

Briefing Paper:

Imprisonment of Yasin Malik
Chairman,
Jammu Kashmir Liberation Front
& Kashmir Issue



By:

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Briefing Paper 1:

Imprisonment of Yasin Malik in India

Mohammed Yasin Malik, Chairman of the Kashmiri pro-independence Jammu Kashmir Liberation Front (JKLF) is lodged in Tihar Jail, Delhi. He was taken into 'preventive custody' on 22nd February, 2019 from his home for the umpteenth times since his declaration of unilateral ceasefire in 1994 in Srinagar, but released without trial or conviction every time. On the last occasion, following an unrelated rebel attack on an Indian military convoy in Kashmir's Pulwama district, where more than 40 soldiers were allegedly killed, he was formally charged under the notorious Public Safety Act (PSA) on 7th March, which allows imprisonment for up to 2 years without any trial (Lawless Law¹) and sent to a Jammu jail. On 10th May, he was moved to Delhi into the custody of India's National Investigation Agency (NIA²), who added his name to the formal charges under Sections 120B (Criminal Conspiracy), 121 (Waging war against the state), 121A (Conspiracy to wage war) of the Indian Penal Code (IPC, 1856) and Sections 15, 17, 18, 20, 38 and 39 of the Unlawful Activities (Prevention) Act 1968, which had been framed against a number of Kashmiri leaders and activists already in NIA custody since 2016, including prominent leaders such as Shabir Shah, Masarat Alam, Nayeem Khan, Farooq Ahmed Dar, Zahoor Shah Watali (on bail), Altaf Shah (Fantoosh), Aftab Shah (Shahid Ul-Islam), Mohammed Akbar Khanday Raja Meharaj Uddin Kalwal, Bashir Ahmed Bhat (Peer Saifullah), Abdul Rashid Shiekh, Kamran Yousaf (on bail), Javed Bhat (on bail), Kishore Kapoor and Yousaf Shah (Syed Salahuddin)- not in custody. The Sedition charge under Section 124a against them was later dropped due to a Supreme Court ruling. All of them deny the charges and are defending themselves in a special court in New Delhi (NIA.20/1017/NIA1DL1). Most have been reported to be suffering from various ailments in prisons. Two other prominent Jamaat-e-Islami figures have died in custody while awaiting trial. Shabir Shah, who has spent nearly 37 years of his life in prison, has never been involved in the armed conflict in Jammu-Kashmir.

While in the NIA custody, Yasin Malik, went on hunger strike from 10th to 22nd May 2019, to protest against the inhumane treatment he was receiving in interrogation and also withdrew his legal counsel, advocate Raja Tufail, to show his distrust in the Indian legal system, following which he was sent to Tihar jail on judicial remand.

There are 13 jails in the Indian controlled areas of Jammu-Kashmir with a total capacity of 2775 but over 5000 have been held in these jails and interrogation centres since the abrogation of Article 370 in August 2019. According to official data, 4131 Kashmiri prisoners (4005 men and 126 women) were still held in 2020 out of which 3,735 were under trial including lawyers, doctors and journalists with just 747 held for militancy related cases. The death toll from extra-judicial killings, however, is reported to be double that number. While there is a blanket ban on the reporting of arrests and custodial killings, 5214 people from both Jammu and Kashmir regions were sent to distant Indian jails in Haryana and Uttar Pradesh (UP). Civilian reports estimate total number of detainees to be somewhere near 25,000. According to India's National Crime Bureau, UP jails are the most overcrowded and Tihar has a total inmate capacity of 1026 but currently accommodates over 17000 prisoners - with all Kashmiri political leaders allegedly held in solitary confinement.

Describing the plight of prisoners and human rights situation in Indian controlled Jammu-Kashmir, a written statement circulated in the 36th Session of the UN Human Rights Council (Sept. 2017) under agenda item 3, the London based Jammu Kashmir Council for Human Rights (JKCHR) claimed that the resolution E/CN.4/Sub.2/1997/L.21 of 15 August, 1997 - moved at the 49th session of the Sub-Commission, could be reproduced verbatim as nothing had improved in the 20 year gap. (HRC/36/NGO/52).

Yasin Malik Trial or Mistrail

On 19th May, 2022 an Additional Sessions Judge-03 Justice Parveen Singh of Patiala House Court, New Delhi, convicted Yasin Malik of the above listed charges following a controversial 'voluntary guilty' plea recorded by the same judge on 10th May, 2022. While awarding 4 terms of 10 years rigorous imprisonment and two consecutive life terms to Mr Malik, the judge chose to omit any mention of the legally mandatory affidavit with a signature of the accused for his alleged admission of the 'guilty plea' in his Conviction Order and in the Sentence Order, which raised eyebrows in legal circles.

The Conviction Order relied on a statement from Amicus Curiae, Advocate Partab Singh, that he (Yasin Malik) did not want to contest the charges but at the same time claimed that he did not understand the consequences of not contesting his case. There is also no mention of Mr Malik's contention that his "only crime was that he was fighting for the freedom for his nation through peaceful means and that if it was considered a crime, he was ready to face the consequences".

The same judge, however, in a previous 'Order on Charge' (section 13.16.6) - dated 16/03/2022, stated that there was no evidence against the accused of raising funds for any terrorist organisation and that "... JKLF was not a terrorist organisation as per schedule-I of NIA Act".

In March 2020, while he was held in judicial custody in Tihar jail, pending trial of the NIA case, some 30-year-old cases were re-opened for trial in a special TADA (Terrorist and Disruptive Activities) court in Jammu against him and 7 others by the Central Bureau of Investigations agency (CBI) with a special prosecutor, Rakesh Singh, despite the fact that Kashmir high court had previously suspended the proceedings through an order OWP No.432/2009 dated April 30, 2009 due to lack of evidence. In April 2018, the BJP government deputed hon. Gita Mittal as the new Chief Justice for Jammu Kashmir, who oversaw that high court decision overturned by the hon. Sanjay Kumar Gupta (OWP No.395/2019) in the Jammu High Court.

On 16th March 2020, following a hearing in the additional session court in Jammu, where Mr Malik was presented via a video link from Tihar, formal charges in the murder of 4 Indian Air Force officers in January 1990 under sections 302, 307 of the Ranbir Penal Code (RPC), Section 3 (3) of the TADA Act, and section 4 (1) of the Arms Act were framed against him and 7 others including the alleged kidnapping of the daughter of the then federal home minister and former chief minister, Mufti Sayeed, in 1989. All the accused deny all the charges.

In a letter written on 19th March, 2020 from the Tihar Jail No 7, complaining that he wasn't being listened to by the judge, Yasin Malik stated that he "shunned the armed path (1994) and returned to peaceful non-violent struggle", which was negotiated on behalf of the Indian government to seek peaceful resolution of the issue and that he was encouraged by the American, EU and the UK diplomats who met with him many times.

"I accepted transformation without surrendering my ideology and after my release in May 1994, held a press conference in Srinagar and declared a unilateral ceasefire. I pledged to follow a non-violent path and with God's grace till date am adhering to that pledge", he wrote in his letter.

The NIA charges included accusations of meeting with militant leaders during his visits to Pakistan but Yasin Malik has invariably maintained that his initiative to bring the militant leaders to the negotiating table had the blessings of the then Prime Minister of India as well as the US State Department.

"Fair trial is a globally recognized right for everyone. If you are suddenly pulling out old cases and not even allowing the accused to properly represent his case, then there would definitely be question marks over it", Said, Khurram Parvez, a leading activist who heads the Asian Federation Against Involuntary Disappearances and coordinator of Jammu Kashmir Coalition of Civil Society (JKCCS). He told an Al Jazeera reporter that it was "a political rather than a judicial move"³. Khuram Pervez has also been jailed since then⁴.

India's former spy chief, A S Dulat, in his book "The Spy Chronicles", published in 2018 also eluded to this and claimed that he was given assurances that lead him to declare a unilateral ceasefire in 1994 upon his release from prison. His understanding was that militancy related cases would not be pursued against him or against his party workers (Dulat et al, 2018:98). Hence the ban on his party was lifted by the then government of India in 2005/6.

Act of perfidy and Geneva Convention

According to international law, an act of perfidy is committed when provisions of Geneva Convention that are meant for the protection of persons are invoked in armed conflict, with intent to betray, kill injure or capture an adversary. Yasin

Malik and his party workers appear to be victims of perfidy in that he was lead to believe a lie that Indian state would not act after the unsuspecting adversary is disarmed. Article 37 of the Geneva Convention (Prohibition of perfidy) Part 1, prohibits to kill, injure or capture an adversary by resort to perfidy, which is further explained as “*Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence*”.

The two additional Protocols to the Geneva Convention approved in 1977, first of which applies to persons involved in wars of “self-determination” (redefined as international conflicts), enables the establishment of fact-finding commissions in cases of alleged breaches of the convention. The second Protocol extends protections to persons involved in severe civil conflicts and should be food for thought for international law experts watching the Kashmir conflict.

Richard Jackson, in his study of ‘Perfidy in non-international armed conflicts’, argues that the Customary International Humanitarian Law study, the findings of international tribunals prosecuting war criminals and state practice provides evidence that perfidy is a “violation of the law of war in non-international armed conflict”, (Jackson, R.B, 2012:253).

Flawed Legal Process

On Monday, 29th May 2023, the NIA application to a divisional bench in Delhi High Court (33) on the quantum of the sentence awarded to Mr. Malik on 25th May 2022, under Section 121 of the IPC was condoned (CRI.A 436/2023) and he was issued a notice to appear before the court 9th August to respond to the said application.

Under Section 21 (Appeals) Subsection 5 of the NIA Act 2008, an appeal to a higher court is only allowed within 30 days, after which 90 days are allowed provided that a High Court permission is sought under special circumstances. No such permission was sought previously for a 360 days.

“Every appeal under this section shall be preferred within a period of 30 days from the date of the judgement, sentence or order appealed from: Provided that the High Court may entertain an appeal after the expiry of the said thirty days if it is satisfied that appellant had sufficient cause for not preferring the appeal within the period of 30 days: Provided further that no appeal shall be entertained after the period of ninety days”, NIA Act 2008, Section 21 Para 5.

The two member bench consisting of Justice Siddharth Mridul and Justice Talwant Singh dealt with the NIA application (CLI.M.A 14875/2023) under Section 5 of the Limitation Act 1963, (and Section 482 of Code of Criminal Procedure, 1973) within 15 minutes without addressing the restrictions in the relevant law cited above. When Justice Talwant Singh tried to raise questions regarding a failed application by the NIA in June 2022, which was apparently returned with objections, he was stopped by the other honorable judge. The NIA application to increase the “life sentence” to death by hanging for Yasin Malik was accepted out of time despite the time bar in the appeals procedure but the appellant was referred to the relevant recommendations by the Law Commission in its 2015 report (262), which abolished capital punishment except for terrorism cases⁵.

India’s Solicitor General, Tushar Mehta, who appeared for the NIA before the court on the day, relied his application on the verbal reasoning that “if he (Malik) was not given the death penalty, any future government could release him”. He expressed his government’s real intention before the honorable bench by praising the American government for shooting dead Osama Bin-Ladin without offering him a due trial process.

Many law watchers and legal experts as well as Congress Party leaders, including Kashmir’s 3 former chief ministers, have already spoken against Mr Malik’s arrest and trial but all the pro-independence/resistance leaders fear that the Indian state is ready to sign his death warrant as an election issue. There is ample evidence that the BJP government has decided to make NIA and the law courts into a political weapon to win the forthcoming general election in India⁶.

Action/Recommendations

The need for an international awareness campaign in this case has arisen tenfold. Local, regional, and international stakeholders interested in peace dividend should be moved to red alert. Questions should be raised on whether Indian state is moving towards ending the conflict and repression or escalating it and if the underlying causes of the Kashmir conflict are adequately being addressed through reconciliation for sustainable peace or for further escalation.

- With the growing concerns of the large Kashmiri diaspora in the UK and their friends in the parliament, the Parliamentary Foreign Affairs Select Committee should be urged to examine the UK government policy and its failure to fulfill their international obligation to ensure that issue of Kashmir (legacy of the British Raj) does not consume any further human lives and not remain unresolved for another 75 years.
- In view of the report of the Committee on Foreign Affairs (A6-0158/2007) in the EU Parliament and having regard to Rule 45 of its Rules of Procedure, the EU Commission for foreign affairs should be urged

to setup a fresh inquiry with a view to implementation of sanctions if the Kashmir conflict remains unresolved and exert greater diplomatic leverage to seek release of Kashmiri political prisoners on humanitarian grounds.

- The USA, Japan, China, Russia and other international partners who wish to see peace in the Indian sub-continent and who are in a unique position of enjoying good relations with both India and Pakistan should go beyond crisis management of the past era and help build a positive peace process for Kashmir, which delivers a lasting solution and avert the ever increasing threat of war between the 3 nuclear armed neighbors. The need to persuade India and Pakistan to return to the UN for mediation through low profile diplomacy and to play a critical role of a catalyst in supporting and sustaining of nongovernmental organizations and civil society initiatives to build up local stake holders to play a greater role in the peace processes instead of allowing the strangling and imprisoning legitimate Kashmiri voices should top the international diplomacy agenda. It is crucial for the international partners for peace to help generate fresh social and political spaces for creative ideas towards untangling and delinking Kashmir from India and Pakistan national identities as an initial step for better understanding of the real issues in erstwhile Jammu-Kashmir state.
- Given that the UN has had military observers in the region since 1949, and as the issue remains unresolved in the Security Council for 75 years despite many resolutions passed on the issue, and in line with the two damning reports by the UN High Commissioner for Human Rights in 2018 and 2019, either the High Commissioner or the Security Council should be urged through Permanent 5 to refer the matter to ICJ for direction or for an Advisory Opinion as to who should be held responsible for the impasse in Kashmir, which has resulted in huge loss of life and curtailing of civil and political rights for the people of Jammu Kashmir on both sides. The UN should be urged to set up of a commission to investigate alleged war crimes including the act of perfidy and genocide in Kashmir under the Article 1.1 of the UN International Covenant on Civil and Political Rights.

For further background details please refer to:

https://www.academia.edu/43532954/Briefing_Paper_Imprisonment_of_Yasin_Malik_and_the_Kashmir_case

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- 3: [India: Human rights defender Khurram Parvez ... detained on baseless charges - Amnesty International](#) Accessed on 20th May, 2023
- 4: <https://www.aljazeera.com/news/2020/04/jailed-kashmiri-separatist-yasin-malik-denied-fair-trial-200407072128148.html> Accessed on 20th April, 2019
- 5: <https://worldcoalition.org/document/report-no-262-the-death-penalty/> Access on 29th May, 2023
- 6: <https://www.deccanherald.com/national/north-and-central/why-does-new-delhi-want-death-penalty-for-yasin-malik-1224698.html> Accessed on 9th June, 2023

Books: Dulat A S, Durrani A, Sinah A, *The Spy Chronicles*, (India: Harper, 2018) Jackson, R. B, *International Law Studies*, 2012

Briefing Paper:2

Imprisonment of Yaseen Malik and the Kashmir Case

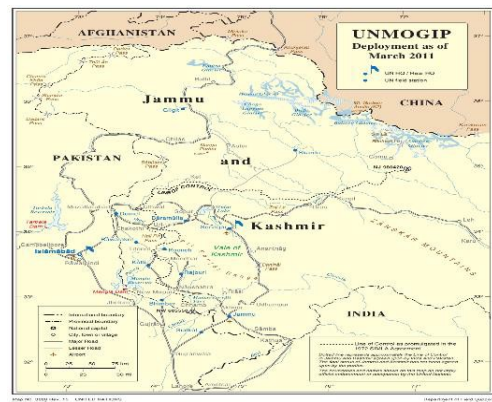
Kashmir Background

Jammu-Kashmir, commonly known as 'Kashmir' has been the hub of smoldering instability and hostility between two nuclear-armed rivals - India and Pakistan, for over seven decades.¹ Despite signing several peace agreements between the leaders of India and Pakistan, they came close to a 4th war in February 2019 as both hotly contest the ownership of Kashmir and continue with their exertions to win over each other internationally thereby successfully evading the question of self-determination.²

Amongst the hundreds of semi-independent princely states in British India Jammu-Kashmir was the largest and most affluent picturesque state ruled by an ambitious Hindu Maharajah, Hari Singh, whose majority population belonged to the Muslim faith. Despite years of internal turmoil and rebellions, his ancestors built and kept their dynastic empire intact for over a century until the British decided to withdraw from India in 1947 to make two new sovereign states in the South Asian subcontinent. As a result, the sovereignty of Jammu-Kashmir state along with several others was disputed by the two countries who invaded it, forcibly divided and occupied it ever since. While the partition maneuvering and negotiations were taking place between the British Boundary Commission, the Indian leaders, and the Maharajah most of the Kashmiri leaders in prisons. He entered into a 'Standstill Agreement' with Pakistan on 12th August 1947 to continue trade, travel and communication services as he did under the British rule. (Schofield 1996:132).

On 27th October 1947 Indian military troops, directed by the Governor-General, Lord Mountbatten, arrived in Srinagar to take over the state. India claimed that it had a legal right to send its troops under a provisional "Accession Treaty" that the Maharaja of Kashmir allegedly signed on 26th October 1947. Pakistan disputed its legitimacy and legality quoting the Poonch rebellion against the Maharaja who had fled Srinagar, the capital, a night before. (Schofield, 1996:146).

Meanwhile, the Poonch rebellion spread into other parts of the state, aided by the neighboring North-West Frontier tribesmen followed by Pakistan's regular army, which used Indian precedent of invading other disputed states such as Hyderabad, Junagarh, and the Gurdaspur district. India's first Prime Minister, Jawaharlal Nehru, himself a Kashmiri by descent, took the issue to the United Nations under Article 35 of the organization's Charter in December 1948 following the failure of direct negotiations with his Pakistani counterpart, Liaquat Ali Khan. The UN Security Council set out to look into possible peaceful alternatives and agreed on terms of the truce between the two through a commission (UNCIP) in pursuant of Article 34 of Chapter VI. In the subsequent years, several resolutions were passed and special envoys were appointed to negotiate terms of withdrawal to allow the people of Kashmir to decide their future through an impartial referendum, which never took place. The UN remained ceased of the issue for another decade and the Security Council special envoys came up with several plans to settle the issue but due to alleged Indian subterfuge, none were implemented except for the setting up of an international military observer group (UNMOGIP) to monitor the ceasefire in Kashmir.



Since 1949 the UNMOGIP has continued to monitor and watch the death toll rise in the two sides of divided Kashmir as the two armies of India and Pakistan relentlessly practice their shelling techniques to date resulting in vast civilian casualties daily.³ The UN lead initiative was successful in maintaining the status quo until another war broke out between India and Pakistan in 1965. Kashmir's internal political and legal structures went through a sea change in the

two sides under foreign occupation but the movement for self-determination grew with vigor under the banner of Plebiscite Front despite Delhi reaching an agreement with Kashmir's popular leader Sheikh Mohammed Abdullah in 1952. Kashmir was given a special status in the Indian Constitution through Article 370 with a separate flag and he was made the Prime Minister of the areas under Indian control. He had led the 'Quit Kashmir' movement in the late 1930s/40s and had ambitions for full independence. He was dismissed a year later as an 'untrustworthy' ally by his friend Nehru because of his overtures for independence and sent to jail. Pakistan signed the Karachi Agreement with Sardar Ibrahim Khan, who had formed a provisional government in the areas under Pakistani control known as 'Azad Kashmir' in April 1948, which virtually surrendered state sovereignty to Pakistan. In return, he became the first President of Azad Kashmir.

During the 1960s, as both countries separately enacted constitutional and political arrangements to perpetuate their hold on the areas under their control, growing resentment against their designs saw a resurgent self-determination campaign take off on both sides of Kashmir. Attempts were made on both sides to quell this new movement led by Plebiscite Front and Mahaz-e-Azadi through arrests, imprisonment, and bartering loyalties. Members of the National Conference on the Indian side and Muslim Conference on Pakistani sides fell prey to political intrigue, inducement, and intimidation by the governments of India and Pakistan for different reasons.

A third war between the two countries in 1971, over East Pakistan (Bangladesh), gave rise to further internal polarization and international re-alignment of allies. As a consequence national security considerations became imperative and a secret hunt for nuclear weapons became the order of the day in Islamabad and New Delhi. In 1972, amid shattered morale in what was left of Pakistan and seemingly victorious India, a historic agreement was reached between India and Pakistan to deal with the remaining issues bilaterally, including Kashmir. The UN imposed ceasefire demarcation within Kashmir, which separated the two rival armies, was renamed as the 'Line-of-Control' (LoC).

In 1974, Pakistan restructured the Azad Kashmir areas under its control to a complimentary parliamentary system with its flag, President and Prime Minister but took the Gilgit-Baltistan territories under its direct control. On the Indian side, however, Kashmir's Sheikh Mohammed Abdullah signed a compromising pact with Indira Gandhi and became State's chief minister in 1975.

The 1970s saw a further internal political upheaval in India in the form of a national 'emergency' and Pakistan in the form of another military coup d'état. As a result, the Kashmir issue went off the radar again, both domestically and internationally.

Despite the turbulent years that followed, including nuclear testing, several more peace-making agreements were signed by the leaders of the two nations but none led to any re-negotiations or settlement of the differences over Kashmir. Kashmir remains a thorny subject to the day. India maintains that Kashmir is its integral part and Pakistan must vacate the areas under its control whereas Pakistan's official position has varied under different regimes ranging from "Kashmir belongs to Pakistan", standing with the people of Kashmir (Indian occupied) to holding of (promised) plebiscite to international arbitration within the framework of historical UN resolutions - where the option of independence was removed. (Burke, 1994).

Following the de-escalation of military conflict in the Kargil region in 1999, Pakistan's military ruler General Pervez Musharraf embarked upon a track II diplomacy and reportedly came close to an agreement with India's Prime Minister Vajpayee for a 4-point solution that entailed reunification of the state with joint sovereignty but it was not implemented as his powers were curtailed through legislative changes in the country that also saw his grip on the military weakened. (Kasuri, 2015)

Kashmir conflict remained smoldering for a further decade or so with almost weekly clashes between Kashmiri civilians, freedom fighters, and the Indian army until the right-wing nationalist Bhartiya Janata Party (BJP) was re-elected into power in India in March 2019. Earlier that year, they dismissed the state's legislative assembly, detained all mainstream and resistance leaders, and on 5th August abrogated the contentious Article 370 and Article 35a of the Indian constitution resulting in splitting the state under its control into two "union territories".

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- 1- <https://www.bbc.com/news/world-asia-34810086>, Accessed on 18, January 2020
 - 2- *The first ceasefire was established between India and Pakistan on 13th August 1948 by the United Nations and a commission to investigate their claims was established by the UN.*
On 10th, January 1966, the 'Tashkent Declaration' was signed by the Pakistani President General Ayyub Khan and the Indian Prime Minister Shastri after the 1965 war.
On 2nd July 1972, the 'Shimla Agreement' was signed by the new president of Pakistan, Z A Bhutto, and the Indian Prime Minister, Mrs. Indira Gandhi following the 1971 war.
On 21st February 1999, the 'Lahore Declaration' was signed by Pakistani Prime Minister Nawaz Sharif and his Indian counterpart A. B. Vajpayee following their earlier agreement in September 1998. One year later, India and Pakistan fought the Kargil war.
 - 3- <https://www.ndtv.com/topic/loc-firing>, accessed on 28th May 2020

The making of JKLF

During the 70s, while Islamabad and Delhi were compelled to put the issue on the backburner, they remained wary of the Kashmiri 'separatist' aspirations for self-determination and deployed enough military and intelligence manpower to suppress any such aspirations in their respective areas of control. They pushed a couple of hardcore nationalist groups lead by Mahaz-e-Azadi and Plebiscite Front into underground while forcing other mainstream politicians from the National Conference and Muslim Conference to succumb to their designs on the two sides. Pakistani and Indian mainstream political parties were launched into the two sides of the state under the pretext of helping the Kashmiris for their quest for self-determination and reunification. Those who defied the onslaught were once again imprisoned or exiled.

Fearing the end of resistance/freedom movement under the new ominous circumstances, a small group of Kashmiri immigrants living in the UK formed a secular pro-independence organization to take up their case internationally. Thus, the Jammu Kashmir Liberation Front (JKLF) was formed in May 1977 in the midlands city of Birmingham.

In February 1984, the Indian government sent the then little known imprisoned Kashmiri leader of the resistance movement, Maqbool Bhat, to the gallows. His hanging gave rise to widespread resentment and as protests grew a clampdown of over ground activists on both sides of Kashmir and brought the JKLF into prominence along with its counterpart Mahaz-e-Azadi. The JKLF leaders found an apt opportunity to establish a foothold on the two sides of the LoC with its head office on the Pakistani side. Within a few years, the JKLF was able to lead an armed rebellion against Indian forces with the help of Pakistan's military regime, which caught the world headlines again. (Khan, 2005:146). The new Kashmiri armed resistance movement started in the Indian occupied side as they saw India as a major stumbling block in their quest for independence. It soon turned into a populist mass movement on both sides. The spotlight, however, was short-lived as it rattled not just the Indian military machine but the Pakistani military regime too. (Puri, 1993). While India sought to crush the rebellion with brutal force in the areas under its control, the Pakistani military strategists sought to deal with the JKLF politically.

The early 1990s saw the launch of several parallel armed groups in the Indian-occupied areas at the behest of both Pakistani and Indian intelligence services whose primary common objective was to keep the pro-independence JKLF in check. In 1991, Tim McGirk of the *Independent* estimated the armed men to be near 45,000 compared to the Indian armed forces at 150,000. ⁴ The Kashmiri sources contested that number to be twice even thrice as big.

While the JKLF cadres were busy fighting, some of the political leaders and activists formed an All-Party Hurriyat (Freedom) Conference (APHC) to fill the political vacuum and provide a political face to the movement in case India wanted to talk but the internal militant wrangling, ideological quarrels and lack of visionary leadership eventually saw the JKLF movement pushed to the backstage. As a result, several hundred of its core cadres were either martyred or captured and many of its sympathizers killed, kidnapped, and forcibly disappeared.

Yaseen Malik, who was also the Party's zonal President then, was one of many prominent underground figures who were captured by Indian forces and locked up for years. Their armed movement supported by a popular uprising met with a brutal military response, where 40-50 thousand people were allegedly killed, hundreds of villages burnt to the ground and dozens of young and old women raped by the Indian forces.⁵ While it left the state machinery, pro-India politicians, and their parties paralyzed it added further complexities to the self-determination conundrum. It also gave rise to an international outcry for safeguarding basic human rights in the region.⁶ Some of the top national and local figures, renowned intellectuals, academics, lawyers, journalists, and even doctors were targeted. A few local and foreign nationals were reportedly kidnapped and killed too. Some of the Indian and various international human rights groups published horrifying stories of targeted killings, mass rapes, mass graves, involuntary disappearance and torture cells established by the Indian security forces comprising of CRPF, BSF, IRPF, Rashtyria Rifle, Assam Rifles and a later induction of a notorious Special Operations Group (SOG).⁷

Between 1990 and 2010, the Indian government and the local state government either re-introduced or re-vamped draconian laws to arrest and imprison leading resistance activists some of whom are still languishing in Indian jails. Many of them were tortured in prisons before their release.⁸ Despite the deployment of ten intelligence and 'law enforcement' agencies equipped with pellet guns, which injured over 4500 people in 2016 alone they failed to silence the popular cry for freedom in the valley of Kashmir.⁹

4- News Story, Tim McGirk, *the Independent*, 17 September 1991

5- <https://timesofindia.indiatimes.com/india/State-data-refutes-claim-of-1-lakh-killed-in-Kashmir/articleshow/8918214.cms>
Accessed on 28, March 2020

6- <https://www.amnesty.org/download/Documents/ASA2018742015ENGLISH.PDF> Accessed on 28, March 2020

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9- <https://www.nationalheraldindia.com/india/since-2016-mostly-young-people-fell-victim-to-pellet-guns-in-kashmir-says-report-by-human-rights-association> Accessed on 28, March 2020

Yaseen Malik and the JKLF's declaration of ceasefire

At about the same time when, JKLF's commander in chief, Yaseen Malik, was arrested in August 1990, and sent to Tihar jail, an Indian civil society support group "Initiative on Kashmir Committee" was formed in Bombay, headed by a retired Supreme Court lawyer, Justice Tarkunde and others. They enlisted support from JRD Tata of the industrialist Tata group who convened a secret seminar at Hotel Taj in Bombay in June 1990. Although its proceedings were never fully disclosed, one of its resolutions recommended complete regional autonomy leaving only defense, foreign affairs, and communication with the Indian union.¹⁰ The JKLF cadres were encouraged and started to invite Indian human rights groups and diplomats to their state. Many liberal Indians felt that political dialogue with the JKLF leadership on the Indian side would produce a peace dividend and started making contacts. Prominent Indian civil society members, writers, lawyers such as Kuldeep Nayer, Raj Mohan Gandhi, ex-chief

Justice of Delhi High Court, Rajender Sachar, former chief justice of the Indian Supreme Court Justice Madhoskar and former union minister Rajesh Pilot along with other influential figures such as Wajahat Habib-Ullah, contacted the APHC leaders to gauge the temperature. Some of them sought permission from the Indian government to meet with Yaseen Malik while he was undergoing treatment in custody in Delhi in 1993/94, which was granted.

In a recent letter written from the Tihar jail, Mr. Malik claimed that his well-wishing visitors were able to convince him that if he “shunned the armed path and returned to peaceful non-violent struggle, we would be provided with a genuine political space and efforts will be made for the resolution dispute through a meaningful dialogue process between all relevant parties”.¹¹ This, he understood, was an offer from the Indian state. In his letter, he also claims that both the American and the UK diplomats were on board - a claim he repeated in many previous press conferences.¹² India’s former spy chief, A S Dulat, in his book “The Spy Chronicles” published in 2018 also eluded to this. (Dulat et al, 2018:98) These verbal assurances lead him to declare a unilateral ceasefire in 1994 upon his release from prison. His understanding was that militancy related cases would not be pursued against him or his party workers, which did not for nearly 30 years.

“I accepted transformation without surrendering my ideology and after my release in May 1994, held a press conference in Srinagar and declared a unilateral ceasefire. I pledged to follow a non-violent path and with God’s grace till date am adhering to that pledge”, he wrote in his letter.

He admits that it was not an “easy job” to declare a unilateral ceasefire, following which over 1000 of his party workers were mysteriously killed in subsequent years and he was dubbed as a ‘traitor’ by many and his party was split in the middle over the issue. The splinter group continued with their militant endeavors for several years but he was eventually able to convince them to come on board and disband the armed group. Meanwhile, several attempts were made on his life but he miraculously escaped every bid and continued with his political activities including meetings with foreign diplomats such as American Robin R. Raphael and politicians such as the British Labour Party Shadow Foreign Secretary, Robin Cook, in Srinagar in 1996. The Indian state reciprocated his ceasefire declaration by lifting the ban on his party and allowing him to travel freely within India.

Following several meetings with US diplomats in Delhi and in Srinagar, he was granted a visa by the US government in March 2001 and the Indian government allowed him to travel to the UK and USA for medical treatment. In June 2005, he was allowed to lead a delegation of Kashmiri leaders to travel to Pakistani controlled Kashmir for an intra-Kashmir dialogue and to meet with the Pakistani leaders, including the then Prime Minister of Pakistan, Shoukat Aziz.



In late 2005, he was allowed to travel to the USA and UK to re-organize his party, the JKLF, which had a strong following in both the countries but remained split in Azad Kashmir region for several more years. On his return to Kashmir, in pursuance of his non-violent campaign to support a peaceful dialogue process to resolve the Kashmir dispute, he undertook a signature campaign calling for Kashmiri people to be recognized as a real party to the dispute and for their representatives to be given a seat in future negotiations between India and Pakistan. His signature campaign culminated in over 1.5 million signatures through a ‘Safar-e-Azadi’ travel campaign, where he held public rallies throughout the state with tacit acknowledgment from the Indian state. Wajahat Habibullah, a former Divisional Commissioner in Kashmir and India’s Chief Information Commissioner in 2007 who was very much involved in the backchannel diplomacy to bring Kashmiri politicians to the talking table, explained in an interview with Priyashree Andley, that Mr. Malik’s campaign had 3 very meaningful dimensions and that it was not directed at New Delhi. It included the demand for rehabilitation of Kashmiri pandits, open support for Indo-Pak dialogue and the inclusion of Kashmiris in that dialogue process.¹³

In February 2006, he was invited by the then Prime Minister of India, Manmohan Singh, for a formal meeting where he and his party general secretary presented the Indian Prime Minister with the signatures they had collected from the people of Jammu Kashmir demanding a peaceful dialogue process to be resumed to resolve the longstanding issue of Kashmir. Following that meeting, he went to Pakistan again and met with Hafiz Saeed, the chief of Lashkar-Tiyba, which was actively involved in militancy in Kashmir and asked him to shun the path of violence and help peace dialogue to take place. At that time several other militant groups were also active in Kashmir and are still around even in 2020. In an Indian TV channel interview in August 2014, he revealed that Indian Prime Minister Manmohan Singh had asked him to talk to other militant groups to bring them into a composite dialogue process.¹⁴



In 2009, the then Indian Home Minister, Mr. Chidambaram, started a new process of converging dialogue with Kashmiri leaders and openly met with Mr. Malik several times, following which an all-party parliamentary delegation was formed at the behest of the Indian government. The delegation visited Kashmir and had extensive talks with some of the APHC leaders and pressed for confidence-building measures that could lead to a peaceful settlement of the issue. This dialogue process was halted in Kashmir with a series of violent protests termed by the BBC in 2010 as the 'summer of discontent'.¹⁵ India accused Pakistani intelligence services of orchestrating the unrest and Pakistan accused the Indian army of unprecedented atrocities.

During these years, while he was detained many times by the local police, Mr. Malik or his party was not charged with any illegal activity or offense of any kind between the years 1995 and 2019. Six governments had changed in India, including the 5-year term lead by the Prime Minister, Narendra Modi, but Yaseen Malik or his party had no new court cases to face or defend.

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- 10- India's Kashmir War, published by the Committee for Initiative on Kashmir (1990)
 - 11- Letter from Tihar jail No 7, Delhi, dated 19 March 2020
 - 12- <http://kashmirdispatch.com/2013/01/16/1994-ceasefire-was-brokered-by-us-uk-jklf/110705/>
 - 13- Interview reprinted: Kashmir Affairs, Vol 2, No3, London, Oct-Dec 2007 Edition
 - 14- https://www.youtube.com/watch?v=msCa_LoG5eg, Accessed on 3rd May 2020
 - 15- <https://www.bbc.com/news/world-south-asia-11333788>, Accessed on 3 May 2020

The Case against Yaseen Malik and the JKLF

Yaseen Malik, re-elected chairman of the JKLF in 2014, is currently lodged in New Delhi's Tihar Jail number 7. He suffers from several ailments and illnesses dating back to the 1990s when he was allegedly tortured in prison. He underwent a heart by-pass surgery in 1992 and a kidney operation some years later while in custody. In an Early Day Motion, tabled in the House of Commons, London, signed by 30 MPs, it was revealed that the London based Human Rights Council petition to the Indian Supreme Court affected the release of Yaseen Malik from prison in 1994.¹⁶

In March 2019, he was formally charged under the notorious Public Safety Act (PSA), which allows imprisonment for up to two years without trial. While he was in a Jammu jail, India's National Investigation Agency (NIA) took him to Delhi for questioning in an alleged "terror funding" case and subsequently sent him into judicial custody even though the special court was not able to proceed with the hearing due to lack of evidence. According to his lawyer, Raja Tufail, "there is not an iota of evidence against him in this case. It is a case of purely political vendetta".¹⁷

The NIA case charge sheet falls under Section 120B (Criminal Conspiracy), 121 (Waging war against the government of India), 121a (conspiracy to wage war), 124A (Sedition) of the Indian Penal Code and the relevant provisions of the Unlawful Activities (Prevention) Act, 1967.

He was originally taken into preventive custody in February 2019, following a rebel attack on an Indian paramilitary convoy in Kashmir's Pulwama district, where more than 40 soldiers were killed on the spot. This was his 48th preventive custody within three years. Hundreds of other Kashmiri activists, politicians, lawyers, and even ministers and former chief ministers were arrested leading up to 5th August 2019, when the Indian government abrogated Articles 370 and 35a of the Indian Constitution to remove Kashmir's special status in violation of several UN resolutions and divided the areas under its control into two separate federally run "union territories". Most of the detainees had been booked under the draconian Public Safety Act (PSA) - a law termed "lawless" by the Amnesty International rights group - for allowing detention without trial. Some of those politicians detained under the PSA have since been released but many district level activists including some women and children remain imprisoned.

According to the official Indian government data, Tihar jail has an inmate population of 17,534 while its capacity is only for 10,026. The National Crime Records Bureau data on Indian prisons last year revealed that Uttar Pradesh had the most overcrowded jails despite having the highest capacity to accommodate prisoners. Most of the Kashmir prisoners are lodged there making it impossible for their families to visit them from Kashmir.

As chairman of the secular JKLF, Yaseen Malik is one of the few Kashmiri leaders, who commands a huge following across the state despite deep ethnic and religious divisions and has earned a great deal of respect within India, Pakistan and internationally for his commitment to peaceful struggle and "Gandhian" approach to resolving the Kashmir issue. His interviews and TV debates on several mainstream Indian and Pakistani TV channels, available on YouTube, are a testimony to his vision and philosophy which has transformed his party's "struggle until victory" concept into peacebuilding and humanitarian organization that wants to see a lasting solution to the issue.

In March 2020, while he was held in judicial custody in Tihar jail, pending trial of the NIA case, some 30-year-old cases were re-opened for trial in a Terrorist and Disruptive Activities (Prevention) Act (TADA) court in Jammu by the Central Bureau of Investigations agency (CBI) special prosecutor, Rakesh Singh. Proceedings, in this case, had been suspended previously by a high court ruling by way of OWP No.432/2009 dated April 30, 2009. He and six of his other accused party men had denied all charges and the high court stayed an order against proceedings due to lack of evidence but that decision was overturned by another high court judge, hon. Sanjay Kumar Gupta, against a writ petition (OWP No.395/2019) in Jammu High Court following the appointment of the new Chief Justice for Jammu Kashmir, hon. Gita Mittal, who was deputed from Delhi in April 2018.

On 16th March 2020, following a hearing in the additional session court in Jammu, where Mr. Malik was presented via video link, the framing of formal charges in the murder of 4 Indian Air Force officers in January 1990 was ordered by the presiding judge under sections 302, 307 of the Ranbir Penal Code (RPC), Section 3 (3) of the TADA Act, and section 4 (1) of the Arms Act. Mr. Malik is also accused of orchestrating the kidnapping of the daughter of the then federal home minister and former chief minister, Mufti Sayeed, in 1989.

Yaseen Malik's political group, the JKLF, one of Kashmir's most prominent pro-independence organizations was banned for the 2nd time by the Indian government in March 2019, as an "unlawful association" involved in seeking secession of J&K and for "anti-national, subversive activities" that supported militancy.

On 16th March 2020, when Yaseen Malik was presented to the Jammu session court from Tihar jail via video link, he was unable to hear anything and complained about not being allowed to speak. Fearing an unfair trial, he had already withdrawn his legal counsel in this case in the hope that he will be able to present his defense directly but found that the honorable judge was not prepared to listen to his argument and behaved like a "prosecuting/police officer and not like a judge". He set out to protest against this prospect of a mistrial by announcing an indefinite hunger strike from 1st April 2020 through his letter, which was released to the press via his sister. "I have relentlessly worked hard for the freedom of my nation, for a peaceful negotiated settlement of Jammu-Kashmir issue and the promotion of non-violence. I will prefer an honorable death instead of disgraceful life", he stated in the letter.

As the court proceedings were suspended due to the Covid-19 lockdown, he postponed his decision to go on a hunger strike. His family or lawyer has not been able to meet with him in prison since then to check on his health.

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- 16- <https://edm.parliament.uk/early-day-motion/9025>, Accessed on 20 March 2020
- 17- Raja Tufail, verbal comments to the writer – 28 September 2019

Imperatives, reflections, and challenges

The filing of all these cases dating back 3 decades against a leading figure of the independence movement has multidimensional implications and repercussions and points to an ominous agenda with fait-accomplis. Many Indian and Kashmir politicians and law watchers have expressed fears that the Indian state led by right-wing nationalist BJP is hell-bent on taking Mr. Malik out of the picture. It is widely believed that in the likelihood of an adverse outcome, where Mr. Malik is sentenced to death or life imprisonment, the smouldering fire in Kashmir will be re-ignited like never before. Questions are also being raised on the act of perfidy on the part of the Indian state and legal experts in international law are already calling for legal protections in the domestic and international law for peace agreements and peace negotiators.

Many liberal Indians and left-wing activists as well as Congress leaders including Kashmir's two former chief ministers, Farooq Abdullah and Mehbooba Mufti, have spoken against his arrest and trial but the pro-independence leaders and resistance sympathizers fear that the Indian state has already decided to sign his death warrant.

"When you reopen a 30-year-old case and pursue it at a fast pace in a bid to hastily produce a judgment, you can understand the intentions of this government," said Khurram Parvez, a leading activist who heads the Asian Federation Against Involuntary Disappearances and coordinator of Jammu Kashmir Coalition of Civil Society (JKCCS). He told an Al Jazeera reporter that it was "a political rather than a judicial move". Insisting that a fair trial is a globally recognized right for everyone, he questioned the Indian intentions, "if you are suddenly pulling out old cases and not even allowing the accused to properly represent his case, then there would be question marks over it".¹⁸

The way the Indian state has set out to 'deal' with Yaseen Malik has rightly lead his apprehensive friends and family to think that "history is being repeated." Many parliamentarians in the UK, USA Europe have raised eyebrows on the way the Indian judicial system is being used and abused for political purposes, where convicted terrorists are being allowed out of jail to contest elections and where judges who dare to comment on the law and order situation in India today are either demoted, dismissed or transferred. Unfair trials and flawed judgments to satisfy the "public conscience" instead of rule of law are not uncommon in the case of Kashmiri prisoners. There are historical evidence and precedence of unfair trials in the case of two well-known Kashmiris, Maqbool Bhat who was hanged in 1984, and Afzal Guru who was hanged in 2013. Kashmir never returned to normalcy following these two hangings.

Imagine where our world would be if freedom fighters such as *Mohandas Gandhi*, *Martin Luther King*, *Yasser Arafat*, *Nelson Mandela*, and *Gerry Adams* were hanged by the opposing regimes instead of being invited to sit around a table to resolve political and armed conflicts. It is inconceivable to imagine that a future Nobel Peace Prize winner, Nelson Mandela could be put behind bars after agreeing on a peace deal with the Apartheid regime in South Africa or Gerry Adams facing murder charges after the Good Friday Agreement of April 1998 in Northern Ireland. We are, however, witnessing pernicious scenario with utter dismay in the case of Yaseen Malik in India, and Josu Urrutikoetxea in France.

Indian state approach led by right-wing BJP regime in legal maneuvering, coupled with a refusal to recognize the JKLF's voluntary efforts undertaken to help end the cycle of violence in Jammu Kashmir, carries the portentous risk of sending a dangerous message that Indian state is not interested in peacebuilding efforts and believes in force and coercion. The use of force and coercion has is exactly what has to lead us to the world's longest-running dispute with

never-ending wars and bloodshed. It is exactly this approach that failed in 1984 when Maqbool Bhat was hanged, which changed the political spectrum forever as it inflamed passions and sent parts of Jammu-Kashmir into flames, where post-graduate scholars, professional lawyers, medical doctors, and even airline pilots felt compelled to take up the gun and fight against the injustices rendered in the disputed region. This mistake was repeated with Afzal Guru, resulting in further alienation of the Kashmiri population and gave rise to never-ending military confrontations. The resurrection of 30-year-old cases against JKLF leaders is bound to have a reversal effect on those who believe in diplomacy and the sanctity of dialogue. It is bound to encourage many on both sides of Kashmir to question the strategic gains in advocating and committing to a nonviolent approach.

The situation faced by Yaseen Malik and his party is bound to set a negative precedent that Indian state is not prepared to honor any peace agreement or historical pledges made by its founding fathers and that there is no legal or diplomatic security in a negotiated outcome in the Kashmir conflict as his participation and investment in the peace process will be seen as a zero-sum game. This new phenomenon of criminalizing those who willingly participate and contribute to conflict transformation is not only ethically problematic but strategically counterproductive. Moreover, it sends a very bad signal to all such ongoing processes around the world. Beyond this specific case, the Indian state is undermining all international standards inherent in conflict resolution processes and setting a dangerous precedent that might be right. It also opens new doors for those interested parties outside Kashmir whose primary objective is to see the conflict fester. They will gain new opportunities to fish in the troubled waters to perpetuate the conflict so that the Indian army remains engaged in Kashmir for another half a century and the death toll rises to an all-time high.¹⁹

Although the UK foreign office minister, Mark Fields, in a written response to a question raised by the Halifax MP, Holly Lynch, regarding the arrest and trial of Mr. Malik, stated that “the British Government encourages all states, including India, to ensure that their domestic laws meet international standards for free and fair trials”, and that his office will continue to monitor the case is an encouraging sign that the world is watching but the world has watched the Kashmir death toll rise for too long.²⁰ In the words of Martin Luther King Jr, the ultimate tragedy is not the oppression and cruelty by the bad people but the silence over that by the good people.

In the face of a seemingly flawed judicial process, predictably unfair trial and the consequential judgment of a pre-determined case, it has all the hallmarks of a recipe for a disaster that will not only derail all hopes for a peaceful resolution to the Kashmir issue but inflame the volatile political process, ignite regional hatred and communal intolerance that has engulfed India in an unprecedented way already.

There are several steps that local, regional, and international community partners could contemplate to empower the rule of law, show respect for human rights, and reap peace dividends in the region and internationally.

- There is a need for an international awareness campaign and to set up an observer group, preferably with ample knowledge of local, international, and humanitarian laws to monitor and report on this case.
- The international community, diplomatic circles, and political institutions interested in seeing a peaceful resolution of the Kashmir conflict would need to exercise greater diplomatic leverage on India to see reason and not repeat the mistakes of the past years.
- Local and regional civil society should raise voice against this ominous situation to save his life and perhaps many more lives in an unpredictable future.
- The government of Pakistan could act on behalf of Mr. Malik’s Pakistani wife (and daughter, both of whom live in Islamabad) to seek justice under international law in the International Court of Justice in The Hague.
- The office of the UN High Commissioner for Human Rights should be persuaded to approach ICJ for an Advisory Opinion in this case and in the case of Kashmir dispute, which has been lingering on in the UN files for 72 years.

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- 18- <https://www.aljazeera.com/news/2020/04/jailed-kashmiri-separatist-yasin-malik-denied-fair-trial-200407072128148.html> Accessed on 20 April 2019
- 19- https://ploughshares.ca/pl_armedconflict/india-kashmir-1947-first-combat-deaths/, Accessed on 1 July 2020
- 20- <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2019-06-03/259320/>, Accessed on 30 June 2019

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