

CAN SELF DETERMINATION SOLVE THE KASHMIR DISPUTE?

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Abstract: *Rather than looking inwards and nursing exclusively European interests, one of the recent laudable actions of the European Parliament has been its focus on the tragic fate of Kashmiris. The Parliament has decided that it ought to help humanity by contributing to the end of this festering dispute, categorised as “A Dynamite under the South Asian Peace.” In this article the author examines the genesis of the Kashmir dispute and, using his expertise in International Law, scrutinises various arguments surrounding this dispute. The upshot of his analysis is that the Master Anomaly in the arguments is that deniers of self determination to Kashmiris wish to eclipse the “rule of law”, and avoid applying the partition rules (patently regulating the division of the Indian subcontinent on religious lines). They hijack the discussion to secularism and democracy in India versus military rule and religious fundamentalism in Pakistan clearly post-partition developments. The Master Anomaly has clouded the legal force of the UN resolutions and the legal effect of binding pledges of the competent heads of State, undermining the “pacta sunt servanda” principle.*

Key words: *Kashmir, European Parliament, human rights organizations, pioneers of Indian liberation*

Introduction

One of the recent laudable actions of the European Parliament has been its focus on the tragic fate of Kashmiris. This body has proved to be a progressive collection of Members with beating hearts. Rather than looking inwards and nursing exclusively the European interest (a perfectly valid approach to take for an “European” institution), the Parliament has decided that it ought to help humanity by contributing to the end of this festering dispute, categorised by this writer in his address to the London Guildhall University in the aftermath of the atomic explosions of India and Pakistan in May 1998, as “A Dynamite under the South Asian Peace.”

The British Member of the European Parliament, Baroness Emma Nicholson (Vice Chairperson of the Foreign Affairs Committee) produced a report on the disputed territory of Jammu and Kashmir as a Rapporteur of the European Parliament. In her report “Kashmir, Present Situation and Future Prospects” she observes that the continuing demand for a plebiscite on the final status of Jammu and Kashmir is not reflective of the current needs of the local people. Nicholson observes in her report that the plebiscite demand is, in fact, damaging to Kashmiris' interests.

The report was criticized by experts in International Law and the Kashmir Dispute was considered to be totally flawed.

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The most significant opponent of the tenor of the report was Mr. Sajjad Karim, Baroness Nicholson's fellow Liberal Democrat MEP. His amendments (based on his 3 separate visits to the region in the previous year and on reports of human rights organizations such as Amnesty International), constituted a "brilliant intervention", according to the European Parliament Press Release.¹ The Kashmir dispute was the one about which many British MEPs had heard, first hand, episodes of rape and extrajudicial killings, etc., directly from the relatives of the victims living in their constituencies. Rather than viewing the report as a great asset to contribute to an informed debate, illogically, it was criticized (not reflecting well on those who wished to discover the truth). To suppress the legitimate debate, this author must say unsuccessfully, Baroness Nicholson said, "it is a pity that the British are washing their dirty linen in public. Most of the MEPs interested in the Kashmir report are British who have large Pakistani, Indian and Kashmiri communities in their constituencies back home."²

On the 27th of February 2007, the European Parliament's Foreign Affairs Committee, in an extraordinary session in the European Union's capital, rejected 16 compromise amendments presented to this report by Baroness Nicholson since they did not remove the assertion that the Kashmiris do not have the right to self-determination. Rejecting the rapporteur's assertions on the Kashmiris right to plebiscite, James Elles, the head of the All Party Group for Kashmir in the European Parliament, said that, by

denying Kashmiris their birthright to determine their future, Nicholson demonstrated double standards and attempted to undermine the United Nation resolutions on Kashmir."³

Incorporating in the report "the primacy of the UN, including the principle of democratic right of self-determination of the Kashmiri people", The European Parliament passed the report on 21 March 2007. The amended report had many other modifications, rigorously resisted by many MEPs (some of them describing themselves as friends of India).

One cannot but admire the political versatility of Baroness Nicholson who, in the perspective of getting every "compromise" amendment rejected on 27 February 2007, was still able to muster a smile and comment on the passage of the report, "I am very pleased indeed that we succeeded in having the vote." Expressly noting that the "central concern" of Kashmiris' right to "democratic self-determination" is embodied in it now, the Liberal Democrat party welcomed the passage of the amended report.⁴

One hopes that not cynically, the amended report admires India as the "world's largest secular democracy" because later on it calls on the Indian government to "put an end to all practices of extrajudicial killings, 'disappearances', torture and arbitrary detention in Jammu and Kashmir." India is party to the 1966 International Covenant on Civil and Political Rights (ICCPR), a move which illustrates a State's fidelity to the Rule of Law. But it has entered reservations to Articles 9 (right

¹ "European Parliament AFET to vote on Kashmir amendments", Brussels, 27 February 2007, <http://www.eupolitix.com/EN/Forums/ICHR+Kashmir+CentreEU/PressReleases/200703/c8a54a6a-91d7-427d-a695-c0fb39be2208.htm>

² "Kashmir report sparks debate in European Parliament", *New Europe*, 3 March 2007 -

<http://www.charlestannock.com/pressarticle.asp?ID=1520>

³ *Supra*, Note 1

⁴ "Foreign Affairs Committee Backs Key Kashmir Report in European Parliament", *Press Release issued at 12.00am GMT Wed 21st Mar 2007* - <http://www.libdemmeeps.org.uk/news/000314.html>

against arbitrary arrest and detention), 19 (freedom of expression), 21 (right of peaceful assembly) and 22 (freedom of association).

Helpers, like Ms Liz Lynne MEP, of the gloomy people of Kashmir should not be too disappointed by the passage of this amended report. They must know that the obtuse formulations such as “the Committee calls on both governments to allow international human rights groups to access the region for investigations” is truly aimed at which State who is barring bodies like Amnesty International and Human Rights Watch from the area? Even the movements of Mr. Richard Howitt MEP (vice-president of the European parliament human rights sub-committee) were restricted by the Indian government in his visit in February this year to acquaint himself first-hand with the ground realities of Jammu and Kashmir.⁵

Indeed, it is encouraging that this sad dispute has come under the intense gaze of the EU. Many Members of the European Parliament must have learnt more about the plight of Kashmiris. Like this author, they must be wondering why the largest democracy in the world, having a glittering claim to a great ancient civilization, is allowing such serious violations of the human rights in this area. Ms Lynne can now focus on the implementation of the recommendations of this (supposedly pro-India) report; for example when it calls on India “to establish an independent commission of inquiry into serious violations of human rights by Indian security forces.”⁶

Are Kashmiris entitled to Plebiscite?

Mahatma Gandhi held a person in a very high regard and complimented him generously by christening him as his “political guru.” He was one of the pioneers of the Indian national liberation movement, Mr Gopal Krishna Gokhale (1866-1915, Principal of the Fergusson College, Pune), a former President of the Congress Party who fought for the independence of India.

When the founder of Pakistan, Mohammed Ali Jinnah, was elected to serve as the Bombay Presidency's Muslim representative on the Viceroy's Central Legislative Council, one of his fellow Hindu representatives was Mr. Gokhale. When “India Today” arranged the biographical notes on most eminent personalities of the Indian sub-continent, a Professor of History from the University of California, author of Jinnah of Pakistan and Nehru: A Tryst with Destiny, Stanley Wolpert, was invited to write about Mr. Jinnah. Prof. Wolpert said that Gokhale held Mr. Jinnah in “high regard for Jinnah's integrity, intellect and moderation” and that is reflected in the sobriquet he coined for his junior colleague, “best ambassador of Hindu-Muslim unity.”⁷

Jinnah wanted a united India. Pakistan had not entered the political debate at this time in any form or shape. But when the British Prime Minister Ramsay MacDonald called the first Round Table conference of Hindu and Muslim leaders of India on 13th November 1930 (ending in January 1931), the Hindu Congress leaders (Mahatma Gandhi and others) boycotted it.

⁵ Interview with Richard Howitt, vice-president of the European parliament human rights sub-committee, Member European Parliament, 24 February 2007, Kashmir Observer - <http://www.kashmirobservers.com/index.php?id=1917&commentspage=4&PHPSESSID=16a6ba6f78c0db4698fc3d58913fe32>

⁶ Paragraph 23 of the Report, as approved by the European Parliament Foreign Affairs Committee on 21 March 2007 - REPORT on Kashmir: present situation and future prospects (2005/2242(INI)), Committee on Foreign Affairs (Rapporteur: Baroness Nicholson of Winterbourne), EUROPEAN PARLIAMENT - <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2007-0158+0+DOC+PDF+V0//EN>

⁷ “Mohammed Ali Jinnah” By Stanley Wolpert, www.123india.com - [Http://www.indiatoday.com/itoday/millennium/100people/jinnah.html](http://www.indiatoday.com/itoday/millennium/100people/jinnah.html)

According to Prof. Wolpert it was Jinnah's idea that the conference should draft such a constitution for independent India which should contain "adequate safeguards" ensuring "separate electorates for its Muslims and other minorities" an idea which did not meet with the approval of the Hindu leaders.⁸

The Hindu leaders participated in the second Round Table Conference (September-December 1931) and the third Round Table Conference (November-December 1932). During the second conference, Mahatma Gandhi insisted to speak for "all of the Indians" and alienated the Muslims who were, according to Mr. Jinnah, "led by either the flunkies of the British Government or the camp followers of the Congress." Mahatma Gandhi continued his approach in the third conference, also.

Based on study of the extensive literature in this field, the upshot of this rift was the grave disappointment of Jinnah and his subscription to the separate homeland for Muslims an idea which was already pursued by some Muslim leaders who were saying that Muslims slaughter the cow and eat it whilst Hindus worship the cow as a Goddess. They argued that the two cultures were miles apart and therefore the separation was the only solution. Mr. Jinnah, addressing the students of the Muslim University Union, later on expressed his profound disappointment about the Round Table Conferences in these words:

"I received the shock of my life at the Round Table conference.... I began to feel that neither could I help India, nor change the Hindu mentality, nor make the Mussalmans (Muslims) realize their precarious position. I felt so disappointed and so depressed that I

decided to settle down in London. Not that I did not love India; but I felt utterly helpless. I kept in touch with India. At the end of four years I found that the Mussalmans were in the greatest danger. I made up my mind to come back to India, as I could not do any good from London."⁹

No division of India would have taken place, if the Hindu leaders had not abused their political supremacy and had come to the first Round Table conference in London with an attitude to accommodating the Muslim concerns. Thus this author agrees with Prof. Wolpert that by creating Pakistan, Jinnah "significantly altered the course of history"; otherwise the "history" was marching in the direction of one India.

However, Jinnah fought for a State in which Muslims could live peacefully and realise their potential fairly and not a "Muslim State" operating on theocratic dogma. In a full-page advertisement for "City FM 89" radio on 11th of August 2006, published in a Pakistani national daily "Dawn", Mr. Jinnah's speech on the independence of Pakistan is quoted. This extract shows his "secular" credentials; a man who has never been accused by any friend or foe of saying things he did not believe in. He said, "You are free to go to your temples; you are free to go to your mosques or to any other place of worship in this state of Pakistan. You may belong to any caste or creed that has nothing to do with the business of the state."¹⁰

Indeed, many Hindus knew about Mr. Jinnah's secular views and believed that "Pakistan was not supposed to be a Muslim state parse but a state where Muslims would be able to practice their religion freely without interference from the State."¹¹

⁸ *Id.*

⁹ "London 1931" - <http://www.pakistan.gov.pk/Quaid/politician14.htm>

¹⁰ "Pictures of the Day: Aazadi Mubarak!" by Adil Najam, *Pakistaniat.com* - <http://pakistaniat.com/2006/08/12/pictures-of-the-day-aazadi-mubarak/>

¹¹ *Id.*

The movement for a separate homeland for Muslims was spearheaded by Muslim League under the Presidency of Mr. Jinnah. The demand for Pakistan was formalized by the Pakistan Resolution of 23 March 1940.

In addition to the native Indians, the British colonial masters (totally dedicated to "democracy") were not in favor of this division on religious grounds. However, they were forced to devise the proposed division, as there was no other alternative. The key principle for this division was that the regions (mainly in the east of India and in the northwest of India) with Muslim majority would go to Pakistan and the Hindu majority areas would form the new Hindu State.¹²

As an element of this partition plan, it was agreed by the Hindu and Muslim communities that insofar as the princely states having majority of one community but the ruler from the other community were concerned, the state will either have an autonomous dominion status, or it will join the Muslim or Hindu country depending on the wishes of its population. What is interesting here is that the "ruler" is not given a veto in this regard.¹³

Under the above principle, an Indian princely state, Junagadh, joined India despite its ruler being a Muslim because the majority of this state was Hindu. The same, in reverse, should have happened in respect of Kashmir since the majority population

was Muslim, although it was ruled by a Hindu Raja.¹⁴

Indeed, thanks to the Attlee government in London, dedicated to the rule of law, when the Kashmiri Maharajah Hari Singh tried to accede to India (by sending a signed Instrument of Accession) in violation of this rule, the Governor General of India, Lord Mountbatten replied to him in a letter of the 27th of October 1947:

"Consistent with the policy that in the case of any (native) state where the issue of accession has been 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 invaders the question of state's accession should be settled by a reference to the people."

That the accession was contingent upon the ascertainment of wishes of the people of Kashmir, is clear from the memorandum of the 27th of October 1947, marked "Top Secret", of the then UK Acting High Commissioner, Mr. Alexander Symon, to the Commonwealth Office. In this memorandum, he communicates to the UK government that Kashmir has requested India to join it but he goes on to say, "I am told that it is conditional upon the wishes of the people, in accordance with the Indian declared policy."

The Indian Prime Minister Pundit Jawahar Lal Nehru re-confirmed this

¹² V. D. Chopra, *Genesis of Indo-Pakistan Conflict on Kashmir* pp10-12 (New Delhi: Patriot Publishers, 1990); M. Burke, *Pakistan's Foreign Policy: A Historical Analysis* p16 (Karachi: Oxford University Press, 1973)

¹³ Alan Campbell Johnson, *Mission with Mountbatten* pp357-358 (London: Robert Hale, 1952) See also Rathnam Indurthy, "Kashmir Between India and Pakistan: An Intractable Conflict, 1947 to Present" pp5-6 of 38 Available from <http://www1.appstate.edu/~stefanov/Kashmir%20Between%20India%20and%20Pakistan.pdf>. For a comprehensive discussion of the First Kashmir war, UN role, Kashmiri domestic politics and Indo-Pakistani relations during 1947 to 1964, Prof. Rathnam Indurthy refers to: Sisir Gupta, *Kashmir* (New York: Asian Publishing House, 1966), pp. 1-439; Rajesh Kadain, *The Kashmir Tangle* (Westview Press, Boulder, 1993), pp. 62-128; Alstair Lamb, *Kashmir* (Hertingfordbury, UK: Roxford Books, 1991), pp. 83-260.

¹⁴ When the Nawab of Junagadh sent his intention to accede his State to Pakistan on 15 August 1947, according to some sources, then prime minister of Pakistan, Mr. Liaquat Ali Khan, had argued that a ruler had the absolute right to so accede without reference to the moral or ethnic aspects of the accession - "Pakistan's lies on Junagadh and Hyderabad" - <http://www.rediff.com/news/2002/jan/01arvind.htm>. With respect to Mr. Liaquat Ali Khan, it was wrong. The approach of the Indian government, as affected by the Governor General emerging from the land "devoted to the rule of law", was correct.

situation. On the 2nd of November 1947, in a speech aired on All-India Radio he stated:

"We have declared that the fate of Kashmir is ultimately to be decided by the people. That pledge we have given, and the Maharajah has supported it, not only to the people of Jammu and Kashmir, but also to the world. We will not and cannot back out of it. We are prepared when peace and law have been established to have a referendum held under international auspices like the United Nations. We want it to be a fair and just reference to the people and we shall accept their verdict."¹⁵

The partition rules do not give any veto to the ruler of a Princely State to accede to either India or Pakistan. It is concluded by many eminent writers that the "Instrument of Accession" was not signed by the ruler of Kashmir and, therefore, it should be treated as of no effect.¹⁶ Whilst the analysis of the validity of the "Instrument of Accession" may reveal conspiracy to annex Kashmir to India (a "conspiracy" this author believes not participated in by Mr. Nehru), the "signing" of a Princely State ruler is irrelevant to the legal disposition of the Jammu and Kashmir. This author has no hesitation in saying that, even if it was properly signed by the ruler, the Instrument

of Accession as Lord Mountbatten and Mr. Nehru were quick to comprehend, was illegal the wishes of the citizens had to be ascertained.

As emissary of Jawaharlal Nehru, Mr. V. K. Krishna Menon (1896-1974), a widely and profusely respected Hindu, hold the record of delivering the longest speech at the UN Security Council. It was so long that it took two days of the 762 meeting of the SC 5 hours on the 23rd of January and 2 hours and 48 minutes on the 24th of January 1957. Mr. Menon who was proclaimed by many to be "peace loving" sadly made a negative contribution to resolve the Kashmir dispute by this long speech. He could have finished his speech within a single minute and remind his great intellectual and personal friend, Nehru, the Hindu proverb: "praan jae per wachchan na jae" (it is better to lose life than break a pledge). In this context, Nehru has said on the 2nd of November 1948: "We have declared that the fate of Kashmir is ultimately to be decided by the people. That pledge we have given, and the Maharajah has supported it, not only to the people of Jammu and Kashmir, but also to the world. We will not and cannot back out of it."¹⁷

¹⁵ P. L. Lakhanpal, *Essential Documents and Notes on the Kashmir Dispute* (New Delhi: Council on World Affairs, 1965, p57.

¹⁶ A leading historian, Professor Alastair Lamb in his article entitled, "A Reappraisal" records: "It is now absolutely clear that the two documents: the Instrument of Accession and the letter to Lord Mountbatten, could not possibly have been signed by the Maharajah of Jammu and Kashmir on 26 October 1947. The earliest possible time and date for their signature would have to be the afternoon of 27 October 1947. During 26 October 1947 the Maharajah of Jammu and Kashmir was travelling by road from Srinagar to Jammu. His Prime Minister, M.C. Mahajan, who was negotiating with the Government of India, and the senior Indian Official concerned in State matters, V.P. Memon, were still in New Delhi where they remained over night and where their presence was noted by many observers. There was no communication of any sort between New Delhi and the travelling Maharajah. Memon and Mahajan set out by air from New Delhi to Jammu at about 10:00am on 27 October; and the Maharajah learned from them for the first time the result of his Prime Minister's negotiations in New Delhi in the early afternoon of that day. The key point, of course, as has already been noted above, is that it is now obvious that these documents could only have been signed after the overt Indian intervention in the State of Jammu and Kashmir. When the Indian troops arrived at Srinagar airfield, that State was still independent. Any agreements favourable to India signed after such intervention cannot escape the change that the false date 26 October 1947 was assigned to these two documents. The deliberately distorted account of that very senior Indian official, V.P. Memon, to which reference has already been made, was no doubt executed for the same end. Falsification of such a fundamental element as date of signature, however, once established, can only cast grave doubt over the validity of the document as a whole." - "The Jammu & Kashmir Cause", [theparliament.com - ICHR Kashmir Centre.EU - http://www.theparliament.com/EN/Forums/ICHR+Kashmir+CentreEU/aicf8078-ab66-4c1a-b0c8-2ce2b1acdc5f.htm](http://www.theparliament.com/EN/Forums/ICHR+Kashmir+CentreEU/aicf8078-ab66-4c1a-b0c8-2ce2b1acdc5f.htm); Alastair Lamb, "The Indian claim to Jammu & Kashmir: Conditional Accession, Plebiscites and the Reference to the United Nation," *Contemporary South Asia* (1994), Vol. 3, No. 1, pp. 6772; Alastair Lamb, *Kashmir: A Disputed Legacy 1846-1990* pp42 (Karachi: Oxford University Press, 1992

¹⁷ *Supra*, Note 15

A respected and valued authority on the Kashmir issue, Prof. Bal Raj Madhok (twice elected to Indian Parliament) in one of his over 30 books, "Kashmir: The Storm Centre of the World" (1992) clearly recognises the "plebiscite commitment" of the Indian government. This commentator agrees with the writer of the Foreword to Prof. Madhok's book that the readers of the book will "soon discover that the Kashmir imbroglio was the creation of one and one man only and that was India's Pundit Jawahar Lal Nehru. And unfortunately this very important fact has been kept hidden from the Indian people all these years by acts of omission and commission."

The totally illogical stance of Mr. V. K. Krishna Menon on Kashmir dispute leaves me to admire his unquestionable eloquence and mastery of English language, just like many cannot resist admiring the elegant conduct of another Indian, Mr. Nathuram Godse, who extinguished a brilliant light of the last century on the 30th of January 1948 in Birla House, Delhi, by a point-blank pistol shot. He was a picture of politeness and a thorough gentleman in the court which, he knew because of his cogent confession, was going to order his death by hanging for the murder of Mahatma Gandhi. He said to the judges, "The court was the only place left in India where bribery and favoritism did not exist. He looked forward to the judges to pass their verdict without fear or favor and without allowing any outside factor to influence them."¹⁸ He pointed out to the judges that he had never put any appeal for himself nor would he ever ask for mercy because he had shown no mercy to the Great Man of India he had killed. The only

favor he wanted was the permission to have a stroll sometimes during the day before the hanging. Although many of the audience of his final 1544-word speech knew that he was convicted for a wicked murder, they were moved to tears.

Godse accused Mahatma Gandhi "guilty of absolute irresponsibility" and of committing "blunder after blunder, failure after failure, disaster after disaster."¹⁹ Godse mentions as an example of this Mahatma's choice of common Indian language "Hindustani" which he believed would bind together various communities in new India. In his speech, Nathuram Godse said:

"Everybody in India knows that there is no language called Hindustani; it has no grammar; it has no vocabulary. It is a mere dialect; it is spoken, but not written. It is a bastard tongue and crossbreed between Hindi and Urdu, and not even the Mahatma's sophistry could make it popular. But in his desire to please the Muslims he insisted that Hindustani alone should be the national language of India. His blind followers, of course, supported him and the so-called hybrid language began to be used. The charm and purity of the Hindi language was to be prostituted to please the Muslims. All his experiments were at the expense of the Hindus."²⁰

Kashmir dispute has a very involved history of being before the Security Council of the UN. The upshot of the UN deliberations has been the translation of the Indian Prime Minister Nehru's "pledge" of plebiscite into the UN Security Council resolutions. The mother of all resolutions on Kashmir, containing detailed procedures, is the one passed on the 21st of April 1948.

On the 24th of January 1957, the UN Security Council passed another resolution

¹⁸ "Nathuram Godse who shot Mahatma Gandhi had brought tears in the eyes of those who heard his statement in court 50 years ago, says a top secret communication made by the then Superintendent of Police CID, to Intelligence Bureau Director", *The Hindustan Times*, 15th Feb 1999 - http://www.geocities.com/indianfascism/fascism/godsays_last_words.htm

¹⁹ "Speech By Nathuram Godse", Newsletter no. 13, Oct - Dec 2006, GandhiServe Foundation - <http://www.gandhiserve.org/news/mgnd/news200610301105.html>

²⁰ Id.

which reaffirmed the principles embodied in the 1948 resolution. The Security Council, reaffirming its previous resolutions to this effect, said 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." It further declared that "any action taken by the Constituent Assembly formed in Kashmir would not constitute disposition of the state in accordance with the above principles." The last statement means that any "internally held" (however fair and impartial) elections will not decide the future of the state.

India proffers the argument that, since these UN resolutions are old, they are dead-letters. This is a totally fatuous contention and personalities like Mr Charles Tannock MEP, do not do any favors to their image by buying this stance. If this argument was correct, then Communist China could not have Hong Kong back because the UK government, headed by Mrs. Thatcher, could have said, "We have been governing our Crown Colony excellently, with democratic and other human rights values in place (creating an oasis of prosperity in the region), and The Leasing Agreement of the 2nd of April 1898 and the Convention of Peking, signed on 9 June 1898, have become dead-letters and the Chinese argument that our '99-year lease will expire on the 30th of June 1997 is otiose."

India took the Kashmir dispute on the 1st of January 1948 to the UN but now it is against "internationalising" the issue a remarkable approach to logic. Following this argument it says that the Simla Agreement from the 2nd of July 1972²¹, concluded between India and Pakistan after the 1971 war between the two countries

leading to the creation of Bangladesh, has made the dispute "bilateral" and the UN resolutions have become irrelevant. This argument is incorrect for the following reasons:

1. Nowhere in the text of the Simla Agreement in 1972 has Pakistan undertaken to resolve the dispute exclusively "bilaterally" without reference to the UN resolutions. It merits commendation of Pakistani negotiators that they did not sell the right of self-determination of Kashmiris, despite the immense pressure they were under to secure the release of nearly 93,000 prisoners of war of whom 79,676 were uniformed personnel. Paragraph 6 of the Simla Agreement of 1972 lists "a final settlement of Jammu and Kashmir" as one of the outstanding questions awaiting a settlement. Paragraph 4(ii) mentions a "Line of Control", as distinguished from an international border. Furthermore, it explicitly protects "the recognized position of either side" who does not know the position of Pakistan?; if the Pakistani diplomats use that language then the other "diplomats" must know what was meant by it. Article 1 (IV) obviously refers to the Kashmir issue when it talks of "the basic issues and causes of conflict which have bedeviled the relations between the two countries for the last 25 years. To take any doubt out of construction, paragraph 1(i) of the Simla Agreement expressly provides that the UN Charter "shall govern" relations between the parties.

2. More importantly, Article 103 of the UN Charter says, "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations

²¹ Simla Agreement 1972, Text of this Agreement is available at <http://www.stimson.org/southasia/?SN=SA20020114291>

under any other international agreement, their obligations under the present Charter shall prevail." Corollary of this is that the Indians would have been fishing in muddy waters to oblige Pakistani leaders to assume obligations contrary to the UN charter. Thus, the member states cannot undermine the efficacy of the UN by invoking other treaty obligations (sometimes unfairly imposed on a weaker State) to frustrate the will of the UN. Put briefly, a state cannot resile from performing its obligations imposed by the Charter by arguing that it has assumed contrary obligations under a treaty with another state, let alone escaping from the UN Charter obligations unilaterally. Thus, the defiance of India of the substantive Security Council resolutions in 1956, the year in which India started to say that Kashmir was its "integral part", "atoot ung", is manifestly illegal.

Krishna Menon's 7 hours and 48 minutes speech in the UN Security Council was aimed at trying to surmount this obvious illegality. He referred to the irrefutable facts, democratic and secular credentials of India. Mr. Menon was an ardent opponent of the division of the Indian sub-continent and Pakistan was regarded by him to be the creation of the British colonists and propped up by America subsequently. But, as this author has said before, Pakistan was created by the intransigence of the Hindu leaders like Mr. Gandhi and Mr. Nehru who refused to accommodate Muslim concerns. In fact, Mr. Nehru was saying in the 1930s and 1940s that there were only two parties in India, the British and the Congress. He invited the others to "line up" behind one of them an odd insult to Muslims to have the

choice of "lining up" behind the British colonial masters. Mr. Jinnah believed that in Hindu-dominated India the Muslims would be treated as "the lowest of the low." He had gone on record to respond to Nehru's invitation by saying, "I refuse to line up."

Mr. Krishna Menon's fans would, this author hopes, be generous and forgive him to link Mr. Menon with Nathuram Godse who was a picture of politeness when he explained his motive to kill Gandhi in the somber atmosphere of the High Court with a gallery full of Hindu nationalist individuals some of whom were willing to cry for him since a cultured and "highly educated" Hindu²², a 37-year-old Brahmin, a former member of RSS, Rashtriya Swayamsevak Sangh, and the Editor of "Hindu Rashtra", was facing death by hanging. Mr. Godse's patience had run out when Mahatma Gandhi actually went on hunger strike until 55 Crore (550 million) rupees were not transferred to Pakistan as apportioned by the British. He called the creation of Pakistan "vivisection" of mother India and believed in "Hindutva" core of which is the "cultural nationalism" of Hindus, advocating that Hindus in India are a "nation" and Muslim minority is a "community" leaving no space for two-nation theory.

Dr. Navnita Chadha Behera, who has written a well-researched book - *Demystifying Kashmir?* - and deserves commendation for her hard work which she started in 1993, falls in the same fallacy. With respect this author would like to point out to her that, though many millions people, including the Muslims who voted for Congress and trusted the promises of Mahatma Gandhi, Nehru and other candid secular Hindu leaders, India was partitioned on "religious" basis. Thus to say that "you cannot resolve Kashmir on religious lines" is

²² Front Page, NathuramGodse.com - <http://www.nathuramgodse.com/>

shifting the goal-post.²³ She must be aware of the fact that in August 1947 many towns fell in the respective domains of India and Pakistan, because they happened to be on the wrong side of the border, even though they had overwhelming majority of the leaving community. One point of detail is that, at the time of partition, Jammu had Muslim majority. Sadly, now this town is Hindu majority town because many Hindus (some seeking sanctuary from the violence in other parts of Kashmir) have moved to it. Dr. Behera should not back out of the Indian obligations without any logical justification. Even on the 2nd of January 1952, Mr. Nehru was saying:

"We have taken the issue to the United Nations and given our word of honor for a peaceful solution. As a great nation we cannot go back on it. We have left the question of a final solution to the people of Kashmir and we are determined to abide by their decision."²⁴

This author can fully respect the liberal choice of the Muslims who tied their future to secularism and stayed in India. But most disappointingly he would think about that option twice now with the hind sight that the devotees of "Hindutva" were so powerful in their sentiments they would kill the most candid proponent of secularism,

Mahatma Gandhi. Dr. Behera would agree with this author that "Mahatma" of our time, Nelson Mandela, is keen to see peace in Jammu and Kashmir. He had said on the 2nd of September 1998, in his inaugural address to Mr. Nehru's cherished body (Non-Aligned Movement), "All of us remain concerned that the issue of Jammu and Kashmir should be solved through peaceful negotiations and should be willing to lend all the strength we have to the resolution of this matter."²⁵

This author may be alone in observing that if Mahatma Gandhi was left to live for a few more years then he would have not allowed the blood of the Kashmiris, as well as the Pakistani and Indian soldiers, to flow for so long.

Sumantra Bose, Professor of International and Comparative Politics at LSE, cannot but receive this author's unqualified appreciation for his sage views to resolve the Kashmir dispute sincerely. His writings²⁶ do not jump over the logical impediments. Instead, he focuses on the power politics. Pakistan, being a weaker State, must take into account the size and influence of India in advancing its claims regarding Jammu and Kashmir.²⁷ The

²³ 'You cannot resolve Kashmir on religious lines', Navnita Chadha Behera, Interview on 16 April 2007, <http://in.rediff.com/news/2007/apr/16inter.htm>. Dr. Behera is in the illustrious but confused company of Prof. MAURICE MENDELSON QC. Without tendering any legal justification whatsoever at any point in his article, for the manifestly illegal defiance of India of the substantive Security Council resolutions in 1956, the year in which India started to say that Kashmir was its "integral part" ("atoot ung"), the learned professor boldly says, "In 1956, following a further deterioration in relations, India withdrew its agreement to a plebiscite." MAURICE MENDELSON, "Self-Determination in Kashmir" 1996 *Indian Journal of International Law*, pp1-33 at 24.

²⁴ "The Jammu & Kashmir Cause", <http://www.theparliament.com/EN/Forums/ICHR+Kashmir+CentreEU/afcf8078-ab66-4c1a-b0c8-2ce2b1accd5f.htm>

²⁵ Address of the President of the Republic of South Africa, Nelson Mandela, at the inaugural session of the twelfth Conference of Heads of State or Government of the Movement of non-Aligned Countries, Durban, 2 September 1998 - http://www.info.gov.za/speeches/1998/98902_0x2719810417.htm

²⁶ For instance, "The Conflict in Kashmir - Exploring Peace in Kashmir", Sumantra Bose - <http://www.fathom.com/course/10701013/session4.html>

²⁷ Since do otherwise will lead to more blood shed, in his writings and oral presentations this author has desisted from encouraging the Pakistani authorities to support military actions of Kashmiri fighters for "self-determination" and highlight the of the exemption contained in paragraph 7 of Resolution on The definition of Aggression 1974. The material words of this Resolution, expressly rendering military support non-aggressive, are, "Nothing in this Definition, (of Aggression) could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations ... nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration." (General Assembly Resolution 3314 (XXIX), 14 December 1974, G.A.O.R. 29th Sess., Supp. 21, p. 142; (1975) 69 A.J.I.L. 480.

learned professor, however, must recognize that India is only great if it adheres to the rule of law and earns honor by discharging its legal obligations meticulously, rather than throwing its weight around against the States it perceives to be less resourceful than itself. In this equation one must not forget that an appallingly poor State, North Korea, is not receiving the threats of the use of force from the almighty United States, but from the non-nuclear rich State of Iran.

The principles of the right to self-determination, prohibition of the use of force, the rule against genocide, crimes against humanity, and the rules against slavery, piracy and racial discrimination are repeatedly mentioned by almost all experts of International Law, as peremptory norms which cannot be deviated from in any circumstance.²⁸ These fundamental principles are also known as "*jus cogens*." One *jus cogens* which is so obviously important that many authors do not even bother to list is the "principle of good faith." The giants in the International Law field, like Prof. Schwarzenberger, have put it in their enumeration, perhaps to educate the ignorant. If States start to circumvent and infringe treaties by ill interpreting and applying them, I am sure that everyone endowed with the least bit of commonsense would agree with this author we have no hope whatsoever for the prevalence of the rule of law. The chaos will then follow like this: State A signs a treaty in bad faith intending not to comply with it in any respect.²⁹

"The Hindu", a prestigious Indian daily, on the 29th of December 2002, in the article "Fear is the key" by Suresh Nambath

described the plight of the untouchables (known as "Dalits") as follows:

"EVERY TIME they want to participate in a local temple festival, every time they want to walk or cycle through upper-caste areas, in short, every time they try to assert themselves, Dalits in Tamil Nadu risk being beaten up. But they rarely prefer a complaint. For, more often than not, the police too are on the side of the upper castes."³⁰

The Dalits account for 165 million of India's one billion-plus human population. The population of cows is pegged at 206 million. There are more cows than dalits in India. The cows, therefore, have more rights than Dalits. For instance, you can kill Dalits before thousands of witnesses and get away with it. But the imagined murder of a cow will not be tolerated.

Since the creation of India on the 15th of August 1947, the candid and saintly views of Mahatma Gandhi, supported by laudable secular statements of Mr. Nehru, Mr. Krishna Menon and other Hindu leaders, have been materially undermined by extremist Hindus. Dalits have been target of inexcusable discrimination and, in some well-documented cases, even horrendous acts of downright barbaric atrocities of murder and rape have been perpetrated against innocent Dalits. Looking at the fate of 165 million Dalits in today's India, prescient observers of affairs of South Asia may be forgiven to say, "It was correct for Dalit minority to demand 'separate electorate' in the first Round Table conference (1930-31); and Mr. Jinnah was tangibly a realist to be wary of the future of Muslim minority (today numbering 5

²⁸ For instance, Brownlie, *Principles of Public International Law* 515 et seq (2001); Judge Cassese, *International Law* 138 et seq (2002)

²⁹ Kindly see also, Majid, Amir A., "The Military Action against Iraq - The Irreparable Damage to the Rule of Law in International Affairs" 24 *Strategic Studies* 13-40 at 22 et seq. (2004)

³⁰ "India: Holy Cow - Lynching of Dalits and Conversion Politics" - <http://www.onlinevolunteers.org/gujarat/news/holycow/>

million less than the Dalits) living amongst the extremist Hindus.”

In a ceremony presided over by Tibet's exiled leader, the Dalai Lama, on the 27th of May 2007, in Mumbai, about 100,000 Dalits converted to Buddhism. The BBC said that it was “easily the biggest mass conversion in India's recent history”; the converts hoped to escape the rigid caste system in which their status is the lowest.”

Right-wing Hindus have often opposed conversion, pushing some Indian states to restrict legal changes of faith. Conversion is particularly opposed if it involves Hindus converting to Christianity or Islam. In the first half of May 2007, two Catholic priests were publicly beaten after being accused of trying to bring a group of local people into the Catholic faith. “But converting to Buddhism does not evoke much adverse reaction, as most hard-line Hindu leaders believe Buddhism is an extension of Hinduism.”³¹

The partition rules were legal obligations which should have been implemented without clouding the issue by looking at the “democratic and secular” credentials of India, which were not known at the time of the agreement of these rules, prior to the partition in August 1947.

The argument, proffered by some Hindu leaders, that the pronouncements of Lord Mountbatten and Nehru are “unilateral” and do not generate any legal obligations, is untenable in International Law. The Permanent Court of International Justice (PCIJ) dealt with the Legal Effects of the “unilateral Declaration” in the Norway v. Denmark case of 1933. The Minister for Foreign Affairs of Norway had declared on the 22nd of July 1919: “I told the Danish Minister today that the Norwegian Government would not make any difficulty

in the settlement of this question” (sovereignty of East Greenland). About this declaration, the PCIJ said that: “The Court considers it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government ... is binding upon the country to which the Minister belongs.”

The International Court of Justice (ICJ) unambiguously confirmed the 1933 PCIJ principle in the Nuclear Tests Case (Australia & New Zealand v. France) in 1974. In this Case, in paragraph 43 of the judgment, the World Court made a comprehensive statement as follows:

“It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was

³¹ “Low caste Indians set to convert” By Zubair Ahmed, Last Updated: Saturday, 26 May 2007, 22:33 GMT 23:33 UK - http://news.bbc.co.uk/1/hi/world/south_asia/6695695.stm

made.”

The Indian Prime Minister, Mr. Nehru, was “very specific” in promising referendum to Kashmiris. In his radio broadcast of the 2nd of November 1947 (available in the archives) he made clear his “intention” in these words, “That pledge we have given, and the Maharajah has supported it, not only to the people of Jammu and Kashmir, but also to the world. We will not and cannot back out of it.”

According to the 1995 Report on Kashmir, of the International Commission of Jurists (ICJ), India has been reluctant to classify the dispute in Jammu and Kashmir as “a non-international armed conflict under the Geneva Conventions 1949” for avoiding any possibility of it being branded as an international dispute. The ICJ comments, “It had not allowed the International Committee of the Red Cross (ICRC), a key international organization 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.”

Some pro-Indians take shelter in technicality and argue that the relevant resolutions are not “mandatory”, since they are not passed by the UN under Chapter VII of the Charter. This displays the lack of full comprehension of the dispute and is untenable on the following grounds:

1. The issue was “taken” to the UN by India. It would be ridiculous that the UN would have felt the need to pass a mandatory resolution against a willing party.
2. The proponents of this argument

must forgive me for saying that they have woken up rather late. There is no evidence that Mr. Nehru and other Indian leaders ever conceived that they could avoid plebiscite in Jammu and Kashmir on this basis.

“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, and 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”, in paragraph 2 of the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the General Assembly resolution 1514 (XV) of 14 December 1960, the UN has declared:

“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.”³²

The respected analysts have brought into the elaboration of this principle the notions of “ethnically separate” character of the people involved and people occupying a “distinct territory.” In fact, the late professor Michael Akehurst and others believed that this elaboration of the principle represents modern International Law. Prof. Brownlie

³² *The Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960. (G.A. Resn. 1514 (XV). December 14, 1960. G.A.O.R. 15th Sess., Supp. 16, p.66; Harris, D. J., Cases and Materials on International Law 112-113 (Thompson Sweet and Maxwell, 6th Ed.) The text of 1960 Declaration is available from: http://www.unhchr.ch/html/menus3/b/c_coloni.htm*

regards it to be the “most important” exposition of the principle.³³

Indeed, the 1960 Declaration is very robust in pursuit of its aim of making the distinct people masters of their destiny. Thus, in paragraph 3 it makes clear as follows:

“Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.”³⁴

Some commentators (motivated to deny self-determination to deserving people) assert that the 1960 Declaration only applies to colonies. This is patently wrong. India, before the 15th of August 1947, was a “colony” (an awful status) and thus the drafters of the 1960 Declaration were pivotally concerned to eliminate this malady with the weapon of “self-determination.” It would be odd if the States, which were freed by this Declaration, said that the right is not available to subjugated people who do not unambiguously fall within the status of a colony. Fortunately, whilst specifically referring to colonies, paragraph 5 of the Declaration also directs the UN Members to take “immediate steps” to end foreign domination “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.”³⁵

Since the Jammu and Kashmir

dispute is rooted in the “territorial disposition” between India and Pakistan under the partition rules, it is most respectfully submitted that paragraph 6 of the Declaration is not relevant. This says that: “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.”³⁶ Likewise, paragraph 7 of the Declaration is inapplicable.³⁷

The International Commission of Jurists conducted a 5-day fact finding mission and investigated the Kashmir dispute in 1995. Regarding the right of self-determination it concluded that: “The peoples of the State of Jammu and Kashmir acquired a right of self-determination at the time of the partition of India. The right has neither been exercised nor abandoned and therefore remains capable of exercise. Full or limited independence for Kashmir is a possible option. 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 people 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.”

The ICJ Mission consisted of lawyers and was headed by Sir William Goodhart QC, a seasoned Human Rights Lawyer. In this perspective, Baroness Nicholson's

³³ Brownlie, *Principles of Public International Law* p554 (OUP, 6th Ed. 2003)

³⁴ *Supra*, Note 32.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* Paragraph 7 reads, “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.”

conclusion that the Kashmiris are not entitled to plebiscite flies in the face of legality.

Even in his “Rivers of Blood” speech on the 20th of April 1968 in Birmingham, Mr. Enoch Powell did not deviate from the quintessential characteristic of an Englishman, i.e. (as George Bernard Shaw has said) you cannot prick an Englishman with a thorn but hang him by the rule. Nowhere in his speech does Mr. Powell infer that England can infringe the “rule of law” and throw out the coloured immigrants; those who were lawfully here could only volunteer.

Baroness Nicholson's report mentioned in the second paragraph above, predicating that the Kashmiris do not merit plebiscite, is certainly running away from the essence of law. With so much infidelity to the rule of law, it cannot be treated legally sound.

The Master Anomaly

When trying to make a concession to India, the UN Representative for India and Pakistan regarding Kashmir, Sir Owen Dixon (1886-1972), a former Chief Justice of the Australian High Court, suggested to the Prime Minister of India, Mr. Nehru, in his message of the 15th of August 1950 that he would confine the plebiscite to some regions of Jammu and Kashmir. Replying to Sir Owen, in his telegram of the 16th of August 1950 (annexed to Sir Owen's Report), Mr. Nehru said, “I must confess...your message surprised me greatly...We have not opposed at any time an overall plebiscite for the state as a whole.” So up to the 16th of August 1950,

the Indian head of state had not deviated from “an overall plebiscite for the state as a whole.” Mr. Nehru remained true to his pledge later, as detailed in the subsequent passages.

The Indian Prime Minister Nehru and Pakistan's Prime Minister, Mohammed Ali Bogra, met in June 1953 at the Commonwealth conference in London and agreed on some points to resolve the intractable dispute of Kashmir. Then, on the 20th of August 1953, both nations agreed to take the issue out of UN's hands and resolve it directly.³⁸ Subsequently, as Prof. Rathnam Indurthy records, in 1953, to the pleasant surprise of Pakistan, “Nehru, who had already informed Kashmir's new Prime Minister, Bakshi Ghulam Mohammed of his intentions, told Bogra, when he visited New Delhi, that he would conduct a plebiscite in Kashmir. Bogra returned to Pakistan triumphantly.”³⁹

The failure of Mr. Nehru's offer of plebiscite did not materialise due to Mr. Bogra's “procrastination reportedly brought about by the conspiratorial politics of General Ayub Khan, who was plotting to seize political power and who needed the hostility with India in order to achieve his goal.”⁴⁰

This author would view the proposition that the “procrastination” here was brought about by the “conspiratorial politics” of the Pakistani military chief with utmost skepticism because General Ayub Khan only toppled the civil regime in October 1958, five years after this event. Further, the merchants of the “conspiracy” theory are the theological disciples of “democracy”. whose candour rapidly disappears when a democratic government

³⁸ Apparently, Pakistan had “agreed temporarily” to achieve self-determination for Kashmiris to suspend the UN involvement and accommodate the Indian wish to obviate internationalization of the dispute. Rathnam Indurthy, “Kashmir Between India and Pakistan: An Intractable Conflict, 1947 to Present” pp5-6, *Supra*, Note 13.

³⁹ *Id.*

⁴⁰ *Id.*

of their choice is not elected. In this context, the election of Hamas in the Palestinian National authority may be cited an election thought to be thoroughly fair and impartial and intensively monitored by external observers, including the American former President, Jimmy Carter.⁴¹ Algeria can be cited as another example. When the Islamic Salvation Front (ISF) in 1992 swept municipal and later national parliamentary elections, the West rushed to nip the democracy in the bud and supported the installation of a military dictatorship.⁴² This intervention led to the most horrible violence in that country.⁴³

Emergence of Hamas was the fairest manifestation of democracy in recent times. However, one cannot but say that it led to unimaginable tragedy in the occupied Palestine. Dr. Condoleezza Rice, the American Secretary of State, to undermine the “majority party” (Hamas) against the “minority party” (Fatah) said, “It is the duty of the international community to support those Palestinians who wish to build a better life, and a future of peace.”⁴⁴ It would have shown some “candour” if she had openly said that in future the US would support “democracy” if the election results were congruent with its own policy goals.

In fact, on the 7th of October 1958, in an unwise move, the civilian President of Pakistan, Iskander Mirza, had declared Martial Law, abrogating the Constitution of 1956, dismissing the ministers, dissolving

the Central and Provincial Assemblies, and prohibiting all political activities. In consequence of this, General Muhammad Ayub Khan, at that time the Commander-in-Chief of the armed forces, was made the Chief Martial Law Administrator. When he took the exclusive charge of the country on the 27th of October 1958, he was welcomed as a national hero by the people because of the widespread Corruption within the national and civic systems of administration.⁴⁵

The Master Anomaly in the arguments, as analysed above, is that deniers of self determination to people of Jammu and Kashmir wish to eclipse the “rule of law”, and avoid applying the partition rules (patently applicable as the temporal law, regulating the division of Indian subcontinent on religious lines) to the dispute. They hijack the discussion to secularism and democracy in India versus military rule and religious fundamentalism in Pakistan clearly post-partition developments. The Master Anomaly has clouded the legal force of the UN resolutions and the legal effect of binding pledges of the competent heads of State, undermining the *pacta sunt servanda* principle.

Observance of the Rule of Law Pays

It is widely believed that India's observance of the “rule of law” will

⁴¹ When the minority party, Fatah, established it in the West Bank area of the Palestinian territory, President Bush had 15-minute telephone conversation with its leader, Mr. Abbas, and resumed the severed links with the “majority party” Hamas a ridiculous approach if one is genuinely concerned with the true wishes of the people, expressed by democratic fair and impartial elections. “US, EU restore Palestinian ties”, Last Updated: Monday, 18 June 2007, 18:04 GMT 19:04 UK - http://news.bbc.co.uk/1/hi/world/middle_east/6764541.stm

⁴² The so-called “mother’s love” legitimacy of “democracy” stirred “the most basic fears in the minds of the West about the Muslims “The unthinkable now seemed to be on the horizon: an Islamic movement would come to power not through bullets but through ballots, not by violent revolution but by working within the system.” - John L. Esposito, John O. Voll, *Islam and Democracy* Ch.7 “Algeria Democracy Suppressed” p150 (OUP: 1996)

⁴³ For details see, Paul de Bendor, “Algeria hopes for democracy, Islamist rebellion ebbs”, Reuters AlertNet NEWSDESK, 06 Apr 2004 20:59:51 GMT.

⁴⁴ Supra, Note 41.

⁴⁵ Martial Law Under Field Marshal Ayub Khan [1958-62] - <http://www.storyofpakistan.com/articletext.asp?artid=A065>

guarantee support of many States and leaders for its claim to get a permanent seat in the Security Council. "India feels it should be entitled to have a permanent seat in the Security Council. Chances of that happening would be greatly increased if the issue of Kashmir could be resolved."⁴⁶

In some fora, the behaviour of India has been patently wrong. The conduct of its ambassadors has been totally misguided and thoroughly incongruent with the splendour expected of the intellectuals rising from the land of Mahatma Gandhi. In this context, two international affairs can be mentioned as follows:

Indian Conduct in the Creation of the UNHCHR

India was one of the three main opponents of giving "fact-finding" power to the UN High Commissioner for Human Rights the States which behind the curtain of "sovereignty" did not wish to be examined by an impartial dispatch of mission of enquiry by the proposed office of the Commissioner. It was accompanied by Fidel Castro's Cuba and Saddam Hussein's Iraq in this struggle.⁴⁷ Despite the fact that such dispatches were to be made in the context of continuous dialogue between the High Commissioner and governments, after consultation with the Secretary-General, and with the consent of the State concerned, "the concept of fact-finders arriving at the scene of human rights atrocities was

portrayed as interference and as being beyond the fringes of the Charter" when the competencies of the proposed UN High Commissioner for Human Rights were considered in 1993.⁴⁸

With hindsight one can see that the fact-finding paragraph had become overloaded with preconditions and caveats. The final version may be vague but it still allows a right of initiative to the High Commissioner. Among other things, it calls for the High Commissioner to play an active role in preventing the continuation of human rights violations around the world. For the first time, the UN now has a human rights official who can take up human rights concerns with governments, without waiting for a mandate from a political body.⁴⁹

Indian Conduct in the Kosovo Crisis

Whilst observing that the NATO military expedition in Kosovo was justified as "a moral action", Judge Antonio Cassese deems it "contrary to current international law", clinically.⁵⁰ He says that "It has been claimed by some non-governmental organizations and even governmental officials that under certain exceptional circumstances, where atrocities reach such a large scale as to shock the conscience of all human beings and indeed jeopardize international stability, forcible protection of human rights may need to outweigh the necessity to avoid friction and armed

⁴⁶ India/Pakistan: Kashmir - What are some of the factors behind the continuing tension between India and Pakistan - NGO Committee on Disarmament, Peace and Security - <http://disarm.igc.org/index.php> (It is noteworthy that the joint author of this article is Ann Lakhdir, President of the NGO Committee on Disarmament, Peace and Security.)

⁴⁷ Clapham, Andrew, "Creating the High Commissioner for Human Rights: the outside story" 5 EJIL 4, pp556-568 at 562 (1994) Available from <http://www.ejil.org/journal/Vol5/No4/art4.pdf>

⁴⁸ Id.

⁴⁹ Id. Pp562-563; also A/C.3/48/L.79, 3 December 1993. Prof. Clapham told us "the outside story" because some States did not wish bodies like Amnesty International or Human Rights Watch to come into the building where the debates dealing with the creation of a Human Rights Commissioner were taking place.

⁵⁰ COMMENT: Antonio Cassese, "Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?" Text available - <http://www.ejil.org/journal/Vol10/No1/com.html>

conflict. To put it differently, "positive peace", i.e. the realization of justice, should prevail over "negative peace", i.e. the absence of armed conflict." Of course, international lawyers cannot sit on their hands when Milosevic type regimes are actively busy in ethnic cleansing. Thus, this author agrees with Judge Cassese: "Based on these nascent trends in the world community, I submit that, under certain strict conditions, resort to armed force may gradually become justified, even absent any authorization by the Security Council."⁵¹

In three successive Resolutions (1160, of the 31st of March 1998, 1199 of the 23rd of September 1998, and 1203, of the 24th of October 1998) the Security Council unanimously decided that it was acting under Chapter VII of the United Nations Charter, and in the second and third of these resolutions explicitly defined the situation in Kosovo as a "threat to peace and security in the region". In these circumstances, everyone, including this author, was praying for somebody to intervene in the Kosovo tragedy which was becoming more and more repugnant every day. Thus, the NATO action was not only an antidote to the brutality of the Milosevic regime but a savior for the legitimacy of the UN, rendered impotent by political posturing of various States.

Against this background, for India to sponsor a SC resolution with its "political friend", the Russian Federation, to criticize the NATO action was hideous.⁵² Needless to say, the resolution sponsored in the Security Council by Belarus, India and the

Russian Federation aimed at condemning NATO's use of force was rejected. The Indian representative called the action to be "senseless violence." The Cuban representative regarded it a "ridiculous claim" to justify the use of force "to coerce a government into fulfilling its obligations" under international law whilst, as its letter dated 24 March 1999 addressed to the Security Council President states (document S/1999/320), the Russian Federation categorized the NATO action an "extremely dangerous situation caused by the unilateral military action of the North Atlantic Treaty Organization."⁵³

Whilst totally failing in succeeding to stop the despicable atrocities of Slobodan Milosevic against Kosovars, speaking before the Security Council action on the text of the resolution, the representative of the Russian Federation said that "attempts to justify the military action under the pretext of preventing a humanitarian catastrophe bordered on blackmail, and those who would vote against the text would place themselves in a situation of lawlessness. Indeed, the aggressive military action unleashed by the North Atlantic Treaty Organization (NATO) against a sovereign State was a real threat to international peace and security, and grossly violated the key provisions of the United Nations Charter."⁵⁴

Ambassador Peter Van Walsum (Netherlands) said that after initial positive pressure on the Milosevic regime, "at every critical juncture Russia had somehow succeeded in making the pressure less credible."⁵⁵

⁵¹ *Id.*

⁵² *The Indians can always depend on the Russian support whether it is the Bangladesh war or its explosion of nuclear bomb. When India exploded the nuclear device (Pakistan had yet to respond) the G8 were meeting in the UK. President Yeltsin single-handedly prevented the imposition of sanctions against India. Special Report: India nuclear testing Tuesday, 19 May, 1998, 14:35 GMT 15:35 UK - http://news.bbc.co.uk/1/hi/special_report/1998/05/98/india_nuclear_testing/94721.stm*

⁵³ "SECURITY COUNCIL REJECTS DEMAND FOR CESSATION OF USE OF FORCE AGAINST FEDERAL REPUBLIC OF YUGOSLAVIA", SC/6659, Press Release, 26 March 1999 - <http://www.un.org/News/Press/docs/1999/19990326.sc6659.html>

⁵⁴ *Id.*

⁵⁵ *Id.*

Ambassador Robert Fowler (Canada) said that, rather than bringing forward that unproductive resolution, in an attempt to divert attention from the fundamental humanitarian issue, countries like India “might more usefully had directed their energies towards convincing the leaders in Belgrade to stop the violence against their people and to accept the Rambouillet peace agreement. As proposed, the resolution would only serve to grant President Milosevic free rein to finish the brutal job he started last year, and had since continued to such deadly effect.”⁵⁶

Ambassador Danilo Turk of Slovenia said he would vote against the draft resolution and gave the following reasons for its inadequacy:

“It took a selective political view of the situation and lacked the objectivity necessary for Security Council resolutions. It ignored the fact that several months ago, the Council had declared the situation in Kosovo as constituting a threat to regional peace and security. The current text ignored the fact that the Council already spelled out the requirements for removing that threat, as well as the fact that those requirements had been flagrantly violated, including by the ongoing massive defense by the Federal Republic of Yugoslavia military forces affecting the civilian population in Kosovo. All of those reasons were ignored in the draft. He said it seemed that the text was intended to redefine Security Council resolutions. Proceeding from a fundamentally flawed factual assessment, the text tried to invoke some basic norms of the United Nations

Charter, but it failed to address the relevant circumstances and ignored the events which had led to the current military action. Moreover, it did not state the reasons for the military action or present any reason to oppose them. The political jargon of flagrant violations could not conceal the lack of a convincing argument.”⁵⁷

Commenting on the NATO's action in Kosovo, The Bosnians Representative asked “Did anyone remember the ethnic cleansing and the genocide committed against Bosnians? He asked whether the supporters of the draft resolution believed that an end to NATO's action would produce anything positive for Kosovo, or Bosnia and Herzegovina, or for the region as a whole. Then he observed that “The world community's response to Bosnia was late but it was welcome.” He did not now wish to see a response come too late for the Kosovars.⁵⁸

Since nobody wanted to turn a blind eye to the growing humanitarian disaster in Kosovo created by the regime of Slobodan Milosevic and knew that the resolution was patently turning the legal logic on its head, it did not receive any appreciable support in the membership. The Canadian Ambassador had said, “Those who would support the resolution had placed themselves outside of the international consensus which held that the time had come to stop the continuing violence perpetrated by the Government of the Federal Republic of Yugoslavia against its own people.”⁵⁹ Thus, the draft resolution was rejected by a vote of 3 in favor to 12 against, with no abstentions.⁶⁰

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

The Indian Representative was too eager to see the resolution succeed. This caused the Canadian Ambassador to have a “second intervention” to clarify that “The representative of India had said that three vetoes had been cast during the vote on the draft. In fact, there had not been any vetoes cast in the morning.” This was confirmed, in a second intervention, by the French Ambassador, Mr. Dejammet.⁶¹

Final Remarks

The activity of the European Parliament is good. This author reiterates what he said before: the friends of the Kashmiris must continue their efforts to solve this dispute. As Mr. Philip Bushill-Matthews, Member of the European Parliament (MEP), belonging to the Conservative Party UK said “that this report shines the spotlight on the problems based on a daily basis of the people of Jammu and Kashmir and that within the European Parliament we should keep that spotlight

shining brightly into the future.”⁶²

This author may request the Indian leaders to resolve the Kashmir dispute according to their wishes. Compliance with the UN resolutions will elevate the image of India and, this author included, observers of the international affairs would feel confident to support the Indian desire of becoming a permanent member of the Security Council. Addressing the 16th Asian Corporate Conference organized by the Asia Society in Mumbai on the 18th of March 2006, dismissing the idea of any regional supremacy, the Indian Prime Minister, Dr. Manmohan Singh, said that “In this globalized world, we are all interdependent, and the world will become better only when we all work together.” Then he observed that in the 21st century “we should look forward to the dominance of freedom.” This kind of opinions give this author palpable reason to be optimistic. Indubitably, the resolution of the Kashmir dispute will be a victory and defeat poverty and violence in South Asia.⁶³

⁶¹ *Id.* Of course, favors have to be returned. Using the procedure in the General Assembly resolution 377 A (V) of 3 November 1950 (The procedure used during the Korean War), with the dependable help of Russia and taking the opportunity of Pakistan being undeniably softened by the 1971 war, by Resolution 303 the Kashmir dispute was removed from the ongoing agenda of the Security Council (document S/Agenda 1606) in December 1971, citing, the “lack of unanimity of the permanent members” preventing the SC from “exercising its primary responsibility for the maintenance of international peace and security.” The result of this overt unfriendly act of Russia towards Kashmir has been that “The Security Council has not considered the issue since. India originally brought the issue to the Security Council, but it has had no interest in resolving this by having a plebiscite for many years. Pakistan continues to try to have UN involvement.” *Supra*, Note 46.

⁶² “Kashmir Report Adopted by the European Parliament”, Strasbourg, 24 May 2007, theparliament.com - Press Releases - <http://www.eupolitix.com/EN/Forums/ICHR+Kashmir+CentreEU/PressReleases/200705/dd8f2f3d-243a-4eed-b7f8-64ff4807c27f.htm>

⁶³ The Indian Prime Minister should start implementing his promise of “zero tolerance for human rights violations” in Kashmir as recommended by the EU report, *Supra*, Note 6, paragraph 23.