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Prof. Dr. Hans Köchler

President of the International Progress Organization

Chairman, Working Group for Sciences and Politics at the University of Innsbruck

Chairman, Department of Philosophy, University of Innsbruck, Austria

**The Kashmir Problem between Law and Realpolitik
Reflections on a Negotiated Settlement**

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(I) Preliminary remarks

For more than six decades, the Kashmir conflict has proven to be one of the most intractable problems of international politics. In view of the many different, often contradictory, proposals, declarations and initiatives made by national and international organizations on the matter, it would be preposterous – and a mission impossible – for an international NGO to come up with a simple recipe for a solution. Nonetheless, as representative of a non-governmental organization, I have the privilege of not being bound by the *raison d'état* of whichever government that may have a vested interest in the problem in question.

Before I enter into the subject matter, let me begin on a personal note. More than 10 years ago, in July 1996, I acted as Chairman of the final plenary session of an international conference on “Democracy and Terrorism” which was held at the Indian Parliament in New Delhi, and I had been assigned the role of Co-ordinator of the Drafting Committee which comprised delegates representing the governments of India and Pakistan. It goes without saying that the Kashmir issue figured prominently in the debates. The main concern was then – as it is now – that violence has to be stopped at all levels (of regular and irregular armed forces) so as to create a climate conducive to negotiations about a just and durable settlement.

In my experience as representative of an NGO that, over a period of more than three decades, has dealt with major issues of international conflict resolution, including Palestine and Iraq, I have to say that it is almost impossible to be honest, fair and balanced in one's approach towards an international dispute *and still provide specific, actionable proposals for a solution*. Due to this dilemma, most statements, in order not to alienate any of the parties, remain on the level of diplomatic courtesies, vague formulas and generalities that are open for interpretation according to each party's requirements.

This conventional “diplomatic” – or tactical – approach, however, has solved nothing; particularly in regard to the Kashmir issue, it has left everything in limbo (and for more than six decades by now). It is in no way sufficient to repeat – for the sake of avoiding controversy and not antagonizing anyone – again and again commonly accepted principles; after their affirmation and reaffirmation, one has to talk about the conditions for their implementation and finally reach the stage of an actionable program.

Should there be any hope for a solution, one has to get away, even if only gradually, from the old *friend-enemy dichotomy* – according to which each and every proposed measure is scrutinized as to whether it is for the other side, thus to be rejected, or against it, thus to be supported – and vice-versa.

In their dispute over Kashmir, India and Pakistan appear now determined to divest themselves of the negativistic logic expressed in the *dicta* “you are either with me or against me” and “the enemy of my enemy is my friend.” The leaders on both sides seem to have realized that priority should be given to the search for common ground between the two neighbouring countries – beyond the traditional rhetoric of confrontation. Ultimately, the paradigms of the nation-state and of state sovereignty may have to be reinterpreted and adapted so as to make them compatible with a system of *regional partnership* – a process which Europe, after devastating wars between its nation-states, has undergone in the course of the formation of the then European Economic Community (EEC) that eventually led to the creation of the European Union.

When talking about future prospects, one must be aware of a historical fact that has almost become a predicament of all efforts aimed at finding a solution to the problem of Kashmir:

The respective resolutions of the United Nations Security Council were undoubtedly the *documents of reference* for a durable and internationally acceptable solution. This perception has been confirmed, at the time of their adoption, by both India and Pakistan. However, *no steps have ever been made towards the implementation of those resolutions*. In order to analyze the situation properly, we have to be aware that those resolutions, in technical terms, are not mandatory because they are not based on Chapter VII of the Charter. Frankly speaking, no unanimity would have been achievable among the then permanent members for enforcement measures according to Arts. 41 and 42 of the Charter. When compared to compulsory resolutions adopted by that body in other conflict situations (e.g. the occupation of Kuwait by Iraq in 1990-1991), the policy of double standards of the Security Council (which is intrinsically linked to the veto privilege of the permanent members) becomes rather obvious. The plight of the Kashmiri people is similar, in that regard, to that of the Palestinians: the often-quoted resolutions 242 (1967) and 338 (1973), calling upon Israel to withdraw from occupied Arab territories are also not based on Chapter VII and have thus been ignored by the occupying power since the day of their adoption. Frankly speaking: in legal terms, false expectations have been created as to the possible role of the United Nations Organization as facilitator of a solution to the Kashmir problem.

A general predicament of which the people of Kashmir are a victim and which goes beyond the scope of the United Nations as an intergovernmental organization is also to be addressed here: in history, even prior to the existence of the UN, *issues of self-determination* have almost always been dealt with on the basis of a policy of double standards. If it suits a country’s (nation-state’s) political interests, that country’s government will call for the respect to the right of self-determination in a given case; if not, it will stick to the norms of state sovereignty, territorial integrity and non-interference. Even the de-colonization process after World War II was

determined by such considerations of political convenience. The practice of the United Nations Security Council as well as of other groupings of states also lacks a clear pattern on this basic issue of international justice. Depending upon the prevailing constellation of power politics, the right of self-determination has been acknowledged in one case and ignored in the other. Because of concerns over national sovereignty, territorial integrity and political stability, the policy of states has been rather erratic in that regard. Recent developments in the Balkans, the Caucasus, East and Southeast Asia attest to this trend.

(II) Basic requirements of a just and durable solution

In view of these predicaments and of the historical developments, particularly as regards the absence of a balance of power at the global level, we would like to outline some of the basic elements of an approach that may allow a just and durable solution of the issue of Kashmir:

- (1) The multidimensional nature of the problem (one of the reasons why it appears almost intractable) is to be acknowledged:
 - (a) The Kashmir problem is an issue of *self-determination*, but also of territorial claims (effectively between *three* countries);
 - (b) it is an issue of basic *human rights* (which form part of the *jus cogens* of general international law), but also of national sovereignty and the political stability of the countries involved in the dispute;
 - (c) it is an issue of *religious rights and identity* (in particular of the Muslim community affected by the partition along the “Line of Control”), but not exclusively. An exclusive religious approach would unavoidably lead to sectarianism and might trigger an endless chain of violence, potentially leading to another armed confrontation between India and Pakistan. It is to be noted that, historically, Kashmir has been a place of religious diversity (including Muslims, Hindus, Sikhs and Buddhists as well) and of inter-religious tolerance;
 - (d) it is (essentially) a *regional* issue in terms of territorial claims (between effectively *three* states, including China), but it is, at the same time, a matter concerning the international community as a whole since it has implications for global peace and security, not the least due to the nuclear potential of the three powers actually controlling parts of the disputed territory.
- (2) In terms of the right to self-determination, a solution has to be pursued on the basis not merely of a bilateral, but tripartite approach (including first and foremost the people of Kashmir).

- (3) A solution must be found *without outside interference*. In a geopolitically sensitive region such as Kashmir it may be almost impossible to find an honest (i.e. disinterested) broker, a state that could act as a “fourth party”¹ mediator and guarantor of a solution. The example of the United States’ facilitating role in the Israeli-Palestinian conflict is not very encouraging. Generally speaking, the only global superpower has strategic interests in *every* region of the world and, thus, cannot act in an impartial manner. A *regional* intergovernmental organization such as the European Union may have a better chance of being perceived as “neutral.”
- (4) All parties to the dispute have to come to realize that they will not gain anything from armed confrontation, neither through the use of force by regular armies nor through the support of clandestine organizations that may engage in violence against civilians (which falls under the definition of “terrorism”).
- (5) Having said that, it has to be made clear that the Kashmir problem must not be confused with issues related to the so-called “global war on terror.” This would bring in a superpower agenda that is alien to the conflict and would load the dispute with a burden that will make it, frankly speaking, unsolvable.
- (6) If there is to be any hope for a durable solution, one also has to get away from a mere police and military approach (“battle against terrorists”) and, instead of dealing with symptoms, address the root causes of the conflict – that are related to questions of self-determination. This may help the parties to get out of the trap that is aptly described by the dictum “one man’s terrorist is another man’s freedom fighter.”
- (7) All parties will finally have to acknowledge that the problem of Kashmir is to be solved on the basis of the *respect for the international rule of law*, including the principles and provisions of the United Nations Charter (in particular those dealing with international peace, national sovereignty and non-interference). This commitment has to be seen in an integrated (or holistic) manner. No rule or principle can be picked and advocated in isolation from the others. They are defined through their interrelatedness.
- (8) Furthermore, the legacy of the Security Council resolutions related to Kashmir is not to be discarded – in spite of the time that has elapsed since their adoption. Those resolutions have repeatedly affirmed the *democratic principle* as basis of a (just) solution, something which, at the time, has been fully endorsed by India. It is to be

¹ “Fourth party” is deliberately used in view of the three parties (the people of Kashmir, India, Pakistan) that are involved in the ongoing dispute over self-determination in Kashmir. This numbering is not to be confused with that related to questions of territorial sovereignty and control (which involves four parties, three of which are states, including China).

recalled that, in a radio broadcast on 2 November 1947, India's Prime Minister Jawaharlal Nehru stated: "We have declared that the fate of Kashmir is ultimately to be decided by the people. That pledge we have given [...] not only to the people of Kashmir but the world. We will not, and cannot back out of it. We are prepared when peace and law and order have been established to have a referendum held under international auspices like the United Nations."² Security Council resolutions 38 (1948) of 17 January 1948 and 47 (1948) of 21 April 1948 as well as the resolutions adopted by the United Nations Commission for India and Pakistan (UNCIP) on 13 August 1948 and 5 January 1949 are to be recalled in this regard. Almost 10 years after the initial resolutions, Security Council resolution 122 (1957) of 24 January 1957 had reaffirmed the principle, stating 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 ...". It is to be noted that this provision has not become obsolete (or invalid) due to its not having been recalled by the Council at later stages; but we must be aware that none of the respective resolutions of the Council has been adopted on the basis of Chapter VII (which explains why the Council has not followed up on them). Apparently, the constellation of power among the five veto-wielding members has prevented the Council from any enforcement action according to Arts. 41 and 42 of the Charter.

(III) Positive steps taken and further measures required for a just settlement

After six decades of bloodshed and confrontation, leaders on both sides of the Line of Control have gradually become aware of the impossibility of solving the conflict through armed force, an option which has acquired an entirely new dimension due to India's and Pakistan's having joined the nuclear club.

In its resolution of 24 May 2007 on "Kashmir: present situation and future prospects," the European Parliament has rightly acknowledged the positive steps taken so far by both countries and encouraged the conflicting parties to proceed on the path to peace. The "composite dialogue" which India and Pakistan have embarked upon just a few years ago must be conducted in a way that justifies the use of the adjective ("composite").

² Quoted according to Jawaharlal Nehru, *Independence and After. A Collection of Speeches 1946-1949*. Freeport, N.Y.: Books for Libraries Press, 1971, Chapter "On Kashmir / Who is Responsible?," p. 59.

India's talks with the *All Parties Hurriyat Conference* (APHC) have been a step in the right direction. The importance of this initiative cannot be underestimated as is evident from an Indian commentary published upon the resumption of the talks with Prime Minister Manmohan Singh in 2005: "So great is the distance separating the formal positions of the Government and the Hurriyat that finding anything remotely resembling common ground is a difficult task at the best of times."³

The statements and declarations by President Pervez Musharraf, indicating a preparedness on the part of Pakistan to get away from old paradigms and launch fresh proposals, are equally encouraging. In his lecture and contribution to the debate at the *Global Discourse on Kashmir 2006* right at this place on 12 September 2006, the President of Pakistan was right in deploring the lack – over so many years – of any concrete proposals for a just and durable solution; he further reiterated his four point proposal of 2001 which includes the basic principle that, for the sake of a settlement, options that are "unacceptable to either side" should be set aside. It is to be recalled that, in his own words, the President "floated" the idea, in December 2005, of a "United States of Kashmir" including all regions, a move that, as he remarked, "actually initiated the international debate."⁴

The proposals advanced by the Indian Prime Minister in 2004 concerning self-rule and open borders also indicate new flexibility compared to the country's earlier position.

So far, however, in spite of all the declarations of goodwill and a readiness to negotiate, both sides have been rather timid in moving forward. What is needed in this historical constellation are *bold steps* to lead both countries away from the traditional enemy stereotypes and the attitude of deep mistrust.

On the basis of repeated declarations of intent, a complex web of confidence-building measures (CBM) will have to be woven and the possibilities of track II diplomacy will have to be explored further to back up the political process. The opening of the border along the Line of Control (LoC) must not consist of sporadic events only. Communication lines also have to be opened on a permanent basis. The movement of people and goods over the LoC must be facilitated; so far there have been too many bureaucratic hurdles to these promising practical measures.

Apart from the alleviation of the daily life of Kashmiris on both sides of the LoC in terms of the economy and of family relations, the following short and medium term measures will undoubtedly be among the most important CBMs: (a) the facilitation of the return of the Pundits to

³ Siddharth Varadarajan, *The Hindu*, 5 September 2005.

⁴ President Pervez Musharraf, "Question & Answer Session," in: *Global Discourse on Kashmir. From the call for demilitarisation to the holding of self-determination. European Parliament, Brussels, 12-13 September 2006*. Brussels: ICHR Kashmir Centre.EU, 2006, p. 12.

the Kashmir valley; (b) the working out of provisions for the peaceful living together of all religious groups so as to get away from a narrow sectarian approach; and (c) the stopping of violence against civilians on all sides. Police brutalities, rape and other human rights violations will have to come to an end and have to be prosecuted with full determination and without bias. At the same time, deliberate attacks on civilians have to be terminated once and for all; no party to the dispute – whether state or non-state actor – has the right to engage in such kind of violence. A struggle for self-determination and political and civil rights must not be carried out by terrorist means – and must equally not be countered by acts of state terrorism.

One of the most important long-term measures to support a just and durable solution to the Kashmir problem will be a comprehensive process of *regional integration*. What has been achieved so far in terms of the South Asian Association for Regional Cooperation (SAARC) can only be seen as a modest beginning. It should not be forgotten, however, that the SAARC Summit in Islamabad in January 2004 served as the venue for President Pervez Musharraf's and Prime Minister Atal Behari Vajpayee's *joint statement* by which they "welcomed the steps towards normalisation of relations between the two countries and expressed the hope that the positive trends set by the CBMs ... would be consolidated."⁵ It might be worthwhile to pay attention to the European experience – where, in cases like that of Northern Ireland, membership of conflicting parties in the European Union has helped them to reach a negotiated settlement to an old dispute.

The various confidence-building measures are meant to back up what has been achieved, in the last few years, in terms of military, but also political, *détente*. Reconciliation and mutual recognition of rights (especially when those include the right to self-determination on the one hand and the principles of state sovereignty and territorial integrity on the other) cannot be imposed through pressure from outside. International actors – whether governmental or non-governmental – may, under specific circumstances, be facilitators of dialogue. However, a just and lasting solution can only be achieved on the basis of a tripartite agreement between the people of Kashmir and the states of India and Pakistan.

⁵ Quoted according to "Text of India-Pakistan statement," *BBC News*, 6 January 2004.