

Is the United Nations Still Relevant for Kashmir?

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The question posed in the title of this essay can possibly be addressed in two ways. The first answer is fairly straightforward, and tends towards pessimism. By any measure Security Council intervention in Jammu and Kashmir (henceforth simply Kashmir) has been ineffective. For seventeen years (1948 to 1965) the UNSC remained actively involved in the Kashmir issue, adopted about twenty-three resolutions in the period 1948-1971, and it established organisations and appointed various officials to deal with the matter. To date neither has the territorial dispute between the two countries been resolved,¹ nor has peace come to the Valley and, by implication, to the Indian sub continent. Despite the attempts of the Security Council to secure the demilitarisation of the region, within a span of sixteen years, the first Indo-Pakistani War (1947-48) was followed by another war over Kashmir in 1965. Though the region was not the direct cause for the third Indo-Pakistani War in 1971; Jammu and Kashmir was constituted as one of the theatres of war. And Kashmir, as we shall see, loomed large over the political negotiations that followed the war. In 1999 another war between the two countries took place in Kargil in Jammu and Kashmir, when Pakistani forces invaded the territory. On that occasion, “restrained but effective Indian military action, supplemented by strong US pressure in the later stages, forced Pakistan to pull back.”² On other occasions, notably 2001-2002, India and Pakistan have come close to war.

The unresolved conflict in Kashmir has prevented normalisation of relations between the two neighbours who have otherwise much in common from languages, meaning systems, music, and love of cricket and Bollywood, to shared historical memories. The discord had fed into the politics of distrust and animosity that occasionally swamps both countries and cripples initiatives to bring peace to the region, and gives an active fillip to trans-national terrorism on the one hand, and rabid expressions of hyper nationalism on the other. Considering that both India and Pakistan are nuclear powers, it is not surprising that even the prospect of increased tension on the border sends shivers of apprehension down collective spines. In sum, despite the long time involvement of the Security Council in the issue, Kashmir remains one of the hotspots of a troubled world. In 2002, the United Nations Secretary General referred to the Kashmir issue as one of the most perilous threats to global peace and security.³ One of the first crises to test the fledgling Security Council (along with the Korean and the Palestinian conflicts); Kashmir has cast a large question mark over the capacity of the UNSC to realise the post Second World War project of collective security, maintenance of peace, and containment of conflict.

A second answer to the question posed above veers towards cautious optimism. Though on crucial occasions the United Nations has been confronted by various obstacles

ranging from states jealously guarding their sovereignty, to muscle flexing by great powers, and has, therefore, been rendered immobile, on other occasions the world body also has provided a road map for the future. Take the biography of the concept of self determination. During the period of decolonisation the United Nations was committed to two principles (a) that the right of self determination is held by the people who inhabit the territory of a state, and (b) after a country had attained independence from the colonial power, no further breakaways from the territory on the grounds of self determination were to be sanctioned. The two implications of this position were plain; self determination was held to be synonymous with independence or secession, and the principle of self determination of people was *not* applicable outside the colonial context.

Kashmir falls outside the colonial context, yet in recent years a number of separatist groups in the Kashmir Valley have made a bid to establish an independent state via the principle of self determination. Though the demand has been sparked off by U.N resolutions on the plebiscite; it has also spilled over the boundaries of the original resolution in significant ways. The problem is that political imaginations of the separatist groups remain tied to the idea of the nation state; even though historians hold that the nation state has proved to be one of history's most serious errors. It is perhaps time that we (the scholarly community) turn our attention to (a) re-examining the link between self determination and establishment of a state of one's own, and (b) conceptualising self determination as a constitutive aspect of democracy. Interestingly, the United Nations has given us a lead in this direction. This lead might provide us with the means to resolve the Kashmir problem as well as other conflict cases. If this is so, the United Nations continues to be relevant but in ways quite different to those envisaged by the Security Council in 1948 when it was first seized of the issue. That is the nature of politics; always contingent and chancy, politics breeds unforeseen repercussions and generates unexpected dynamics.

The normative position that underlies the argument is that it is possible to liberate the concept of self determination from that of independence/secession with which it has been associated for long. The United Nations has shown us the way and this is a welcome move. Allen Buchanan suggests that secession challenges our abilities to re-imagine the sort of political institutions and practices that govern individual and collective lives. The impulse to secede from an existing state betrays a fundamental lack of political imagination, because paradoxically, secession is one of the most conservative of political acts. The secessionist tends to assume that his problems are due to the state in which he finds himself, and that the solution is to get his own state. The anti-secessionist tends to be equally unimaginative, seeing in every demand for autonomy a threat to the existence of the state. The imaginations of both are cramped by the narrow horizons of the statist paradigm. What the usual rhetoric of both parties overlooks, is that sovereignty can be unbundled in many ways, and that the only choice is not to stay in the state, or get away. Once we take seriously the indefinitely large range of possible regimes of political

differentiation within state borders, the rich menu of intra-state autonomy arrangements, we liberate ourselves from the confining assumptions of self-determination. There are various inter- and intra-state autonomy regimes that can cope with, or serve to avoid secessionist conflicts. Therefore, international legal institutions should support, and even mandate intrastate autonomy regimes.⁴ Buchanan's argument gives us cause to reflect. Perhaps it is time we devote our energies towards the task of unpacking and delegitimising the seductions of a state of one's own. Perhaps it is time to stress that self-determination is inbuilt into the democratic project. And perhaps it is also time to suggest that except in extreme cases, the setting up of a state of one's own, which is necessarily a clone of the parent state, is hardly a solution. The problem of the nation state is not resolved in this way; it is merely *deferred*.

I consider that the immediate responsibility for the rectification of historical wrongs and the restoration of regional autonomy lies on responsible members of civil society in India who are committed to democracy and justice, and who are willing to take up cudgels for their fellow citizens in Jammu and Kashmir. The government of India has to be pressed into realising that if its claims to be the world's largest democracy are to be justified, injustices towards the citizens of the state of Jammu and Kashmir have to be remedied. It is in this domain of prescription that the United Nations continues to be relevant for the Kashmir issue. That it continues to be relevant in a different avatar illustrates the unpredictability of politics.

Kashmir in the Security Council: Demilitarisation and the Plebiscite

On 31 December 1947, the government of India lodged a complaint against the government of Pakistan in the Security Council under Article 35 of the Charter of the United Nations.⁵ The allegation was that the government of Pakistan was aiding the invaders who had overrun the state of Jammu and Kashmir, through extension of transit facilities, supply of bases and military and economic transport, and by permitting Pakistani nationals to fight and train these tribesmen/raiders. In light of the accession of Jammu and Kashmir to India, such aid constituted an act of aggression. The Security Council was accordingly requested to:

- Ask the government of Pakistan to prevent its government, personnel, military and civil, from participating in or assisting in the invasion of Jammu and Kashmir state;
- Call upon its nationals to desist from taking part in the fighting in the state;
- Deny the invaders
 - (a) Access to and use of its territory for operations against Kashmir,
 - (b) Military and other supplies, and

(c) All other kinds of aid that might tend to prolong the present struggle.⁶

The background of India's complaint to the Security Council was as follows. Although before 1947, the princely state of Jammu and Kashmir did not form part of British India, the political status of the state was ambiguous, just like the other five hundred and sixty five princely states that accounted for about 45.3 percent of the total land area of the country. Whereas these states were technically not part of British India; they were also not entirely independent of British sovereignty. Via the Doctrine of Paramountcy, the British Sovereign exercised suzerainty over the rulers through a variety of treaties and political arrangements.

The suzerainty of the British monarch over these princely states lapsed with the passing of the India Independence Act in July 1947, as did all treaties and agreements in force.⁷ Though in principle rulers, some of whom controlled kingdoms barely larger than a substantial landholding, had the right to decide their own future, the unalloyed message was that they could not retain their status as autonomous principalities *within* the territory of either newly independent India, or the newly constituted state of Pakistan. The princely states were left with only one option; that of joining either of the two countries, logically the one that their state bordered geographically.⁸ The Maharaja of Kashmir, however, dreamt of sovereignty in perpetuity, and refused to accede to either India or Pakistan. This was a risky option because Jammu and Kashmir, which is geographically contiguous to India as well as Pakistan, is of enormous importance to both countries both for its geo-strategic importance since it borders both China and Afghanistan, and for its invaluable resources, particularly river water upon which the two countries are dependent. The independence of the state of Jammu and Kashmir, however, lasted for precisely seventy-three days.

Pakistan was provided with an opportunity to intervene in the region when in August 1947 parts of Jammu and Kashmir, particularly Poonch, rebelled under the leadership of demobilised soldiers, against the misrule of the Maharaja, oppressive taxation policies, and following reports of massacres of Muslims in Hindu-dominated eastern Jammu districts during the Partition of India.⁹ The rebels were helped by several thousand armed tribal militias from the North West Frontier Province of Pakistan who infiltrated the valley in October, forcibly occupied territory, and inflicting atrocities on the residents of the Valley during their advance on the capital Srinagar.¹⁰ According to all reports the attack, which was meticulously planned and executed, could not have taken place without the backing of the government of Pakistan. The monarch rushed to the Indian Government and requested military aid. Since the government of India stipulated that Jammu and Kashmir accede to India *before* troops were sent to Jammu and Kashmir, the monarch signed the Instrument of Accession on 26 October 1947.¹¹ The instrument was accorded legality when it was accepted by Lord Mountbatten the Governor General of

India the next day. On 27 October 1947 Indian troops landed in Srinagar in order to contain the onslaught of the tribal raiders.

Therefore, as far as the government of India was concerned, the issue before the Security Council was simply that of aggression by Pakistan backed raiders and violation of state sovereignty. Notably, India requested that the Security Council recommend appropriate procedures or methods of adjustment for the pacific settlement of disputes under Article 35 of Chapter VI of the Charter. It did not call for action under Chapter VII of the Charter, for sanctions against Pakistan, or for severance of relations with her government. The complaint merely asked the Security Council to ensure that Pakistan should cease giving aid to the raiders.¹² There was a larger issue at stake; to contain the conflict. Nehru's objectives of going to the Security Council were explicated in a letter he wrote to the Kashmiri leader Sheikh Abdullah on 25 August 1952. The reference to the UN, wrote Nehru, was primarily to:

Avoid the extension of war elsewhere, i.e., it's becoming an all-out war between India and Pakistan. We thought that that would be a dangerous development, bad for India and Pakistan. This judgment has little to do with success of the war. By normal standards, we could expect to defeat Pakistan, but the cost would have been heavy and there was always the possibility of international complications.¹³

Two weeks later, the government of Pakistan responded to the complaint with a list of counter allegations. Basically the Pakistani representative in the Security Council denied all charges, whether that of aggression, or that of helping the tribesmen. But he also denied that India exercised sovereignty over Jammu and Kashmir. The government of India, it was alleged, had secured the accession of the state through force and fraud, carried out genocide of the Muslim community in the country, and in Kashmir, and blocked agreements that had been concluded under the Partition pacts. According to the representation, India was trying to destroy the state of Pakistan. Finally, the Pakistani representative drew amply upon the two nation theory to suggest that the problem between the two countries was essentially one of incompatible religious sensibilities. He concluded with the suggestion that a plebiscite should be held in the state in order to decide the legal status of Jammu and Kashmir. India, in sum was accused of (a) annexing Jammu and Kashmir illegally and (b) trying to throttle the new state of Pakistan.¹⁴ In the Security Council Pakistan's stand was backed by the United Kingdom and other western powers. Consequently, the very parameters of the debate shifted dramatically. In the process, the two positions were rendered incommensurate. Whereas the government of India requested the Security Council to establish procedures to ensure that the act of aggression was reversed and normalcy restored, Pakistan insisted that the accession was not recognisable in law.¹⁵

Setting aside India's complaint that Pakistan had invaded Jammu and Kashmir; the Security Council proceeded to concentrate upon the demilitarization of the region. In the first resolution on the issue on 17 January 1948 (38), the United Nations Security Council asked both governments to exercise restraint and ease tensions. Three days later, on 20 January, the Security Council, *without addressing India's complaint* adopted a resolution (39) that established a United Nations Commission on India and Pakistan to investigate and mediate in the dispute, execute the directions of the Security Council, and report to the UNSC.¹⁶ The accession of the state of Jammu and Kashmir to India might never have happened.

On 20 April 1948 the Security Council passed Resolution 47, which established the framework of Security Council mediation in the Kashmir conflict. The first part of the resolution instructed the UNCIP to proceed at once to the Indian sub continent and ensure that the two governments take necessary measures with respect to (a) the restoration of peace and order and (b) the holding of a plebiscite to determine the will of the people of the state. The second part of the resolution laid down the preconditions for holding the plebiscite. To some extent the resolution recognised the validity of India's position on Jammu and Kashmir, and asked Pakistan to use its "best endeavours to secure the withdrawal from the state of Jammu and Kashmir of tribesmen and Pakistani nationals not normally resident therein," who had entered the state for the purpose of fighting. Once the UNCIP was satisfied that the withdrawal had been accomplished, the government of India should reduce its own armed forces to the minimum strength required for the maintenance of law and order. The resolution acknowledged to some degree the complicity of the government of Pakistan in the invasion of Jammu and Kashmir, made the withdrawal of the Indian army contingent upon the withdrawal of the Pakistani army, and laid down that the primary responsibility for establishing appropriate conditions for the plebiscite was that of the government of India. But the Security Council side stepped the issue of the accession of the state to India.¹⁷

Also ignored was the empirical fact that the idea of a plebiscite had been already mooted by the government of India. In the letter that accompanied acceptance of the Instrument of Accession (27 October 1947), Lord Mountbatten had stipulated that *after* the invader was expelled from the territory, and *after* law and order had been restored, the question of the state's accession should be settled by reference to the people or through a plebiscite. This was consistent, stated Mountbatten, with the policy adopted by the government of India. This commitment was reiterated by PM Nehru in a radio broadcast on 2 November 1947, in which he promised that the future of the state would be decided in accordance with the wishes of the people ascertained through a referendum held under the auspices of the UN.¹⁸ He reiterated this commitment several times at press conferences, public meetings, and international forums. In August 1952, he told India's Parliament that he wanted "no forced unions" and that if the people of Jammu and Kashmir wish "to part company with us they can go their own way and we shall go our

way.”¹⁹ The pledge of holding the plebiscite was in keeping with the commitment of the Congress that the people of princely states should decide their own future. In sum, even though India’s sovereignty over Jammu and Kashmir had been established with the signing of the Instrument of Accession by the monarch; a plebiscite would have ratified and legitimised this decision.

This stand was reiterated in the Security Council by the Indian representative. Once the state had been cleared of the invader and normalcy restored, its people would be free to decide their future by the recognized direct method of the plebiscite or referendum, which “in order to ensure complete impartiality, might be held under international auspices.”²⁰ The government of India, in other words, wanted the Security Council to intervene in the Kashmir imbroglio not only in the interests of containing conflict, but also because the holding of the plebiscite required the withdrawal of the raiders and reversal of aggression. This is borne out by Nehru’s letter to the UN secretary-general of 31 December 1947:

To remove the misconception that the Indian government is using the prevailing situation in Jammu and Kashmir to reap political profits, the Government of India wants to make it very clear that as soon as the raiders are driven out and normalcy restored, the people of the state will freely decide their fate and that decision will be taken according to the universally accepted democratic means of plebiscite or referendum.²¹

Not only was the pre-history of the referendum ignored by the Security Council, India protested that Resolution 47 did not do justice to her complaint; that it tended to make her look like a co-accused with Pakistan; that it did not recognize the merits of the matter; that it was vague and indefinite in its proposed attitude to Pakistan, and that it did not take into full account the accession of the state to India. The government of India held that Pakistan did not hold a constitutional position in Jammu and Kashmir, therefore, the demand to allow the latter to intervene in the plebiscite was not justified. Pakistan, on the other hand, complained that the resolution ignored the suggestion that Pakistan place her troops in Muslim areas and insisted that political groups in that Pakistan-occupied Jammu and Kashmir should be represented in the interim administration. Neither government declined to receive the Commission, but both declared that they were not bound by the decision.²²

In any case, by the time the UNCIP arrived in the subcontinent, regular troops of the Pakistani army had entered the north of Jammu and Kashmir. Though the UNCIP did not condemn the presence of Pakistani armed forces in the region, in a resolution passed on 13 May 1948, it recognised that the presence of the Pakistani army constituted a material change from the situation that originally came before the UNSC. Subsequent developments in the region were to render the UNCIP more or less irrelevant. On 1

January 1949 the two countries signed a ceasefire agreement. Subsequently, the very framework of the Jammu and Kashmir problem was radically transformed, because the July 1949 Karachi Agreement formalised the de facto division of Jammu and Kashmir between India and Pakistan. The ceasefire line stopped short at the Siachen Glacier [at map coordinate Point NJ 9842], and both troops withdrew to behind the ceasefire line.²³ India retained less than half of undivided Jammu and Kashmir that is a major part of Jammu, Ladakh and the Kashmir valley. One third of the region which consists of a sliver of territory extending from the north to the south of western Jammu district, comprising the Punjabi speaking districts of Poonch, Mirpur, and Muzafferabad, Hunza, Chilas, Gihit and Baltistan is under the control of Pakistan. Pakistan also controls Skardu in Ladakh, and the thinly populated Northern Territories of Gilghit and Baltistan. In the 1960s Aksai Chin occupying 16.9 percent of the area of the state and almost no population came under the control of China during the 1950s. In 1963 Pakistan ceded to China another 2.33 percent of the land claimed by India.²⁴ The state of Jammu and Kashmir was subsequently divided between three countries.

After both governments repeatedly refused to accept the recommendations of the UNCIP, in March 1950 the Security Council wound up the body and proceeded to appoint UN representatives in India and Pakistan.²⁵ However, the recommendations of various representatives did not find favour with the governments of both the states. On 31 March 1951, the Security Council via Resolution 91 established the United Nations Military Observer Group in India and Pakistan to monitor the ceasefire line, known after the 1972 Simla Agreement as the Line of Control. This group continues to exist though India had argued that the establishment of the Line of Control made it dispensable. After 1972, the Government of India has not reported to the UNMOGIP, though the organisation has a token presence in Srinagar.

In the meanwhile, India had tilted towards the Soviet Union which had emerged as a formidable power in the Security Council, even as Pakistan allied strategically with the U.S. The Soviet Union backed India's position that the accession of Jammu and Kashmir to India was not in dispute, and further discussions in the U.N were deadlocked. After the 1965 Indo-Pakistani war it was the Soviet Union that negotiated the Tashkent Peace Agreement between the two countries on 10 January 1965. The 29 September 1965 ceasefire had been similarly negotiated by the U.S and the USSR rather than the UNSC, which had passed a strongly worded resolution on the subject. The two resolutions passed by the Security Council during the war, represented practically the last statement of the organisation on the Kashmir dispute. Since the Simla Peace Accord emphasized the need for a bilateral solution to the problem, United Nations involvement in Kashmir was for all practical purposes rendered irrelevant.

Why Did the Security Council Prove Irrelevant?

Ratner suggests that the incapacity of the Security Council to act decisively in the early days can be traced to the cautious and unimaginative manner in which the Security Council interpreted Chapter VI.²⁶ Chapter VI provides detailed mechanisms for the implementation of the goals of the organisation, but it is Chapter VII that is held to represent the key innovation of the United Nations since it centralises enforcement mechanisms of the Council, and requires states to comply with any coercive measure whenever there is a threat to the peace. In comparison, Chapter VI of the Charter gives to the UNSC at the most a general and somewhat tepid mandate in the pacific settlement of disputes. Parties to a dispute are urged to settle peacefully; the Security Council has the power to investigate disputes to determine if they are likely to endanger the peace, to recommend appropriate methods of adjustments and terms of settlement for such disputes. Even within this limited mandate, the Security Council failed in the early days to either interpret the provisions of Chapter VI creatively, or independently of the consent of the parties. In a majority of cases, one permanent member managed to block implementation of these recommendations.²⁷ Moreover, peacekeeping was either delegated to the UN Secretary General and his Special Representatives, or to organisations such as the UNMOGIP. For these reasons the Council's dispute settlement powers before the end of the cold war remained weak.

Indisputably however, many of the reasons that contributed to the incapacity of the UNSC lay outside the Council, in doctrines of state sovereignty that fragile states in much of the postcolonial world held firmly onto. Matters were even more fraught in the Indian sub continent because India had been partitioned in 1947. The Partition itself bore dreadful consequences in the form of involuntary migrations, mass killings, gang rapes, and sordid mutilations, all of which have left vivid scars upon the memories of populations on both sides of the border. It is not surprising that the Government of India was acutely paranoid about further division and alienation of territory. But for the Government of Pakistan the Muslim majority state of Jammu and Kashmir represented the unfinished business of Partition. Above all, Jammu and Kashmir provided the touchstone for the two rival ideologies that competed for space in 1947. Whereas for India, the accession of Jammu and Kashmir validated its official policy of secularism, the Pakistani assertion that the country provided a homeland for the Muslims of the sub-continent justified its claim that the Muslim majority state should accede to Pakistan. The two positions were simply incompatible, and the resultant inflexibility ruled out decisive action by the Security Council.

Finally, the role of the Security Council in resolving the conflict was neutralised because of developments in the Indian subcontinent. After 1965, the involvement of the Security Council in this matter was to remain more formal and nominal than substantial. The 1972 Simla Peace Accord, signed by PM Indira Gandhi of India and PM Zulfikar Ali

Bhutto of Pakistan in the aftermath of the 1971 Indo-Pakistani War, emphasised that the Kashmir issue could only be resolved through a bilateral framework. Since then the Government of India has eschewed third party/international mediation, though the Government of Pakistan continues to raise the issue in various international forums.²⁸

More importantly, since Pakistan did not withdraw its armed forces, India also refused to act on this front. The preconditions for the plebiscite were, consequently, not set in place, and the plebiscite was consigned to one of those might have beens of history. Prime Minister Nehru in a letter to Sheikh Abdullah proclaimed the obituary of the plebiscite. "It became clear to me," he wrote, "that we would never get the conditions which were necessary for a plebiscite. Neither side would give in on this vital issue, and so I ruled out the plebiscite for all practical purposes."²⁹

The Complexities of Self Determination

Ironically Security Council resolutions were to find political resonance in different circles. Though both India and Pakistan consistently rejected the resolution of the Security Council that demilitarisation should be followed by a plebiscite, over time separatist groups in the Kashmir Valley began to demand their right to self determination. This was particularly visible between 1990 and 1993, when the Valley of Kashmir erupted in a series of violent protests that brought normal life to a standstill. The scale and the intensity of protests involving bomb explosions in the capital city of the Kashmir valley Srinagar, closures, strikes, arson, attacks on government offices, bridges, and buses, and murders of government officers was unprecedented. Periodically, hundreds of people marched to the headquarters of the UNMOGIP in Srinagar and called upon the UN to implement its own resolutions. On 1 March 1990, a crowd of more than one million from every part of the valley, many wrapped in shrouds, gathered at the headquarters of the UN Military Observers Group in Srinagar. "Impassioned speeches were made; memoranda addressed to the U.N. Secretary-general demanded that he urge India to concede to Kashmiri's their inherent right of self-determination."³⁰ Till today under the leadership of the separatists, crowds assemble at the same site and urge the United Nations to intervene in Kashmir. On 5 January 2010 for instance, separatist leaders Mirwaiz Umar Farooq and Syed Shah Geelani who head two factions of the all party conference Hurriyat, urged the UN to implement its resolution on Kashmir granting self determination to the Kashmiri's.³¹

However, there is a major difference between the way in which the plebiscite was conceptualised by the UNSC and the way in which it is conceptualised by separatist groups. For the Security Council the objective of the plebiscite was to determine whether the people of Jammu and Kashmir wanted to join India or Pakistan. Today the separatist groups want the plebiscite to legitimise the option of independence from both countries.³²

This demand is anchored firmly onto the plank of self determination, which in turn serves to legitimise the claim to independence. The concept of self determination is, however, neither self explanatory nor unambiguous. There is little unanimity on who the bearer of the right of self determination is, and there is even less consensus on what the implications of the exercise of this right are. There is even less consensus on why the demand for the right to self determination is justified.

Consider the biography of the demand for self determination in the Kashmir Valley. Two sorts of charges have been put forth to validate the demand for independence. The first charge is that the accession of the state was unfairly secured by the government of India. Historical records however show that the head of the state had signed the Instrument of Accession. Two, Sheikh Abdullah the leader of the regional political party, the National Conference (NC) was witness the fact. In 1948 he declared in the Security Council that “Kashmir and the people of Kashmir have lawfully and constitutionally acceded to the dominion of India.”³³ Three, a few weeks after the Maharaja had acceded to India on 26 October 1947, the working committee of the NC passed a resolution recommending acceptance of the accession of Jammu and Kashmir to India. The resolution was ratified by a special convention of the representatives of the people of the state. Throughout the Indo-Pakistan War from October 1947 to December 1948, the NC supported India. Four, the State Constituent Assembly which was convened on 31 October 1951, and to which delegates were elected on the basis of full adult franchise approved accession. The Constitution of Jammu and Kashmir, which was adopted in 1957, made the state an integral part of India. The then Prime Minister of the state, Bakshi Ghulam Mohammed, declared in the first broadcast he made to the nation that “The democratic movement in the State has been consistently fighting for the realisation of an autonomous status for the State within the Indian Union.”³⁴ Four, though the Security Council had recommended that Pakistan withdraw its troops from the territory prior to the withdrawal of Indian forces, and that this was an essential condition for holding the plebiscite, this was not carried out. Consequently the government of India did not feel obliged to call back her armed forces. Five, in Jammu and Kashmir, the people have participated in state assembly and parliamentary elections. In the December 2008 elections to the state assembly, for instance, the voter turnout in the Kashmir valley was about 55 percent compared to about 29.5 percent in 2002. In Srinagar, the heart of the secessionist movement, the turn out increased from 5.06 percent in 2002, to 21 percent. The elections marked by low levels of mainly localised violence, and the voters ignored the call of the leadership of the separatist movement to boycott the elections.

The second charge holds that India did not honour its commitment to the plebiscite. The major reason why it could not be held was because the preconditions, notably the withdrawal of Pakistani armed forces followed by the withdrawal of Indian armed forces, were not secured. It is also worthwhile noting that a violent movement in pursuit of the cause of self determination arose in the Valley, and in two districts of the region of

Jammu, some forty three years *after* the default of this particular obligation by the Indian state. Two, the original uprising in the Valley in 1990 was, within a space of about three years, practically hijacked by mercenaries coming into the valley from the outside, particularly from Pakistan and Afghanistan. These mercenaries thereon proceeded to fight for a cause that, arguably, has little to do with the original grievances of the Kashmiri people. Three, though the citizens of Jammu and Kashmir had been given assurances that they would be able to determine their own future, it is only in the Muslim dominated valley that the violent demand for the right of self determination arose at the turn of the 1990s.

Four, Jammu and Kashmir is a plural society, and that *no* group apart from the Muslim separatists in the Valley has articulated a desire to secede from India. On the contrary, Buddhist organisations in Ladakh, and Hindu organisations in Jammu demand fuller integration into India. The Kashmiri Pandits who had been compelled to leave the Valley in 1989, have now begun to agitate for a separate homeland, and have put forth the idea of a Panun Kashmir, comprising the regions of the valley to the East and the North of river Jhelum. The homeland should have, it is demanded, the status of a Union Territory governed by the central government. The other group that has demanded autonomy from the Valley is the Gujjar's, consisting of 9 percent of the state's population. The Gujjars who form the third largest community in Jammu and Kashmir are mainly nomadic and Muslim. In 1991 the Gujjar's were granted the status of a Scheduled Tribe, and granted reservations in the legislature, the government services, and professional and technical institutions. These measures have led to the politicization of the Pahari people who speak a distinct language and consider themselves as possessing a distinct identity. They have asked for a new Pahari region separating predominantly Muslim Rajouri-Poonch from Jammu division with an Autonomous Hill Council on the patterns of the Leh Autonomous Hill Council, citing underdevelopment, social and economic backwardness and dominance of the Jammu district in the share of civil services, public sector undertakings, and institutions. Another demand for autonomy has been put forth by the residents of the Chenab Valley for an Autonomous Hill Council. In sum, the assertion of the right to self determination does not have popular backing of every group in the state.

Does then the right to self determination pertain to the Valley alone, because it is the Muslim-dominated region that constitutes the centre of unrest? But although the Muslim community forms an overwhelming majority of the population in the Valley, historically the place has been home for the Kashmiri Pandits and the Sikh community as well. In the wake of the 1990 popular uprising in the Valley, 95 per cent of the valley's 150,000 to 160,000 Kashmiri Pandits were forced to leave their homes and their work places under coercion by *jehadi* groups. Despite the fact that the Kashmiri Pandits form a minority in the Valley, a justified assertion of the right to secede cannot ignore other groups who see the territory as their homeland, not these days when minority rights have been placed so

firmly on political agendas. If these groups have been compelled to leave the territory, will the exercise be democratic? But to bring back the Pandits, as well as the moderate Muslims who have fled or who have been compelled to leave the Valley, is an impossible project.

Sorting out Dilemmas

What we see here is the making of a serious moral dilemma born out of the conflict between the right to self determination/secession, and the rights of other groups in the territory *not* to secede. Conflict between rights is of course not peculiar to the right of secession alone; such conflict is endemic to rights. Since rights are asserted and claimed in a context that is indisputably social and marked by a scarcity of resources, the rights of one person or group, say P, can affect the rights of other persons and groups say Q. For instance, Group P might wishes to secede, but Q, X, and Y who also live on that territory do not wish to do so, and claim the right to their homeland. Matters become even more complicated when group X not only opposes the right of secession but also demands a different status for the sub-region in which it lives.

The problem is that there is nothing in the conceptual repertoire of rights that tells us how to negotiate this conflict. Even so justice demands that the rights of one person or group should not be held hostage to the right held by another person or group. How do we go about balancing the two sets of rights? How do we trade off the P's right with Q's right? Arguably, some kind of a balance can be achieved only when the good to which both agents have rights is scaled down somewhat. The good that is realised may be lesser than the good that P has claimed a right to, but if in the process the harm caused to Q's rights is reduced, this might be a better solution to the problem, than upholding the rights of one group at the expense of another group.

Arguably, the institutionalisation of self determination within the democratic polity might serve to sort out clashes of rights, because the scale of the good P has asserted a right to, is pruned from secession to self determination. Correspondingly, Q also scales down the good it asserts a right to. For instance, Q might oppose the grant of self determination to the region through regional autonomy, and demand closer integration into the country. But it will have to accept regional autonomy in exchange for opting out of secession.³⁵ The advantage of such a mode of reconciling conflicting claims is that the rights of both agents are realised, albeit to a lesser degree than initially envisaged. The trade off in this case is not between two sets of rights. The trade off is between the full realisation of the good the right is a right to; and a realisation of a reduced scale of the good. In the process the concept of self determination is liberated from that of secession and attached to democracy; as a constitutive aspect of democracy.

It is precisely here that the United Nations has shown us the way in recent years. After the end of the Second World War, the United Nations established that the political unit which possessed the right of self determination was an entity called the 'people', rather than the nation. Despite the fact that administrative boundaries of colonies in Sub Saharan Africa had been often pencilled in on maps by distant colonial powers in distant places, the UN applied the principle of *Uti Possideti Juris* during the phase of decolonisation and thereafter.³⁶ Therefore, national groups *within* the territory did not have the right to their own state.

Thereafter, UN resolutions ritually reiterate that the right of self determination is a right that is possessed by all people, however, a few clauses down the document, these resolutions also lay down that the world body is committed to the territorial integrity of its member states. For instance, on 24 October 1970, the UN General Assembly adopted Resolution 2625 (XXV) on "Declaration on Principles of International Law on Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations." Whereas the Resolution restated that all people have the right to self-determination, it also stated that "[n]othing in the foregoing paragraph should be construed as authorizing or encouraging any action which would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent States."

This stance however did not help to resolve the problem of minorities within states that were bent upon homogenising diverse populations and welding them into a nation. In country after country not only of the postcolonial world but also of the developed western world, regional groups began to demand a state of their own through the right of self determination or the right to a state of one's own. In some countries this demand heralded the advent of an armed struggle, pace Bangladesh and Sri Lanka. On the other hand the parent state responded to these demands in oft brutal ways. In other cases minorities have been subjected to gross forms of injustice. The problem is that no agent is authorised to intervene and protect minority groups that are often held hostage to the nation state project. The United Nations is proscribed from interfering in the domestic affairs of its member states via Article 2 (7) of the Charter.³⁷ In recent years, however, a number of significant declarations and resolutions of the United Nations have begun to take cognizance of the, often, endangered rights of minorities within nation states. And General Assembly resolutions have begun to stipulate how states should treat their own people, particularly those who do not belong to the 'right' ethnic group and are in a minority. In the process, the concept of self determination has taken on a new avatar. For instance, in the General Assembly Declaration (Resolution 2625) cited above, the ritual invocation of the principle of territorial integrity carried an important addendum. The relevant clause read as follows:

Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States *conducting themselves in compliance with the principle of equal rights and self-determination of peoples...and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or colour*.³⁸

The UN General Assembly's 'Declaration in Commemoration of the Fiftieth Anniversary of the United Nations' of 9 November 1995 echoed this warning.³⁹

The implication of these clauses is plain; the international community will not tolerate any violation of the principle of territorial integrity, *as long* as states conduct themselves in compliance with the principle of *equal* rights and self determination, and as long as the government represents the *entire* people. For example the 1993 Vienna Declaration issued after the UN World Conference on Human Rights, laid down that the principle of territorial integrity applied (only) to governments "representing the whole people belonging to the territory without distinction of any kind." The subterranean but nevertheless effective message seems to be as follows: *if* the relevant government does not uphold the rights of all sections of society, particularly the minorities, the commitment of the UN to maintaining the territorial integrity of its member states might not hold. Arguably these clauses contain, but the *seeding* of the right of secession. Yet the UN has certainly come a long way since the 1960 Resolution that stated flatly that any attempt to partially or totally disrupt the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter. In sum, whereas the UN continues to rule out secession, the text is underwritten by the sub-text: this is *provided* the state observes the Conventions in relation to minorities. Arguably these documents lay down a soft law, but soft laws, like soft power, are likely to be more effective. More importantly, these resolutions instruct states to respect minority rights, and to ensure that minorities also have the opportunity to realise themselves through institutionalisation of the right of self determination.

Unraveling Self-Determination

The concept of self determination is closely tied to the concept of autonomy insofar as we can only be autonomous if we are able to determine which way our lives are going. Conversely we can only decide which way our lives should go if we exercise a degree of autonomy from any kind of external constraint.⁴⁰ It follows that people can determine which way their lives should go, if they possess the right to participate in the making of decisions and rules that are likely to affect their lives as individuals, and as members of a

collective. One way of ensuring this is to institutionalise ethno federalism. In plural societies, ethno federalism, or the devolution of power and resources to a territory dominated by one ethnic group can be seen as a desirable option for, at least, four reasons. One, it permits people who have different conceptions of a good life to maintain and develop their own cultural/linguistic/religious practices in some degree of autonomy. This dissipates anxiety that minority identities are under serious threat of destruction or assimilation. Secondly, ethno federalism by decentralizing power and control over resources to local populations deepens democracy, because people have greater access to local structures of participation, representation, and accountability, than geographically distant institutions and procedures permit. Thirdly, ethno-federalism allows for the reconciliation of the national as well as the regional principle. Where the national pact sanctions devolution of power and resources, regional communities possess a degree of autonomy, and yet continue to be a part of a larger political community. This is absolutely essential to prevent ghettoization, as well as reap benefits from pluralism. Fourthly, elites who are in search of political power and who in pursuit of this project confront the state; can be transformed into stakeholders by the grant of power. If ethno federalism establishes the preconditions for self determination; secession might well become superfluous.

If this argument holds, then constitutionally sanctioned autonomy to Jammu and Kashmir (which has been whittled away and should be restored) should not be seen as *an exception in the Indian case*, but as part of a larger plan of devolving power to territorially settled minority groups. Chaim Gans referring to what he terms sub-statist self determination, suggests that “each national group, and all those belonging to it should be granted a package of privileges normally within the state that coincides with their homeland.”⁴¹ The package should include self-government rights, special representation rights, and rights to cultural preservation. These rights can be granted within the state; therefore these are rights that can be enjoyed by more than one national group within the framework of the state, those groups that have an interest in their nationality. The grant of these rights is subject to one provision; all these rights are subject to constraints deriving from the basic human rights to freedom, dignity, and subsistence.⁴²

The institutionalisation of self determination through ethno federalism carries at least two advantages. One, self determination becomes a constitutive aspect of democracy since it encourages participation in the political processes and in forums of decision making, protects distinct identities, and reassures minority groups that they will not be at the mercy of the majority. Two, if self determination is institutionalised then secession which carries far too many problems in its wake becomes redundant. One significant outcome of institutionalising the preconditions of self determination is that conflicts between rights of the citizens of a particular territory are resolved by reducing the scale of the good their right is a right to.

Conclusion

Though the issue of Kashmir came to the Security Council under Article 35 of the Charter, and though it has been treated as a case of conflicting jurisdiction and war, today the problem at hand today is one of self determination *outside* the colonial context. And it is in this particular domain that we might well discover in UN resolutions the seeds of a new political settlement. This settlement might help us to deal with some of the most intractable conflicts that bedevil the global political arena.

The principle of self-determination in the specific sense of independence from external control was politically an explosive concept in the era of large multi-national empires and colonialism. Now that the processes of decolonisation, as well as the age of formal empires, are more or less over, self-determination needs to be reinterpreted to suit the aspirations of minority groups within states. The General Assembly of the United Nations has pointed out the general direction for the reworking of the principle. In essence, the realisation of the principle of self determination does not have to involve the violent renegotiation of territorial boundaries, except when the existing state *denies* self-determination to the people. In other words, if a national group asserts the right to secede, this is legitimate only if the existing state has denied to the group self-determination through the institutionalisation of injustice. Two implications follow this renegotiation of the principle of national self determination. One, there is no essential link between self-determination and the right of secession; only a contingent one. That is if states do not institutionalise appropriate conditions for the realisation of self-determination, *then* minorities might have a right to secede. Two, democracy is not only about majority rule. Majority rule may be workable when it comes to the making of decisions, but the principle possesses absolutely no moral validity. Democracy is about safeguarding the rights of each individual irrespective of his or her cultural belonging. More significantly democracy involves the establishment of institutions that protect vulnerable citizens and groups. This is what all states owe to all their people. There is, arguably, another role that awaits the United Nations besides keeping peace and containing inter-state conflict; that of enforcing justice for people in general, and in conflict affected areas in particular. This is the normative position staked by this essay.

Notes

¹ The government of India has consistently maintained for a number of reasons spelt out below that the Kashmir is not disputed territory, and the government of Pakistan has consistently maintained that it has claims over the region.

² Verghese Koithara, *Crafting Peace in Kashmir: Through a Realist Lens* (New Delhi: Sage, 2004), p. 44.

³ In 2002 Secretary General Kofi Annan identified the hostility between India and Pakistan as such a threat. "In South Asia the world has recently come closer for many years past to a direct conflict between two nuclear weapon-capable states." Cited in Sumantra Bose, *Kashmir: Roots of Conflict, Paths to Peace* (New Delhi: Sage, 2003), pp. 201-201.

⁴ Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004), pp. 7.

⁵ The Article provides that any member can "bring to the attention of the Security Council a situation whose continuance is likely to endanger the maintenance of international peace."

⁶ Sisir Gupta, *Kashmir: A Study in India-Pakistan Relations* (Bombay: Asia Publishing House, 1966), p. 140.

⁷ Clause 7 sub para (1) (b) of the India Independence Act of 18 July 1947, 'Indian Independence Act', in Penderel Moon Editor and Nicholas Mansergh Editor in Chief, *The Transfer of Power; Constitutional Relations Between Britain and India* (London: Her Majesty's Stationary Office, Vol XII, 1983), pp. 233-249, pp. 237-238.

⁸ At a meeting held on 17 and 18 April 1947, India's future Prime Minister Jawaharlal Nehru warned the princes that "all those who do not join the Constituent Assembly now would be regarded as hostile States and they will have to bear the consequences of being so regarded. Our aim at present is to liberate as much of India as we can-half or three-fourths-and then to deal with the question of independence for the rest." In Urmila Phadnis, *Towards The Integration of Indian States 1919-1947* (Bombay: Asia Publishing House, 1968), p. 172. The statement was in keeping with the commitment that the Indian National Congress (that led the freedom struggle) had made to the subjects of the princely states; that it would liberate the people from the stranglehold of authoritarian power.

⁹ On the other hand, the entire Hindu and Sikh population of Muslim majority districts in western Jammu districts-Muzaffarabad, Bagh, Rawalkot, Kotli, Mirpur and Bhimbar were forced to migrate or killed.

¹⁰ Though Pakistan claimed that the government had no role to play in the invasion, subsequent evidence proves otherwise. For example, according to Alan Campbell-Johnson, the press attaché of Mountbatten, at a meeting of the Joint Defence Council in November 1947 in Lahore Jinnah told Lord Mountbatten that the accession of Jammu and Kashmir to India was not bona fide, because it rested on fraud and violence. Johnson reports that Mountbatten agreed that the accession had indeed been brought about by violence. But, the violence, added Mountbatten, came from the tribes for whom Pakistan, and not India, was responsible. Jinnah proposed that both sides should withdraw at once and simultaneously. "When Mountbatten asked him to explain how the tribesmen could be induced to remove themselves, his reply was 'if you do this, I will call the whole thing off.'" Alan Campbell-Johnson, *Mission with Mountbatten* (London: Robert Hale Ltd, 1968), p. 229.

¹¹ V.P. Menon, *The Integration of the Indian States* (New Delhi: Orient Longman, 1985), pp. 399-400, also Prem Shankar Jha, *Kashmir 1947: The Origins of a Dispute* (New Delhi, Oxford University Press, 2003), pp. 64-85.

¹² Ibid. Gupta writes that the invasion of Kashmir was extremely embarrassing for the leadership in India that was struggling to restore communal harmony in the aftermath of the Partition of the country, and the bloodshed that had accompanied the partition. "To carry the Indian case to its logical extreme and to present India-Pakistan relationship as one of intense hostility and conflict might substantiate the charges against the Indian leadership that it had failed to evolve a realistic policy towards Pakistan earlier and that that it was inherent in the creation of Pakistan that she should be anti-Indian. It might have helped to make the Indian appeal stronger at the United Nations but it would simultaneously imply a prolonged conflict with Pakistan and the hardening of attitudes internally when they needed to be softened," p. 141.

¹³ Jawaharlal Nehru, 'Impracticability of an Independent Kashmir' *Selected Works of Jawaharlal Nehru, Second Series, Vol 19, 16 July 1952-18 October 1952* (New Delhi, Jawaharlal Nehru Memorial Fund, Oxford University Press, 1996), p. 323.

¹⁴ Ibid, pp. 144-145.

¹⁵ Ibid, pp. 147-48. Pakistan wanted the Council to ask India to desist from aggression against Pakistan and to implement all agreements with the latter, for the establishment of a Commission to investigate genocide, to arrange for an evacuation of princely territories that had acceded to India such as Junagadh and Manavadar, to arrange for the cessation of fighting in Kashmir and withdrawal of all outsiders, to ensure the return of Muslims to the state, to establish an impartial administration in the state/ and to hold a

plebiscite to determine where the people of Jammu and Kashmir wanted to go. India wanted the Council to ask Pakistan to prevent her personnel to assist in the invasion of Kashmir, call upon other nations to similarly desist, and to deny their territory to the invaders for operations against Kashmir as well as other kinds of aid.

¹⁶ S.C. Res 39, U.N Doc S/654, <http://www.mtholyoke.edu/acad/intel/kashun39.htm>, accessed on 10 May 2010.

¹⁷ C. Dasgupta, *War and Diplomacy in Kashmir, 1947-48* (New Delhi: Sage Publications, 2002), pp. 130-131.

¹⁸ Navnita Chaddha Behera, *Demystifying Kashmir* (Washington DC: Brookings Institution Press, 2006), p. 31; Bose, *Kashmir*, p. 38.

¹⁹ Bose, *Kashmir*, p. 38.

²⁰ Ibid, p. 142.

²¹ Cited in Josef Korbel, *Danger in Kashmir* (Princeton, Princeton University Press, 1954), p. 98.

²² Ibid, pp. 131-132.

²³ Since 1949 the ceasefire line has remained the de facto border between the two parts of Kashmir on the one hand and between India and Pakistan on the other. During the 1972 Simla negotiations between India and Pakistan, the ceasefire line was renamed the Line of Control [LOC]. The LOC stopped short at the Siachen glacier which extends for forty miles to the de facto border with China. In 1984 Indian troops took control of part of the glacier and now Indian and Pakistani troops confront each other in the highest war zone in the world.

²⁴ Today 45.62 percent of the original territory of the state is with India, 35.15 percent with Pakistan, and 19.23 percent with China. The valley of Kashmir consists of 15.8 percent of the area of Indian Jammu and Kashmir, Jammu consists of 25.9 percent, and Ladakh 58.3 percent. According to the 2001 census the population of Kashmir totals 10.01 million, of which Muslims form 64.2 percent, Hindus 32.2 percent, and others 3.6 percent. Muslims form 95 percent of the population in the valley.

²⁵ In 1950 Sir Owen Dixon was appointed as the UN representative, subsequently Frank Graham was appointed as the UN representative.

²⁶ Steven R. Ratner, 'Image and Reality in the UN's Peaceful Settlement of Disputes' *European Journal of International Law*, Vol 6, no 1 (1995): pp. 420-444, <http://ejil.oxfordjournals.org/cgo/pdf-extract./6/1/426> accessed on 15 May 2010, p. 428.

²⁷ Ibid, p. 433.

²⁸ Michael Brecher outlines five distinct phases of UN involvement in the Kashmir dispute; (a) direct Security Council intervention for the first six months of 1948; (b) the establishment of the United Nations Council for India and Pakistan to resolve the conflict in the period July 1948 to December 1949, (c) informal mediation at the end of 1949 by the then President of the UNSC General A.G.L McNaughton; (d) proposals offered to resolve the crisis by Sir Owen Dixon the U.N Representative for India and Pakistan, and (e) efforts made by Dr Frank Graham to secure agreement for demilitarization as an essential condition for the plebiscite. Michael Brecher, 1953, 'Kashmir: A Case Study in United Nations Mediation' *Pacific Affairs* vol 26, no 3 (1953): pp. 195-207, p. 195.

²⁹ Nehru, 'Impracticability', p. 323.

³⁰ Ibid.

³¹ The Tribune online Jammu and Kashmir edn, 6 January 2009.

³² Some fringe elements still want to join Pakistan.

³³ Cited in Riyaz Punjabi, 1995, 'Kashmir imbroglio: the socio-political roots', *Contemporary South Asia* 4, 1 (1995): pp. 39-53, in p. 47. Punjabi also notes that Sheikh Abdullah declared in a public meeting in September 1947 that 'Our first demand is complete transfer of power to the people in Kashmir. Representatives of the people in a democratic Kashmir will then decide whether the state should join India or Pakistan', *ibid*, p. 46.

³⁴ Cited in *ibid*, p. 49.

³⁵ I give this example because the inhabitants of Jammu and Ladakh, fearing the domination of the Muslim majority valley of Kashmir, have protested since the early 1950s against the grant of regional autonomy to the state of Jammu and Kashmir, and demanded fuller integration into India.

³⁶ The principle of *Uti Possidetis Juris* implying that ‘you shall possess as you possess’, was first conceived of by the newly independent countries of South America. Sub-Saharan Africa was one region where secessionist movements could have threatened the very existence, let alone the stability of newly independent countries, since colonial boundaries had been drawn arbitrarily, and with complete disregard for the fact that ethnic communities had been divided by frontiers. Members of the Organization of African Unity, fearing precisely this kind of eventuality, agreed at the Cairo meeting of the organization in July 1964 that frontiers were binding. These states thereby sanctioned the principle of *Uti Possidetis Juris*.

³⁷ Article 2 (7) prohibits the UN from intervening in affairs which are essentially within the domestic jurisdiction of a state or from requiring the members to submit such issues to settlement under the UN Charter. The world body cannot make recommendations to a state on matters which fall under the latter’s domestic jurisdiction.

³⁸ Annex to G.A Resolution 2625 (XXV), U.N GAOR 25 Session, U.N Doc A/8082.

<http://daccessdds.un.org/doc> accessed on 23 November, 2008, p. 124, italics added.

³⁹ G.A Resolution 50/6, 9 November 1995, <http://daccessdds.un.org/doc> accessed on 23 November 2008, p.

3.

⁴⁰ Therefore, autonomy and self determination can be seen as overlapping concepts.

⁴¹ Chaim Gans, *The Limits of Nationalism* (Cambridge: Cambridge University Press, 2003), p. 83

⁴² Ibid, p. 84.