusion that no part of the Agreement should be interpreted in isolation from the principles and purposes of the Charter, quite apart from the provision in Article 103 of the Charter according to which the obligations of the Members under the Charter prevail over their obligations under any other international agreement.

- (b) The comment in (a) above is vital particularly to the interpretation of the point at (ii) in the Simla Agreement (which provides for peaceful settlement of differences between the two countries «through bilateral negotiations or any other peaceful means mutually agreed upon between them....»). The Mission's opinion on page 24, that «The agreement requires the existing disputes between the two countries to be settled bilaterally (and therefore, by implication, to the exclusion of third parties such as the UN except with the consent of both India and Pakistan»), is defective in the part about «the exclusion of ... UN ...» The UN cannot be excluded because apart from the fact that some of the organs of the United Nations can invoke original jurisdiction, any member of the United Nations has the right to bring any question relating to the maintenance of international peace and security to the notice of the General Assembly or the Security Council.
- (c) The other part of the Mission's opinion, on page 24, namely that «The agreement requires the existing disputes between the two countries to be settled bilaterally...» merited further scrutiny in order to determine the implications of failure of bilateral negotiations and refusal of one of the parties to agree to any other peaceful means. By withholding consent to any other peaceful means, a party cannot be considered entitled to frustrate the agreed objective of settlement of differences or to permanently freeze the difference. Law and justice cannot permit an interpretation that would reward obduracy and intransigence. An appropriate way has to be available in order to break a stalemate. One such situation arose in 1973 when India inordinately delayed the repatriation of Pakistani prisoners of war and civilian internees. Pakistan petitioned the International Court of Justice. Also Pakistan has brought differences with India to the notice of international organizations.
- (d) With reference to the observation on p.23 of the report, namely that the Simla Agreement «involves a recognition of the ceasefire line as the *de facto* boundary....» it is pointed out that Pakistan and India, recalling no doubt the prolonged and infructuous discussions at Simla on the suggestion for the conversion of the ceasefire line into a boundary, have

refrained from using the word «boundary» or «*de facto* boundary», and consistently adhered to the use of «line of control. The same usage in the Report will preclude unnecessary confusion and controversy.

Nine

At page 79 is the section on the Northern Areas. This section did not exist in the Preliminary Report. The third paragraph of the section states: «In March 1993, the High Court of Azad Kashmir, in a startling decision, declared that the Northern Areas were part of Azad Kashmir and ...»

The above decision of the High Court of Azad Jammu and Kashmir was not upheld by Supreme Court of Azad Jammu and Kashmir, which is the final court of appeal, by its decision pronounced in March, 1994.

Another paragraph under section The Northern Areas at page 80 states: «The complete absence of democracy and constitutional rights in the Northern Areas is patently unacceptable ...»

It is not correct that there is complete absence of democracy in the Northern Areas. The Northern Areas Council Legal Framework Order, 1975, provides for the composition of the Council for Northern Areas representing the people of that area. Recently, this Order has been amended so as to invest the Council with more powers, including legislative powers.

Ten

For reasons not explained by the ICJ mission, Chapter 5 of the Preliminary Report which dealt with self-determination has been taken out as a whole from the main body of the report and is now reproduced as Appendix-I. Similarly, para 9 of the Conclusions in the old version which related to self-determination has been removed from the main body of the report and is now reproduced at the end of Appendix-I on self-determination, and forms the Conclusion of this Appendix. A consequential drafting change has been made in the Introduction, which now describes Appendix-I as «an analysis of the

concept of self-determination by the members of the ICJ mission».

In this context it needs to be noted that self-determination is central to the issue of human rights violations in the Indian held Jammu and Kashmir. The Section on self-determination therefore should, in all fairness, have been retained in its original position. Nevertheless my government commends the Mission's forthright assertion on page 94 of Appendix-I of the report that «The ICJ mission therefore concludes that the right of self-determination to which the peoples of Jammu and Kashmir became entitled as part of the process of partition has neither been exercised nor abandoned, and thus remains exercisable today».

Eleven

At Appendix-1, page 91, a paragraph which did not exist in the Preliminary Report, states India's acceptance of Resolution 47 as being conditional on Pakistan's withdrawal of forces by that resolution. It states «India's acceptance of Resolution 47 (1948) was stated by Nehru to be conditional on the withdrawal of Pakistani forces from territory within the 1947 boundaries of the State of Jammu and Kashmir, in accordance with the terms of that Resolution. Pakistani forces have, of course, never been withdrawn.»

The factual position is as under:-

- (a) The demilitarization of Jammu and Kashmir was to take place in a *synchronized manner on both sides of the cease-fire line*. It was India which refused to implement the process of demilitarization.
- (b) The proof of Indian refusal to demilitarize is to be found in the report of Sir Owen Dixon (an eminent Australian Jurist and United Nations 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 and abuse by which the freedom and fairness of the plebiscite might be imperilled.»

(Para 52 of Document S/1971).

- (c) It should also be noted that after a thorough examination of the matter the Security Council in its Resolution No. 98(1952), adopted on 23rd December 1952, allowed both India and Pakistan to maintain a limited number of their forces on each side of the cease-fire line at the end of the period of demilitarization in order to maintain law and order. This number was to be between 3000-6000 armed forces remaining on the Pakistani side and 12000-18000 remaining on the Indian side of the cease-fire line. Pakistan agreed to this proposal; India did not.
- (d) To claim, in the face of this clear and irrefutable evidence, that the plebiscite could not be held because Pakistan refused to withdraw its forces, is patently an attempt to deceive the world. The simple truth is that India did not allow the creation of conditions necessary for the holding of a free and fair plebiscite under UN auspices.

Twelve

Appendix I, pages 95 to 97 of the Final Report, discusses the modalities for a plebiscite.

Events of the past five years have forcefully underscored the fact that the Kashmir dispute can be resolved only on the basis of the wishes of the Kashmiri people. A plebiscite is the most democratic means of eliciting the wishes of the people. This method has been used in many other instances to resolve political and inter-state issues. A cardinal principle of democracy is that the view of the majority prevails. This was the basis on which India and Pakistan were created, with Muslim and Hindu minorities remaining in the two States. There is no reason that a different criteria should be applied to Kashmir. Nonetheless, Pakistan has always expressed its readiness to discuss the implementation of the UN Security Council resolutions calling for a plebiscite in Jammu and Kashmir. In the past various

plans were put forward including by UN negotiators, Mc. Naughton, Owen-Dixon and Graham, on ways and means to implement the Security Council's call for a plebiscite in Kashmir. Our position on these proposals was flexible, while India had rejected all suggestions for a compromise. Pakistan is interested in a peaceful, just and durable solution of the dispute. We believe this is also in the interest of India and specially of the people of Jammu and Kashmir.

Thirteen

Comparing the section on «The Modalities of Self Determination» (pages 95-97 of Appendix-I of the Final Report) with the version which was given in the Preliminary Report, we find a number of significant changes. The most important change is the addition of the last paragraph in the section dealing with «Modalities of Self-determination», on page 97 of Appendix-I. The para states: «Rights of self-determination are not, of course, exercisable in an ideal world. If the people of Kashmir are willing, for the sake of peace, to accept something less than a free choice, that acceptance could still be an exercise of the right of self-determination. For example, if the Indian Government and representatives of the people of Kashmir were able to agree on the restoration of full internal autonomy to Kashmir while retaining Indian control of defence and foreign affairs - a solution supported by a number of those interviewed by the ICJ mission - a referendum approving that solution would be a valid exercise of the right of self-determination.»

This addition is starkly at variance, if not in contradiction, with the view expressed in the earlier version which stated that an agreement reached through negotiations between India, Pakistan and the peoples of the State could be considered as self-determination provided it was approved by the Kashmiris through a referendum. The revised view also negates the UN Security Council Resolutions which clearly recognize Pakistan as a party to the dispute. My Government therefore has the following comments to offer:

- (a) There cannot be a piece-meal solution of the Kashmir dispute specially when the wishes of the people of the State are involved. ICJ's report suggesting: «Independence for the Valley of Kashmir would be a possibility», ignores the wishes of the people of other regions. It also belies the *raison d'être* of

the partition of the Subcontinent which allowed muslim majority regions to join Pakistan. The only viable mechanism to ascertain the will of the people lies in holding of a plebiscite in the whole State of Jammu and Kashmir.

- (b) The idea of «less than a free choice», totally disregards the intensity of the commitment of the Kashmiri people for self-determination. The fundamental question is; would such argument find favour with the people of Kashmir who have totally rejected Indian rule in the State? If unprecedented Indian repression could not deter the people of the State from demanding a «free choice» would it be possible to convince them to agree to a solution whose forcible imposition constitutes the root cause of the present unrest in the State. The Kashmiris have not rendered unprecedented sacrifices for the sake of internal autonomy. The genesis of the Kashmir dispute lies in the denial of the just aspirations of the Kashmiri people, who have been deceived by broken Indian promises.

Fourteen

The Appendices to the Report do not list the UN Security Council Resolution 122/57 which is highly relevant to the report. The text of this Resolution 122/57 is reproduced as Annexure.

The Government of Pakistan sincerely hopes that the ICJ mission would expedite the process of finalizing and issuing the report since it has already been delayed for no good reason. Since the last date for submission of the comments of the Governments of Pakistan and India is January 30, 1995, we hope that the Report would be issued shortly thereafter.

(Ahmad Kamal)

*Ambassador and Permanent Representative
[Permanent Mission of Pakistan, Geneva]*

His Excellency

Mr. Adama Dieng,

*Secretary General, International Commission of Jurists,
Chemin de Joinville 26, 1216 Cointrin,
Geneva.*

29 January 1995

*Resolution 122 (1957) adopted
by the Security Council at its 765th Meeting
on 24 January, 1957.*

The Security Council,

Having heard statements from representatives of the Governments of India and Pakistan concerning the dispute over the State of Jammu and Kashmir,

Reminding the Governments and authorities concerned of the principle embodied in its resolutions 47 (1948) of 21 April 1948, 51 (1948) of 3 June 1948, 80 (1950) of 14 March 1950 and 91 (1951) of 30 March 1951, and the United Nations Commission for India and Pakistan resolutions of 13 August 1948 and 5 January 1949, 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,

Reaffirms the affirmation in its resolution 91 (1951) and declares that the 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;

Decides to continue its consideration of the dispute.

Appendix 4

Note on Sources

The main sources for the historical background were:

GUPTA, Sisir: *Kashmir – A Study in India-Pakistan Relations*⁶⁵

A thorough and scholarly book. Though written from an Indian point of view, it is fair and well-balanced. Its limitations are that it only covers the period up to 1964, and that, being mainly concerned with the impact of the Kashmir dispute on India's external relations, it deals relatively briefly with internal developments in Kashmir.

JAGMOHAN: *My Frozen Turbulence in Kashmir*⁶⁶

The autobiography of the high-minded but autocratic and controversial Governor of Jammu and Kashmir from 1984 to 1989, and again for a brief but crucial period from January to May 1990

LAMB, Alastair: *Kashmir – A Disputed Legacy*⁶⁷

Lamb is perhaps the leading Western expert on the politics and recent history of the Himalaya-Karakoram region. His book, though regarded by some as unduly sympathetic to Pakistan, is essential reading.

65 Asia Publishing House (1966).

66 Allied Publishers Ltd. (3rd Edition, 1993).

67 Roxford Books (1991).

PURI, Balraj: *Jammu and Kashmir – Triumph and Tragedy of Indian Federalism*⁶⁸ and *Kashmir Towards Insurgency*⁶⁹

Balraj Puri has been involved at a high level in political life in Jammu and Kashmir for many years. A supporter of accession to India, his books are critical of what he sees as Indian mishandling of the situation which has alienated the people of Kashmir.

THOMAS, Raju: *Perspectives on Kashmir – The Roots of Conflict in South Asia*⁷⁰

A collection of chapters from different authors – mostly academics – written from a wide variety of viewpoints. The chapter by Ashutosh Varshney is outstanding and may well be the best short account of the Kashmir problem yet written. Also notable are the introduction by the editor and the chapter by Reeta Chowdhari Tremblay on the often overlooked problems of Jammu.

An interesting book about the early post-partition years is *Danger in Kashmir*, by Josef Korbel.⁷¹ Karan Singh's autobiography⁷² is also of considerable interest.

There is an extensive literature on the legal principle of self-determination. Professor James Crawford's *The Creation of States in International Law*,⁷³ though not very recent, is the most helpful.

68 Sterling Publishers Private Ltd. (1981).

69 Orient Longman Ltd. (published as part of the series 'Tracts for the Times', 1993).

70 Westview Press (1992).

71 Princeton University Press (1954, revised edition 1966).

72 Published in two volumes, 'Heir Apparent' (1982) and 'Sadar-i-Riyasat' (1985), combined in one volume in 1989 (Oxford University Press).

73 Clarendon Press (1979)

Appendix 5

United Nations General Assembly Resolution 1514 (1960)

*1514 (XV) . Declaration on the granting of independence
to colonial countries and peoples*

The General Assembly,

Mindful of the determination proclaimed by the peoples of the world in the Charter of the United Nations to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and to promote social progress and better standards of life in larger freedom,

Conscious of the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples, and of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Recognizing the passionate yearning for freedom in all dependent peoples and the decisive role of such peoples in the attainment of their independence,

Aware of the increasing conflicts resulting from the denial of or impediments in the way of the freedom of such peoples, which constitute a serious threat to world peace,

Considering the important role of the United Nations in assisting the movement for independence in Trust and Non-Self-Governing Territories,

Recognizing that the peoples of the world ardently desire the end of colonialism in all its manifestations,

Convinced that the continued existence of colonialism prevents the development of international economic co-operation, impedes the social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace,

Affirming that peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law,

Believing that the process of liberation is irresistible and irreversible and that, in order to avoid serious crises, an end must be put to colonialism and all practices of segregation and discrimination associated therewith,

Welcoming the emergence in recent years of a large number of dependent territories into freedom and independence, and recognizing the increasingly powerful trends towards freedom in such territories which have not yet attained independence,

Convinced that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory,

Solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations;

And to this end

Declares that:

1. 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 an impediment to the promotion of world peace and co-operation.
2. 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.

3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.
4. 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, and the integrity of their national territory shall be respected.
5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.
6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.
7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.

*947th plenary meeting,
14 December 1960.*

Appendix 6

United Nations General Assembly Resolution 2625 (1970)

2625 (XXV). Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations

The General Assembly,

Recalling its resolutions 1815 (XVII) of 18 December 1962, 1966 (XVIII) of 16 December 1963, 2103 (XX) of 20 December 1965, 2181 (XXI) of 12 December 1966, 2327 (XXII) of 18 December 1967, 2463 (XXIII) of 20 December 1968 and 2533 (XXIV) of 8 December 1969, in which it affirmed the importance of the progressive development and codification of the principles of international law concerning friendly relations and co-operation among States,

Having considered the report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States,⁷⁴ which met in Geneva from 31 March to 1 May 1970,

Emphasizing the paramount importance of the Charter of the United Nations for the maintenance of international peace and security and for the development of friendly relations and co-operation among States,

Deeply convinced that the adoption of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations on the occasion of the twenty-fifth anniversary of the United Nations would contribute to the strengthening of world peace and constitute a landmark in the development of international law and of relations

⁷⁴ Official records of the General Assembly, Twenty-fifth Sessions, Supplement N° 18 (A/8018).

among States, in promoting the rule of law among nations and particularly the universal application of the principles embodied in the Charter,

Considering the desirability of the wide dissemination of the text of the Declaration,

1. *Approves* the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the text of which is annexed to the present resolution;
2. *Expresses its appreciation* to the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States for its work resulting in the elaboration of the Declaration;
3. *Recommends* that all efforts be made so that the Declaration becomes generally known.

*1883rd plenary meeting,
24 October 1970.*

Annex

Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations

Preamble

The General Assembly,

Reaffirming in the terms of the Charter of the United Nations that the maintenance of international peace and security and the development of friendly relations and co-operation between nations are among the fundamental purposes of the United Nations,

Recalling that the peoples of the United Nations are determined to practise tolerance and live together in peace with one another as good neighbours,

Bearing in mind the importance of maintaining and strengthening international peace founded upon freedom, equality, justice and respect for fundamental human rights and of developing friendly relations among nations irrespective of their political, economic and social systems or the levels of their development,

Bearing in mind also the paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations,

Considering that the faithful observance of the principles of international law concerning friendly relations and co-operation among States and the fulfilment in good faith of the obligations assumed by States, in accordance with the Charter, is of the greatest importance for the maintenance of international peace and security and for the implementation of the other purposes of the United Nations,

Noting that the great political, economic and social changes and scientific progress which have taken place in the world since the

adoption of the Charter give increased importance to these principles and to the need for their more effective application in the conduct of States wherever carried on,

Recalling the established principle that outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means, and mindful of the fact that consideration is being given in the United Nations to the question of establishing other appropriate provisions similarly inspired,

Convinced that the strict observance by States of the obligation not to intervene in the affairs of any other State is an essential condition to ensure that nations live together in peace with one another, since the practice of any form of intervention not only violates the spirit and letter of the Charter, but also leads to the creation of situations which threaten international peace and security,

Recalling the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence of territorial integrity of any State,

Considering it essential that all States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

Considering it equally essential that all States shall settle their international disputes by peaceful means in accordance with the Charter,

Reaffirming, in accordance with the Charter, the basic importance of sovereign equality and stressing that the purposes of the United Nations can be implemented only if States enjoy sovereign equality and comply fully with the requirements of this principle in their international relations,

Convinced that the subjection of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security,

Convinced that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States, based on respect for the principle sovereign equality,

Convinced in consequence that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter,

Considering the provisions of the Charter as a whole and taking into account the role of relevant resolutions adopted by the competent organs of the United Nations relating the content of the principles,

Considering that the progressive development and codification of the following principles:

- (a) The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,
- (b) The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered,
- (c) The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter,
- (d) The duty of States to co-operate with one another in accordance with the Charter,
- (e) The principle of equal rights and self-determination of peoples,
- (f) The principle of sovereign equality of States,
- (g) The principle that States shall fulfil in good faith the

obligations assumed by them in accordance with the Charter, so as to secure their more effective application within the international community, would promote the realization of purposes of the United Nations,

Having considered the principles of international law relating to friendly relations and co-operation among States,

1. *Solemnly proclaims* the following principles:

The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations

Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues.

A war of aggression constitutes a crime against the peace, for which there is responsibility under international law.

In accordance with the purposes and principles of the United Nations, States have the duty to refrain from propaganda for wars of aggression.

Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.

Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect. Nothing in the foregoing shall be construed as prejudicing the positions of the parties concerned with regard to the status and effects of such lines under their special régimes or as affecting their temporary character.

States have a duty to refrain from acts of reprisal involving the use of force.

Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal. Nothing in the foregoing shall be construed as affecting :

- (a) Provisions of the Charter or any international agreement prior to the Charter régime and valid under international law; or
- (b) The powers of the Security Council under the Charter.

All States shall pursue in good faith negotiations for the early conclusion of a universal treaty on general and complete disarmament under effective international control and strive to adopt appropriate measures to reduce international tensions and strengthen confidence among States.

All States shall comply in good faith with their obligations under the generally recognized principles and rules of international law with

respect to the maintenance of international peace and security, and shall endeavour to make the United Nations security system based on the Charter more effective.

Nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful.

The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered

Every State shall settle its international disputes with other States by peaceful means in such a manner that international peace and security and justice are not endangered.

States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice. In seeking such a settlement the parties shall agree upon such peaceful means as may be appropriate to the circumstances and nature of the dispute.

The parties to a dispute have the duty, in the event of failure to reach a solution by any one of the above peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon by them.

States parties to an international dispute, as well as other States, shall refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security, and shall act in accordance with the purposes and principles of the United Nations.

International disputes shall be settled on the basis of the sovereign equality of States and in accordance with the principle of free choice of means. Recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with sovereign equality.

Nothing in the foregoing paragraphs prejudices or derogates from the applicable provisions of the Charter, in particular those relating to the pacific settlement of international disputes.

The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State.

The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention.

Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.

Nothing in the foregoing paragraphs shall be construed as affecting the relevant provisions of the Charter relating to the maintenance of international peace and security.

The duty of States to co-operate with one another in accordance with the Charter

States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international

economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences.

To this end :

- (a) States shall co-operate with other States in the maintenance of international peace and security;
- (b) States shall co-operate in the promotion of Universal respect for, and observance of, human rights and fundamental freedoms for all, and in the elimination of all forms of racial discrimination and all forms of religious intolerance;
- (c) States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention;
- (d) States Members of the United Nations have the duty to take joint and separate action in co-operation with the United Nations in accordance with the relevant provisions of the Charter.

States should co-operate in the economic, social and cultural fields as well as in the field of science and technology and for the promotion of international cultural and educational progress. States should co-operate in the promotion of economic growth throughout the world, especially that of the developing countries.

The principle of equal rights and self-determination of peoples

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social, and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-

determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

- (a) To promote friendly relations and co-operation among States;
and
- (b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

The principle of sovereign equality of States

All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.

In particular, sovereign equality includes the following elements :

- (a) States are juridically equal;
- (b) Each State enjoys the rights inherent in full sovereignty;
- (c) Each State has the duty to respect the personality of other States;
- (d) The territorial integrity and political independence of the State are inviolable;
- (e) Each State has the right freely to choose and develop its political, social, economic and cultural systems;
- (f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter

Every State has the duty to fulfil in good faith the obligations assumed by it in accordance with the Charter of the United Nations.

Every State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law.

Every State has the duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law.

Where obligations arising under international agreements are in conflict with the obligations of members of the United Nations under the Charter of the United Nations, the obligations under the Charter shall prevail.

General Part

2. Declares that :

In their interpretation and application the above principles are interrelated and each principle should be construed in the context of other principles.

Nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter or the rights and duties of Member States under the Charter or the rights of peoples under the Charter, taking into account the elaboration of these rights in this Declaration.

3. Declares further that :

The principles of the Charter which are embodied in this Declaration constitute basic principles of international law, and

consequently appeals to all States to be guided by ~~these~~ principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles.

Appendix 7

United Nations Security Council Resolution 47 (1948)

47 (1948). Resolution of 21 April 1948

[S/726]

The Security Council,

Having considered the complaint of the Government of India concerning the dispute over the State of Jammu and Kashmir,

Having heard the representative of India in support of that complaint and the reply and counter-complaints of the representative of Pakistan,

Being strongly of the opinion that the early restoration of peace and order in Jammu and Kashmir is essential and that India and Pakistan should do their utmost to bring about a cessation of all fighting,

Noting with satisfaction that both India and Pakistan desire that the question of the accession of Jammu and Kashmir to India or Pakistan should be decided through the democratic method of a free and impartial plebiscite,

Considering that the continuation of the dispute is likely to endanger international peace and security,

Reaffirms its resolution 38 (1948) of 17 January 1948;

Resolves that the membership of the Commission established by its resolution 39 (1948) of 20 January 1948 shall be increased to five and shall include, in addition to the membership mentioned in that resolution, representatives of ... and ..., and that if the membership of the Commission has not been completed within ten days from the date of the adoption of this resolution the President of the Council may designate such other Member or Members of the United Nations as are required to complete the membership of five;

Instructs the Commission to proceed at once to the Indian subcontinent and there place its good offices and mediation at the disposal of the Governments of India and Pakistan with a view to facilitating the taking of the necessary measures, both with respect to the restoration of peace and order and to the holding of a plebiscite, by the two Governments, acting in co-operation with one another and with the Commission, and further instructs the Commission to keep the Council informed of the action taken under the resolution; and, to this end,

Recommends to the Governments of India and Pakistan the following measures as those which in the opinion of the Council are appropriate to bring about a cessation of the fighting and to create proper conditions for a free and impartial plebiscite to decide whether the State of Jammu and Kashmir is to accede to India or Pakistan:

A. Restoration of peace and order

1. The Government of Pakistan should undertake to use its best endeavours:
 - (a) To secure the withdrawal from the State of Jammu and Kashmir of tribesmen and Pakistani nationals not normally resident therein who have entered the State for the purpose of fighting, and to prevent any intrusion into the State of such elements and any furnishing of material aid to those fighting in the State;
 - (b) To make known to all concerned that the measures indicated in this and the following paragraphs provide full freedom to all subjects of the State, regardless of creed, caste, or party, to express their views and to vote on the question of the accession of the State, and that therefore they should co-operate in the maintenance of peace and order.
2. The Government of India should:
 - a) When it is established to the satisfaction of the Commission set up in accordance with the Council's resolution 39 (1948) that the tribesmen are withdrawing and that arrangements for the cessation of the fighting have become effective, put

into operation in consultation with the Commission a plan for withdrawing their own forces from Jammu and Kashmir and reducing them progressively to the minimum strength required for the support of the civil power to the maintenance of law and order;

- b) Make known that the withdrawal is taking place in stages and announce the completion of each stage;
 - c) When the Indian forces have been reduced to the minimum strength mentioned in (a) above, arrange in consultation with the Commission for the stationing of the remaining forces to be carried out in accordance with the following principles :
 - i) That the presence of troops should not afford any intimidation or appearance of intimidation to the inhabitants of the State;
 - ii) That as small a number as possible should be retained in forward areas;
 - iii) That any reserve of troops which may be included in the total strength should be located within their present base area.
3. The Government of India should agree that until such time as the Plebiscite Administration referred to below finds it necessary to exercise the powers of direction and supervision over the State forces and police provided for in paragraph 8, they will be held in areas to be agreed upon with the Plebiscite Administrator.
4. After the plan referred to in paragraph 2 (a) above has been put into operation, personnel recruited locally in each district should so far as possible be utilized for the re-establishment and maintenance of law and order with due regard to protection of minorities, subject to such additional requirements as may be specified by the Plebiscite Administration referred to in paragraph 7.
5. If these local forces should be found to be inadequate, the Commission, subject to the agreement of both the Government of India and the Government of Pakistan, should arrange for the use of such forces of either Dominion as it deems effective for the

purpose of pacification.

B. *Plebiscite*

6. The Government of India should undertake to ensure that the Government of the State invite the major political groups to designate responsible representatives to share equitably and fully in the conduct of the administration at the ministerial level while the plebiscite is being prepared and carried out.
7. The Government of India should undertake that there will be established in Jammu and Kashmir a Plebiscite Administration to hold a plebiscite as soon as possible on the question of the accession of the State to India or Pakistan.
8. The Government of India should undertake that there will be delegated by the State to the Plebiscite Administration such powers as the latter considers necessary for holding a fair and impartial plebiscite including, for that purpose only, the direction and supervision of the State forces and police.
9. The Government of India should, at the request of the Plebiscite Administration, make available from the Indian forces such assistance as the Plebiscite Administration may require for the performance of its functions.
10. (a) The Government of India should agree that a nominee of the Secretary-General of the United Nations will be appointed to be the Plebiscite Administrator.
 - (b) The Plebiscite Administrator, acting as an officer of the State of Jammu and Kashmir, should have authority to nominate his assistants and other subordinates and to draft regulations governing the Plebiscite. Such nominees should be formally appointed and such draft regulations should be formally promulgated by the State of Jammu and Kashmir.
 - (c) The Government of India should undertake that the Government of Jammu and Kashmir will appoint fully qualified persons nominated by the Plebiscite Administrator to act as special magistrates within the State judicial system

to hear cases which in the opinion of the Plebiscite Administrator have a serious bearing on the preparation for and the conduct of a free and impartial plebiscite.

- (d) The terms of service of the Administrator should form the subject of a separate negotiation between the Secretary-General of the United Nations and the Government of India. The Administrator should fix the terms of service for his assistants and subordinates.
 - (e) The Administrator should have the right to communicate directly with the Government of the State and with the Commission of the Security Council and, through the Commission, with the Security Council, with the Governments of India and Pakistan and with their representatives with the Commission. It would be his duty to bring to the notice of any or all of the foregoing (as he in his discretion may decide) any circumstances arising which may tend, in his opinion, to interfere with the freedom of the plebiscite.
11. The Government of India should undertake to prevent, and to give full support to the Administrator and his staff in preventing, any threat, coercion or intimidation, bribery or other undue influence on the voters in the plebiscite, and the Government of India should publicly announce and should cause the Government of the State to announce this undertaking as an international obligation binding on all public authorities and officials in Jammu and Kashmir.
 12. The Government of India should themselves and through the Government of the State declare and make known that all subjects of the State of Jammu and Kashmir, regardless of creed, caste or party, will be safe and free in expressing their views and in voting on the question of the accession of the State and that there will be freedom of the press, speech and assembly and freedom of travel in the State, including freedom of lawful entry and exit.
 13. The Government of India should use and should ensure that the Government of the State also use their best endeavours to effect the withdrawal from the State of all Indian nationals other than

those who are normally resident therein or who on or since 15 August 1947 have entered it for a lawful purpose.

14. The Government of India should ensure that the Government of the State releases all political prisoners and take all possible steps so that:
 - (a) All citizens of the State who have left it on account of disturbances are invited, and are free, to return to their homes and to exercise their rights as such citizens;
 - (b) There is no victimization;
 - (c) Minorities in all parts of the State are accorded adequate protection.
15. The Commission of the Security Council should at the end of the plebiscite certify to the Council whether the plebiscite has or has not been really free and impartial.

C. General provisions

16. The Governments of India and Pakistan should each be invited to nominate a representative to be attached to the Commission for such assistance as it may require in the performance of its task.
17. The Commission should establish in Jammu and Kashmir such observers as it may require of any of the proceedings in pursuance of the measures indicated in the foregoing paragraphs.
18. The Security Council Commission should carry out the tasks assigned to it herein.

Adopted at the 286th meeting.⁷⁵

⁷⁵ The draft resolution was voted on paragraph by paragraph. No vote was taken on the text as a whole.

The five members of the United Nations Commission for India and Pakistan were : CZECHOSLOVAKIA (nominated by India on 10 February 1948); BELGIUM and COLOMBIA (appointed by the Council on 23 April 1948 - see the decision below); ARGENTINA (nominated by Pakistan on 30 April 1948); UNITED STATES OF AMERICA (designated by the President of the Council on 7 May 1948, in the absence of agreement between Argentina and Czechoslovakia on the member to be designated by them).

Decision

At its 287th meeting, on 23 April 1948, the Council, pursuant to its resolution 47 (1948), appointed Belgium and Colombia as the additional members of the United Nations Commission for India and Pakistan.

Adopted by 7 votes to none, with 4 abstentions (Belgium, Colombia, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics).

Appendix 8

United Nations Security Council Resolution 91 (1951)

*Resolutions Adopted And Decisions Taken By
The Security Council In 1951*

Part I. Questions considered by the Security Council under its responsibility for the maintenance of international peace and security

*Complaint Of Aggression Upon The Republic Of Korea*⁷⁶
90 (1951). Resolution of 31 January 1951
[S/1995]

The Security Council

Resolves to remove the item «Complaint of aggression upon the Republic of Korea» from the list of matters of which the Council is seized.

Adopted unanimously at the 531st meeting.

*The India-Pakistan Question*⁷⁷
91 (1951). Resolution of 30 March 1951
[S/2017/Rev.1]

The Security Council,

Having received and noted the report of Sir Owen Dixon, the United Nations Representative for India and Pakistan,⁷⁸ on his

⁷⁶ Resolutions or decisions on this question were also adopted by the Council in 1950.

⁷⁷ Resolutions or decisions on this question were also adopted by the Council in 1948, 1949 and 1950.

⁷⁸ See Official Records of the Security Council, Fifth year, Supplement for September through December 1950, document S/1791 and Add.1.

mission initiated by Security Council resolution 80 (1950) of 14 March 1950,

Observing that the Governments of India and Pakistan have accepted the provisions of the United Nations Commission for India and Pakistan resolutions of 13 August 1948⁷⁹ and 5 January 1949⁸⁰ and have reaffirmed their desire that the future of the State of Jammu and Kashmir shall be decided through the democratic method of a free and impartial plebiscite conducted under the auspices of the United Nations,

Observing that on 27 October 1950 the General Council of the «All Jammu and Kashmir National Conference» adopted a resolution recommending the convening of a constituent assembly for the purpose of determining the «future shape and affiliations of the State of Jammu and Kashmir»; observing further from statements of responsible authorities that action is proposed to convene such a constituent assembly and that the area from which such a constituent assembly would be elected is only a part of the whole territory of Jammu and Kashmir,

Reminding the Governments and authorities concerned of the principle embodied in its resolutions 47 (1948) of 21 April 1948, 51 (1948) of 3 June 1948 and 80 (1950) of 14 March 1950 and the United Nations Commission for India and Pakistan resolutions of 13 August 1948 and 5 January 1949, 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,

Affirming that the convening of a constituent assembly as recommended by the General Council of the «All Jammu and Kashmir National Conference» and any action that the assembly might attempt to take to determine the future shape and affiliation of the entire State or any part thereof would not constitute a disposition of the State in accordance with the above principle,

79 *Ibid.*, Third Year, Supplement for November 1948, document S/1100, para. 75.

80 *Ibid.*, Fourth Year, Supplement for January 1949, document S/1196, para. 15.

Declaring its belief that it is the duty of the Security Council in carrying out its primary responsibility for the maintenance of international peace and security to aid the parties to reach an amicable solution of the Kashmir dispute and that a prompt settlement of this dispute is of vital importance to the maintenance of international peace and security;

Observing from Sir Owen Dixon's report that the main points of difference preventing agreement between the parties were:

- (a) The procedure for and the extent of demilitarization of the State preparatory to the holding of a plebiscite, and
 - (b) The degree of control over the exercise of the functions of government in the State necessary to ensure free and fair plebiscite,
1. *Accepts*, in compliance with his request, Sir Owen Dixon's resignation and expresses its gratitude to Sir Owen for the great ability and devotion with which he carried out his mission;
 2. *Decides* to appoint a United Nations Representative for India and Pakistan in succession to Sir Owen Dixon;
 3. *Instructs* the United Nations Representatives to proceed to the subcontinent and, after consultation with the Governments of India and Pakistan, to effect the demilitarization of the State of Jammu and Kashmir on the basis of the United Nations Commission for India and Pakistan resolutions of 13 August 1948 and 5 January 1949;
 4. *Calls upon* the parties to co-operate with the United Nations Representative to the fullest degree in effecting the demilitarization of the State of Jammu and Kashmir;
 5. *Instructs* the United Nations Representative to report to the Security Council within three months from the date of his arrival on the subcontinent; if, at the time of this report, he has not effected demilitarization in accordance with paragraph 3 above, or obtained the agreement of the parties to a plan for effecting such demilitarization, the United Nations Representative shall

report to the Security Council those points of difference between the parties in regard to the interpretation and execution of the agreed resolutions of 13 August 1948 and 5 January 1949 which he consider must be resolved to enable such demilitarization to be carried out;

6. *Calls upon* the parties, in the event of their discussions with the United Nations Representative failing in his opinion to result in full agreement, to accept arbitration upon all outstanding points of difference reported by the United Nations Representative in accordance with paragraph 5 above, such arbitration to be carried out by an arbitrator, or a panel or arbitrators, to be appointed by the President of the International Court of Justice after consultations with the parties;
7. *Decides* that the military observer group shall continue to supervise the cease-fire in the State;
8. *Requests* the Governments of India and Pakistan to ensure that their agreement regarding the cease-fire shall continue to be faithfully observed and calls upon them to take all possible measures to ensure the creation and maintenance of an atmosphere favourable to the promotion of further negotiations and to refrain from any action likely to prejudice a just and peaceful settlement;
9. *Requests* the Secretary-General to provide the United Nations Representative for India and Pakistan with such services and facilities as may be necessary in carrying out the terms of this resolution.

Adopted at the 539th meeting by 8 votes to none, with 3 abstentions (India, Union of Soviet Socialist Republics, Yugoslavia).

Decisions

At its 543rd meeting, on 30 April 1951, the Council appointed Mr. Frank P. Graham United Nations Representative for India and Pakistan.

Adopted by 7 votes to none, with 4 abstentions (India, Netherlands, Union of Soviet Socialist Republics, Yugoslavia).

At its 548th meeting, on 29 May 1951, the Council approved the text of a letter to be sent by the President to the Governments of India and Pakistan, reading as follows :

«I have the honour to call your attention to the important principles regarding the India-Pakistan question restated in the Security Council resolution of 30 March 1951 [resolution 91 (1951)].

«Members of the Security Council, at its 548th meeting held on 29 May 1951, have heard with satisfaction the assurances of the representative of India that any constituent assembly that may be established in Srinagar is not intended to prejudice the issues before the Security Council or to come in its way.

«On the other hand, the two communications to me, as President of the Council, from the representatives of Pakistan, set forth in documents S/2119⁸¹ and S/2145⁷³, contain reports which, if they are correct, indicate that steps are being taken by the Yuvaraja of Jammu and Kashmir to convoke a constituent assembly, one function of which, according to Sheikh Abdullah, would be 'a decision on the future shape and affiliation of Kashmir'.

81 *Ibid.*, Sixth Year, Supplement for 1 April through 30 June 1951.

73 *Ibid.*,

Appendix 9

Article 370 of the Constitution of India

370. Temporary provisions with respect to the State of Jammu and Kashmir.⁸² -

- (1) Notwithstanding anything in this Constitution, -
- (a) the provisions of Article 238 shall not apply in relation to the State of Jammu and Kashmir;
 - (b) the power of Parliament to make laws for the said State shall be limited to-
 - (i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and
 - (ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

⁸² In exercise of the powers conferred by this article the President, on the recommendation of the Constituent Assembly of the State of Jammu and Kashmir, declared that, as from the 17th day of November, 1952, the said Art. 370 shall be operative with the modification that for the Explanation in cl. (1) thereof, the following Explanation is substituted, namely :-

«Explanation.- For the purposes of this article, the Government of the State means the person for the time being recognized by the President on the recommendation of the Legislative Assembly of the State as the *Sadar-i-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office.» (Ministry of Law Order N°. C.O.44, dated the 15th November, 1952.) *Now «Governor».

Explanation.- For the purposes of this article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth day of March, 1948;

- (c) the provisions of Article 1 and of this article shall apply in relation to that State;
- (d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order ⁸³specify :

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State:

Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

- (2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.
- (3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

⁸³ See the Constitution (Application to Jammu and Kashmir) Order, 1954, published with the Ministry of Law Notification N° .C.O.48, dated the 14th May, 1954, Gazette of India. Extraordinary, Part II, S.3, p. 821, as amended from time to time.

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.

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Acting President

LENNART GROLL

Judge, Stockholm Court of Appeal, Sweden

Vice Presidents

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