The Kashmir Dispute & Right to Self Determination: A Review of the Frank P. Graham Report

Muhammad Abdul Qadeer
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Muhammad Abdul Qadeer is a Research Associate at the Strategic Studies Institute Islamabad (SSII). His area of research focuses on South Asian politics and security challenges in South Asia.
Introduction

The government of India blames Pakistan for not fulfilling the preconditions for a plebiscite in Jammu and Kashmir (J&K). It maintains that plebiscite was “conditional upon Pakistan fulfilling Parts (I) & (II) of the United Nation’s resolution of August 13, 1948 which required Pakistan to withdraw its troops and to secure the withdrawal of both tribesmen and Pakistani nationals” from Jammu and Kashmir. India would then withdraw, “the bulk of its forces once the UN Commission confirms that the tribesmen and Pakistani nationals and Pakistani troops are being withdrawn.” The government of India believes that Pakistan never fulfilled these commitments and argues, because Pakistan did not withdraw its troops from the state, normal conditions under which a plebiscite could be held were never created.

The Indian argument does not rest on real principles of plebiscite as determined by the United Nations Commission for India and Pakistan (UNCIP) Resolution of August 13, 1948. A United Nations Mediatorial Report on Kashmir submitted in October 1967 by UN representative, Dr Frank P. Graham noted in detail that in the provisions of part II of the August 13, 1948 resolution, the requirement for the withdrawal of all the Pakistani forces was related to the required withdrawal of the bulk of Indian forces in stages to be agreed upon by India and the UN Commission. The report stated that such an agreement was never reached between India and the UN Commission and the Indian failure and that of the UN Commission became the reason for Pakistan to not withdraw all its troops from the state.

This report also noted that Pakistan withdrew some of its forces from Kashmir. However, it could not withdraw its remaining forces from Kashmir due to India’s failure to reach an agreement with the UN Commission, or its successors, on related withdrawals of the Indian forces provided in B 2 of part II of the August 13, 1948 resolution. The report also noted that Pakistan had accepted even as India rejected most of the basic proposals of the several UN mediators for resolving the deadlock in demilitarisation.

This paper will analyse the persistent deadlock in the process of demilitarisation that became the reason for the non-implementation of the UNCIP resolution of August 13, 1948, which were the basis for holding plebiscite in the state. The first part of this paper will examine the UNCIP resolution of August 13, 1948 and will discuss in detail the deadlock involved in the two stages of demilitarisation explained in the 1967 UN Mediatricial report by Frank P. Graham. The second
part will analyse how the Kashmiris right to self-determination was affected after 9/11 terrorist attacks in the US, when India managed to capitalise the Global War on Terrorism in the Kashmir situation. The third part will examine the law on belligerent occupation and the liberation wars under international humanitarian law.

**United Nations Commission for India and Pakistan (UNCIP) Resolution of August 13, 1948 & the Dead Lock in Demilitarisation**

The United Nations got involved in the conflict between Pakistan and India shortly after the partition of Indian subcontinent in August 1947. India brought the issue of Pakistani interference in Kashmir before the UN Security Council (UNSC) on January 1, 1948 under article 35 of the UN charter. India alleged that Pakistan had assisted in the invasion of Kashmir by providing assistance to the tribesmen. The government of Pakistan in response denied the charges and accused India of securing the Maharaja’s accession of the state through force and fraud and blocked agreements that had been concluded under the partition pacts. Pakistan thus pressed charges that the accession was not in accordance with the law.

On April 21, 1948, the UN Security Council (UNSC) passed resolution 47 on the Jammu & Kashmir dispute noting that both “India and Pakistan desire that the question of accession of Jammu and Kashmir to India or Pakistan should be decided through free and impartial plebiscite”. In the same resolution, the UNSC instructed the UNCIP to visit the Indian subcontinent and take all “necessary measures for the restoration of peace and order and to the holding of a plebiscite.”

The UN Commission visited the Indian subcontinent and issued a three-part resolution on August 13, 1948. The first part of the UNCIP resolution called for a ceasefire. The second part called for a truce and noted that while the presence of Pakistani troops in Jammu and Kashmir “constitutes a material change in the situation since it was represented by the Government of Pakistan before the Security Council, the Government of Pakistan agrees to withdraw its troops from that state.” It further stipulated that the Government of Pakistan will also withdraw the tribesmen and Pakistani nationals from the state who are “not normally resident therein and have entered the state for the purpose of fighting.” It should be noted that the UNCIP resolution also instructed India that after the UN Commission would notify the Indian Government that the tribesmen and Pakistani nationals have been withdrawn, and that the Pakistani forces are being withdrawn from the state, India would begin to, “withdraw the bulk of their forces from the state in stages to be agreed upon with the Commission”. However, the UNCIP resolution could not be implemented after India argued that the UN-mandated withdrawal of Pakistani troops had not taken place and therefore it would not reduce its own troops in Jammu and Kashmir.
It should be emphasised that there was a correlation between section A 1 and B 1 of Part II of the August 13, 1948, resolution. The resolution did not provide for the simultaneous withdrawals of all the Pakistani forces and the bulk of the Indian forces. It did, however, establish a relation between them in A 1 and B 1 and 2 of part II. As the resolution, in A 1, provided that Pakistan agrees to “withdraw its troops from the State,” the same resolution, in B 1 also provided that, “When the Commission shall have notified the Indian government that the tribesmen and Pakistan nationals have withdrawn,” and that, “The Pakistani forces are being withdrawn from the state, India would withdraw the bulk of its forces from that state in stages to be agreed upon with the UN Commission.”

As noted earlier, under the provisions of part II of the August 13, 1948 resolution, the requirement for the withdrawal of all the Pakistani forces was related to the required withdrawal of the bulk of the Indian forces in stages to be agreed upon by India and the UN Commission. Dr Frank P. Graham, the UN mediator in Kashmir, noted in the 1967 Mediator’s report of the UN that such an agreement was never reached between India and the UN Commission or by the several successor UN mediators. Because such an agreement was never reached with India by the UN Commission as provided in the August 13, 1948 resolution, it created a complete deadlock in the demilitarisation process, and ultimately the “continuing grounds for the failure of Pakistan to withdraw all of its forces from Kashmir.”

Pakistan also pointed out that India was not ready to, “accompany the withdrawal of all the Pakistani forces, as provided in the August 13, 1948 resolution, with the related withdrawal of the bulk of the Indian forces, in accordance with an agreement with the UN Commission.

The UN mediator report stated that Pakistan and India made “some withdrawals” of their forces from Kashmir, however, Pakistan could not withdraw its remaining forces from Kashmir because India “did not reach an agreement with the UN Commission, or its successors, on related but not simultaneous withdrawals of the bulk of the Indian forces.”

The UN Commission had assured Pakistan that after Pakistan began the withdrawal of its forces from Kashmir there would be, “a relation between the further withdrawals of all the Pakistani
forces and the beginning withdrawals of the bulk of the Indian forces from Kashmir in stages to be agreed upon with the UN Commission.”

This report also emphasises that there was a divergence of interpretation between India and Pakistan on the meaning of the word “bulk”. However, the resolution of August 13, 1948 does not provide for any interpretation of the meaning of the word “bulk” by Pakistan. Meanwhile, the Commission also denied “Pakistan’s demand for disclosure regarding phasing of withdrawals” maintaining that there would be no prior disclosure to Pakistan of the Indian programme of withdrawals.

For many years, India stood by the two UNCIP resolutions of August 13, 1948 and January 5, 1949, respectively and rejected other bids by UN mediators for resolving the dispute. However, it later refused to fulfil the obligations of these resolutions insisting that provisions of these resolutions had not been fulfilled by Pakistan.

During the 1950s, India renounced plebiscite and began referring to Jammu and Kashmir as an integral part of the country. It also started calling the Maharaja’s accession as “final and irrevocable” after the Constituent Assembly of Jammu and Kashmir formally ratified its accession to India in 1954, and approved its own constitution in 1957 in an effort to legitimise the accession. This position was contrary to the UN and the basic provisions of the UN resolution of August 13, 1948. On January 24, 1957, the UNSC rejected the ratification through its resolution 1951 and declared that no action by the state’s Constituent Assembly to decide the final disposition of the state would be considered legal thus reaffirming plebiscite as the final solution.

Since 1950, the government of India not only refuses to hold a plebiscite, it considers Kashmir as an integral part of India. It neither wants to negotiate with Pakistan nor accepts any third-party mediation to resolve the dispute.

The UN resolutions, which were accepted by both India and Pakistan, declared that the final status of Kashmir would be decided by the self-determination of the people themselves. It did
not suggest that Kashmir’s final status would be determined by the Maharajah’s accession or by a Constituent Assembly.

**Right to Self-Determination**

The concept of the right to self-determination was mainly developed in the decolonisation period after the emergence of many new states in the aftermath of World War II and thus became a core principle of international law. Articles 1(2) and 55 of the UN Charter also validated this right.\(^{xviii}\) The UN General Assembly adopted resolution 1514 (XV) in 1960 and resolution 2625(XXV) in 1970 with regards to self-determination. These two resolutions which are considered binding customary international law declare that people’s right to self-determination, “constitutes a significant contribution to contemporary international law”\(^{xix}\) and that the “subjection of peoples to alien subjugation, domination and exploitation,” is a breach of the UN Charter and a threat to “world peace”.\(^{xx}\) The meaning of self determination has also been articulated by several international instruments, including the International Covenant on Civil and Political Rights (ICCPR) 1966\(^{xxi}\) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966.\(^{xxii}\)

Therefore, the existence of these principles within the UN Charter suggests that the recognition of the right to self-determination is a fundamental principle of international law. However, it is important to distinguish between the principle of self-determination and the right to non-intervention. International law and the principle of the right to self-determination do not permit secession neither do they challenge the territorial integrity of states. This principle also does not apply on people simply having different ethnicity or language. An instance is India’s aiding of secessionist movements in Pakistan’s Balochistan province as a counter move to Pakistan’s resentment over Kashmir. However, Delhi has failed to make a moral case over Balochistan and its efforts in this regard have not attracted international interest.\(^{xxxiii}\)

In the Kashmir situation, it was agreed between India, Pakistan and the UN decades ago that the future of the Kashmiri people would be decided through the principle of self-determination. However, this never happened and the continued impasse and a denial of the right to self determination to the Kashmiris created new trends in the region. Thus, began an era of armed struggle against the Indian forces in the state during the 1980s. The insurrection soon gained strength and since then Indian forces have faced popular uprising on Indian side of Jammu and Kashmir.\(^{xxiv}\) This consequently led to the creation of several armed resistance groups within the state. First among them was the Jammu and Kashmir Liberation Front (JKLF) which is one of the indigenous groups that has fought against the Indian forces in the territory.\(^{xxv}\) It is a nationalist group that has sought independence of Kashmir from both India and Pakistan. The group was formed during the 1970s, by Amanullah Khan and Maqbool Bhat both of whom organised
armed resistance to Indian rule. The group enjoyed popular support in the state during the 1980s. However, Bhat was hanged to death by the Indian government in February, 1984.\textsuperscript{xxvi} Khan flew to Pakistan in 1986 and later became the head of the organisation on the Pakistani side of Kashmir. Another JKLF leader, Yasin Malik became the head of the organisation on the Indian side of Kashmir. By mid-1993, there was a division within the organisation after Yasin Malik declared a unilateral ceasefire against the Indian forces. He gave up armed struggle and changed its course to a political one while committing to achieve independence through nonviolent means. It is believed that hundreds of JKLF members had been killed by Indian security forces by then.\textsuperscript{xxvii} Therefore, the major factor that is believed to have contributed to the JKLF’s shift from violence to pacifism was the use of excessive coercion by Indian forces against the JKLF cadre. Another reason for this change was the decrease in Pakistani support to the JKLF after it continued its campaign for independence from both, India and Pakistan. In October, 2011 the two JKLF factions were again reunited formally.\textsuperscript{xxviii}

Since the late 1990s, India has equated the Kashmiri resistance with terrorism

Hizbul Mujahideen is another organisation fighting Indian rule on the territory and is considered to be the most prominent Kashmiri indigenous armed group. It was founded in the 1989 and remained the largest group throughout the 1990s comprising of an essentially Kashmiri rank. In the early 1990s, it was estimated that Hizbul Mujahideen had more than 10,000 armed fighters. Today the group still maintains a presence in both the Indian and Pakistani sides of Kashmir but the number of its fighters has considerably dropped and is estimated to be in hundreds.\textsuperscript{xxix} The group calls for the merger of Jammu and Kashmir with Pakistan and has conducted a number of operations against Indian military targets in Jammu and Kashmir. The group’s operations have remained restricted to Jammu and Kashmir and there is no evidence of its involvement in the killing of any civilians. Pakistan views the members of Hizbul Mujahideen as “freedom fighters”\textsuperscript{xxx} whereas, India regards them as terrorists. Since the late 1990s, India has equated the Kashmiri resistance with terrorism and accuses Pakistan of “supporting militants” fighting on the Indian side of Kashmir. This rhetoric gained further significance after the September 11, 2001 terrorist attacks in the US by suspected affiliates of Osama bin Laden who crashed hijacked planes into the World Trade Centre and the Pentagon killing nearly three thousand people.\textsuperscript{xxxi} Five days later, US President, George W. Bush announced a ‘crusade’ and ordered to move forces and weaponry to strike Bin Laden’s training camps and organisation in Afghanistan.\textsuperscript{xxxii} The decision was supported by all its Western allies and led to the creation of an international coalition to fight terrorism. Pakistan came under immense pressure, after the US sought its assistance in its fight against terrorism. On the other
hand, the Taliban threatened to declare ‘Holy War’ on Pakistan if it assisted the US. Under pressure, Pakistan, became a US non-NATO ally in its war in Afghanistan.

In the wake of these developments, India was successful in exploiting world opinion in its favour with regards to the Kashmiri resistance. As the global community started viewing the resistance in Kashmir as a terrorist activity, it affected the Kashmir cause to a great extent. Pakistan’s support for the Kashmiri resistance was further weakened after its western allies most importantly the US initiated a ‘do more’ campaign against the country to fight radicalism and extremism.

Pakistan asserts that it would never abandon its support for Kashmiri resistance which it believes is a “legitimate struggle for liberation from alien occupation” and implementation of UN Security Council resolutions.

In the following years, particularly after the US invasion of Afghanistan, Pakistan made a strategic shift and had to cut its ties with the Taliban government in Afghanistan to join the US war on terrorism.xxxiii

Notwithstanding India’s hard-line on Pakistan with regard to Kashmir, Pakistan sought to separate the war on terrorism and the resistance in Kashmir. Pakistan believes that India’s terrorism charge against the country is a strategy to manipulate world opinion on the Kashmiri freedom movement. It argues that Kashmiris are fighting for their right to self-determination and the “war on terrorism” could not affect the legitimacy of Kashmiris’ fight for self-determination. Pakistan also asserts that it would never abandon its support for Kashmiri resistance which it believes is a “legitimate struggle for liberation from alien occupation” and implementation of UN Security Council resolutions.xxxiv

In August 2017, India, however, gained a diplomatic victory over Pakistan when the United States designated Hizbul Mujahideen as a “foreign terrorist” organisation. For India, the terror designation on the group, was an acknowledgement of its stance that the violence in Kashmir is terrorist activity fueled by Pakistan. Therefore, Islamabad finds increasingly difficult to distinguish between “freedom struggle” and “terrorism”. The liberation movements are not led by the small groups of individuals. They are the struggle of nations against foreign invasion that emerge out of popular discontent, seeking freedom from “alien” regimes. Furthermore, liberation movements are always supported by whole communities of subjugated people, and have strong support of the population. However, the opposing governments do not recognise them as freedom struggle, and instead relate them with terrorism.

In almost all the cases where people have resisted foreign invasion, they have been labelled terrorists. However, liberation movements view their armed struggle as a just war for achieving
their right to selfdetermination. Conversely, governments view them as a challenge to their authority and territorial integrity. They mostly regard this struggle as a “terrorist activity” and try to deal with such violence under domestic criminal law.

The use of force between states is not permitted under international law. However, exceptions of this prohibition are admitted in case of individual or collective self-defence and to carry out the right of peoples to self-determination. The next section will discuss how the law of belligerent occupation governs the relationship between an occupying power and its inhabitants who take part in resistance and the extent to which international law permits the use of force against the occupying power.xxxv

## Belligerent Occupation & Resistance

The international rules relating to occupation were provided in The Hague Regulations of 1899 and 1907, which themselves were built on customary international law. However, after the Second World War, rules relating to the occupied territories were subsequently incorporated into the Fourth Geneva Convention that was adopted in August 1949. The two additional protocols to the Geneva Conventions further widened the scope of international humanitarian law in addressing liberation wars.xxxvi

Article 1(4) of Additional Protocol I provide that international armed conflicts include situations in which peoples are fighting against colonial domination or alien occupation in the exercise of their right to self determination. The study will further examine the status of combatants in the resistance movement under international humanitarian law.

### A Combatant

The legal status of combatants struggling against colonial or alien regimes for the right to self determination was defined by the General Assembly in 1973. Such struggles are legitimate and in accordance with the principles of international law. Attempts to suppress struggles against alien regimes are contrary to the UN Charter, as well as the principles of international law.

In an international armed conflict, a combatant is either a member of the armed forces,xxxvii or the member of an armed group which is party to the conflict and who fulfils certain obligations to distinguish himself from the civilian population.xxxviii
The combatant should be under responsible command wearing a fixed distinctive sign and carrying arms openly. He is also subject to an internal disciplinary system. The captured combatants are accorded the status of prisoners of war under the Third Geneva Convention. It should be emphasised that Hizbul Mujahideen combatants have, in general, followed these principles of international humanitarian law as they wear uniforms to distinguish themselves from the civilian population and only attack military targets on the Indian side of Jammu and Kashmir.

**The Use of Mercenaries in the Liberation Movements**

The use of mercenaries in the liberation movements is not permissible under international law. A violation of the legal status of combatants entails full responsibility in accordance with the norms of international law. A mercenary, as defined in Protocol I to the Geneva Conventions does not have the right to be considered a combatant or a prisoner of war. The practice of using mercenaries for liberation movements is regarded a criminal act under international law.

There are several groups that have fought in Jammu and Kashmir and can be regarded as mercenaries. The Lashker-e-Tayyiba (LeT), formed by Hafiz Muhammad Saeed in the 1980s, initially recruited volunteers to fight the Soviet forces alongside the Taliban in Afghanistan. In the mid-1990s, the group entered the Kashmir war, calling for “jihad” in Kashmir and has demanded liberation of Kashmir from the Indian forces and its merger with Pakistan. However, since the group’s rise to prominence, it has often been accused by India for carrying out armed attacks, not only in Kashmir, but in India as well. The Indian government has blamed the organisation for carrying out the November 2008, terrorist attacks in Mumbai. However, the group has denied any links to these attacks. The Pakistani government banned the group in 2002. In 2005, the UN also declared the group a terrorist organisation.

Harakat-ul-Mujahedeen (HuM) is another group that has conducted operations in Kashmir. It was founded by Fazlur Rehman Khalil in 1985 as a splinter group of the anti-Soviet armed group, Harkat-ul-Jihad-al-Islami (HuJI). It was initially formed to fight the Soviet occupation of Afghanistan, however, after the Soviet withdrawal in 1989, HuM shifted its focus to Jammu and Kashmir.

In December 1999, the HuM gained international attention for hijacking Indian Airlines travelling from Kathmandu to New Delhi. The hijackers forced the pilot to land in Afghanistan. Afghan Taliban then negotiated between HuM and the Indian government and with the support of the Afghan Taliban, HuM successfully secured the release of three militants, including former HuA commander, Maulana Masood Azhar and Ahmed Omar Saeed Sheik. In January 2000, following his release from jail, Azhar and many of his followers split off from HuM to form the new armed group, Jaish-eMuhammad (JeM). After the terror attacks of September 11, 2001
the United States designated the HuM as a foreign terrorist organisation, given its connection to Osama bin Laden. Pakistan also banned HuM in November 2001.

The Jaish-e-Mohammed (JeM), which was also banned in Pakistan in 2002, became involved in Kashmir conflict. JeM is considered a terrorist organisation by the US and India also.

In Pakistan, there is now a consensus in some quarters that groups including the Lashker-e-Tayyiba (LeT), Jaish-e-Mohammed and Harakat-ul-Mujahedeen have sabotaged the Kashmiris’ freedom movement and provide propaganda material to the Indian government which it uses to suppress the Kashmiri movement. Most importantly, these groups have caused damage to the image of indigenous armed struggle of Hizbul Mujahideen and some countries also started equating it with terrorist organisations.

Conclusion

In Pakistan, what is remembered now was a promise made by India to hold a plebiscite in which the people of Kashmir could decide their own future. That plebiscite was never held. However, India adopted a consistent position that it had accepted the UN resolutions, whereas, Pakistan refused to implement the resolutions at that time by not fulfilling the preconditions. The government of India firmly maintains that due to Pakistan’s refusal to accept the preconditions, its offer “lapsed” and was “overtaken by events”. However, the UN mediatory report does not support the Indian position and suggests that Pakistan had started withdrawal of its forces from the state. India’s failure to secure an agreement with the UN commission on the required withdrawal of the bulk of its forces ultimately became the ground for non-implementation of the UNCIP August 13 resolution.

Pakistan had started withdrawal of its forces from the state. India’s failure to secure an agreement with the UN commission on the required withdrawal of the bulk of its forces ultimately became the ground for non-implementation of the UNCIP August 13 resolution.

Notwithstanding the fact that the UN position was consistent with that of the Pakistani position on Kashmir, Islamabad failed to develop a coherent strategy on Kashmir in contrast to India’s belligerent rhetoric. Amongst the top reasons is the policy paralysis in the country including a lack of consensus within the leadership, the power elites as well as the intelligentsia. Besides this, an extremely vulnerable media policy is yet another factor which has negatively impacted the Kashmir issue.
References


ii Ibid.


iv Ibid. 11.


ix India/Pakistan- Graham Report, S-0868-0001-05-00001, 12, 13.

x Ibid., 13.

xi Ibid., 13, 14.

xii Ibid., 35.

xiii Ibid., 11.

xiv Ibid., 9.


xvii India/Pakistan- Graham Report, S-0868-0001-05-00001, 41.


xxv English/static/in_depth/south_asia/2002/india_pakistan/timeline/1989.stm


xxviii Sumantra Bose, Kashmir: Roots of Conflict, Paths to Peace,

May 28, 2017


xxv If there is a recognition of belligerency by the state, it converts the internal conflict into an international armed conflict. In such case the government forces as well as the armed groups have to conform by the rules of international humanitarian law applicable in an international armed conflict, for further information see L Moir, “The Historical Developments of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949”, I.C.L.Q. 1998, 337-350.


xxvii 71 Cf. Art. 4 IA) (1) of Convention III

xxviii Cf. Art. 4 (A) (2) of Convention III