

THE FUTURE OF KASHMIR

Issues and Precedents

Memorandum prepared by Hurst Hannum¹

This Memorandum addresses several issues raised in the February 2005 proposal by the Kashmir Study Group, "Kashmir - A Way Forward," which describes the possible reconstitution of the Jammu and Kashmir region into five self-governing entities.² In brief, I conclude that there is no international legal impediment to implementing the proposal, although a number of difficult political issues obviously will have to be resolved.

The Memorandum is divided into three sections, followed by a short conclusion. The first section considers general issues, such as the concept of self-government; citizenship; legislative, executive, and judicial competence; economic and financial issues (including currency); foreign affairs powers; defense and policing; freedom of movement; and the right of return. The second section briefly addresses issues of coordination among the five entities. The final section suggests ways in which an agreement on Kashmir might be given

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2. "Kashmir" is used here to refer generally to the entire territory of historic Kashmir, which is now under the respective control of India, Pakistan, and (in the view of many) China, unless the context makes it clear that only part of the territory is included. On the Indian side of the "Line of Control" [LOC] established in July 1972, the area is coterminous with the Indian state of Jammu and Kashmir. On the Pakistani side of the LOC are the autonomous state of Azad Kashmir (also known as Azad Jammu and Kashmir), recognized only by the Pakistani government, and the Northern Areas, administered directly by Pakistan. The Chinese-held areas, known unofficially as Aksai Chin and Shaksgam, are administered as parts of the autonomous provinces of Tibet and Sinkiang. Reference to "Indian" or "Pakistani" Kashmir refers to the territories under the control of the respective states, without implying any conclusions as to the present status of those territories under international law.

legal standing, focussing on the possibility of a bilateral India-Pakistan treaty.

I. Scope of Kashmiri Autonomy or Self-government

So long as Kashmir remains associated with India and/or Pakistan (as opposed to becoming independent), the basic issue will be how power is divided between a regional or autonomous Kashmir and the larger state within which it is located. The KSG Proposal [occasionally referred to herein simply as "the Proposal") states that each of the five proposed entities -- Kashmir, Jammu, and Ladakh (within the territory now administered by India), and Azad Kashmir and the Northern Areas (within the territory now administered by Pakistan) -- will have legislative authority over "all matters other than defense and foreign affairs." In addition, a three-entity body within India and a two-entity body within Pakistan would be created to "coordinate issues of concern" to the entities. Finally, an all-Kashmir body encompassing all five entities would be created to address "areas of broader interest."

Self-government

The degree of self-government possessed by the five Kashmiri entities would be determined by agreement between the entities and India and Pakistan, respectively. Any powers to be devolved upwards to the regional or all-Kashmiri bodies also would be subject to negotiation, perhaps after the entities themselves began to function. To be self-governing in a meaningful sense, Kashmir would need to have the ability to act independently in undertaking a wide range of internal governmental functions, including basic legislative, executive, and (probably) judicial activities. The functions reserved to the entities should not be subject to limitation by any other government, although there could be areas in which joint authority would be exercised.

Meaningful self-government also implies that the population of each of the five entities has the right to determine the basic institutional structure of their government without outside interference. This right is equivalent to a Kashmiri right of internal self-determination, although it does not imply any right to unilateral secession or independence.

Citizenship

The KSG Proposal provides for distinct "citizenship" for each of the five entities, which also would entitle the holder of entity citizenship to acquire Indian or Pakistani passports, depending on their residence. An alternative suggestion is that

entity passports might be subject to endorsements by India or Pakistan, respectively.

Determination of citizenship is normally a power reserved to a sovereign independent state, and even regions with a very high degree of autonomy maintain a common citizenship with the state within which they are located. Indeed, it may not be coincidental that UN membership has not been granted (or sought) for the associated states of the Cook Islands and Niue, whose residents are New Zealand citizens, or for Puerto Rico, which is a "free associated state" of the United States. In contrast, the associated states of Micronesia and the Marshall Islands, which are UN members, have their own citizenship, distinct from that of the state with which they are associated, the United States.

Of course, even separate citizenship need not mean entirely separate treatment for various purposes. In the United Kingdom, for example, Irish and Commonwealth citizens resident in the UK have long been entitled to vote in British elections and to stand for office. As the European Union has expanded and deepened, foreign citizenship is no longer a barrier to the free movement of people, goods, and services among EU members. Citizens of the Marshall Islands, Micronesia, and Palau have the right to reside and work in the United States and to serve in the U.S. armed forces (although they cannot be subject to mandatory conscription unless they become "habitual" residents of the U.S.).

The reverse is also true: common citizenship does not necessarily imply precisely equal rights for all purposes. There are many different arrangements that distinguish among co-citizens who may or may not possess the same rights within an autonomous territory. The most common and important of these rights concern residence or domicile, property ownership, and participation in government. Absent special provisions dealing with these or similar issues, however, general human rights norms of non-discrimination require that all citizens (and, in most cases, all legal residents) be treated equally.

Restrictions on the ownership of real property may be imposed on citizens of the same state who do not have the right of permanent domicile in the autonomous region. For example, the constitution of the Indian state of Jammu and Kashmir currently prohibits the alienation of land to non-Kashmiris. The Swedish-speaking Åland Islands may refuse to grant the "right of domicile" in Åland to any person, if there are

"persuasive reasons" for such refusal, although in practice all Finnish citizens who meet the requirements for domicile (five years' actual residency in the Åland Islands and proficiency in the Swedish language) are granted it.³ A similar situation prevails in Hong Kong, which shares a common citizenship with other parts of China. Hong Kong issues its own passports to Chinese citizens who hold permanent identity cards and have the right of residence within Hong Kong, but only certain categories of Chinese citizens have the right of abode within Hong Kong.⁴

Restrictions on land alienation also are commonly imposed in situations where indigenous or tribal peoples own land communally, and the government wishes to protect such traditional forms of ownership from encroachment by other citizens of the state. For example, the Indian constitution allows the restriction or regulation of land transfers within "Scheduled Areas" inhabited by tribal peoples;⁵ communal lands within the autonomous regions of the Atlantic Coast of Nicaragua are inalienable;⁶ and customary land in Niue may not be taken or alienated by the legislature without a report from a special Commission of Inquiry.⁷ Malaysia reserves ownership of certain lands to persons of Malay ethnicity.⁸

Some form of shared citizenship between the entities, on the one hand, and either India or Pakistan, on the other hand, would be both possible and unexceptional. Entity citizens, whether defined by permanent residency or otherwise, would have the right to vote, own property, and live in one of the entities; they also would be obliged to pay taxes and would be subject to whatever other specific obligations might be placed upon them by the government of their entity. If ties among the

3. See Åland Autonomy Act (1991), secs. 7, 10.

4. Basic Law of the Hong Kong Special Administrative Region (1990), art. 24.

5. Indian Constitution, Fifth Schedule, sec. 5.

6. Autonomy Statute for the Regions of the Atlantic Coast of Nicaragua (1987), art. 36.

7. Niue Constitution, sec. 33.

8. Malaysian Constitution, art. 89.

entities deepen, Kashmiris might be given the option of choosing dual Indian-Pakistani citizenship, as is the case for persons born in Northern Ireland, for example, who have the right to both British and Irish nationality.

The only problematic citizenship arrangement would be if an individual wished to claim *only* Kashmiri citizenship, to the exclusion of Indian or Pakistani citizenship, or if India or Pakistan objected to the granting of citizenship to an individual by one of the entities.⁹ A grant of citizenship in its international sense is normally within the power only of fully sovereign states, which accept a concomitant duty to protect their citizens abroad. The entities described in the KSG Proposal would not be capable of providing that protection, which would have the practical effect of rendering a person stateless if Kashmiri citizenship were unrecognized by other states.

9. One could imagine both India and Pakistan wishing to retain some control over who is granted citizenship, rather than leaving such powers exclusively in the hands of the five local entities. For example, would it be acceptable for a non-resident ethnic Kashmiri to be granted entity "citizenship," even though that person holds another (neither Indian nor Pakistani) nationality?

Nonetheless, there would be no international legal impediment to the issuance of special Kashmiri passports or identity cards, under powers delegated to the entities by India and Pakistan.¹⁰ Alternatively, regular Indian and Pakistani passports could include some form of special mention of Kashmiri citizenship or identity. For internal purposes, holding Kashmiri identity could be a prerequisite for exercising any rights enjoyed only by Kashmiris, e.g., residence or unrestricted cross-border travel. This would approximate the situation in Hong Kong, where Hong Kong citizenship is a sub-category of Chinese citizenship, rather than the other way around.

Legislative powers

Assuming that there is agreement that Kashmir should exercise a wide range of governmental powers, free from interference by any other government, this could be accomplished in two different ways. First, the powers specifically delegated to Kashmir could be set forth in detail in the treaty or other instrument that implements any agreement on Kashmir's status. Alternatively, Kashmir could simply assume all governmental powers not specifically reserved to either India or Pakistan. The latter option appears to be the one recommended by the KSG Proposal, and it is consistent with the broadest possible grant of authority to Kashmir.

Although it is difficult to generalize, many federal systems are based on the principle that the components of the federation retain all powers not specifically granted to the federal government, as provided, e.g., in the Tenth Amendment to the U.S. Constitution. Retention of reserved powers also is the practice in "associated states" and appears to be the basis of the Kingdom of the Netherlands (which includes the Netherlands Antilles). The extensive constitutional changes adopted in 1993 in Belgium provide that the three linguistic communities retain residual powers not specifically granted to the federal government, although Belgium is not formally a federal state.¹¹

10. In Switzerland, for example, individual cantons issue citizenship documents and Swiss passports.

11. Belgian Constitution, art. 25ter.

The situation is similar in Bosnia and Herzegovina, where each of the two "entities" retains residual governmental powers.¹²

Substantively, the entity legislatures should enjoy broad power in areas of direct concern to their residents, such as provision of health and social services, taxation, education, language policy, transportation, regional economic policy, adoption of penal and civil laws, police, exploitation of natural resources, planning, and local government. Of course, a broad grant of powers to the entities does not mean that cooperation with India and/or Pakistan would not be expected or desirable. In matters such as telecommunications, transportation, environmental protection, the apprehension of common criminals, and tourism, for example, cross-border and inter-entity arrangements would be mutually beneficial. In addition, particularly during any transitional period, the entities might find it useful simply to adopt or continue in force a number of existing Indian or Pakistani laws, although implementation and enforcement of such laws would be within the competence of the entities.

Whatever the substantive scope of competence, members of the entity legislatures should be elected freely and independently by duly qualified Kashmiri electors, without any limitation imposed by India or Pakistan. Likewise, the electoral system within the entities should be a wholly internal matter, to be determined by them.

The Proposal envisages only a "coordinating" role for the regional bodies and an all-Kashmiri body, but some degree of legislative or administrative authority could be delegated to these bodies in the future.

Executive powers

An independent entity executive would be responsible for the administration, implementation, and enforcement of all laws applicable within the entities. If there are specific areas within which India or Pakistan would continue to enjoy authority (e.g., narcotics or other transnational crimes), enforcement should be with the cooperation and consent of entity authorities.

12. See Constitution of Bosnia and Herzegovina, art. III(3)(a), set forth as Annex 4 to the 1995 Dayton Peace Agreement.

Liaison offices of the entity governments might be established in New Delhi and Islamabad, and central government officials would no doubt maintain a presence in Kashmir. The size and mandate of such offices should be determined by agreement between each entity and the respective national government.

Judicial powers

The Proposal makes no reference to judicial authority within Kashmir, and there is no consistent pattern among autonomous regions with respect to whether or not they possess their own judicial systems. However, it is more likely that there would be an independent judiciary in situations where full political, as opposed to primarily cultural, autonomy is desired. For example, there is no independent judiciary in the Faroe Islands, Greenland, Åland Islands, or the autonomous regions of Spain. South Tyrol also lacks a separate judiciary, although a special autonomous section of the regional court exists to consider alleged violations of the principle of equality of the two language groups within South Tyrol.¹³

Even when self-governing regions do have their own judicial system, appeals from regional or autonomous courts generally lie to the supreme judicial authority of the state. This is the case in, e.g., the Netherlands Antilles, Niue, and the Cook Islands. Even fully independent states may provide for an ultimate appeal to a foreign court, as is the case in many of the former British colonies in the Caribbean, which allow an ultimate right of appeal to the British Privy Council in appropriate cases.

A greater degree of judicial independence is found where there is either mistrust between the central and regional governments or where the legal system in the autonomous region is substantially different from that in the rest of the country.

For example, the power of final adjudication of cases in Hong Kong rests with the Hong Kong Court of Final Appeal, not with courts responsible to the central Chinese government.¹⁴ Scotland has long maintained a judicial system separate from that of the

13. Autonomy Statute for the South Tyrol (1972), arts. 90-93.

14. Basic Law of the Hong Kong Special Administrative Region (1990), art. 82.

rest of the United Kingdom. In federal states, parallel judicial systems are common, in which the respective component entities have full and final judicial authority over laws they have adopted within their areas of competence, while a separate federal judiciary has jurisdiction over federal laws and regulations.

Human rights are often judicially guaranteed by both the federal/central and regional/autonomous governments. In such a context, human rights guaranteed by the central government normally prevail against actions by an autonomous government that would violate those rights. At the same time, autonomous governments may expand the rights they guarantee to their own citizens.

Of course, if India and Pakistan retain only minimal powers in the areas of defense and foreign relations and their laws do not extend to the Kashmiri entities, the need for a judicial presence in Kashmir would be minimal.

The key area in which disputes are likely to arise is in determining whether a particular government action lies within that government's jurisdiction, as opposed to merely interpreting acts that fall clearly within the power of either one of the Kashmiri entities or India/Pakistan. This issue is closely related to the question of how a settlement in Kashmir might best be guaranteed, and it is discussed below in Section III.

Economic and financial issues

Given the unique situation of relatively prosperous, capitalist Hong Kong as part of the less developed mainland of China, it is not surprising that Hong Kong enjoys essentially complete financial and monetary independence. Hong Kong levies its own taxes, is exempt from taxation by the central government, retains full control over monetary matters, and is a separate customs territory from mainland China.¹⁵ Hong Kong also may be unique in retaining its own currency, the Hong Kong dollar, which is not linked to the currency of China.

The other extreme may be the lesser developed, associated states of Niue and the Cook Islands, which remain largely dependent on New Zealand for the economic assistance necessary to run their governments and provide social services, even though they enjoy full self-government. For example, although

15. See *id.*, arts. 105-119.

Niue has independent powers of taxation and makes no financial contribution to New Zealand, New Zealand accepts a "continuing responsibility... to provide necessary economic and administrative assistance" to Niue; New Zealand officials also participate in auditing Niue government accounts and in the Niue Public Service Commission.¹⁶

In between these extremes lies an almost infinite number of specific formulas for revenue- and cost-sharing between autonomous and central governments. For example, revenues are shared between St. Kitts and Nevis on the basis of the respective populations on the two islands, less the cost of shared or common services provided by the state government to each island.¹⁷ South Tyrol has the right to levy its own taxes, and it also receives various percentages of taxes collected from South Tyrol by the Italian government.¹⁸ In the Åland Islands, a special "equalisation" procedure determines the percentage of annual Finnish government revenue that is allocated to Åland each year.¹⁹ In Spain, Catalonia and the Basque Country collect most taxes and divide them between the regions and central government according to formulae that are negotiated annually with the central government.²⁰

The reference to "financial arrangements" for the Kashmiri entities masks a plethora of very complex questions, many of which are beyond the scope of this Memorandum. Some might be

16. Niue Constitution Act 1974, sec. 7; Niue Constitution, secs. 60, 64-67.

17. St. Kitts and Nevis Constitution Act 1983, sec. 110.

18. E.g., all taxes on power and gas, 90% of real property and personal income taxes, 90% of the concessions received for hydroelectric power (an important revenue source in the area), and various other taxes. Italy also contributes a proportion of VAT and other taxes, as determined by annual negotiations between South Tyrol and the central government, "with the aim of assisting the finances of the Autonomous Provinces in attaining the goals and in exercising the duties established by law". See Autonomy Statute for the South Tyrol, arts. 69-78.

19. See Åland Autonomy Act (1991), secs. 45-47.

20. See, e.g., Basque Autonomy Statute (1979), art. 41.

closely entwined with the scope of entity legislative powers, for example, whether Kashmir should establish and fund its own health and social services or whether such services should be financed by India or Pakistan. Another issue will be whether international support may be provided directly to the entities and, if so, whether any loans received by them would be expected or required to be guaranteed by India or Pakistan.

Matters related to imports, exports, and customs normally fall within the foreign affairs powers of the central government, but nothing would prohibit a different arrangement for Kashmir. Reservation of all or a portion of the customs revenues that are collected within Kashmir to the Kashmiri entities might provide an independent source of income, although the sums collected might not be substantial. Creation of a duty-free zone encompassing all five entities could encourage cross-border economic activity, but additional problems might arise in controlling the flow of goods out of Kashmir and into India or Pakistan, respectively.

It would be unusual for Kashmir to have its own currency, separate from that of either India or Pakistan, although the Proposal would seem to reserve such power to the entities. The only example of a currency independently issued by a non-sovereign entity is that of Hong Kong, whose unique financial situation is not comparable to that of Kashmir. A free-standing Kashmiri currency also might have difficulty gaining international acceptance. From a symbolic point of view, however, a distinctive Kashmiri currency tied to the national currency might be issued, in the same way that commercial banks in Scotland are authorized to print their own banknotes, so long as the notes are matched one-for-one by the banks' holdings of notes printed by the Bank of England. The Scottish notes are technically not legal tender, but they are universally accepted within Scotland and widely accepted in the rest of the United Kingdom.

Foreign affairs

The KSG Proposal reserve foreign affairs to India and Pakistan, respectively, but there are many precedents for some participation by Kashmir in various aspects of "foreign affairs".

Most political entities engage in commercial and promotional activities of some kind, even if no specific legal or constitutional provision is made for such activities under domestic law. For example, Quebec has a number of "foreign

affairs" offices in various countries, and most states of the United States have trade offices that actively pursue commercial and economic relations with foreign countries and companies. India also had overseas trade missions and offices prior to obtaining independence.

On the other hand, few such local or regional governments have the competence to enter into internationally binding treaties, at least without the consent of the central government. One exception is Belgium, where the linguistic community councils are given explicit authority to enter into treaties in the areas of culture, education, and personal status.²¹ Another exception is Hong Kong, which, under the name "Hong Kong, China," may conclude agreements with foreign states and organizations in the areas of economic relations, trade, finances, shipping, communications, tourism, culture, and sports. It also may establish economic and trade missions in foreign countries, reporting such missions to the central government but not requiring the central government's approval.

The establishment of foreign consular offices in Hong Kong, on the other hand, does require the approval of the central Chinese authorities.²²

Consideration might be given to specifying that treaties entered into by India or Pakistan would apply to the Kashmiri entities only with the latter's specific consent. India and Pakistan also should undertake to enter into diplomatic negotiations and, where possible, conclude relevant treaties when requested to do so by a Kashmiri entity.

There are several precedents that would support Kashmiri participation in Indian or Pakistani diplomatic delegations. The Faroe Islands and Greenland enjoy such participation in the formulation of Danish foreign policy that affects them, as does Hong Kong with respect to China. Representatives of German Laender participate in German delegations to UNESCO, and U.S. delegations to international conferences or bodies dealing with economic or trade matters may include representatives of states or even cities.

21. Belgian Constitution, arts. 59bis(2)(3), 59bis(2bis), 59ter(2).

22. See Basic Law of the Hong Kong Special Administrative Region (1990), arts. 150-157.

The ability of Greenland and the Åland Islands to opt out of the European Union is perhaps the clearest example of a government's responsiveness to the needs of a particular region in the area of foreign affairs, and special provisions were negotiated by Finland and Italy when they joined the EU, to address the needs of the Åland Islands and South Tyrol, respectively.

With respect to formal membership in international organizations, as opposed to participation in national delegations, general-purpose or political international organizations usually restrict formal membership to "states," a term that has been consistently interpreted to refer to sovereign independent countries. For example, only states may join the United Nations, Organization of African Unity, Organization of American States, Council of Europe, Organization for Security and Cooperation in Europe, European Union, Association of South-East Asian Nations (ASEAN), South Asian Association for Regional Cooperation (SAARC), World Bank Group, or World Trade Organization. Neither small size nor de facto dependence is an impediment to membership, and "micro-states" such as Palau, Kiribati, Tuvalu, Nauru, San Marino, and Andorra have been admitted to UN membership without question.

Of course, both non-member-states and non-states may be permitted to participate in various capacities in such organizations (such as the official observer status granted by the United Nations to, e.g., the Palestine Liberation Organization and the Holy See²³), but neither regular nor associate membership is usually possible. One exception is the rather informal South Pacific Forum, which includes heads of government of both independent and self-governing states in the region.

On the other hand, most of the specialized agencies associated with the United Nations and many other international organizations created for limited purposes do admit non-states as either regular or associate members. The specific requirements vary from organization to organization, but, in all cases, membership may be acquired only with the consent of the

23. The Holy See or Vatican is generally considered to be a state; it enjoys diplomatic relations with many states and is a subject of international law separate from Italy. However, its unique situation and history limit its value as a precedent.

state which exercises control over the foreign relations of the self-governing territory in question. The following international organizations, for example, have non-state or associated state members:

International Civil Aviation Organization (Cook Islands is a member)²⁴

International Telecommunications Union (British, French, and U.S. territories are members)²⁵

Food and Agriculture Organization (Cook Islands and the European Union are members; Puerto Rico is an associate member)²⁶

UN Educational, Scientific and Cultural Organization (Cook Islands and Niue are members; Aruba, British Virgin Islands, Macau, and Netherlands Antilles are associate members)²⁷

Universal Postal Union (British Overseas Territories, Netherlands Antilles, and Aruba are members)²⁸

24. Membership in ICAO is open to UN members states and "States associated with them". Convention on International Civil Aviation (1944), art. 92(a).

25. Membership of these territories is based on historical precedent; new members are limited to UN members or any other "sovereign country" accepted by two-thirds of the existing ITU membership. See art. 1 of the ITU Constitution.

26. Membership in the FAO is open to "nations" (which appears to mean independent states) and to "regional economic integration organizations"; the latter must be constituted by "sovereign States." Associate membership is available to any territory or group of territories upon application of the member that has responsibility for the territory's international relations. FAO Constitution, art. 2.

27. Territories or groups of territories may be admitted as Associate Members of UNESCO, upon application of the state responsible for their international relations. UNESCO Constitution, art. 2.

28. As is the case for the ITU, art. 11(2) of the constitution of the UPU permits any "sovereign country" to apply for membership; the self-governing members listed here were

World Health Organization (Cook Islands and Niue are members; Puerto Rico and Tokelau are associate members)²⁹

World Meteorological Organization (members include British Caribbean territories, Cook Islands, French Polynesia, Hong Kong, Macau, Netherlands Antilles, Aruba, and New Caledonia)³⁰

International Maritime Organization (Hong Kong and Macao are associate members)³¹

Membership in regional economic organizations varies considerably. Only states are members of, e.g., the Inter-American Development Bank, while non-state territories may become members of the Caribbean Community and Common Market (CARICOM), the Asian Development Bank, and the Asia-Pacific Economic Co-operation (APEC).

Defense and policing

Given the history of hostility between India and Pakistan, security arrangements will be among the most important issues to be resolved. The Proposal calls for the demilitarization of Kashmir, but additional guarantees beyond the simple withdrawal of troops may be necessary. Any withdrawal of forces should be predicated on the successful completion of confidence-building measures, and some international or joint Indian-Pakistani presence may be useful in overseeing any process of demilitarization. Depending on the nature of border and customs posts retained, a small number of national police or military personnel might be stationed in Kashmir in order to maintain such posts. In any event, the phasing, timing, and procedures (..continued)

admitted prior to 1947, when the "sovereign" requirement was introduced.

29. Associate membership is open to territories which are not responsible for the conduct of their international relations upon application of the state which is so responsible.

30. Membership is open to any territory which maintains its own meteorological service, provided that the application for membership is presented by the state responsible for the territory's international relations.

31. Associate membership is available to a territory upon application of the state responsible for the territory's international relations.

for achieving appropriate demilitarization will need to be carefully negotiated among all the affected parties.

The legitimate rights of India and Pakistan to provide for the defense of their territory should not be confused with the implied right and obligation of the entity governments to provide for internal security and police forces within Kashmir.

Here, too, a great deal of discussion is likely to be necessary on issues such as the level of armament permitted for entity police forces; reciprocal law enforcement rights and duties; and provision (if any) for Indian or Pakistani military forces to come to the assistance of an entity in an emergency.

Freedom of movement

The Proposal envisions open borders and the free movement of people, goods, and services within the Kashmiri entities and between the entities and India and Pakistan, respectively. However, a fully open border will raise serious issues of control and security.³² So long as a recognized border remains, the security of that border would normally be considered to fall within the jurisdiction of the internationally recognized states of India and Pakistan, rather than any Kashmiri entity.

However, an "open border" does not necessarily mean a border without controls. In particular, if a separate Kashmiri identity or "citizenship" is recognized formally (by means of a passport or identity card), national border guards could facilitate and ensure free passage of Kashmiris without abandoning their control over the movement of other persons. Indeed, the 1992 UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities provides that members of minorities "have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties." Provision for such contacts should be included in whatever arrangement is agreed to among the entities, India, and Pakistan.

It may not be necessary to consider ways of limiting migration into the entities, in order to preserve cultural or

32. One might recall the extensive negotiations on opening cross-border bus service between Srinagar and Muzaffarabad.

linguistic cohesion. However, if this is desirable, one should recall the internationally recognized human right to freedom of movement within one's own state, which is set forth in article 13 of the Universal Declaration of Human Rights. Unless there are specific security or other legitimate reasons to limit access to parts of Kashmir, nationals of India and Pakistan should be able to travel freely therein.

Right of return

Article 13 of the Universal Declaration of Human Rights provides that every person has the right "to return to his country," and the Proposal would ensure a right to return "to their home localities" to all persons displaced from Kashmir. Given the extent of such displacements and the long time span over which they have occurred, provision might be made for a joint commission to determine issues of property rights that might arise if long-time absentees seek to return to their original homes. Such a commission should bear in mind that those who have resided peacefully in Kashmir for a number of years also have rights and interests that should be balanced against those of the returnees.

II. Coordination among the Kashmiri Entities

Each of the five entities envisaged under the KSG Proposal could have a different relationship with its "parent" state, or the relationships could be based on parallel principles. The latter option might make coordination among the entities easier, but it should not be considered essential to any agreement. The structuring of the relationships between the entities and their parent states also might have implications for power-sharing in other regions within each state.

The KSG Proposal envisages two inter-entity bodies to be created on each side of the present Line of Control, as well as an all-Kashmiri body, which are intended contribute to cross-border or inter-entity cooperation on matters such as trade, tourism, the environment, and natural resources. Such arrangements, where issues of mutual interest would be discussed on the basis of consensus, are reminiscent of similar arrangements called for in the 1998 Good Friday/Belfast Agreement concerning Northern Ireland. That agreement created a North/South Ministerial Council, to bring together executive branch officials from Northern Ireland and the Republic of Ireland; a British-Irish Intergovernmental Conference, consisting of UK and Irish government officials; and a British-Irish Council, which includes representatives from the United

Kingdom, Ireland, Northern Ireland, Scotland, Wales, the Isle of Man, and the Channel Islands.

Such bodies certainly could be useful in dealing with many of the practical issues that are likely to arise if relations among the five entities become closer over time. To be successful, however, such coordination should be firmly grounded in the context of friendly and cooperative relations between India and Pakistan, without which the network of coordination envisaged will be difficult, at best.

III. Entrenchment of an Agreement on the Status of Kashmir

Whatever agreement is reached among India, Pakistan, and the people of Kashmir, it would be appropriate to clarify that the agreement could not be altered without the mutual consent of both the population of the entities and the respective governments. Such clarification would remove any confusion over whether the entities' status represents a mere delegation of power from India and/or Pakistan (which could theoretically be withdrawn) or a mutually agreed arrangement based on the exercise of free will or self-determination by the Kashmiri people themselves. This element is particularly important, given the international interest of the United Nations and others in settlement of the Kashmir dispute.

Any new arrangement for Kashmir would undoubtedly require constitutional amendments in India and Pakistan, and such amendments should be entrenched in the usual manner in each country. However, it could be desirable to entrench any new status internationally, as well. This could be done in a variety of ways, but the simplest procedure might be for India and Pakistan to enter into a treaty that would outline the status of the five entities and their relationship with the two states, with or without the formal involvement of the United Nations or other international guarantor.

A treaty between Italy and Austria was utilized to entrench South Tyrol's autonomy following the end of World War II, as an annex to the Treaty of Peace with Italy. A non-treaty agreement between the two countries, adopted in 1969, subsequently spelled out a number of specific steps that Italy agreed to take to address the status of South Tyrol, although it was not until 1992 that Austria declared itself satisfied that the agreement had been fulfilled. A Treaty of Guarantee among Cyprus, Greece, Turkey, and the United Kingdom accompanied the 1960 independence of Cyprus, confirming the respective legal obligations undertaken by the parties. A 1984 treaty between the United

Kingdom and China set forth in detail the arrangements that China was to adopt to ensure a "high degree of autonomy" for Hong Kong, when the latter was returned to Chinese sovereignty in 1997.

Given the strategic importance of Kashmir, as well as the long-standing UN interest in the situation, consideration should be given to calling on the UN Security Council to play a role in overseeing any agreement reached between India and Pakistan. A convenient vehicle for such approval might be as part of a resolution to end the UN peacekeeping operation, UNMOGIP, that has been operating in Kashmir along the ceasefire line or Line of Control since 1949.

Some means should be found to ensure that any agreement on the status of Kashmir reflects the wishes of a majority of the population of the region. While imposition of an agreement from the top down, through appropriate Indian and Pakistani legislation, is a possibility, such an approach risks attempting to coerce what should be a matter of wide acceptance, if not consensus. If a referendum, plebiscite, or other direct means of ascertaining the wishes of the Kashmiri population on both sides of the Line of Control is chosen, it must be determined whether each entity's approval should be sought separately or whether the overall package should be submitted to voters within the entire region of Kashmir.³³ Alternatively, the entity legislatures could be asked to endorse the arrangement once they are elected (although it is unlikely that those elected to these new bodies would then vote to disband themselves). Whatever process is chosen, it is essential that various options be subject to free, vigorous public debate throughout Kashmir.

Finally, to deal with the possibility of disagreement over the extent of authority exercised by either an entity, India, or Pakistan, a provision regarding dispute-settlement should be included in the agreement. If each entity is to have a separate

33. An admittedly complicated, but successful, model for determining the creation of the new entities and adjusting the borders between them might be found in the series of votes held in Switzerland in 1974-1978 to create and determine the boundaries of the new canton of Jura. That complicated process is described and some of the relevant documents set forth in Hurst Hannum, *Documents on Autonomy and Minority Rights* (Martinus Nijhoff, 1993), at 533-549.

judiciary, initial challenges to the jurisdiction of any of the parties might be brought in that entity's courts. Appeals from any decision could be brought to the supreme courts of India or Pakistan, depending on which government was concerned.

In addition to or as an alternative to domestic judicial action, a mixed arbitral commission could be established for the sole purpose of adopting binding interpretations of the agreement reached among the parties. Such a commission could be composed of the parties concerned, with or without other international participation. Of course, ultimate appeal to the International Court of Justice also would be possible, but only states may be parties to contentious cases before the Court.

Conclusion

The most important principle to be borne in mind with respect to self-government or autonomy arrangements is that neither international law or nor practice imposes any restriction on the specific form that such arrangements may take. If it is accepted that all governmental functions except defense and foreign affairs will be assumed by the Kashmiri entities, then the primary task may be to ensure that authority is effectively transferred.

It also should be remembered that assumption of greater control and authority is normally accompanied by greater obligations and responsibilities, particularly in the areas of finance and the economy. The level of economic support received by the entities will be crucial in determining whether or not they will be able to meet all of their obligations. If not all financial issues can be resolved immediately, consideration might be given to a gradual or conditional assumption of additional powers by the entities, rather than an immediate assumption of competences that would require greater resources for their successful implementation than might be readily available.

The Proposal outlines a relatively complex solution, with five new entities, two regional coordinating bodies, and an all-Kashmiri coordinating body. It is possible that the five entities would have different relationships with India and Pakistan, respectively. Such an arrangement may well be desirable, but issues of government efficiency and cost should not be entirely ignored. The goal should be to meet the political, economic, and symbolic needs of all those concerned as fully as possible, not to create either unnecessary symmetry or complication.

Of course, the analysis of this Memorandum assumes a good-faith willingness to negotiate on the part of Kashmiris, Indians, and Pakistanis. It is necessary to find a creative way forward that attempts to meet the real needs of the peoples and countries involved, even though it may not satisfy the demands of some for either immediate independence or unqualified integration. Compromises by all parties will be necessary.

Finally, even if no provision for revision or amendment is built into an eventual agreement, all those concerned should keep in mind that democratic political processes are designed to ensure that political institutions change with the times, not that they remain forever static. Given the suffering of all "sides" in Kashmir, a realistic way forward is to reach a reasonable agreement that will be acceptable for the foreseeable future. Any attempt to search for a perfect arrangement that will last forever and satisfy everyone is probably doomed to failure.