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**CHARLES UNIVERSITY IN PRAGUE**

**FACULTY OF SOCIAL SCIENCES**

Institute of Political Studies

Department of International Relations

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**Unilateral Secession in International Law: The  
Cases of Kashmir and Catalonia**

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**Abstract:**

In the recent times, unilateral secession in International Law has come under widespread discussion with the major issues revolving around the circumstances under which a minority group or sub-state can secede from the state incorporating it. The study focuses on the principles of self-determination, an important factor to secede from a state over which international law has an ambiguous stand. International Law regards unilateral secession to be legal only in the aspects of decolonization as a last resort, that is one of the reasons why Kosovo remains unrecognized by the United Nations. The study focuses on two important cases i.e. Kashmir and Catalonia and compares them with Kosovo and Western Sahara respectively to understand the stance of International law on their demands for secession. The examination of these cases reveals that historical violence and injustice are not the only factors influencing the secessionist demands in Kashmir; similarly, the reasons for the demand for secession in Catalonia extend beyond collective identity i.e. cultural, linguistic and ethnic identity. Furthermore, the stand of International Law over the concept on secession remains ambivalent.

**Abstrakt:**

V nedávné době se jednostranné odloučení v mezinárodním právu dostalo do rozsáhlé diskuse a hlavní otázky se otáčejí kolem okolností, za kterých může být minoritní skupina nebo sub-stát oddělena od státu, který ji začleňuje. Studie se zaměřuje na principy sebeurčení, důležitý faktor odchodu od státu, nad kterým mezinárodní právo má nejednoznačný postoj. Mezinárodní právo považuje jednostranné odloučení za legální pouze v aspektech dekolonizace jako poslední možnost, což je jeden z důvodů, proč Kosovo OSN nezůstává rozpoznáno. Studie se zaměřuje na dva důležité případy, např. Kašmír a Katalánsko, a porovnává je s Kosovem a Západní Saharou, aby porozuměli postoji mezinárodního práva o jejich požadavcích na odloučení. Z přezkoumání těchto případů vyplývá, že historické násilí a nespravedlnost nejsou jedinými faktory ovlivňujícími secesionistické požadavky v Kašmíru; podobně jsou důvody pro poptávku po odchodu do Katalánska rozšířeny mimo kolektivní identitu, tj. kulturní, jazykovou a etnickou identitu. Navíc postoj mezinárodního práva nad pojetím odloučení zůstává ambivalentní.

**Klicova slova**

Jednostranná secese, sebeurčení, nápravná práva, mezinárodní právo, dekolonizace, Terra Nullius, neregulační území.

**Keywords**

Unilateral Secession, Self Determination, Remedial Rights, International Law, Decolonization, Terra Nullius, Non Self-Governing Territories.

### **Declaration of Authorship**

1. The author hereby declares that he compiled this thesis independently, using only the listed resources and literature.
2. The author hereby declares that all the sources and literature used have been properly cited.
3. The author hereby declares that the thesis has not been used to obtain a different or the same degree.

Prague, December 05, 2018

**CHETAN CHOWDHARY**

**Signature**

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# Master's Thesis Proposal

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**Unilateral Secession in International Law: The Case of Kashmir and Catalonia**

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### Motivation

In the recent times, unilateral secession in international law has come under widespread discussion. The major issue surrounding the debate has been whether a sub-state or a minority group can under certain circumstances be allowed to unilaterally secede from the encompassing state. The question links to the principle of self-determination. In general, international law does focus on the principle of 'internal self-determination' whereby a group can claim certain degree of autonomy but within the state. The state of Telangana in India portrays a very good example where they broke free to form the 29<sup>th</sup> state of India. About external self-determination, international law takes a very ambiguous stand (Mueller, 2012).

Why secession is so highly debated? The matter of the fact is that the right to secession continues to be unaddressed effectively by international law.

Catalonia: Buchanan states that groups - cultural, ethnic, linguistic or ideological - entail collective rights. Catalonia's demand for secession stems from their inherent national voices. The Spanish constitution does not recognize the right to secession, any form of secession by Catalonia would be deemed as illegal by the Spanish court. The question is so how does international law see the problem?

Kashmir: The Kashmir valley continues to broil itself in long lasting conflict. With Kashmir, the situation gets a tad complicated, as Kashmir itself fails to provide a united stand. While the Kashmiri Muslims strongly voice their independence from the Indian authorities, the Kashmiri Pandits wish to integrate with the Indian state and demand for the abolishing of the special status. The question here is two-fold; one of Kashmir's secession and not unified stand of local population.

## Research Question

This thesis aims to answer the following question:

1. How does international law consider the self-determination of people in certain circumstances and what are the international legal instruments at its disposal? <sup>[1]</sup><sub>[SEP]</sub>
2. How would international law treat these two different cases (Kashmir and Catalonia)?
3. Do they qualify as inherent cases to justify secession? <sup>[1]</sup><sub>[SEP]</sub>

## Hypothesis

1. Kashmir and Catalonia do have the right to unilaterally secede under the current international law framework. <sup>[1]</sup><sub>[SEP]</sub>
2. International law maintains a sense of ambiguity on unilateral secession.

## Framework and Methodology

The most popular theories on secession include the remedial rights theory and the national self-determination theory. Remedial rights secession theory states that it must be employed only when regions have faced injustice. This theory will be used to understand the underlying ethos of Kashmir.

National self-determination theory puts forward the justification of secession through the lens of identity. Collective identity of a minority forms the crux of the arguments on secession and this theory will be employed to understand the Catalonian demands for secession.

Crawford's definition of secession implies the creation of a state without the acquiescence of the parent state and with the use of force whereas Anderson defines secession as the creation of an entirely new state from an existing one. The cases of Kosovo and Western Sahara will be used to make a historical comparative study with our primary cases of Kashmir and Catalonia. Furthermore, the stance of international law towards decolonization, unilateral secession and the right to self-determination, will be examined in detail.

The concepts used in the study include the right to self-determination. The United Nation Charter explicates the right to self-determination as a right granted to the people by the friendly relations between the states. But again, the question is whether these definitions are mostly focused on internal self-determination and largely neglect the right of the people to external self-determination or not.



## Outline

1. Introduction <sup>[1]</sup><sub>[SEP]</sub>
2. Definition
  - a. Self Determination
  - b. Decolonization
  - c. Secession
  - d. Recognition of States
  - e. Non-Self-Governing Territory
  - f. Terra Nullius
  - g. United Nation on Secession <sup>[1]</sup><sub>[SEP]</sub>
  - h. Theories
3. Case Analysis of the secession and the right to self-determination
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  - b. Western Sahara <sup>[1]</sup><sub>[SEP]</sub>
4. Analysis
  - a. The Case of Kashmir <sup>[1]</sup><sub>[SEP]</sub>
  - b. The Case of Catalonia <sup>[1]</sup><sub>[SEP]</sub>
5. Conclusions <sup>[1]</sup><sub>[SEP]</sub>
6. References <sup>[1]</sup><sub>[SEP]</sub>

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## LIST OF ABBREVIATIONS

DOI:	Declaration of Independence
ECHR:	European Court of Human Rights
ECJ:	European Court of Justice
EU:	European Union
GDP:	Gross Domestic Product
ICCPR:	International Covenant on Civil and Political Rights
ICECCR:	International Covenant on Economic, Social and Cultural Rights
ICJ:	International Court of Justice
J&K:	Jammu and Kashmir
JKLF:	Jammu and Kashmir Liberation Front
KLA:	Kosovo Liberation Army
KFOR:	Kosovo Force
MINURSO:	Nations Mission for a Referendum in Western Sahara
NATO:	North Atlantic Treaty Organization <sup>[1]</sup>
NSGT:	Non-Self-Governing Territory
SADR:	Saharan Arab Democratic Republic
TEU:	Treaty of European Union
UN:	United Nations
UNGA:	United Nations General Assembly
UNMIK:	United Nations Interim Administration Mission in Kosovo
UNSC:	United Nations Security Council
WW2:	World War II

# **UNILATERAL SECESSION IN INTERNATIONAL LAW: THE CASE OF KASHMIR AND CATALONIA**

## **1. INTRODUCTION**

In the 20<sup>th</sup> century, after the World Wars, the nations are seemingly living harmoniously and at peace while engaging in trade and international relations with each other. The growing connectivity and interdependence between the nations has presented all the parties involved with more opportunities to benefit and develop simultaneously. The modern world has made remarkable progress considering the economic, political and social development but territorial matter remains a delicate issue considering the soft power and geopolitical advantage it brings among the ambitious states of the world to stay ahead in the competition. To make sure, human rights are being respected and rules are being followed by the states, international law is set up to regulate the relations between them and be certain of the practices adopted by the states to be legal. But since the colonial era, the role of International Law has increased significantly, which required delineating the set of rules and regulations already existing in guiding the relations between the states.

International law turned more comprehensive when the demand for being independent from the colonial masters started to grow, with the colonies struggling to be more autonomous. Nearly the end of colonial era, the call for independence by the colonies led to the recognition of their right to be independent or to adopt any status they choose, by the international law. This was an example of secession, which includes successful secessions of Indonesia; formerly part of the Netherlands, Guinea Bissau; previously part of the Portuguese territory and the now Democratic Republic of Vietnam; a colony of France. This successful unilateral secession of the colonies was a period referred to as Decolonization by the United Nations Special Committee of the 24 of Decolonization. Even though the process of decolonization was successful to a certain extent, there still exist some territories, which are not independent but on the objective of the UN to help attain independence, also known as Non-Self Governing Territories e.g. Western Sahara, Gibraltar, New Caledonia.<sup>1</sup> In the midst of all the peaceful globalization and international relations, there exist territories still not content under

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<sup>1</sup> United Nations (2018). *Non-Self-Governing Territories*. UNdata. <https://www.un.org/en/decolonization/nonselfgovterritories.shtml>

their host states, which demand to withdraw and become an independent nation to govern themselves without the political influence of their parent states. Such examples are Kashmir (India), Catalonia (Spain), Tibet (China), Katanga (Congo). Since these territories are a part of an independent sovereign states, the secession of such territories from their host states is still not recognized by the UN or the International Law. All these concepts will be defined in the next chapter.

But since then, the concept of secession remains vaguely defined in the international law, which acts as a loophole with scholars debating on the definition of the word “secession”. In this paper, the stance of international law on secession and the cases of Kashmir and Catalonia towards a demand for secession will be studied in detail. The journey towards secession becomes more strenuous when the seceding territory demanding secession hold a significant importance to their states, which could be either political, cultural, geopolitical, economic or social for that matter. For example, both Kashmir and Catalonia are a paramount territorial region in India and Spain respectively with Kashmir providing geopolitical advantage to India whereas Catalonia providing economic advantage to Spain. The differences lie in the historical background with the fact that Kashmir’s demand for secession lies in the violent and injustice in the past,<sup>2</sup> whereas Catalonia’s cry for secession lies in the cultural and linguistic identity the people share coupled with the economic conditions of the region.<sup>3</sup>

## 1.1 Purpose of Study

During this paper, I will seek to understand the grounds behind the need for secession both for Kashmir and Catalonia, whether they stand justified to secede, and use historical method of study while also discussing the case study of Kosovo and Western Sahara. Moreover, the research will focus on the laws applied to Kosovo and Western Sahara’s case of secession and if the same laws can guide our path towards determining the result of the cases in question i.e. Kashmir and Catalonia. Kosovo’s independence from Serbia erupts from violent clashes between the parent state and the seceded state of Kosovo and even though the struggle for independence did not witness any transgression of International law, the question of recognition remains neglected. Whereas Western Sahara is still struggling to exercise their

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<sup>2</sup> Chandhoke, N. (2014). Contested Secessions Rights, Self Determination, Democracy and Kashmir. *Philosophy and Public Issues*, 4(1), pp.3-5.

<sup>3</sup> Levrat, N., Antunes, S., Tusseau, G. and Williams, P. (2018). *Catalonia's Legitimate Right to Decide*. Universite De Geneve, pp.36-39. Available at:

right for self-determination, which the Moroccan authorities blatantly reject, especially after the Spain's Madrid Accords, following which the Moroccan government exercised hegemony over majority of Western Sahara territory. Morocco's denial to accept the claim of independence and rejection of conducting a referendum exhibit some similarities with the case of Catalonia. To be specific, this thesis will attempt to investigate the international law aspect of Kashmir and Catalonia along with the legality of these cases in a similar way International Court of Justice looked into the legality of Kosovo and Western Sahara in their case towards secession.

## **1.2 Research Question**

The research question of this thesis is "How does international law actually consider the self-determination of people in certain circumstances and what are the international legal instruments at its disposal?" To answer this question, the international law's stance towards secession in the aspect of decolonization and the secession from independent states will be highlighted. This work will further try to answer if international law takes into consideration the self-determination of the people? If yes, does it treat Kashmir and Catalonia differently since they demand secession on completely different grounds? Referring to the advisory opinion by the ICJ on Kosovo and Western Sahara, this thesis will additionally seek to answer if Kashmir and Catalonia qualify as inherent cases to justify secession.

## **1.3 Methodology**

To answer the primary research question, the thesis will focus on the content analysis of the international law to highlight the instruments available to understand the concept of self-determination in colonies and sovereign states. The articles, laws and resolution under the UN and International law will be studied to mark the difference between the concept and acceptance of secession during the colonial era and the period after decolonization.

Secondly, the research will follow a historical method while studying the law implemented on Kosovo and Western Sahara's case and examine if these same laws can guide our current cases. The advisory opinions by the ICJ especially in the case of Kosovo and Western Sahara will be referred as a primary source and as a template to deal with the legality of the cases of Kashmir and Catalonia, both entities aspiring to be independent.

## 1.4 Cases

### Kashmir

Kashmir, a vibrant valley part of Jammu and Kashmir State is in the northern part of Indian subcontinent comprising majority of Kashmiri Muslims followed by Kashmiri Pandits. The valley has been embroiled in a violent conflict between two nations i.e. India and Pakistan since decades, which converted it into a battle zone leaving the current and the following generations confronting deleterious effects. The incessant struggle since the last few decades involving two nuclear nations with an aggressive history after partition is a conflict difficult to resolve and poses a challenge to political theorist to find the balance between the right to secession and other moral consideration, which till now has been an arduous task. I'll try to highlight some of the reasons for these complications. One, Jammu and Kashmir, formerly independent princely state acceded to India and in return India assured the right of self-determination to the people of the valley through a plebiscite, which finally never happened, and the detailed reasons will be discussed in the coming chapters. Two, following accession India accorded a special status by the constitution of the Republic of India. Three, after the assurance of determining their own future to the Kashmiri people, the demand for an independent state arose from only the Kashmiri Muslims whereas the Hindu and the Buddhist minority demanded for removal of special status and more integration into India. This represents a divided stance on the right of self-determination. Four, since the valley has also been tormented by mercenaries coming from Afghanistan and Pakistan since the 1990s, India has applied harsh measure to contain the violence unleashed by the mercenaries upon the people.<sup>4</sup> These measures include deployment of military to contain the situation since the state police force is not well equipped or trained enough to deal with such circumstances. The outcome of such a measure has been implausible with violence disseminating through the society.<sup>5</sup> All these factors will be studied deeply in the next few chapters.

A tremendous deal of research has been conducted on Kashmir's history, tensions between India and Pakistan, cross border terrorism and injustice within the valley but none of them answer one simple question i.e. Does Kashmir have the right to secede from India under the

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<sup>4</sup> Chandhoke, N. (2011). *Contested Secessions: Rights, Self-determination, Democracy, and Kashmir*. New Delhi, India: Oxford Univeristy Press.

<sup>5</sup> Hoskote, A. and Hoskote, V. (2017). Evidence of Violence in Jammu & Kashmir: Narratives From the Hinterland. *International Journal of Research in Social Sciences and Humanities*, 7(2).



current international legal framework?

## **Catalonia**

Catalonia, located on the northeastern side of the Iberian Peninsula, in the territory of Spain and is regarded as an *autonomous community* along with the status of *Nationality*, which goes on to explain the strong sense of identity in the region. Barcelona, Girona, Lleida and Terragona form the four provinces of the region, with Barcelona as the capital of Catalonia. The region depicts and contributes significantly towards the economic and social growth of the nation constituting 19% Gross Domestic Product of Spain.<sup>6</sup> Now with the strong sense of identity, nationalism and growing economic capabilities of the region, the demand for independence has been growing. Catalan independence movement first began in 1922, but the modern movement started in 2010, but since then demands for secession have not found any acceptance by the Spanish government. According to the Spanish Constitutional Court, all referendums by Catalonia till now have been rejected based on them threatening the sovereignty of the country and in violation of the Spanish legal order.<sup>7</sup> The only possible way to carry any referendum forward would be by reforming the constitution in a rigid amending process. Comparing the Catalonia case with other secession attempts like Quebec or Scotland, the difference lies that in the latter the parent state recognized the political value of the seceding regions, allowing the calling, holding or organizing of a referendum. The demand for secession does not erupt from the oppression or violence committed on the people of Catalonia, which can be justified till some extent by unilateral secession but in a democratic environment which is not looking for a reasonable solution. Catalonians are proud of their language and culture in general and even though their cultural identity is preserved with Catalan (Catalonia's language) being awarded equal status as Spanish, things soon turned severe when the Spanish Constitutional Court in 2010 struck down the law passed by the Catalan Parliament. The demands highlighted in the law with a pledge for higher importance to Catalan than Spanish and reference of Catalonia as a nation instead of a region were unacceptable for the Spanish government.

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<sup>6</sup> OECD. (n.d.). *Catalonia, Spain*. Retrieved April 10, 2018, from oecd.org: <http://www.oecd.org/education/imhe/46827358.pdf>

<sup>7</sup>Cockburn, H. (2017). Catalonia: Spanish government rejects 'tacit' independence declaration. *Independent*. [online] Available at: <https://www.independent.co.uk/news/world/europe/catalonia-independence-spain-government-rejects-declaration-referendum-latest-a7993596.html> [Accessed 30 May 2018].

The research will focus on the historical aspect of Catalonia's demand for secession along with the response of the government regarding such claims. Even if the Spanish government amends its constitution to allow referendum for independence, does Catalonia qualify as the inherent case to justify secession under the international legal framework?

## 2. DEFINITION OF TERMINOLOGIES

### 2.1 Self-Determination

The term recognized in the UN Charter in the simplest of terms, fundamentally grants all the “peoples” the right to decide their own political future including the economic, social and cultural development. To describe, self-determination gives people the idea of self-government by granting them a right which affords them to determine the economic, social, political development by their own actions, decisions and will within the political realm.<sup>8</sup> According to the Article 1(2) of UN Charter “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”, which points out that UN recognizes the importance of acceptance and exercise of this right, a crucial measure to strengthen peace.<sup>9</sup> Furthermore the Article 55 of the UN Charter supports the need for policies in promoting peace and fulfillment of goals set forth in Article 1(2).<sup>10</sup> These articles bind all the member states of the UN to follow and fulfill the principles articulated in the Charter. Not only does it strengthen the legality of the principles of self-determination, but the violation of these mentioned principles would lead to expulsion or sanctions according to the Article 6 of the UN Charter. Even though the UN legally recognizes the concept of self-determination in the early 20<sup>th</sup> century, it was a topic of discourse among many philosophers and lawyers in the late 19<sup>th</sup> century.<sup>11</sup> But the then United States President Woodrow Wilson internationalized one of the most significant and closest definitions of self-determination, in his Fourteen Points in the context of World War

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<sup>8</sup> Margalit, A. and Raz, J. (1990). National Self-Determination. *Journal of Philosophy, Inc*, 87(9), p.440.

<sup>9</sup> United Nations (1945). *Charter of the United Nations and Statute of the International Court of Justice*. San Francisco: United Nations, pp.3-8. Article 1(2). Retrieved From: <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>

<sup>10</sup> United Nations (1945). *Charter of the United Nations and Statute of the International Court of Justice*. San Francisco: United Nations, pp.11. Article 55. Retrieved From: <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>

<sup>11</sup> Fisch, J. (2015). *A History of the Self-Determination of Peoples: The Domestication of an Illusion*. Cambridge University Press, pp.118, para 1

1. Even though he didn't mention "self-determination" anywhere in his writing, the point five of the *Fourteen Points* "questions of sovereignty the interests of the populations concerned must have equal weight", which first marked the right of people to decide on their political future especially by an international leader.<sup>12</sup> Not only do the people have the right to exercise their right to determine their political will without external interference but all the states have the duty to respect it and assist in the realization of this right in accordance with the provision of the Charter, as mentioned in the Helsinki final Act and the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States.<sup>13</sup>

The exercise of the right of self-determination can reveal two outcomes, integration in the state or independence from it. The level of acceptance by the government depends upon the outcome when the right is exercised. To explain this in simpler words, the reaction from the government depends upon the outcome from the exercise of this right i.e. if the outcome is towards integration, the government will more readily accept it but on the other hand, if the outcome is leaning towards independence, the government will more likely reject the claims. To dig deeper in the concept of self-determination, there exist two-sub concepts i.e. *internal* self-determination and *external* self-determination and as the name indicates, internal self-determination deals with the exercise of the right of self-determination within the framework of an existing state which means that the territorial integrity of states in the internal self-determination should be maintained whereas external self-determination is slightly different in the fact that this right can be exercised to form an independent state, which will break the territorial integrity of the parent state.<sup>14</sup> One perfect example of internal self-determination is Telangana as the 29<sup>th</sup> state of India.<sup>15</sup> On the other hand, Kosovo's unilateral declaration of independence from Serbia serves as an appropriate example of external self-determination.<sup>16</sup>

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<sup>12</sup> Wilson, W. (1918). President Woodrow Wilson's Fourteen Points. *Yale Law School*, Point 5.

<sup>13</sup> Point 8. *Conference on Security and Co-operation in Europe Final Act*. Retrieved From: <https://www.osce.org/helsinki-final-act?download=true> & also see point. 5 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.(GAR 2625). (1970). pp.7. Available at: <https://cil.nus.edu.sg/wp-content/uploads/formidable/18/1970-Declaration-on-Principles-of-International-Law-Concerning-Friendly-Relations.pdf> [Accessed 20 May 2018].

<sup>14</sup> Demir, E. (2017). The right to internal self-determination in peacebuilding processes: a reinterpretation of the concept of local ownership from a legal perspective. *Sussex Research Online*, [online] pp.23-30. Available at: <https://pdfs.semanticscholar.org/0b35/fdc64486b19310d1883bec5c89102fcfeec9.pdf> [Accessed 1 Jul. 2018].

<sup>15</sup> Desmond, E. L. (n.d.). Legitimation and Secession in Telangana State in India: The View from Three Villages. *Academia*, 31.

<sup>16</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion* [2010] (International Court of Justice). Page 6 Retrieved From: <https://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf>

The details of these cases will be explained later in the thesis.

Considering the definitions and the principles mentioned in the UN Charter, the right of self-determination is recognized and respected only till its exercised within the framework of parent state. To explain it in the simpler words, the exercise of such a right is valid and acceptable in accordance with UN Charter and international law, till it doesn't affect the sovereignty and integrity of the parent state. If self-determination threatens the territorial integrity of the state, the recognition from UN is absent as it violates the territorial integrity principle of UN Charter.<sup>17</sup> In practice only the existing colonies or Non-Self-Governing Territories can use the exercise of such a right to justify independence. In terms of non-colonial states, this right can be exercised only in terms on internal self-determination.

## 2.2 Decolonization

Since the WW2, the right of self-determination has been recognized as a principle of international law, but its use has been primarily to justify decolonization. After the adoption of UNGA Resolution 1514(XV), colonialism was condemned on an international platform, established it as contradictory to the principle of the UN Charter and made self-determination a matter of global concern.<sup>18</sup> Decolonization was a process to provide independence to the people under the rule of colonial power and oppose colonialism by the exercise of the right to self-determination. It was meant to grant independence to all the territories under foreign rule as a crucial step towards full enjoyment of human rights.<sup>19</sup> It garnered the support of several states simply because the supporters were either against colonialism for their own interests or were a colony themselves.<sup>20</sup> Even though the principles in the UN Charter do not advocate the use of force for the realization of the right to self-determination, an exception was made in the implementation of decolonization. To free the colonial people, the realization and implementation of right to self-determination should be first initiated by the colonial powers but if the government blocked it, only then the UN supported use of force.<sup>21</sup> If the colonial

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<sup>17</sup> *Vienna Declaration and Programme of Action*. (1993) Point I(2). Retrieved From: <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>

<sup>18</sup> *United Nations Resolution 1514(XV)* (1960). Retrieved From: <https://www.sfu.ca/~palys/UN-Resolution%201514.pdf>

<sup>19</sup> *United Nations General Assembly*. (1982). Retrieved From: <http://www.un.org/documents/ga/res/37/a37r043.htm>

<sup>20</sup> Secession: State Practice and International Law after the Dissolution of the Soviet Union and Yugoslav. (2018). *Duke Journal of Comparative & International Law*. 3(299), pp.16-18

<sup>21</sup> Crawford, J. (1997). State Practice and International Law in Relation to Unilateral Secession. *TamilNation*, Point 17.

government refuses to allow its people the right to self-determination, it violates the human rights and fundamental rights granted to all people and in such a situation, the colonial people might use force as a last resort to counter their suppression of their right of self-determination.<sup>22</sup> E.g. Angola.

External self-determination is only recognized by the UN in the context of decolonization as all the states that gained independence through this process, as of today are recognized by the UN, and the colonies that did not are regarded as Non-Self-Governing Territories till they exercise their right to self-determination. So, to go ahead and say that decolonization as a concept helped in recognizing self-determination as a principle right of the people would not be wrong. Apart from decolonization context, the right to self-determination in the external sense has made little to no developments and therefore its scope in the 21<sup>st</sup> century remains limited.

## 2.3 Secession

Secession has been a concept of unvarying debates from different disciplines of study often yielding different definitions of secession. To put in the simplest of words, secession means withdrawal of a territory from the opposing parent state, which causes this internationally recognized host to lose control and sovereignty over this withdrawn territory. According to James Crawford definition of secession, the withdrawal of a territory from apparent state must be without the consent of the host state.<sup>23</sup> Here, the crucial word is “consent”, for secession to be successful and deemed true to its definition. The withdrawal of a territory in secessionary terms does not and should not require the agreement with the host government, as detachment with agreement of the parent state does not pose any problem for international law as the host states recognizes the independence of the newly created state: the process described by Crawford as “granting of independence”. The absence of consent in the secessionist demands is further supported by Marcelo G. Kohen in his work on secession. According to him,

*“...secession is the creation of a new independent entity through the separation of part of the*

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<sup>22</sup> Nyameke Blay, S. (1985). Self Determination: Its Evolution in International Law and Prescriptions for its Application in the Post-Colonial Context. *University of Tasmania*, pp.105-107.

<sup>23</sup> Crawford, J. (1997). State Practice and International Law in Relations to Unilateral Secession. pp.2-5.

*territory and population of an existing State, without the consent of the latter.*"<sup>24</sup>

Since the parent state does not recognize then seceding territory's claim to independence, the use of force by the government to quiet such claims and violent reprisal from the people supporting such claims is quite common.<sup>25</sup> One of the key differences between decolonization and secession is that decolonization was a process to remove the "foreign" rule from the colonies and provide independence through the exercise of principles of self-determination, whereas secession, is the separation of a territory from a sovereign state based on the exercise of the same right by the people of an independent state. In the context of secession, exercising the right of self-determination can be supported by various reasons excluding "foreign".

Keeping in mind the above definitions, for the withdrawal of a territory to be defined as secession, there are two conditions needed to be fulfilled. First, in the democratic environment, any demands for a separate state from the people of a sovereign nation must face opposition from the host state. Second, if separation of a territory from the host state was successful after the fulfilment of the first condition, the host state should continue to exist. If after the separation, the host state ceases to exist or disintegrates into sub-states, the process is devolution, a concept entirely distinct from secession.<sup>26</sup> The one and only example of successful secession since 1945 is of Bangladesh, which was admitted in the UN in 1974.<sup>27</sup>

## **2.4 Recognition of a State**

State recognition is an integral part of international law, a process through which the existence and the status of the state as a subject to international law are accepted. Failure of recognition by the international community, a state's capacity to get into relations with other sovereign states is significantly restricted. Before recognition, it is important to see if the state demanding recognition fulfills the requirements of statehood. The Article 1 of the Montevideo Convention put forward four requirements for statehood: a) a permanent population; b) defined territory; c) government, and d) the capacity to enter in relations with other states.<sup>28</sup> The last two conditions of statehood described in the convention help cement

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<sup>24</sup> Kohen, M. (2006). *Secession: International Law Perspectives*. Cambridge University Press, pp.3-10.

<sup>25</sup> Crawford, J. (2006). *The Creation of States in International Law*. Oxford University Press, pp.372-390.

<sup>26</sup> Ibid. p.390.

<sup>27</sup> Ibid. p. 383-395.

<sup>28</sup> Montevideo Convention on the Rights and Duties of States. Article 1. Retrieved from: <https://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml>

the sovereignty of a state. If the supreme authority within a state exercises power over a fixed population & territory and can enter into relations with other independent states without any outside influence, the internal and external sovereignty is realized. If these conditions are met, the path towards recognition becomes smoother. A state can be recognized by either by the United Nation or the international community i.e. other independent states. In international law, recognition takes many forms. The two most common forms of recognition are *de jure* and *de facto*. De jure means legal recognition whereas de facto means factual recognition. For a state to be recognized as de jure, its government should have firmly established control over the territory. It also includes the recognition of a new state by already existing state through an official declaration. Similarly, de facto recognition includes methods that simply imply that the new state would be treated as any other international sovereign state but doesn't explicitly recognizes a new state, instead subtle means are employed to convey the message. For example, signing a bilateral treaty or setting up a diplomatic mission.<sup>29</sup> Another method of recognition employed by the international law is diplomatic recognition. This method does not grant full formal recognition. For example, Taiwan is not recognized as de jure by the international community but since it fulfills all the criteria specified by the Montevideo convention, it enjoys de facto recognition by engaging in trade and cultural relations with other states. It is also noted that even if a new state fails to gather any support from the international law, doesn't mean it cannot be considered a sovereign state. Such a recognition comes from other sovereign states. If other independent nations are willing to extend their recognition to a new state, it can enjoy de facto recognition irrespective of the stance of the international law or the UN. For example, Kosovo, this case will be discussed in detail in the next sections.

But what if neither UN nor other sovereign state recognize the newly created state? A government can keep its distance from a newly created state, but it does not have any influence over the existence of the new state. Every state strives for recognition because it reaps socio, economic and political benefits through bilateral agreements and trade. If, however, a new state fails to gather recognition, it can still communicate with other independent states through other means/channels, media being one of them. For example, Taiwan is not recognized by the US, but the communication is open through an unofficial

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<sup>29</sup> Jennings, R. (1956). International Law. By L. Oppenheim. Eighth Edition by H. Lauterpacht, Q.C., LL.D., F.B.A. Vol. I—Peace. [London: Longmans, Green & Co.1955. lvi and 1029 and (index) 42 pp. £4 10s. net.]. *The Cambridge Law Journal*, 14(1), 112-113. doi:10.1017/S0008197300007959.

representative known as “American Institute” to serve the interest of the US in the country.<sup>30</sup> Moreover, if a sovereign state denies recognition to a newly created state, that doesn’t mean the decisions cannot be changed later. One such example is People’s Republic of China, that failed to get any recognition from the US for 30 years (till 1979) but that didn’t stop it from acting as an independent sovereign nation.<sup>31</sup> Hence, recognition from other independent state does not lead to creation of independent state but just confirms its existence.

## 2.5 Non-Self-Governing Territory

During the process of decolonization, most of the colonies gained independence followed by recognition from the UN and the international community. Even though decolonization was an overall success, some of the colonies were still left under the colonial rule, which are on the list of UN to help attain independence. The territories that have not yet attained the complete measure of a self-government and the right of self-determination has not been exercised by its people, fall under the category of Non-Self-Governing Territories. The responsibilities of such territories are assumed by the UN members to promote peace and self-government, recognizing the right and will of the people as paramount objectives.<sup>32</sup> Even though being administered by member/s of the UN, such territories possess a status completely distinct than the territories of the state administering it and that status will exist under the Charter, till the people of NSGT have exercised their will and right of self-determination.<sup>33</sup> Furthermore, Article 73, 76 and 77 of the UN Charter along with UN Resolution 1514(XV) confirms the right to self-government and self-determination to all the people of such territories, which have led to the demands of independence.<sup>34</sup> One such case is Western Sahara that will be discussed in the later chapters..

Even though the UNs objectives to support the realization of the principles of Self-determination and developing peace in such territories are clearly visible in Article 73(b) in the Charter, “*to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political*

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<sup>30</sup> History (2009). [online] Available at: <https://www.history.com/this-day-in-history/united-states-announces-that-it-will-recognize-communist-china> [Accessed 9 Mar. 2018].

<sup>31</sup> Ibid.

<sup>32</sup> *Charter of the United Nations*. (1945). Article 73. Retrieved From: <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>

<sup>33</sup> The principle of equal rights and self-determination of peoples. UNGA 2625(XXV). (1970). Retrieved From: <http://www.un-documents.net/a25r2625.htm>

<sup>34</sup> *Charter of the United Nations*. (1945). Article 73, 76 and 77. Retrieved From: <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>



*institutions, according to the particular circumstances of each”* , the method to achieve it should still not involve unilateral secession until the right of the people to decide their own future is opposed by the colonial power.<sup>35</sup> The simplest reason behind this support is that these territories are not a part of any sovereign state, therefore any change politically or geographically does not violate any principles mentioned in the Charter of the UN. Considering their status, these are the only territories supported by the UN in the journey towards self-determination even if it is achieved by the creation of independent state. But establishment of an independent state is not the only mode of implementation of the right of self-determination granted by the UN to such territories. Whenever the people of NSGT choose to exercise their right of self-determination, they should have the possibility of either establishing a sovereign state or integration with an independent state or emergence into any other political status determined by their own free will.<sup>36</sup>

## 2.6 Terra Nullius

A Latin phrase (terra i.e. earth, nullius i.e. no one's) used to define the status of the land. The land that does not belong to anyone is called Terra Nullius. To elucidate, land that remains unoccupied and has never been subjected to sovereignty of any nation. It also includes land that was previously under a sovereign power, but the sovereignty was renounced implicitly by that state. The doctrine of Terra Nullius states that an unoccupied land can be claimed by a sovereign state and the laws of that state would apply in the claimed territory. According to this rule, the land without an owner can be taken under possession by the first owner. Some of the most common form of acquiring terra nullius, is occupation.

This principle has been exploited by colonizers to justify their occupation of another territory even though there were traces of the presence of local population.<sup>37</sup> One such example is the occupation of Australia by the British as terra nullius. Even though the Aboriginals Islanders existed on the land before the British occupation, their existence was completely ignored.<sup>38</sup>

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<sup>35</sup> Crawford, J. (1997). *State Practice and International Law in Relations to Unilateral Secession*. pp.5-8.

<sup>36</sup> The principle of equal rights and self-determination of peoples. UNGA 2625(XXV). (1970). Retrieved From: <http://www.un-documents.net/a25r2625.htm>

<sup>37</sup> *The Doctrine of Terra Nullius*. Retrieved From: <http://stage6.pbworks.com/f/The+Doctrine+of+terra+nullius.pdf>

<sup>38</sup> Banner, S. (2005). Why Terra Nullius? Anthropology and Property Law in Early Australia. *Law and History Reviews*, [online] 23(1), pp.95-115. Available at: [http://www.murschhauser.net/documents/australien/Banner\\_Landrecht.pdf](http://www.murschhauser.net/documents/australien/Banner_Landrecht.pdf) [Accessed 24 Jul. 2018].

The belief that the English occupation of Australia in 1788 as terra nullius was overthrown in the 1992.<sup>39</sup> One of the most recent cases of terra nullius was brought into light in the territorial dispute of Western Sahara, where the ICJ found Western Sahara not to be terra nullius at the time of Spanish colonization 1885. This will be elucidated later in the work.

## 2.7 United Nations

Self-determination is the right recognized by the United Nations to all people irrespective of the state, territory or colony to which they belong. In the colonial concept, this right was used as a primary tool in providing independence to all the territories under the colonial rule.<sup>40</sup> During decolonization, the right of self-determination was to be first implemented by the colonial government and if the colonial government refused to do so, the people had the right to defend themselves against such violations. Not only did such situations ended up in violence followed by independence in some cases, the UN supported such form of secession, but only in colonial context.<sup>41</sup> E.g. Namibia.

Even though the principle of self-determination found its way in the legal principles of UNs in the late 20<sup>th</sup> century, the concept was a topic of discussion among many international leaders. During the WWII, President Roosevelt of the United States and the Prime Minister Churchill of the United Kingdom declared that they did not wish to see any territorial changes which do not depict the free wishes and will of the people. Moreover, they confirmed that they respected the right of the people to choose their own government and wished to see the self-government and rights restored to those who have been deprived of them.<sup>42</sup>

United Nations recognize this right to all people and to achieve peace in the international order these rights must be respected by every member states. According to the Article 1(2) of the Charter “self-determination of peoples” is a necessary measure to strengthen peace and develop better relations among nations. To achieve the principles marked in Article 2, the UN

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<sup>39</sup> *The Doctrine of Terra Nullius*. Page 2. Retrieved From:

<http://stage6.pbworks.com/f/The+Doctrine+of+terra+nullius.pdf>

<sup>40</sup> Roy, A. (2001). Sovereignty and Decolonization: Realizing Indigenous Self-Determination at the United Nations and in Canada. *University of Victoria*, pp.27-40.

<sup>41</sup> Independence And Decolonization In Southern Africa. (n.d.). *Encyclopedia Britannica*. [online] Available at: <https://www.britannica.com/place/Southern-Africa/Independence-and-decolonization-in-Southern-Africa> [Accessed 3 Aug. 2018].

<sup>42</sup> Thurer, D. and Burri, T. (2010). Self-Determination. *Heidelberg and Oxford University Press*. [online] Available at: <https://falklandstimeline.files.wordpress.com/2018/06/self-determination-daniel-thurer-thomas-burri.pdf> [Accessed 25 Aug. 2018].

should promote better economic condition along and no discrimination of any kind. Furthermore, the ICECCR confirms that the principle of self-determination should be realized to create an environment of peace.<sup>43</sup> And if any state fails to abide by the principles defined in the UN Charter, the state should take either “separate” or “joint” actions for the realization of the right to self-determination.<sup>44</sup>

If exercising such a right lead to secession in the non-colonial context, there is no recognition from the UN. The word “secession” is entirely missing from all the documents containing the principles of the UN. According to the UN, self-determination is a constitutional process to determine the future of the people in a state without any form of external intrusions and if part of its population/people want to secede, it is entirely the choice of the government of the state to decide the response.<sup>45</sup> The reasons behind the UNs refusal to recognize any attempts at independence outside the colonial sense, where the host state opposes such desires are simple. Since it is a sovereign nation, any attempts by its people towards independence threatening its territorial integrity could be viewed as a threat to the principles of the UN. If the state fairly represents its people, without any kind of discrimination and complies with all the principles of the UN Charter, then that state is entitled to the protection of its integrity. In such a state, the right of self-determination can only be exercised by participating in the government through a constitutional way.<sup>46</sup> Even though UN recognizes the values and principles of self-determination, it also values the territorial integrity of the states. Furthermore, UN clearly states that none of its principles should be interpreted or understood in a way that would threaten the integrity of any sovereign state.<sup>47</sup> Recognition of secession by UN in non-colonial sense would directly go against its principles. The stance taken by the UN can be summarized through the speech of its secretary general in 1992, “*if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to*

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<sup>43</sup> International Covenant on Economic, Social and Cultural Rights A Handbook. (2015). Article 1. *Programme on Women’s Economic, Social and Cultural Rights*. [online] Available at: [http://www.pwescr.org/PWESCR\\_Handbook\\_on\\_ESCR.pdf](http://www.pwescr.org/PWESCR_Handbook_on_ESCR.pdf) [Accessed 2 Sep. 2018].

<sup>44</sup> Point 8. *Conference on Security and Co-operation in Europe Final Act*. Retrieved From: <https://www.osce.org/helsinki-final-act?download=true> & also see point. 5 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.(GAR 2625). (1970). p.8.

<sup>45</sup> Crawford, J. (1997). *State Practice and International Law in Relations to Unilateral Secession*. pp.17-20. Available at:

<sup>46</sup> . *Conference on Security and Co-operation in Europe Final Act*. Retrieved From: <https://www.osce.org/helsinki-final-act?download=true> & also see point. 5 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.(GAR 2625). (1970). p.8.

<sup>47</sup> Crawford, J. (1997). *State Practice and International Law in Relations to Unilateral Secession*. pp.3-20..

achieve”.<sup>48</sup>

## 2.8 Theories

The philosophical frameworks are an important way to link our cases with the appropriate theories along with relevant evidence to support our conclusions. *Remedial Rights Only* and *National Self-determination* are two such theories that will be employed in this study to understand the cases of Kashmir and Catalonia respectively. Remedial Rights Only theory is put forward by Allen Buchanan and is deeply installed in the principle of secession as the curative rights to injustice in the territory or region. According to Remedial Rights Only theory, a group holds the right to secede only if the following conditions are met. One, when the actions of the state threaten the physical survival of its members or the violation of human rights. Policies adopted by the Iraqi government to wards Kurds in Iraq<sup>49</sup> and the violation of human rights in East Pakistan<sup>50</sup> (now Bangladesh) acts as the most suitable examples respectively. Two, the unjust colonization or occupation of a previously sovereign territory e.g. the Baltic Republic. This theory asserts secession as a last resort only when a group suffered injustice, in other context, secession is rejected.<sup>51</sup> The most important part of this theory is that it is applicable only to certain segment of the citizenry instead of the entire populace and the exercise of this right by the people is to unwind the control of the government over that portion of the region and not to overthrow the government entirely.

The reason why this theory is chosen for analyzing Kashmir scenario is simply because of the similarities shared by this case study and the conditions specified by the theory. Remedial Rights Only focuses on injustices inflicted upon a group as a pre-condition for demanding secession, Kashmir fits in perfectly. Since the last few decades, Kashmir has been in a state of conflict fought between Indian government, Kashmiri separatists and other agencies involved with cases of human rights violation against the Kashmiri people.<sup>52</sup> Furthermore, there are claims of secession grounded on the possibility of unjust annexation of J&K into

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<sup>48</sup> *United Nations Security Council*. (1992). Point 17. 47 sessions. Retrieved from: <http://www.un-documents.net/a47-277.htm>

<sup>49</sup> Unrepresented Nations and People's Organization (n.d.). *The Kurdish Genocide Achieving Justice through EU Recognition*. [online] Available at: [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/d-iq/dv/03\\_kurdishgenocidesofanfalandhalabja\\_/03\\_kurdishgenocidesofanfalandhalabja\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/d-iq/dv/03_kurdishgenocidesofanfalandhalabja_/03_kurdishgenocidesofanfalandhalabja_en.pdf) [Accessed 14 Nov. 2018].

<sup>50</sup> Salzberg, J. (1973). UN Prevention of Human Rights Violations: The Bangladesh Case. *International Organization*, 27(1), 116-127. doi:10.1017/S0020818300003222.

<sup>51</sup> Buchanan, Allen (1997). Theories of Secession. *Philosophy and Public Affairs*, 26 (1):31-61.

<sup>52</sup> Amnesty International (2001). *INDIA Impunity must end in Jammu and Kashmir*. [online] Available at: <http://www.refworld.org/pdfid/3c29def33.pdf> [Accessed 14 May 2018].

India, which falls within the scope of the second condition of Remedial Rights Only theory. Another factor that favors this Remedial Right's applicability on Kashmir is that this theory focuses on certain citizenry of the territory, which seems like a perfect fit as the demands for secession arise mostly from the Muslim community in Kashmir. Furthermore, Buchanan highlights the self-centered behavior of states for its survivability. He goes forwards to explain the state's interest in maintaining this principle lies behind two reasons, one, the territorial integrity helps protect the physical security, human rights of the members with the states and second, because a defined and protected territory provides an "incentive structure" for individuals or groups with that states to participate in the basic fundamental processes of the state government. If this is true in Kashmir's case will be discussed in the chapters below.

Another important theory that will be brought under light is "National Self-Determination Theory" put forward by Avishai Margalit and Joseph Raz, which particularly focus on the demand of secession justified by the shared identity of the seceding group. To explicate, the idea behind this theory speaks of groups sharing a common *variable*, determining their political, economic development and future by their own will and actions through their own free will within the political realms.<sup>53</sup> The variable mentioned can be either be common culture and/or character, shared history, occupation, language, cuisine, music, traditions, customs, architecture for that matter. These variables help people connect, bond and create an identity. An important thing to note is that these variables cannot be bound by geographical limitations, for they spread beyond borders. These variables connect people into groups with shared identities and such groups should always exercise their rights of self-determination keeping in mind the interest of the group, its member and the people who may be affected by it. This theory suits Catalonian case because the demands for independence by Catalonia are based on shared identity. The claims laid by the Catalonians are grounded on cultural uniqueness of the region as compared with the rest of Spain. Such secessionist views are coupled with past discrimination of the people during Franco's regime,<sup>54</sup> to give strength to pro-secessionist arguments. This theory will be used to determine whether identity is the only

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<sup>53</sup> Crawford, J. (1997). *State Practice and International Law in Relation to Unilateral Secession*. University of Cambridge, pp.15-20.

<sup>54</sup> Birnbaum, M. (2017). For some, Catalonia crackdown evokes memories of the dark days of Spain's dictatorship. *The Washington Post*. [online] Available at: [https://www.washingtonpost.com/world/europe/spanish-crackdown-on-catalonia-independence-effort-prompts-bitter-memories-of-franco-dictatorship/2017/11/08/b0ae6eac-bf14-11e7-9294-705f80164f6e\\_story.html?noredirect=on&utm\\_term=.665d88140a3f](https://www.washingtonpost.com/world/europe/spanish-crackdown-on-catalonia-independence-effort-prompts-bitter-memories-of-franco-dictatorship/2017/11/08/b0ae6eac-bf14-11e7-9294-705f80164f6e_story.html?noredirect=on&utm_term=.665d88140a3f) [Accessed 20 Jun. 2018].

reason or there are some economic issues involved as well for demanding independence of Catalonia. Furthermore, it will be examined if cultural identity is a condition enough to demand independence? Whatever the answer, how does international law treat it?

### **3. CASE ANALYSIS**

#### **3.1 Kosovo**

Secession is a concept under continual philosophical discourse. The distinct nature of all cases of seceding state makes secession a strenuous concept to grasp followed by characterization of its applicability only in theoretical terms with raising uncertainty in its practical significance. To understand, we will highlight the case of Kosovo seceding from Serbia, while answering the three main questions. First, what is the fight about? What are the claims made by Serbia and Kosovo? Second, how did they international community react to the Declaration of Independence of Kosovo? Does it bear any legal significance? Third, the most important question of all, does Kosovo fulfill the right to unilaterally secede from Serbia?

The conflict between Kosovo Albanian and Serbs is a territorial one, with both parties claiming Kosovo to be their territory based on historical facts but since it happened a long time ago, this claim cannot be justified for secession. Kosovo Albanian claims themselves to be the descendants of the Illyrians, who were the inhabitants of the region in the 2<sup>nd</sup> century BC.<sup>55</sup> Whereas the Serbs claim Kosovo to be the center of their medieval kingdom accentuating the Serbian churches and monasteries widely spread over the territory.<sup>56</sup>

By the beginning of 20<sup>th</sup> century, Serbia was able to gain independence from the Ottoman Empire followed by finalizing of Kosovo's status as a part of Serbia in 1912-1913 after the Treaty of London with international recognition.<sup>57</sup> With the growing nationalist feeling between both groups, Kosovo Albanians saw the arrival as an act of occupation. One of the most significant periods for Kosovo was from 1974 till 1990. The violence between the

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<sup>55</sup> Malcolm Noel, *Kosovo: A Short History*, New York University Press, 1998, p. 31 and Vickers Miranda, *Between Serb and Albanian: A History of Kosovo*, Hurst & Company, London, 1998, p. 1 ff

<sup>56</sup> Judah, Tim, *The Serbs: History, Myth and the Destruction of Yugoslavia*, 2nd ed., Yale University Press, 2000.

<sup>57</sup> Treaty of London, 1913, R. 328, opened for signature on December 1912, entered into force on 30 May 1913. <https://www.mtholyoke.edu/acad/intrel/boshtml/bos145.htm> (retrieved on 2013-10-06).

Serbian authority and the Kosovo population erupted in the 1990. The Circumstance that led to this outcome will prove the importance of this period for Kosovo and Serbia. In 1974, the status of Kosovo was changed from Autonomous Province of Kosovo to Socialist Autonomous Province of Kosovo which not only gave Kosovo autonomy by allowed them to have their own assembly, judiciary and administration but also specified that the borders of the region cannot be altered without approval from the Kosovo Parliament.<sup>58</sup> This was a short lived dream as the rising tensions between Serbian authorities and Kosovo population fueled by declining economic growth paved the way for a new law, which dissolved Kosovo's Parliament.<sup>59</sup> The Serbian government took over the healthcare, police, educational system and prohibited Albanian language in public, after the return of all power to them. Finally, in 1990, Kosovo referred itself as a Republic of Kosovo (Republika e Kosoves).<sup>60</sup> In 1997, a small-armed group Kosovo Liberation Army (KLA) started its fight for an independent Kosovo, which marked the beginning of the Kosovo War between the KLA and the Serbian authorities.<sup>61</sup>

Coming to the second question, with the escalating violent clashes between both the groups, the United Nations decided to intervene and resolve the conflict. In December 1992, United Nations Human Rights Committee urged the Yugoslav government to stop the repression of the local population of Kosovo followed by the international community's recommendation of granting autonomy rights to Kosovo for internal self-determination.<sup>62</sup> Furthermore the UN General Assembly suggested the Yugoslav government to authorize the establishment of genuine democratic foundation, which include the parliament and the judiciary to return the autonomy taken away from the region.<sup>63</sup> After the failure of any diplomatic panacea, the NATO decided to intervene and carry out air raids over the Federal Republic of Yugoslavia (FRY). Under Milosevic's presidency, Kosovo Albanians experienced severe human rights violation, which is often described as "ethnic cleansing".<sup>64</sup> NATO's intervention came with

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<sup>58</sup> Independent International Commission on Kosovo, *The Kosovo report: conflict, international response, lessons learned*, New York, New York, Oxford University Press, 2000, p. 35-36

<sup>59</sup> *Ibid.*

<sup>60</sup> Malcolm Noel, *Kosovo: A Short History*, New York University Press, 1998, pp. 354-356.

<sup>61</sup> Independent International Commission on Kosovo, *The Kosovo report: conflict, international response, lessons learned*, New York, New York, Oxford University Press, 2000, p. 83.

<sup>62</sup> Comments of the Human Rights Committee: Federal Republic of Yugoslavia (Serbia and Montenegro), UN Doc. CCPR/C/79/Add.16, December 18, 1992, para. 8.

<sup>63</sup> Situation of human rights in Kosovo, UN General Assembly Resolution 51/111, March 5, 1997, and UN Security Council Resolution 1160, March 31, 1998.

<sup>64</sup> NATO, *The Kosovo Air Campaign*, [http://www.nato.int/cps/en/natolive/topics\\_49602.htm](http://www.nato.int/cps/en/natolive/topics_49602.htm) (retrieved on 2013-10-06). See also Independent International Commission on Kosovo, *The Kosovo report: conflict, international response, lessons learned*, New York, New York, Oxford University Press, 2000, p. 85-94.

the aim of forcing the Serbian president Slobodan Milosevic to end these human rights violations and persuading him to engage in diplomatic solutions or agreement after the withdrawal of the Serbian and Yugoslav forces from Kosovo. Following the conclusion of Military Technical Agreement in 1999, NATO decided to cease the air raid campaigns. United Nations Security Council passed resolution 1244, which put into the effect the UN administration in the territory of Kosovo through United Nations Interim Administration Mission in Kosovo (UNMIK) and deployed Kosovo Force (KFOR), a peacekeeping force led by NATO. The resolution was meant to provide greater autonomy to Kosovo under the Yugoslav framework.<sup>65</sup> Finally in 2006 the negotiations began under this resolution, to determine the status of Kosovo, which eventually failed.

In February 2008, Kosovo parliament authorized a unilateral Declaration of Independence (DOI) followed by the Constitution of Serbia's complete denial of its legality on the foundation that it is in disagreement or is not compatible with the UN Charter, Helsinki Final Act, the Constitution of Serbia and UN security Council Resolution 1244 and therefore demanded the International Court of Justice opinion in the same year.<sup>66</sup> The question put forward by the Serbian government was "Whether the declaration of independence is in accordance with international law". Throughout the proceedings various arguments were posed by the participants, which were answered by the ICJ, till the point they were relevant to the actual question that required the opinion of the court. Some of these arguments covered, a) UNSC's reaction to the cases of Republika Srpska and Northern Cyprus as a basis for argument against Kosovo's DOI; b) Kosovo's DOI in violation of the constitutional Framework of Serbia; c) if Kosovar Albanians exercised their right to independence through self-determination or Remedial Secession? To fully understand the advisory opinion, these arguments are discussed in the next few paragraphs.

To even consider the possibility of illegality of the DOI according to the international law, there is a need to inspect the articles it incorporates. Since the second half of the 20<sup>th</sup> century, there have been many cases of secession under decolonization, with formation of new states along with NSGT. Since colonialism is regarded as opposite to international law, independence from colonial rulers is accepted in international law. Many states declared their

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<sup>65</sup> UN Security Council Resolution 1244, June 10, 1999, Preamble, para. 11 and Raic David, *Statehood and the Law of Self-Determination*, Kluwer Law International, the Hague, 2002, p. 270.

<sup>66</sup> Voa News (2009). Serbia Requests ICJ Opinion on Legality of Kosovo Independence. [online] Available at: <https://www.voanews.com/a/a-13-2008-08-15-voa58/400431.html> [Accessed 22 Nov. 2018].



intentions of independence through a DOI outside this context, but there was no emergence of any new law prohibiting such an act by the international law. Without the existence of any law against such DOI's in non-colonial states by the international law; the court completely rejected the question of illegality of declaration of independence of Kosovo till international law was considered. Many participants contested that even though the declaration of independence is not prohibited by the international law, the DOI authorized by Kosovo was in violation of the principle of territorial integrity mentioned in the Article 2 of the UN Charter and Article 4 of the Helsinki Conference. According to the UN Charter, Article 2 provides that "*All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.*" Furthermore, Article 4 of the Helsinki conference says "*[t]he participating States will respect the territorial integrity of each of the participating States*". In both the articles, these principles form the basis for peace in international order, but both are only confined to the relations between states.<sup>67</sup> There is no mention of relations within a state in these articles that influence the behavior of sub-state entities. Therefore, the DOI authorized by Kosovo neither violated the principle of territorial integrity nor the international law. This, however, doesn't mean that other sovereign states were not bound by such principles, and their recognition of Kosovo's statehood might have violated the above principles. But since Kosovo's DOI was not in violation of any law, the recognition of Kosovo's statehood by these states did not violate any law either.

During the proceedings, the cases where the security council condemned the declaration of independence were used as a basis for arguments against Kosovo's DOI e.g. (SC Resolution 787 for Republika Srpska, SC Resolution 541 for Northern Cyprus). The court concluded that such a stance by the Security council towards the DOI stemmed from the unlawful use of force, violations of the international law norms and not from the unilateral nature of it.<sup>68</sup> If this were the case, UNSC would have issued a resolution in Kosovo in unequivocal terms as in the cases mentioned above. Since the UNSC did not have a similar position towards Kosovo, the prohibition of DOI from the past practice of the Security council would be unjustified and unlawful. Furthermore, the

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<sup>67</sup> Dunay, P. and Haines, S. (2010). The Kosovo Advisory Opinion of the International Court of Justice and its Political Consequences. Geneva Centre for Security Policy, (7).

<sup>68</sup> Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 38, point 81.

UNSC resolution 1244 only maintained its authority as an interim administrator in Kosovo. It could not in any way act as a permanent institutional framework but only as an institution assisting in negotiating a desired solution, whatever that may be. Neither did it create any obligation under the international law to prohibit the expression of the desire of independence through a DOI nor did it contain any conditions for achieving the final status of Kosovo. Moreover, the resolution 1244 did not describe the final status of the region nor did the UN Security Council reserve the decision regarding the status of Kosovo for itself, therefore and Kosovo's DOI was an attempt to determine the final status of the territory. Therefore, the court's conclusion denied the claims of DOI in violation of UNSC Resolution 1244 and thereby came in the favor of Kosovo.<sup>69</sup>

Regarding the violation of Constitutional Framework of Serbia, the ICJ concluded that the authors of the Declaration of Independence were acting as persons who as the representatives of the people of Kosovo, acted together outside the framework of the interim government and not as one of the provisional institutions of self-government bound by the constitutional framework of Serbia. This was visible from the language of the document, which cemented the fact that the authors did not in any way act under the framework of the Provisional Institution of Self-Government (PISG) but focused instead at establishing Kosovo as an independent country within the capacity of non-state actors.<sup>70</sup> Acting as representatives of the people kept them outside the framework and responsibilities under the PISG. Therefore, it did not exceed or violate the authority provided by Constitution of Serbia.<sup>71</sup>

The participants during the court proceedings further raised claims regarding the right of the people of Kosovo to create their own nations either through self-determination or through the principle of “Remedial Secession”? Secession under international law is only justified if the group seeks it as “the last resort”<sup>72</sup>, meaning there is no feasible solution available for them. The historical evidence especially the events in 1989-1990 with the Serbian authorities taking away the autonomy by dissolving

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<sup>69</sup> Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo, Advisory Opinion, ICJ Reports, 2010, pp. 36–39.

<sup>70</sup> Murphy, S. (1999). Reflections on the ICJ Advisory Opinion on Kosovo: Interpreting Security Council Resolution 1244 (1999). *GW Scholarly Law*, [online] pp.20-30. Available at: [https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?referer=https://www.google.cz/&httpsredir=1&article=2216&context=faculty\\_publications](https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?referer=https://www.google.cz/&httpsredir=1&article=2216&context=faculty_publications) [Accessed 16 Oct. 2018].

<sup>71</sup> Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo, Advisory Opinion, ICJ Reports, 2010, p. 403, part IV, para. 109,

<sup>72</sup> Rafols, X. (n.d.). *Secession in International Law*. [online] Barcelona: Instituto De Derecho Publico. Available at: <http://idpbarcelona.net/docs/blog/secession.pdf> [Accessed 22 Jul. 2018].

the Kosovo government highlights that Kosovo was denied internal self-determination. Even after the UNSC resolution of 1244, which established the autonomous status of Kosovo, the negotiations between Serbia and Kosovo didn't bring any fruit. The continuous failed negotiations and turbulent history with years of conflict, any realistic political solution or agreement except for an independent nation would have been unimaginable for the Kosovo Albanian population. In 2007, the troika consisting of the United States, European Unions and Russia reported to the United Nations Security Council that the negotiations are continuously failing with neither party considering surrendering its position on the question of sovereignty over the territory of Kosovo.<sup>73</sup> The troika further informed that any talks regarding Kosovo's status would be redundant, which goes on to prove that Kosovo didn't have any other option other than independence. The court however, refused to answer or discuss any such questions as they were outside the scope of the question put in front of them by the Serbian government. The question simply requested the opinion of the court towards the legality of DOI according to international law. It neither focused on the validity of Kosovo's statehood & its recognition nor the legal consequences of the DOI.

Even though the questions regarding Kosovo's statehood were denied justification, the ICJ, however, did mention the evolution of the right of self-determination in the twentieth century. It explained that many news states came into existence through declaration of independence but nowhere the act of enforcing such declarations were regarded as contradictory to international law. Furthermore, it clarified that the people belonging to the Non-Self-Governing Territories and people being subjected to exploitation, subjugation or domination, do have the right of self-determination that could pave way for the right to independence.<sup>74</sup> This basically means that the above-mentioned people could exercise their right of self-determination to get independence, if they are experiencing such behavior by the parent state.

Considering the principle of self-determination when examining the secession of Kosovo point to the justified claim of an independent state from Serbia since the Kosovo Albanians are "people" different from other groups, have a defined territory and completely different historical, cultural and linguistic background than the Serbs. Not only did they suffer from decades of injustice and human rights violation, the Serbian authorities denied their claims

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<sup>73</sup> UN Security Council Resolution 1244, June 10, 1999, Preamble, para. 11 and Raic David, *Statehood and the Law of Self-Determination*, Kluwer Law International, the Hague, 2002, p. 270.

<sup>74</sup> *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo*, Advisory Opinion, ICJ Reports, 2010, pp. 36–39.

for autonomy continuously. The failed international negotiations left them with no other alternative than to demand for an independent state, which fulfills all the necessary conditions to support their case of unilateral secession; the reason why it gained recognition from more than 100 independent states.<sup>75</sup>

### 3.2 Western Sahara

Western Sahara is one of the Non-Self-Governing Territories with the ongoing conflict in the region followed by incessant negotiations that fail to bear any fruit. It raises the basic yet most important question of “Is United Nations effective in providing a practical solution to issues involving the exercise of right of self-determination outside the colonial context”? Under this case, we will try to highlight the complexities surrounding the territorial conflict between Morocco and Western Sahara, and the legal right to self-determination to the people of Western Sahara.

Before discussing the conflict, the historical background along with present situation needs an explanation. Western Sahara, a colony of Spain in 1884 was referred as “Spanish Sahara”.<sup>76</sup> The Arab population migrated from Yemen intermingling with the local Berber population formed the indigenous population of the region known as Saharawi, that date back to 12<sup>th</sup> century. Following the colonization, the Spanish discovered vast amount of phosphorous reserves along with oil and fish and started exploiting the territory for their own economic gains. Things however changed significantly after the Second World War, marking the beginning of the decolonization period through which many African countries started asserting their independence. Morocco gained its independence from France in 1956 with Mauritania following suit and declaring independence in 1960 but Spain however declared “Spanish Sahara” a province to avoid any such similar pro-independence movement but it did little to help on the global platform with the community demanding self-determination for the people of the region. In 1963, U.N. placed “Western Sahara” in the “Non Self Governing Territory” and began pressurizing the Spanish to withdraw from the territory and give the people of Western Sahara the right to determine their own political status through a

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<sup>75</sup> Crnić-Grotić, V. (2011). *The Right to Self-Determination- The Kosovo Case Before the International Court of Justice*. Rijeci: Pravni fakultet Sveučilišta u Rijeci.

<sup>76</sup> Western Sahara, Advisory Opinion, I.C.J. Reports (ICJ 1975). Point 62, Page 26

referendum (Resolution 2229).<sup>77</sup> The 1970s marked the formation of freedom fighter Polisario front (The Frente Popular para la Liberacion de Saguia el Hamra y Rio) consisting of young individuals representing the Western Sahara and its government in exile, the Saharan Arab Democratic Republic (SADR), which marked the conflicts between the Polisario front and the Spanish government. Spanish finally succumbed to the international pressures and liberation movement, carried out the first census of inhabitant in 1974 and decided to leave the territory after the referendum in 1975. It was throughout the planning phase of the referendum that Morocco and Mauritania started proffering for the territory. Following the escalating situation, U.N. finally decided to postpone the referendum and requesting the International Court of Justice's advisory opinion on the matter. A few days after the court's declaration, Morocco invaded the territory on the planned date of Western Sahara's independence from Spain, in the infamous "Green March" and took control of almost sixty five percent of Western Sahara's territory with the Mauritanian controlling the southern thirty five percent. Soon in 1979 the conflicts between Polisario Front, Mauritania and Morocco emerged, with Algeria supporting the liberation movement. It was during these confrontations, Mauritania ended its role in the territorial conflict by making peace with the Polisario Front and abandoning its control over the southern part of Western Sahara, which Morocco overtook. During the conflicts the U.N. assisted in the ceasefire and put forward the "Settlement Plan", followed by the establishment of United Nations Mission for a Referendum in Western Sahara (MINURSO) in 1991 to assist in determining the sovereignty of the people of Western Sahara.<sup>78</sup> In 1996, U.N. suspended the referendum followed by the failure of the James A Baker III plan because of disagreement between both the groups regarding the identification and participation of voter in the process of self-determination. After Bakers resignation, Peter van Walsum filled his shoes and concluded that only two options exist; either confirmation of stalemate in the negotiations which would eventually lead to more violent conflicts or negotiations without any precondition.<sup>79</sup> Following the negotiations in 2008, no result could be achieved.

One argument to counter the self-determination of Western Sahara could be that Spain being

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<sup>77</sup> UNGA Resolution 2229 (XXI) Point 4. Available at:  
[http://legal.un.org/repertory/art2/english/rep\\_supp4\\_vol1\\_art2\\_1\\_5.pdf](http://legal.un.org/repertory/art2/english/rep_supp4_vol1_art2_1_5.pdf)

<sup>78</sup> U.N. Security Council Resolution 1495 (31 July 2003). Available at  
<http://unscr.com/en/resolutions/doc/1495>

<sup>79</sup> Meaning Morocco would not require Polisario to recognize Morocco's sovereignty over the territory before discussing autonomy and that Polisario would not demand discussion of a referendum with independence as one of the option before the negotiations.

the administering power over Western Sahara ceded the territory to Morocco and Mauritania. Now looking into the legal aspect of this statement, under the United Nations General Assembly Friendly Relations Declaration under the U.N. Charter asserts that the status of a Non Self Governing Territory is different from the territory of state administering it. The separate status will continue to exist till NSGT have exercised its right to determine their political status through the right of self-determination. Not only does this make the administering power's status temporary but also marks that the administering power does not have any sovereignty over the territory. In this case, Spain did not have the right to cede the territory to either Morocco or Mauritania. Since the territory of Western Sahara has never been under the official recognized border of Morocco, the right to self-determination of the people part of NSGT cannot be equated with the right to a subgroup attempting secession outside the colonial context.<sup>80</sup> According to the U.N. resolution 1541, Western Sahara has three options. First, the creation of a new independent state. Second, free association with Morocco as an autonomous region. And third, full integration with Morocco. Furthermore all the choices must be a result of free will of the people of the territory. In 2016, Ban-Ki-moon called the Morocco's move over the territory "occupation".<sup>81</sup>

Coming back to the advisory opinions important for the conclusion of this chapter. In 1975, U.N. put forward two questions regarding Western Sahara; First, Whether Western Sahara had been *terra nullis* at the time of Spanish colonization? Second, if there exist any legal relationship between Morocco and Western Sahara, and Mauritania and Western Sahara.<sup>82</sup> The claims made by both the independent nations are prior to the Spanish colonization.

To answer the first question, there is a need to focus on *terra nullius*. As explained in Chapter 2, *terra nullius* is a territory belonging to no one and open to acquisition. To acquire the sovereignty of a territory, "occupation" is a well-recognized method. To prove the status of Western Sahara to be as "terra nullius" during the time of Spanish colonization, it should be established that Western Sahara belonged to no one at that time. If the territory shows any sign of inhabitation by people or tribe with social or political structure, such a territory cannot

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<sup>80</sup> New York City Bar (2012). *The Legal Issues Involved in The Western Sahara Dispute*. [online] New York: New York City Bar Association. Available at: <https://www2.nycbar.org/pdf/report/uploads/20072264-WesternSaharaDispute--SelfDeterminationMoroccosLegalClaims.pdf> [Accessed 19 Oct. 2018].

<sup>81</sup> Nichols, M. (2016). *U.N. chief regrets Morocco 'misunderstanding' over Western Sahara remark*. [online] Reuters.com. Available at: <https://www.reuters.com/article/us-morocco-westernsahara-un/u-n-chief-regrets-morocco-misunderstanding-over-western-sahara-remark-idUSKCN0WU1N9> [Accessed 19 May 2018].

<sup>82</sup> *Western Sahara, Advisory Opinion, I.C.J. Reports 1975* [1975] 414 (ICJ). Available at: <https://www.icj-cij.org/files/case-related/61/061-19751016-ADV-01-00-EN.pdf>

be considered terra nullius and therefore acquisition of such a territory is only valid through agreements concluded by local rulers. Based on the information provided, the court reached the conclusion that Western Sahara at the time of Spanish colonization was inhabited by people and tribes depicting a social organization under competent chiefs representing them. Furthermore, during the court proceedings, it was confirmed that Spain's colonization of Western Sahara was supported by the Royal Order of 26 December 1884. According to the Royal Order, the agreement between the local chiefs and the king of Spain allowed the territory of Western Sahara to be taken under the protection of the ruler of Spain.<sup>83</sup> With the available evidence, the court concluded that Western Sahara was not terra nullius at the time of colonization by Spain. During the court proceedings, many questions regarding the legality of agreement between the local chiefs and Spain were raised, but since the first question did not demand any answers regarding the legal character of any agreements, the court decided not to address them. Furthermore, after the conclusion on the first question, the court did not find necessary to state whether Western Sahara was a part of Mauritania or Morocco for a simple fact that it did not fall within the scope of the first question.

To answer the second question, the claims of Morocco and Mauritania over Western Sahara should be examined separately. Morocco based its territorial claims on the continuous unchallenged display of authority over the territory of Western Sahara and to support its claims, Morocco referred to various historical works from the 7<sup>th</sup> century AD.<sup>84</sup> Since historical works relevancy, as evidence can be ambiguous, it failed to gather any attention from the court. Morocco further referred to the case of Denmark's claim over the territory of Greenland to support its assertion. Highlighting the case, Morocco argued that the geographical contiguity between its borders and Western Sahara coupled with the shared desert characteristic of the territories demonstrated the continued display of authority. Morocco used the above-mentioned case to strengthen its claim over the territory of Western Sahara hoping the court's decision would come in its favor just like it did for Denmark (Denmark vs Greenland). The court but argued that to prove the continued display of authority, it should be supported by "intention or will to act as sovereign" and "actual exercise of authority".<sup>85</sup> Considering this particular case, the evidence provided by Morocco to manifest the display of authority was ambiguous and made legitimacy of the claims

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<sup>83</sup> Abass, A. (2014). *Complete International Law: Text, Cases, and Materials*. Oxford University Press, pp.200-300.

<sup>84</sup> See point 89-91 *Western Sahara, Advisory Opinion, I.C.J. Reports 1975* [1975] 414 (ICJ).

<sup>85</sup> See pg. 45-46 *Western Sahara, Advisory Opinion, I.C.J. Reports 1975* [1975] 414 (ICJ).

difficult. The court further claimed the geographical propinquity of Morocco and Western Sahara debatable.<sup>86</sup> To prove the internal display of authority, Morocco requested the court to consider the unique structure of Moroccan state founded on the basis of Islam and allegiances of local chiefs to the Sultan rather than the notion of territory. The claims were based upon continuous historical and political ties, which according to them were cemented by the religious allegiance owed by the Saharawi people to the Sultan of Morocco. Furthermore Morocco provided evidence according to their Islamic legal law as highlighted by Pamela Epstein “Morocco offered evidence rooted in traditional Islamic legal principle of Bayya which asserts an allegiance amounting to a "contractual agreement whereby the Muslim community offered a conditional loyalty to the leader in response to their recognition of obligation under the Sharaia”.<sup>87</sup> To support its claims to sovereignty over Western Sahara, Morocco highlighted the allegiances of Saharan local chiefs i.e. caids to the Sultan, imposition of taxes and Koranic laws by the Moroccan authorities. All such claims were denied by Spain.<sup>88</sup> Based on the material provided, the International Court of Justice (ICJ) did accept the existence of cultural and social links of allegiance between the Saharawi’s and the Sultan of Morocco but it didn’t prove the territorial rights of Morocco.<sup>89</sup> More so, the appointment of caids (local administrators) & taxes only proved the existence of the Saharawi’s authority. Furthermore, the Sultan’s sherifian religious status did not in any way depict the territorial control over the region of Western Sahara. The ICJ claimed there is a need of political, formal, traditional, social and cultural ties between the state and the colony so that the former can show territorial ties over the latter and mere allegiances cannot be deemed sufficient evidence to prove the claims by Morocco. Due to the lack of any concrete evidence, the court finally declared that Morocco did not possess any territorial rights over the region of Western Sahara.

On the other hand, Mauritania claims were based on its entity Bilad Shinguittie and its relationship with the neighboring regions. Mauritania claimed that Shinguittie had legal ties in linguistic, religious, racial and economic form with the tribes of Western Sahara. ICJ gave some credibility to these claims after discovering ties of legal character between the two groups. Furthermore, the court conferred and confirmed the legitimacy that the people of Shinguittie could possess rights over the land through which they migrated and could

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<sup>86</sup> Ibid.

<sup>87</sup> Epstein, P. (2009). Behind Closed Doors: "Autonomous Colonization" in Post United Nations Era - The Case for Western Sahara (Vol. 15). Pp. 112. Annual Survey of International & Comparative Law.

<sup>88</sup> See pg. 101 *Western Sahara, Advisory Opinion, I.C.J. Reports 1975* [1975] 414 (ICJ).

<sup>89</sup> See para 105-107 *Western Sahara Advisory Opinion* (International Court of Justice October 16, 1975).



constitute a legal tie between the Mauritanian entity and Western Sahara. But since Mauritania being a French colony couldn't act with international legal personality therefore could not contest over the sovereignty of Western Sahara. The court could not find the character of the personality of the Mauritanian entity different from the tribes and emirates composing it.<sup>90</sup> Hence the court also rejected the territorial claims of Mauritania over Western Sahara. International Court of Justice finally submitted its official statement to the United Nations, that neither Morocco nor Mauritania possessed legal ties strong enough to affect the decolonization of Western Sahara by their territorial sovereignty claims.

## 4. ANALYSIS

### 4.1 Kashmir

Like Western Sahara, Kashmir remains one of the most conflicting cases of self-determination for the international community to resolve, considering the history of both nations involved i.e. India and Pakistan, followed by the failure of negotiations made the issue almost unresolvable. Since the independence of India from the British India in 1947, the valley has been constantly in the state of unrest between Indian government and the Jammu and Kashmir Liberation Front (JKLF). Since 1989, the neighbors i.e. India and Pakistan have been involved in violent confrontations in the region since the last 20 years, which consumed the lives of almost 40,000 inhabitants of the valley.<sup>91</sup> The continued intense encounter between the Indian government, JKLF and the third parties entering the region made the matters worse for the population in the region. It was in the 1990s when the demand for freedom started to arise from the discontent population of the valley.<sup>92</sup>

The demands for an independent state of Kashmir are based upon the four following principle arguments. First, the people of the valley consider the historical accession of the state of Jammu and Kashmir into the Indian Union, unlawful. Second, the denial of the right of self-determination to the residents of the state of Jammu and Kashmir by failure to hold a fair

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<sup>90</sup> See point 148 *Western Sahara, Advisory Opinion, I.C.J. Reports 1975* [1975] 414 (ICJ).

<sup>91</sup> Chandhoke, N. (2016, December 19). *When is Secession Justified? The Kashmir Case*. Retrieved May 10, 2018, from ETH Zurich: <http://www.css.ethz.ch/en/services/digital-library/articles/article.html/782918c1-d866-46a9-be29-4312a25ddf7d/pdf>

<sup>92</sup> Wajahat Habibullah, 2008, *My Kashmir: Conflict and the Prospects of Enduring Peace*, Washington D.C: United States Institute of Peace, p. 170-200

plebiscite promised by the Indian government. Third, the human rights violation and institutional injustice inflicted upon the people by the Indian government.<sup>93</sup> Fourth, the people of Kashmir associate themselves as a group with distinct identity than the rest of the Indian subcontinent. These arguments will be explained in detail in the next few paragraphs.

Before discussing the above points, it's important to once again assess the most relevant articles of UN Charter to this case. As mentioned in Chapter 2, UN accepts secession only in colonial context and forbids any effort towards unilateral secession. Furthermore, the resolution 1514 only affords the right of self-determination to the people of the colonized nations or NSGT and fails to mention any means of self-determination through unilateral secession. As the resolution 1514 highlighted the importance of territorial integrity of the states, the resolution 2625 reinforced the prohibition of resolution 1514 about the integrity, sovereignty and unity of states applied to the states "which conduct themselves in compliance with the principle of equal right and self-determination of people".<sup>94</sup> Therefore, the resolution made clear that failure to comply with the "self-determination and equal rights of the people" by the state could be seen as violation of the resolution. Considering the resolution 1514 and 2625, the question of Kashmir secession partly also depends upon the behavior of Indian government in the region.

Coming back to the main arguments for Kashmir's secession lets focus on the first arguments, which challenges the legitimacy of the Indian government's sovereignty over the state of Jammu and Kashmir by rejecting the accession calling it unlawful. Prior to the partition of the Indian subcontinent, Jammu and Kashmir, a princely state under the rule of Maharaja Hari Singh recognized the British Empire as the supreme power. After the departure of the British on 4 June 1947, the maharaja was left with a choice to either join India or Pakistan. The state was geographically contiguous with both nations but shared better geographic, demographic and economic links with Pakistan; with more than 70% of the population in the region being Muslims.<sup>95</sup> Before choosing the nation to integrate the

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<sup>93</sup> Khan, R. (2015). *Kashmir Dispute: A Legal Perspective*. NDU Journal. Pp. 140-150.

<sup>94</sup> United Nations General Assembly. (1970, October 24). 2625 (XXV). *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*. Retrieved May 14, 2018, from UN Documents: <http://www.un-documents.net/a25r2625.htm>

<sup>95</sup> Webb, M. J. (2012, November 21). *Escaping History or Merely Re-Writing it? The Significance of Kashmir's Accession to its Political Future*. pp. 450-500. Retrieved May 01, 2018, from Research Gate: [https://www.researchgate.net/publication/234007029\\_Escaping\\_History\\_or\\_Merely\\_Re-Writing\\_it\\_The\\_Significance\\_of\\_Kashmir's\\_Accession\\_to\\_its\\_Political\\_Future](https://www.researchgate.net/publication/234007029_Escaping_History_or_Merely_Re-Writing_it_The_Significance_of_Kashmir's_Accession_to_its_Political_Future)

state with using the instrument of accession, the maharaja could also conclude the standstill agreement where the essential service of the nation/state could be preserved till Jammu and Kashmir either joined India or Pakistan. Finally, on 15 August 1947, Jammu and Kashmir concluded a standstill agreement with Pakistan following which the Pakistani nationals approximately 3000-4000 crossed into the Kashmir committing violent and gruesome atrocities, which prompted the maharaja to request for military support from India to defend the integrity of the region.<sup>96</sup> The first governor general of independent India Mountbatten, insisted the Maharaja of Kashmir to first accede into the Indian Union prior to which any military action would be considered an invasion on an independent state. The then Jammu and Kashmir Prime Minister M.C. Mahajan agreed to accede the territory to India on 26 October 1947 for the military support to defend the territory and bring an end to the violence. Mahajan further reports that he flew to Jammu on 27<sup>th</sup> October 1947 to obtain the signature of the Maharaja on the formal documents whereas V.P. Menon reports that he flew with Mahajan on 26<sup>th</sup> October 1947 to obtain all the formal documents from the Hari Singh.<sup>97</sup> Mountbatten accepted the instrument of accession and stated, "...it is my government's wish that as soon as law and order have been restored in Kashmir, her soil cleansed of invaders, the question of state's accession should be settled by a reference to the people".<sup>98</sup> Similarly, on 2 November 1947 Jawaharlal Nehru broadcasted on All India Radio "We are prepared when peace and law and order have been established to have a referendum held under international auspices like the United Nations. We want it to be a fair and just reference to the people, and we shall accept their verdict".<sup>99</sup>

Considering the accession of Jammu and Kashmir and the accounts of Menon and Mahajan show conflicting information, which highlights the inconsistencies in India's account of accession. Furthermore, Kashmir's secession would be a threat to the integrity of India as it may open accession issues in other formerly princely state. The alleged right to Kashmir's secession is based upon the argument that the accession of Kashmir to India was not in accordance with the regulations of accession but even if we consider this argument completely true, the regulations of accession only allowed the state of Jammu and Kashmir a choice to either join India or Pakistan. Therefore, failure to act in accordance with the

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<sup>96</sup> Mahajan, Mehr Chand. 1963, *Looking back : the autobiography of M.C.Mahajan, former Chief Justice of India* Asia Pub. House Bombay

<sup>97</sup> Campbell-Johnson, A. (1994). *Mission with Mountbatten*. New Delhi [u.a.]: Wiley Eastern Ltd.

<sup>98</sup> Birdwood, C. (2005). *Two nations and Kashmir*. Srinagar: Gulshan Books, p.214.

<sup>99</sup> Hewitt, Vernon Marston. 1995, *Reclaiming the past? : the search for political and cultural unity in contemporary Jammu and Kashmir / Vernon Hewitt* Portland London. p.77

regulations of accession did not give the right or justify the creation of an independent state. The rights returned to the princely state after the departure of the British, were temporary till they choose to incorporate into either India or Pakistan.<sup>100</sup> This was done to protect the territorial integrity of the two new nations and avoid fragmentation of the subcontinent during partition. Furthermore, questions regarding the authority of the Maharaja to sign the instrument of accession were raised. Before discussing Maharaja's authority, let's discuss the argument if the maharaja did not possess the authority to determine the future of the state, does that give Kashmir the right to demand secession? Matthew J. Webb summarizes the answer "we cannot premise a right to secede upon an individual's failure to abide by procedures when the individual did not possess the authority that these procedures imbued him/her with, or the procedures were otherwise invalid". Considering the actual situation, Maharaja was the only authority to take decisions for the state and to question a ruler right to sign the Instrument of Accession would have been interpreted as an attempt to interfere in the internal politics of the state by the government of India.<sup>101</sup> If the argument is raised that the Maharaja's decision to accede the state of J&K to India was taken under pressure<sup>102</sup>, it still fails to question the sovereignty of India over Kashmir and doesn't make the Instrument of Accession fraudulent. Even if Kashmir's accession to India was brought in to effect by violence, meaning that Maharaja didn't have any other option but to ask for India's help, the first act of violence towards Kashmir was still mitigated by the Pakistani tribes. The statement by Lord Louis Mountbatten "Maharaja was most anxious to remain independent, and, nothing but the terror or violence could have made him accede to either Dominion; ...the violence had come from tribes for whom Pakistan was responsible..." supports these claims.<sup>103</sup> Even if the legitimacy of India's sovereignty over Kashmir is not recognized or considered illegal, that does not mean that Pakistan possess the sovereignty over the territory. But what does international law say about that? According to International law, the state sovereignty is characterized by territorial control (state's control over its territory) and

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<sup>100</sup> Pal, S. (2017). The Making of A Nation: How Sardar Patel Integrated 562 Princely States. *The Better India*. [online] Available at: <https://www.thebetterindia.com/124500/sardar-patel-vp-menon-integration-princely-states-india-independence/> [Accessed 7 Nov. 2018].

<sup>101</sup> Nath, S. (2017). The myth of the instrument of accession: A Reappraisal. *International Journal of Applied Research*, [online] pp.17-20. Available at: <http://www.allresearchjournal.com/archives/2016/vol2issue3/PartA/2-1-133.pdf> [Accessed 7 Nov. 2018].

<sup>102</sup> Pressure to protect the state and its people from the Pakistani nationals that crossed borders into J&K and started committing violent atrocities. To receive military support, Maharaja acceded the state to India. See pg. 44.

<sup>103</sup> Mountbatten, L. (1947). Mountbatten to Nehru on the Bitter Reactions of Liaquat Ali and Jinnah on the Accession of Kashmir to Indian Union Sardar Patel's Correspondence. [online] pp.5-8. Available at: <http://www.claudearpi.net/wp-content/uploads/2016/12/1947-11-03-Mountbatten-to-Nehru.pdf> [Accessed 7 Nov. 2018].

independence of the state in maintaining international relations.<sup>104</sup> The ethos of territorial control is that the state should exercise its authority over the peoples, organizations and its associates within its boundaries. India exercises this authority over the state of J&K, which means that the individuals and the organizations in the territory of J&K fall within the power of the government of India. Furthermore, the special status granted to J&K by Indian constitution under Article 370 highlights the authority of Indian government in determining the political, economic and social policies in the region. This cements the territorial control of India over J&K. Another characteristic that underlines the state sovereignty is the independence of the state to participate in international relations.<sup>105</sup> J&K is one of the twenty-nine states of India and is represented by the Indian government among international community.<sup>106</sup> This highlights the India's sovereignty over J&K but that doesn't mean that the people of J&K cannot express their views to change it, which is exactly what the current situation in the valley depicts. Talking about the people's will to determine their future, the next section will focus on Kashmir's plebiscite.

Focusing on the issue of Plebiscite, an argument can be formed that Kashmir's secession is justified on the procedural ground that India did not fulfill its pledge of a fair plebiscite and therefore marks the breach of obligation that invalidates India's sovereignty over the territory. As mentioned above, Mountbatten and Nehru both made the promise of a fair plebiscite to support the will of the people in deciding their own political future. The statement "*the state may adopt any constitution .for organizing its management...with the requirements of respecting the demands of customary international law or international treaties which are obligatory for him*"<sup>107</sup> allows the state to take decisions related to its territory as long as it does not violate international law or international treaty. Since India exercises sovereign rights over J&K, it is the responsible authority to hold the promised plebiscite. Even though secession is still not accepted in international law in the context of non-colonial countries, there is no mention of any restrictions on organizing a plebiscite, referendum or a DOI in international law. Moreover, it also reflects the views of the people towards their future. In Kashmir scenario, such a plebiscite would have given a chance for the Kashmiri's to express their opinions in determining their political future, whether it meant incorporating into Pakistan, remaining a state in the Indian Union, demanding an independent

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<sup>104</sup> K. Gevorgyan, *Concept of State Sovereignty: Modern Attitudes* (YSU Press, Yerevan, 2014), pp. 440-445.

<sup>105</sup> Ibid.

<sup>106</sup> Union of India (1956). *The Constitution of Jammu and Kashmir, 1956*. C.O. 48, Part II, pp.1-5.

<sup>107</sup> Oppenheim's *International Law*, (Sir R. Jennings & Sir A. Watts, eds.), 9th ed., vol. 1, Harlow, 1992, page 384.

state or any other status for that matter. It is also important to understand why India did not fulfill the promise made by its leaders. Considering the legal procedures for a fair plebiscite, the United Nations Security Council Resolution 47 devised a three-step plan to resolve the conflict. Both the nations agreed to work with the United Nations commission.<sup>108</sup> The first step of the resolution included a ceasefire, with Pakistan withdrawing its forces from the border followed by India's withdrawal of the military to the minimum level just enough to keep law and order. Considering the previous wars with Pakistan, having an army at the J&K border signified a threatening situation for India's territorial integrity especially when the political future of a state sharing border with Pakistan was in question. The protection and maintenance of the territorial integrity of a nation forms the fundamental principle of international law. According to the international law, for the plebiscite to be held with secrecy and fairness, the troops from the interested parties need to be evacuated from the territory where the plebiscite needs to take place.<sup>109</sup> According to India, the first precondition of the resolution was not fulfilled for the plebiscite to be held.<sup>110</sup> Even though the ceasefire was respected by both the parties, the steps outlined by the UN needed to be fulfilled to proceed. Furthermore, in the statement by Mountbatten, the plebiscite could be held only when the law and order had been restored in the valley. The constant involvement of third parties like Hizb-ul Mujahedeen and the liberation front in Kashmir only added fuel to the already existing conflicts with the government. According to international law, the violation of a state's territorial integrity can either occur directly by another state or indirectly in the form of another state supporting a rebel or terrorist group to operate in its region.<sup>111</sup> The terrorist group Hizb-ul Mujahedeen is known to have its base in Pakistan occupied territories and connection with Pakistan's Intelligence agency.<sup>112</sup> Since the partition, the valley has seen three wars between India and Pakistan followed by continuous conflicts between the Kashmiri insurgents and Indian government. With such conditions since Kashmir's accession, holding a plebiscite could lead to unfair/manipulated

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<sup>108</sup> United Nations Security Council. (n.d.). *Resolution of 21 April 1948*. Retrieved May 13, 2018, from United Nations:

[https://undocs.org/S/RES/47\(1948\)](https://undocs.org/S/RES/47(1948))

<sup>109</sup> Fox, G. (1992). The Right to Political Participation in International Law. *Yale Journal of International Law*, [online] 17(2), p.572. Available at:

<https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=https://www.google.de/&httpsredir=1&article=1600&context=yjil> [Accessed 23 May 2018].

<sup>110</sup> Hasbrouck, E. (2014). *Kashmir, self-determination, and human rights*. Avalon Travel Publishing, pp.2-9.

<sup>111</sup> Marxsen, C. (2015). *Territorial Integrity in International Law – Its Concept and Implications for Crimea*. Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, p.19. Available at: [http://www.zaoerv.de/75\\_2015/75\\_2015\\_1\\_a\\_7\\_26.pdf](http://www.zaoerv.de/75_2015/75_2015_1_a_7_26.pdf) [Accessed 23 Feb. 2018].

<sup>112</sup> Fair, Carol. (2014). Insights from a Database of Lashkar-e-Taiba and Hizb-ul-Mujahideen Militants. *Journal of Strategic Studies*. 37. 10.1080/01402390.2013.811647.

results. Therefore, to put in simpler words, the unclear interpretation of the accession of the territory of Jammu and Kashmir to India and the failure to hold the plebiscite provides a troublesome and a slender basis for secession especially keeping in mind the debatable nature of both the situations.<sup>113</sup>

Coming to the next argument that talks about the violence perpetuated in the territory of Kashmir to justify the secessionist claims brings another variable in secessionist claims. As put forward by Neera Chandhoke, the secessionist conflict between two groups i.e. the state and the group demanding secession, usually involves a third party, which profit or direct the conflict to their own advantage whether economic or political.<sup>114</sup> In the case of Kashmir, the extremist group Hizb-ul Mujahedeen is infamous for its connection with Pakistani governmental agencies.<sup>115</sup> Pakistan has been an influential part in conducting violent conflicts by deploying various Kashmiri organizations to favor the conflict towards itself.<sup>116</sup> The growing discontent among the Kashmiris and the loss of faith in the democratic institutions of the government of India paved the way for foreign agents to enter the territory and direct the struggle towards their own goals. The Jammu and Kashmir liberation Front was founded with the objectives of uniting the people and two territories of Jammu and Kashmir along with the setting up of a sovereign state. Failure to gather support from the people, the organization divided into two parts. Following the division, the conflict was then picked up by Hizb-ul Mujahedeen along with the support of Pakistan in the 1990s.<sup>117</sup> Soon after the armed confrontations followed with some demanding a separate nation while the other demanding integration in Pakistan. The group soon started conducting armed operations against the military of India and even the inhabitants of Kashmir.<sup>118</sup> The struggle that started out as a united voice against the institutionalized injustice by the government of India, which could justify secession, soon turned into the organized armed struggle to establish an

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<sup>113</sup> Webb, M. J. (2012, November 21). *Escaping History or Merely Re-Writing it? The Significance of Kashmir's Accession to its Political Future*. Retrieved May 01, 2018, from Research Gate: [https://www.researchgate.net/publication/234007029\\_Escaping\\_History\\_or\\_Merely\\_Re-Writing\\_it\\_The\\_Significance\\_of\\_Kashmir's\\_Accession\\_to\\_its\\_Political\\_Future](https://www.researchgate.net/publication/234007029_Escaping_History_or_Merely_Re-Writing_it_The_Significance_of_Kashmir's_Accession_to_its_Political_Future)

<sup>114</sup> Chandhoke, N. (2016). *When is the Right of Secession Justified?* New Delhi: India International Centre. Pp.15-20. Retrieved May 20, 2018, from India International Centre: [http://www.iicdelhi.nic.in/contentattachments/publications/diaryfiles/29411july92012\\_iic%20occasional%20publication%2037,%20.pdf](http://www.iicdelhi.nic.in/contentattachments/publications/diaryfiles/29411july92012_iic%20occasional%20publication%2037,%20.pdf)

<sup>115</sup> Fair, Carol. (2014). Insights from a Database of Lashkar-e-Taiba and Hizb-ul-Mujahideen Militants. *Journal of Strategic Studies*. 37. 10.1080/01402390.2013.811647.

<sup>116</sup> Ibid.

<sup>117</sup> Chandran, D. (2013). *Armed Conflicts in South Asia 2010: Growing Left-wing Extremism and Religious Violence*. Routledge, p.70.

<sup>118</sup> Ibid.

intolerant version of Islam and its doctrinaire in the region that follows Sufi Islam (best known for its secularism and traditions of tolerance). One of the Kashmiri Islamist patriarchs Geelani said, “The people of Kashmir should, as their religious duty, raise their voice against India’s aggression”. He further claimed, “practice Islam completely under the subjugation of India is impossible because human beings in practice worship those whose rules they abide by”.<sup>119</sup> Not only does this statement points towards the religious sentiments being the driving force in the struggle in the area but it further accuses India of being intolerant towards Islam, which explains that the argument is neither about the rights of the people in the territory nor about democracy.<sup>120</sup> It signals towards the establishment of a theocratic state. International law grants all the peoples the right to determine their own political future, but the ethnic, cultural and linguistic heritage of all people should be respected by guaranteeing the protection of their fundamental rights. How can secession even be an option when the leaders of the struggle lost the primary objective, with foreign invaders and Islamic patriarchs producing illiberal principle in the cause for secession? Furthermore, the right to secession weakens when the extremist groups trying to achieve their own objectives overtake the movement for separatism by sidelining the voice of the people. Even if we consider the violence in Kashmir as a benchmark to negate the state sovereignty over it, these harms were inflicted over time by allowing the inhabitants of the territory to settle in the region and benefit the life better than the previous one before the annexation. Furthermore, discussion over the effects of violence over the legitimacy of the sovereignty of a nation not only opens a door for colonization and annexation but could also render voluntary union impermissible. For e.g. the reunification of East and West Germany led to some severe consequences for East Germany whereas it yielded some benefits for the West Germany. But just because of temporary harms, the reunification of these two states cannot be called unjust. Keeping in mind the presence of third parties in the conflict area, their influence over the separatism struggle and individual Kashmiri militants attacking the Indian military, the Indian authorities cannot consider the possibility of withdrawing the military from the borders and the region of Jammu and Kashmir.

If the future of Kashmir is built through the violence inflicted by such extremist groups, it raises doubts if they would establish democracy and respect the rights of the people.

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<sup>119</sup> Chandhoke, N. (2011). *Contested Secessions: Rights, Self-determination, Democracy, and Kashmir*. New Delhi, India: Oxford Univeristy Press. Pp. 125-180

<sup>120</sup> Ibid.



Therefore, if Kashmir's secession is successful soon, then the future of the people in the territory cannot be secure if the new political community set up will be less democratic than the one already existing. However, international law does not hold any stance on the correctness of a newly created state. Neither does it contain any legal definition to secession, nor is it responsible for creation of states through its norms. Rather it simply stays outside the process through which states are created.<sup>121</sup> The legal system neither authorizes nor prohibits secession. Furthermore, international law does not consider the normative or procedural aspect of state creation. In simpler words, if the new state respects the will of its people and territorial boundaries, it does not matter how the new government took control of the territory and its population.<sup>122</sup> If a state is formed because of secession by violating the principle of self-determination, and the state is real, then neither the UNSC nor the UNGA can eliminate the factual existence of a state.<sup>123</sup> Therefore, to conclude, international law does not distinguish or discriminates between the legitimately or illegitimately born states.

Approaching the final argument, even if we assume the claims of secession to be justified in Kashmir, minorities in the region possess the power and say to determine the future of the state. To consider the right to secession in Kashmir to be *prima facie*, we need to make sure the right weighs in the considerations that have a bearing on them, which in this case would be the right of minorities. According to the 2001 census, the state of Jammu and Kashmir consist of 68% Muslims, 28% Hindus, 1.8% Sikhs and 0.90% Buddhists<sup>124</sup>, defining the Muslim majority in the region followed by the Hindus. The region contains both Shia and Sunni Muslim located in Kargil and Kashmir valley respectively whereas the Hindu and the Buddhist population reside in the Jammu and Leh territory respectively.<sup>125</sup> The area is also home to many small groups like *Gujjars, Kashmiri Pandits, Dogras and Bakkarwals*. These minorities possess the same rights as the majority to determine the future of the state but the difference between such groups and majority Muslims lie in their preferences. The Hindu and the Buddhist minorities prefer more integration into the Indian Union whereas the demand of secession only arises from the Muslim dominated Kashmir valley. Furthermore, the Hindu and the Buddhist community demand the abrogation of Article 370 along with full integration

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<sup>121</sup> Marcelo G. Kohen (2006). *Secession (International Law Perspective)*. Cambridge University Press. Pp. 173-190

<sup>122</sup> *Ibid.* See pp.174

<sup>123</sup> *Ibid.* See pp. 198

<sup>124</sup> Jammu and Kashmir Population Census data 2011. (2011). *Census Population 2018 Data*. Available at: <https://www.census2011.co.in/census/state/jammu+and+kashmir.html> [Accessed 9 Nov. 2018].

<sup>125</sup> On the Pakistani side of J&K, Balti, Shina, Khovar, Burushashki, Wakhi and Pahari speaking people are part of the state, and in the Northern Areas Ismaili, Sunni, Shia and NurBakshi sects live together.

of the state into the Indian Union since 1950s. Article 370 of the India Constitution gives autonomous status to the state.<sup>126</sup> There exists a conflict between the demand of Muslims in Kashmir and the other minorities residing in the state. If the right to free political association forms the basis of the secessionist claims of Jammu and Kashmir, then the sub groups within the state should be afforded a similar choice. While Kashmir calls for independence or autonomy in the region, its stance rejecting the sub regional autonomy to other groups depicts the irony in their demands.<sup>127</sup> With continuation struggle and displacement of many minorities from their homes have led to many more autonomy and separatism demands. During the 1990 uprising, 150,000 to 160,000 Hindu were forced to evict their homes and settle in different regions of the territory.<sup>128</sup> The Kashmir exiled Hindu community has begun to demand a separate homeland under the governance of the Indian Union. Similarly, the *Gujjar* minority has demanded autonomy from the Kashmir with a distinct political status. The minorities in the region desire dismissal of special status granted to the state with some regions in the states subsequently being administered directly by the central government of India. Since the 1980s most of the minorities have been forced out of Kashmir, but they still reserve the right to have a say in the future determining issues of the region. To sum up the argument, there is no consensus on secession in Jammu and Kashmir as different groups demand and conceptualize the future of Kashmir differently.

Kashmir's demand for secession is more likely to find acceptance among the parties involved i.e. India, Pakistan and Kashmiri separatists when looked through the lens of Remedial Rights Only theory. This theory focuses on the sub-state's demand for secession based on violation of the rights of its people by the parent state.<sup>129</sup> Kashmir has been a conflicted valley that has suffered various human rights abuses since decades, and the demand for secessions have been rising ever since, which explains the fact that the government of India has been unable to propose or implement a solution. A right grounded on such abuses would be more relatable to the valley where most of the abuses took place and where the pro-secessionist views are more conspicuous. However, such a claim would have to overcome

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<sup>126</sup> Krishen Teng, M. (1990). *Article 370*. Anmol Publications. Available at: <https://koausa.org/article370/doc/article370.pdf> [Accessed 9 Nov. 2018].

<sup>127</sup> Chandhoke, N. (2018). Is the United Nations Still Relevant for Kashmir?. *Journal of Modern Hellenism*, 30, pp.95-120. Available at: <http://journals.sfu.ca/jmh/index.php/jmh/article/view/13> [Accessed 9 Nov. 2018].

<sup>128</sup> Essa, A. (2011). Kashmir: The Pandit question. *Aljazeera*. Available at: <https://www.aljazeera.com/indepth/spotlight/kashmirtheforgottenconflict/2011/07/2011724204546645823.html> [Accessed 9 Jun. 2018].

<sup>129</sup> Day, J. (2012). *The Remedial Right of Secession in International Law*. Potentia, pp.29-32. Available at: [https://blogs.elpais.com/files/2.secession\\_day.pdf](https://blogs.elpais.com/files/2.secession_day.pdf) [Accessed 23 May 2018].

some deep obstacles to be persuasive; for example, the worst of the abuses and violation took place after a campaign claiming a right to secede by the Kashmiri people, which led to shocking human rights violation by all sides. Furthermore, claim based on such abuse may allow the possibility of strict administration along with lesser territorial autonomy than independence if its revealed to be the most favorable way of securing Kashmiri's human rights. Also, using this approach might shift the focus from the events that occurred a few decades ago since they cannot be undone, towards new viable processes for conflict resolution regarding J&K's future. Considering the current stalemate between all the involved parties, this might seem like an optimal solution considering that all parties agree on putting an end to violence. Therefore, such a solution might face minimum opposition towards its implementation. If for the above reasons, demands for secession gain momentum in the coming future and Kashmir declares itself an independent state, the decision on such matters remain within the scope of the Indian government only. The government can decide to either oppose such activities or diplomatically settle the dispute, but such matters lie outside the dominion of the UN. According to the Article 31D of the Indian Constitution, the government holds the right to oppose any "anti-national" activities related to individuals, groups or associations.<sup>130</sup> Therefore, any declaration of independence by the Kashmiri people would qualify to be treated as anti-national activity by the government of India but it would not be violating any international law since international law doesn't prohibit any DOI and referendums. With J&K, the Indian government follows a strict stance because it consists of three religions, Muslim, Hindu and Buddhists, which will experience a spillover effect if the government even considers the demand for secession justified. Since the call for secession is extremely divided with only one religious group demanding it, the government of India does not consider it a viable option because of the risk it possess to other religious groups present in and around the valley and the territorial complications and consequences it would have to embrace. But what about recognition from the UN and global community? Taking Kosovo's example, it is an independent country recognized by other sovereign nations but still lacks recognition from the UN. This doesn't stop it from setting relations with other nations. To explicate, till now outside the colonial context, UN recognized a country as independent only if that country first gained recognition from the parent country.

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<sup>130</sup> Indian Government (1976). *The Constitution (Forty-Second Amendment) Act, 1976*. Available at: <https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-forty-second-amendment-act-1976>

<sup>131</sup> So, if a newly seceded state calls for recognition, it needs support from either the UN or simply other sovereign independent nations.<sup>132</sup> However, recognition is not a pre-condition for statehood.<sup>133</sup> Every state strives for recognition because it reaps socio, economic and political benefits through bilateral agreements and trade. But the support from other sovereign nations towards secession depends upon a case by case scenario. For e.g. Kosovo is recognized by many countries because it fulfills all three elements of state i.e. territory, population and state power unlike the case of Western Sahara, which lacks similar credence. This creates a normative problem of whether power politics is stronger and more influential than the international law? Moreover, the creation of states is neither influenced nor normalized by the international law.<sup>134</sup> Till the time international law does not recognize secession and provide a framework to treat all cases of secession alike, this divide will continue to exist.

Summing up the Kashmir conflict and their demands for secession, there exist a few major issues. First, the historical facts and events regarding Kashmir's accession are unclear and extremely difficult to verify especially after two contradicting accession accounts of Menon and Mahajan have emerged. Secondly, to consider the hypothesis that India lacks legitimacy over the sovereignty over Kashmir doesn't prove Pakistan does; at least not till Pakistan demonstrate it. So even if India lacks any sovereignty over Kashmir, there is no original position (before the partitions and accession) to which this case can be compared with. Third, the demands of secession are only raised by one group i.e. Muslim whereas the other minorities completely reject such ideas, which makes self-determination in the region, a conflictual issue. Fourth, the violation of Human Rights are inflicted by all the parties involved in the conflict, which makes it unfair to just blame the Indian military considering the fact that its withdrawal from the region would be even worse keeping in mind the security of the minorities living in and around the region and the presence of foreign invaders waiting to capitalize on the right set of circumstances to divert the struggle for their own convenience and advantage.

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<sup>131</sup> Chandhoke, N. (2016). *When is Secession Justified? The Kashmir Case*. E-International Relations. Available at: <http://www.e-ir.info/2016/09/21/when-is-secession-justified-the-kashmir-case/> [Accessed 8 Jun. 2018].

<sup>132</sup> Look at Bangladesh case. India recognized it 3 years before the UN.

<sup>133</sup> Check sub-chapter 2.4 Recognition". Pp. 23

<sup>134</sup> See pp.51

## 4.2 Catalonia

Catalonian demand for independence is one of the ongoing cases of attempt for secession, with the political confrontations between the Catalan and the Spanish government reaching the peak gathering the international community attention. Even though Catalonia has been the part of Spain since centuries, the people's demand for an independent state has been rising continuously since the last few decades. The lack of precedents of unilateral secessions from European nations that could be applied to this case contributes to the confusion and unanswered questions in everyone's mind.

In this section, we will focus on the historical and legal legitimacy of the Catalonian demand for self-determination. First, what is the historical background of this autonomous community in regards with Spain? Second, how does International Law treat this case in full legality with their laws? Third, what are the reasons for the Catalonian demand for right to decide? Finally, why does Spain reject the idea of independent Catalonia?

Coming to the first question, the historical background is an important aspect to focus on especially when secession is in debate. Catalonia is a territory slightly bigger than Belgium with approximately 32000 square kilometers, with its capital Barcelona where most of Catalan population is concentrated. Catalan is the official language of the community and economically, Catalonia is the most important region of the country.<sup>135</sup> Before 1714, Catalonia enjoyed autonomy under the monarch i.e. King of Spain, as it maintained its own statehood, based on the parliament, taxation system, government institutions and its own constitution. After the war of succession, the Bourbon dynasty dissolved all the legal and political order in the Kingdom of Spain following the implementation of Castilian absolute law.<sup>136</sup> This highlights the importance of the region along with the autonomy it enjoyed till the Bourbon dynasty implemented a new rule of law. Coming to the beginning of the 20<sup>th</sup> century, the Catalan provinces joined forces and created Mancomunitat de Catalunya, a new institution to depict administration powers but ended up gaining significant political relevance simply because since 1714, it was the first time the Spanish government recognized one institution representing all of Catalonia. One of the most important changes in the history

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<sup>135</sup> Henley, J. (2017). How important is Catalonia to Spain?. *The Guardian*. [online] Available at: <https://www.theguardian.com/world/2017/oct/02/catalonia-important-spain-economy-greater-role-size> [Accessed 16 Jun. 2018].

<sup>136</sup> Morato, X. C., Guinjoan, M., Rodon, T., & Guirao, F. (2016). *Catalonia: A New Independent State in Europe?* Routledge

of Catalonia was the first Statute of Autonomy of Catalonia passed in 1932, the democratic period of Spain in between two military coups. During the Francoist Spain, all the institutions along with the powers, developed in the Statute were suppressed and the democratically elected president of Generalitat of Catalonia was executed in 1940. This was the second time; the autonomy of the region was snatched away from the region by the suppressive and violent methods employed by the ruling party.

Focusing on 1978, Spain re-established democracy and Catalonia's new Statute of Autonomy was approved in 1979, which under the new framework gave significant autonomy and self-government in administrative, legislative and spending terms on culture, education, health, research and social issues. Even though the community enjoyed new autonomous powers within the region, there were certain issues like financial arrangements and ambiguity in jurisdictional powers between the central government and Catalanian government, which will be highlighted in detail later. The autonomy and the relationship between the Catalan and the Spanish government can be highlighted into three phases.

1980-2003: The period will highlight the development of autonomy of Catalonia in a new democratic regime under the leadership of Jorgi Pujol. After the first election for Catalanian parliament, the situation between the Spanish government and the Catalanian government started to spiral down on the two basic issues highlighted above i.e. finance and judiciary limits. Considering the jurisdictional conflict, there always existed tensions and conflict between both these government regarding their jurisdiction on policies related to all sort of issues including the adequate degree of devolution or fiscal revenues. Secondly, the president Jorgi Pujol favored the strategy of constant bargaining from the central government to extract concessions to improve the financial situation and autonomy of the Catalan government.

2003-2010: This period marks the most important in the development of Catalanian nationalism and feeling of repression among the Catalans towards the government of Spain. After the elections, Pasqual Maragall became the leader of the Generalitat and the most significant task for the new government was the approval of the new Statute of Autonomy of Catalonia, which would improve the self-government, better the financial position and safeguard the regional capacity of the Catalan government. The project was approved with a clear majority in the Catalan parliament, but the central government did not receive it well. The main objections raised were regarding the legitimacy of the project in terms of Spanish constitutions and financial provision, which clearly highlighted the objectives of allocating

more finances to the Catalan government making it less dependent upon the central government regarding the finances. After continuous discussions, the Statute was watered down to make it acceptable for the Spanish government and finally accepted. Since the beginning till the end, the Parted Popular (PP) was not in agreement with the new statute of Autonomy and finally after the 2006 elections, it decided to challenge the newly adopted Statute of Autonomy of Catalonia in the constitutional court. Finally, four years after the appeal, the court decided in favor of the party and struck down various clauses in the statute calling it unconstitutional, like the attempt of the Catalonians to place Catalan language over Spanish in the region. Furthermore, the reference of Catalonia as a “nation” was rejected, as it had no legal effect, according to the court, which added fuel to the already growing fire.

2010-2017: After the 2010 elections, the parties elected faced new issues, which added pressure on the existing ones. Not only did the new government had to deal with the financial crises which was in full swing at that time but also the austerity measures taken by the central government worsened the already existing financial divide between both the governments. One of the most significant debate was regarding the Fiscal Pact, which gave a separate tax agency for Catalonia to monitor and control their taxes just the way other autonomous communities like Basque country and Navarre. But the debate outside the parliament moved towards independence with Catalan National Assembly (ANC) organizing several demonstrations throughout the next few years. Finally, in 2014, a referendum was organized with two questions: Do you want Catalonia to be a state? Do you want this state to be independent? With approximately 80% of the inhabitants of Catalonia voted yes-yes to both questions.

Considering the history of the community also keeping in mind the last decade, the region experienced a continuous struggle in acquiring or maintaining the autonomy one way or the other. Furthermore, the constant clashes between the central government and Catalonian government coupled with financial issue gave rise to secessionist feelings among the inhabitants of the region.

Coming to the next important aspect, Catalonian demand for right to decide to represent the will of the Catalan people but does it fare well when the legitimacy is concerned in the International law is concerned? When discussing the stance of International Law on secession, international lawyers can agree that it is ambiguous but what about the right to decide? According to the international law, the sub-state entities or peoples have the right to

assess the will of the people. The determination of their will can be done either through a petition, referendum or government declaration, which explain that the International law has no prohibition whatsoever that denies peoples that right. While the referendums are in the clear, the declarations of independence (DOI) are also not prohibited under this law. This can be explained perfectly with the case of Kosovo discussed earlier. With the court's decision it was clear that since there is no prohibition on the declaration of independence, the Kosovo did not violate any international law whatsoever.<sup>137</sup> Secondly, the DOI are in violation of international law only if United Nations Security Council or other *lex specialis* forbid them to do so, which was the case with Southern Rhodesia, Northern Cyprus etc.<sup>138</sup>

When discussing the right to decide in the European law context, the stance of European Union is clear. European Union does not possess any clause, term or specification of any kind endowing them with capabilities to interfere with the internal matters of member states in the exercise of the right to self-determination according to the Article 5 of the Treaty of the European Union (TEU).<sup>139</sup> This point goes to explain that the Spanish government cannot use the European Union or its law to stop the Catalonians from legitimately exercising their right to decide. Moreover, the Spanish argument based on the Article 4 of the TEU that European Union institutions and provisions are bound to protect the intangibility and existence of member states, does not allow the Catalonian demands for secession is false. According to the Article 4 of TEU,

*The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.*<sup>140</sup>

The national security of the states remains their sole responsibility and EU institutions or provisions are not bound to interfere in any internal matter of the states till requested.

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<sup>137</sup> Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, § 84.

<sup>138</sup> Levrat, N., Antunes, S., Tusseau, G., & Williams, P. (n.d.). *Catalonia's Legitimate Right to Decide: Path to Self-Determination*. Retrieved from Universite de Geneve: [https://www.unige.ch/gsi/files/9115/0461/7417/EXECUTIVE\\_SUMMARY\\_Catalogne.pdf](https://www.unige.ch/gsi/files/9115/0461/7417/EXECUTIVE_SUMMARY_Catalogne.pdf)

<sup>139</sup> European Law. (2012, October). *Consolidated version of the Treaty on European Union*. Retrieved June 02, 2018, from EUR.Lex: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>

<sup>140</sup> Ibid.



Furthermore, the clause of territorial integrity solely applies to relationship between states and does not count the intra-state relationship i.e. the case of Catalonia. The recognition of the right to self-determination of the people constituted to the European states is visible in the Article 48, 49 and 50 of the TEU, which gives people the right to determine their political future.<sup>141</sup> Talking about the right to decide, the perfect example is the European Court of Human Rights (ECHR) in the decision related to the legality of the interdiction of a political party in Bulgaria calling for secession from Bulgaria to join Macedonia, said “the fact that a group of persons calls for autonomy or even requests secession of part of the country’s territory – thus demanding fundamental constitutional and territorial changes – cannot automatically justify a prohibition”.<sup>142</sup> This explains and confirms that such calls for secessions depict the expression of will in a democratic society and hence cannot be invoked. Therefore, the European Court for Human Rights defends and protects the right to decide based on collectively exercised individual freedoms according to the Article 10 and 11 of the ECHR. Moreover, the European Union has been seen to recognize the states formed without the consent of the parent states e.g. Former Soviet Union sub-states; the recognition of newly formed states i.e. Czech Republic, the Slovak republic; member states recognizing the expression of the people’s political will e.g. Serbia recognized Montenegro. Therefore, both the law and the state practice show the support for self-determination of the states and peoples.

Catalonian demands for secession are based on numerous factors, which will be explained in this section. First and foremost, the question that needs answers focuses on the annexation of the territory of Catalonia. The claims for secession become slightly heavier when the territory demanding a separate state was unjustly annexed into the nation. Catalonia has been a part of Spain since the last three centuries; therefore international law doesn’t apply to it.<sup>143</sup>

The second most important factor supporting the feeling of secession among the Catalonians is the distinct language and culture they possess since centuries, which is different from the

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<sup>141</sup> Official Journal of the European Union (2018). Consolidated Version of the Treaty on European Union. Article 48, 49, 50.

<sup>142</sup> The European Court of Human Rights. *Case of the United Macedonian Organisation Ilinden- Pirin and Others v. Bulgaria* [2005]59489/00. Pt. 61

<sup>143</sup> Levrat, N., Antunes, S., Tusseau, G., & Williams, P. (n.d.). *Catalonia's Legitimate Right to Decide: Path to Self-Determination*. Retrieved from Universite de Geneve: [https://www.unige.ch/gsi/files/9115/0461/7417/EXECUTIVE\\_SUMMARY\\_Catalogne.pdf](https://www.unige.ch/gsi/files/9115/0461/7417/EXECUTIVE_SUMMARY_Catalogne.pdf)

rest of Spain. Since the territory holds 16% of total Spanish population<sup>144</sup>, it is the second most populated community, which represent a vast number of people and acts as one of the most important region in the Spanish territory. According to the National self-determination theory, the collective identity possessed by a certain group can acts as the crux of the argument for secession. Since the Catalan language is the 9<sup>th</sup> most spoken language in the European Union and approximately 94% Catalonians speak and understand it, it plays an important role in determining their collective identity.<sup>145</sup> The past struggles faced by Catalonians and their language helps form their secessionist claims, which can be explained in details by taking the instances under the Francoist regime. In 1939-75 Francisco Franco's victory over Barcelona in the Spanish Civil war unleashed discriminatory laws over the Catalonians. Right after the victory, Franco's dream to unite Spain started to take form and everything that differentiated people including language was to be rid of. These measures included persecution of the Catalan language and intellectuals, dismissal of Catalonian autonomy followed by the repression of Catalonian nationalism. The language was outlawed, it disappeared from the educational system, radios, televisions, and the street signs were changed to Castilian Spanish. The discrimination didn't just stop there as thousands of Catalonian nationalists were exiled or worse killed.<sup>146</sup> This period continued for the Catalans till the death of Franco in 1975, but the effects of such treatment and discrimination are still felt by many Catalonians. The language represents a spirit of endurance and hope for the people of Catalonia having bared such oppression during the dictator's regime and therefore the Catalonians desire their language to be regarded as more of an official language in the European Union at par with the Castilian Spanish. Furthermore, their desires of placing Catalan over the Spanish language in the region were visible in the Statue of Autonomy of 2006, which the court denied calling it unconstitutional that led to sour sentiments and feeling of discrimination again among the Catalonians.

Another factor contributing to the rising secessionist desires among the Catalonians is financial in nature. One of the most economically beneficial autonomous communities for Spain, the Catalonians feel betrayed and used by the central government. The central government does not provide any significant amount of financial support for social spending or infrastructure investment even though their contribution towards taxes are \$15 Billion

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<sup>144</sup> Powell, R. (2018). Catalan Statistics – Catalonian Independence By The Numbers. [Blog] *Rob Powell Biz Blog*. Available at: <https://robpowellbizblog.com/catalan-statistics/> [Accessed 16 Nov. 2018].

<sup>145</sup> Marinzel, A. (2014). Catalonia: The Quest for Independence from Spain. *Seniors Honor Project* , 39.

<sup>146</sup> Vilanova, Francesc. (2018). Did Catalonia endure a (cultural) genocide?. *Journal of Catalan Intellectual History*. 10.1515/jocih-2016-0002.

more than it receives.<sup>147</sup> Considering the positive impact of Catalonia for Spain, it is also the most indebted, which the Catalonians blame on the central government by calling their disproportionate tax collection from the region and distributing towards the poorer region. According to the 2005 statistics, Madrid contributed 5.6% of its gross domestic product (GDP) in taxes, whereas Valencia contributed 6.3% and Catalonia gave 8.7%, which proves the disproportionate collection of taxes.<sup>148</sup> Considering this issue, the 2006 Statute of Autonomy of Catalonia requested for its own tax agency, which would give Catalonia the power to decide on the taxes to transfer to Madrid government. This step was considered by many Catalonians to be fair considering the other regions like the Basque country and the Navarre already have their agencies. Considering the discriminatory past, the unequal powers vested in different autonomous communities creates a divide between the Catalanian government and the central government, which gives rise to secessionist feelings as the Catalan government believes they will be better off without the involvement of Spanish government, financially. These demands rose in the recent past, especially when the Spanish government out rightly declined to negotiate on the autonomy and the financial issues of Catalonia. The rejection of the fiscal reforms and increased autonomy put forward by the Catalan government, they were left with no other option but exercising their right to decide by organizing a referendum.

Talking about the referendum it is important to decide if the referendum organized by the Catalan government is legitimate? The referendum organized by the Catalan government in 2014 and 2017 were passed under a democratic legitimacy to pursue the political destiny of Catalonia according to the will of the Catalan people. Furthermore the Catalan government elected in 2015 promised right to decide to the people of the region therefore not fulfilling the promise would be unfair to the people and thus possess the democratic legitimacy to exercise the right to decide.<sup>149</sup> But the Spanish government claimed the right to decide exercised by Catalonians to be unconstitutional and illegal but the constitution's interpretation is not uncontested and hence can be challenged.<sup>150</sup> This can be explained perfectly by the report put forward by the Nicolas Levrat, Sandrina Antunes, Guillaume Tusseau and Paul Williams "*Spain, as a member State of the Council of Europe and the EU is bound to respect the*

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<sup>147</sup> Marinzal, A. (2014). Catalonia: The Quest for Independence from Spain. *Seniors Honor Project* , 39.

<sup>148</sup> Ibid. pg. 7

<sup>149</sup> Levrat, N., Antunes, S., Tusseau, G., & Williams, P. (n.d.). *Catalonia's Legitimate Right to Decide: Path to Self-Determination*. Pp. 10-14. Retrieved from Universite de Geneve:

[https://www.unige.ch/gsi/files/9115/0461/7417/EXECUTIVE\\_SUMMARY\\_Catalogne.pdf](https://www.unige.ch/gsi/files/9115/0461/7417/EXECUTIVE_SUMMARY_Catalogne.pdf)

<sup>150</sup> Ibid.

*European Convention of Human Right and EU Law.....which all national constitutional decisions shall frame themselves. In that respect, it is well possible that some of the decisions of Spanish Courts, as regard the exercise of the right to decide by present or former Catalans authorities, could be successfully challenged in front of European Courts (either the ECtHR or the ECJ).”*

Even if Catalonia becomes independent, its membership in the European Union is the next question that needs our attention. According to the norm of the international law, any sovereign or possible seceded state would have to go through the admission process to be a part of any intergovernmental organization. To participate in the integration process, people without their own state should first become a nation, which highlights that even if Catalonia becomes independent, it will not be automatically given the European union membership. According to the Article 49 of the TEU “Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union.”<sup>151</sup> The key word here is “State”, a pre-condition that needs to be satisfied to participate. Even though Catalans have contributed to the democratic stabilization of the Spanish government after Franco regime and European projects, it still needs to be an independent nation to fully participate on equal level as other EU nations to craft the future of the European union.

Coming to the Spanish stance on the secessionist demands of Catalonia, there is a need to focus on the reasons why the Spanish government completely rejects the Catalonian demands for right to decide. Considering the importance of this autonomous community, the Spanish government is cautious about the economic effects along with the political effects, which include possibility of other secessionist attempts. Focusing on the economic effect, Catalonia is the most prosperous region of the Spain contributing to the 19% of its economy through tourism, manufacturing, exports and industry sectors.<sup>152</sup> Furthermore, the Catalonian GDP is one fifth higher than the per capita income of remainder of Spain. According to the 2016 and 2017 statistics, Catalonia made approximately 20% of all Spanish GDP, which is approximately 223 billion euros. Separating from Spain would benefit Catalonia by

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<sup>151</sup> European Union. (n.d.). *Article 49*. Retrieved June 16, 2018, from Lisbon Treaty: <http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-european-union-and-comments/title-6-final-provisions/136-article-49.html>

<sup>152</sup> Bosch, S. (2018, April 04). *Here's how bad economically a Spain-Catalonia split could really be*. Retrieved June 18, 2018, from CNBC: <https://www.cnbc.com/2017/09/21/heres-how-bad-economically-a-spain-catalonia-split-could-really-be.html>

approximately 16 billion euros as they would no longer have to pay the taxes, but Spain would lose 2% of Spanish GDP every year.<sup>153</sup> Furthermore, Catalonia's contribution to Spanish exports amount to almost 26% and approximately 21% of total foreign investment. For the Spanish government, losing a region contributing most in terms of economy and taxes would be a huge loss to bear. Another reason for a strictly opposite stance of Spain to the Catalonia's right to decide is the territorial integrity. Even if Spain for a hypothetical situation allows Catalonia to secede, it would create havoc for the central government to control other regions from demanding it. One such example is the Basque country, one of the 17<sup>th</sup> autonomous communities in Spain that possess a distinct language Euskera, which suffered similar discrimination as Catalan under the Franco regime and was banned in 1959. During that era, a terrorist group ETA was formed to promote the independence of Basque state. This group carried out various violent attack to promote independence.<sup>154</sup> Even though the group declared ceasefire in 2010, it would be unwise for the Spanish government to provide legal separation to Catalonia without expecting retaliation from the north. The final factor explaining the stance of the Spanish government is that the Spanish authorities believe their Constitution to be uncontested power and even if they consider the legal separation of the Catalonian region, it is only possible via a constitutional reform. The two basic problems with the constitutional reform are, first; it is an extremely cumbersome procedure of amendment and the constitutions is almost unchangeable when this question is addressed even though the constitutional court considers there are no limits to the constitutional reforms. Second; the constitutional reform is only possible by a referendum submitted to the Spanish people, which would go against the will or demands of the minority group like Catalonia. As a conclusion, there exist little possible progress in the never-ending debate between the two groups especially when neither is willing to negotiate.

After understanding the reasons of the Spanish rejection of the Catalonia's right to decide and calling its referendum illegal and unconstitutional, it is important to understand if Spanish government's denial of the exercise of this right by the Catalonian is in line with the International law. As discussed in the last few sub-chapters, Spain respected the distinct identity of the Catalonian and provided autonomy to the Catalonia to govern itself, which is a form of internal self-determination. Therefore, to say that Spanish government entirely denied the right to self-determination to the people of Catalonia, would be incorrect. But

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<sup>153</sup> Ibid.

<sup>154</sup> BBC (2017). Timeline: Eta campaign. [online] Available at: <https://www.bbc.com/news/world-europe-11181982> [Accessed 24 Apr. 2018].

international law does not put a limit to which the right to self-determination can be exercised, if it does not violate the law itself. Therefore, if a sub-group in a state expresses will to want more autonomy or even independence from the parent state, international law does not prohibit that. After Catalonia's referendum in 2017, the Spanish government invoked Article 155 of its constitution and took over the Catalan political autonomy. Neither Spanish government nor Catalonia broke any international law in doing so, but this move also highlights the Spanish government's disapproval of the Catalan DOI. According to the 1978 Spanish constitution, the Spanish government denied the external right to self-determination to the people of Catalonia. Spain accepted the two 1966 United Nations Covenant on Human Rights "shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."<sup>155</sup> Therefore, Spain did not completely deny the right to self-determination to the people of Catalonia and also did not violate its obligation under either international or European law.

To sum up the case, the referendum put forward by the Catalan government along with their right to decide are perfectly legal under the International Law. The demands for secession in Catalonia arise from the past discrimination of their language, denial of more autonomy and financial exploitation by the Spanish government. Since the issue is within the state and an internal affair, Spanish government cannot use the EU institutions or provisions to undermine the Catalan demands for secession and therefore the interference from the outside authority is not acceptable or a possible solution. Even though the rights exercised by the Catalan government are well within the democratic structure, the secession is only possible as a constitutional reform, which does not look possible soon. Furthermore, Catalonia will have to consider the fact that if it is able to secede soon, it will lose European membership, which to apply again will be a long and time consuming bureaucratic process, which will most certainly affect its growth. Also, there is no foreign support to the Catalan cause as Merkel, Obama, Cameron, Macron, May and even Trump for that matter support a united Spain.<sup>156</sup> There has been a complete consensus among the international leaders to support Spain's explication of its own constitution. But the only possible solution to Catalan issue will be if both the parties decide to negotiate on the demands but

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<sup>155</sup> Article 1 § 3, common to the 1966 UN Covenant Economic, Social and Cultural Rights and the UN Covenant on Civil and Political Rights. *International Covenant on Economic, Social and Cultural Rights*.2200A.

<sup>156</sup> Elcano Royal Institute. (2018). The conflict in Catalonia. *Elcano Royal Institute*, 25-28

independence is most likely not possible anytime soon.

### 4.3 Brief Discussion Through International Relations

Looking at this issue through an international relations perspective opens a range of perspectives for analysis that go beyond only demands for self-determination from a state. In the case of J&K, there have been political tensions between India and Pakistan over that state since partition; it is its location at the crossroads between these two countries and China that makes J&K extremely important from a geopolitical and geostrategic point of view. The subaltern realist emphasis by Mohammed Ayoob will help understand the driving force behind the conflict. This theory highlights the behavior of third world nations by arguing that their focus on short-term gains is due to the countries' economic and social weakness; in terms of security, this translates into interactions which are limited to their neighbors. Since both the nations are opposite in terms of the population comprising them (Muslim majority in Pakistan; Hindu majority in India), the possibility of ethnic aspect coupled with irredentism, be fueling the conflict is also one to be considered. In this context, the desire of the state to re-examine its boundaries to incorporate groups belonging to the same ethnic or religious background from the neighboring states is a common practice.<sup>157</sup> To avoid such a scenario, both are following a realist logic of defense by arming oneself for any possible conflict, especially in the present situation when both are nuclear states. The behavior of both nations is driven by the subaltern realist perspective along with regional security complex, making for the shaping of their domestic and foreign policy especially towards each other. To better understand both parties' stance on Kashmir, this section is divided into three categories: vulnerability, geopolitics and ethnic ties. When discussing vulnerability, it is highly likely that the parent state would oppose secession especially when it is made up of several distinct ethnicities, as is the case with India. India is a sub-continent comprising various religious groups with different cultural and linguistic backgrounds and in such a diverse nation; the territories tend to attempt to keep their identity protected. If India were to agree on Kashmir's secession, it might be opening a Pandora's box that would enable or

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<sup>157</sup> Sridharan, E. (2005). International Relations Theory and the India–Pakistan Conflict. *Taylor & Francis Inc*, [online] 4(2), p.115. Available at: [https://www.researchgate.net/publication/232900803\\_International\\_Relations\\_Theory\\_and\\_the\\_India-Pakistan\\_Conflict](https://www.researchgate.net/publication/232900803_International_Relations_Theory_and_the_India-Pakistan_Conflict) [Accessed 24 Feb. 2018].

foster broader secession, eventually leading to the fragmentation of the country. India's hard stance towards secessionist claims by Kashmir may therefore be to avoid a spillover effect. Coming to the second category, secessionist attempts face opposition as well as support also because of strategic motives. As we insert another major regional player – China – into the equation, its good relations with Pakistan and the fact that both have had conflicts – namely having attacked/started to attack – the Union of India must be considered. For instance, one of the vital interests of Pakistan in the valley resides in the water supply, and the country's dependence on Kashmiri reserves is yet one more layer adding to the key strategic importance of that territory for Pakistan.<sup>158</sup> Furthermore, the famous Silk Route passes through the valley and Pakistan provided control of Gilgit, an important air base located on the route, to China.<sup>159</sup> The access to this air range to China completely negates the natural advantage provided by the Himalayan range to India. Additionally, the Siachen Glacier is the only barrier preventing the Pakistani and Chinese military linkup in Kashmir<sup>160</sup>; in this sense taking control of Kashmir would connect Pakistan's and China's military, which would greatly undermine the security and geographical advantage of India. India does not want to let of Kashmir for the same reasons. Furthermore, the China Pakistan Economic Corridor (CPEC) plan directs its way through the Pakistan occupied Kashmir, which makes China's economic interest attached to the Kashmir dispute visible.<sup>161</sup> Focusing on the last category, according to the theory of "ethnic ties"; secession receives recognition from the states where the ruling elite share ethnic ties with the secessionist groups;<sup>162</sup> if that is not the case, opposition to secession of the group will follow, which can explain India's stance as well as Pakistan's support for Kashmir's secession, along with the ethnic irredentism dimension above-explained. Through an international relations perspective, the demands for secession thus stretch beyond just the exercise of the right to self-determination in that they include various factors that influence relations between neighboring and other independent states.

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<sup>158</sup> Kalis, N. and Dar, S. (2013). Geo-political Significance of Kashmir: An overview of Indo-Pak Relations. *IOSR Journal Of Humanities And Social Science*, [online] 9(2), p.120. Available at: <http://www.iosrjournals.org/iosr-jhss/papers/Vol9-issue2/O092115123.pdf> [Accessed 24 Mar. 2018].

<sup>159</sup> Raina, D. (1994). *Kashmir - Distortions and Reality*. Reliance Publishing House, pp.25-180.

<sup>160</sup> Ibid.

<sup>161</sup> Bhattacharya, P. (2018). China-Pakistan Economic Corridor: How India lost an opportunity. *The Economic Times*. [online] Available at: <https://economictimes.indiatimes.com/news/defence/china-pakistan-economic-corridor-how-india-lost-an-opportunity/articleshow/58761877.cms> [Accessed 7 Sep. 2018].

<sup>162</sup> Nelson, Elizabeth A., "Power and Proximity: The Politics of State Secession" (2016). CUNY Academic Works. Pp. 13-15.



Moving onto the European context, Catalonian demands for independence are based upon identity and economic factors. Parts of Catalan society associate themselves in a single identity, wanting to achieve their political will together. This is a perfect example of Identity politics, according to which, people closely associate themselves to a group sharing similar affiliations such as language, caste, ethnicity, nationality, social class, etc. These connections, which distinguish them from other people, are then used to represent them as a group and to ultimately attain/gain empowerment in any form. The fact that many states are constituted by several recognized identities, as is the case with Spain, tends to generate some degree of friction between states' efforts to maintain stability in its system (including by addressing the rights of minority groups) and minorities claiming statehood especially in ethnically diverse states.

Catalans are united by their ethnicity, which they are utilizing to put forward economic and political agendas – i.e. economic independence from Spanish government and statehood, respectively - through the demands of statehood. These feelings and claims stem from both, historic trajectory and more recent events. Considering the discrimination faced by Catalans during Franco regime (and subsequent decisions such as the Pact of Forgetting), the population still holds bitter feelings and memories, which the government needs to delicately manage. On the other hand, Catalonia is at the same time one of the richest regions in Spain and one of the most indebted, namely due to what is perceived by its people as a result of disproportionate tax collection by the central government. As demands for a separate tax agency for Catalonia were rejected by the Madrid, Catalans considered it unfair while believing that gaining independence would bring about more opportunities and development to the region and its people. Therefore, frustrations from economic inequality coupled with previous discriminations (under Francoism), gave rise to secessionist demands. Even though no agreement has been reached towards Catalonia's secession, it is still important to notice the aftermath, if and when it takes place. While Catalonia would benefit immediately if it is able to gain independence simply because it transfers more to the Spanish government than it receives, and Spain, losing a dynamic economy, would be at a disadvantage in the short-term; on the other hand, while Madrid would have the support from the EU safety net and institutions, including the European Central Bank, Catalonia would lose various rights and privileges that EU membership grants it as a part of Spain, including in terms of trade (access to market). Even if Catalonia were to apply for Union membership, that is a lengthy and cumbersome process and one that would be subject to approval from other member states (including Spain), further hindering Catalonia's prospects. Even though

the demands for secession are a result of combination of shared identity with perceived political and economic unfairness by Catalans, it show casts how identities might influence a sovereign nation's politics.

Adopting an international relations approach makes clear that these issues have a multiplicity of variables involved, in interaction among themselves, than what meets the eye. In this sense, keeping apart the legal aspect of both Kashmir and Catalonia's situations, if either of them were to attain statehood, political, economic, social and geographical changes are to be expected on regional and global levels. Each party would stand for gains and losses on the international relations' chessboard – one in which all the regions and events taking place across the globe are ever more connected –, although diving into how and to what extent this would happen falls outside the scope of this work.

## 5. CONCLUSION

Secession in the recent years has become a constant debate between philosophers and pioneers of law. The International law is not very pellucid considering secession, but it does recognize the right to self-determination to every “people” or “group of people”. According to the International Law, the right to decide is a right equipped to people to decide their political future according to their own will. When this right is exercised within the parent state, the international law considers it an *internal self-determination* where the territorial integrity of a state is maintained, and the right is exercised within the framework of the parent state. Such an example is Telangana, a state to exercise the right within the sub-continent of India, which was perfectly accepted by both India and International Law. A similar case is of Catalonia where the demands for secession arose from the rejection of the demand of more autonomy from the government that led to a complicated situation. But when cases such as Kosovo demand secession, they fall under the category of *external self-determination*, where the only possible solution is the creation of an independent state, which means the territorial integrity of the parent state, will be questioned and altered if secession is achieved. Considering the external self-determination, International law has a very ambiguous stand. Since the law grants people, the right to self-determination, when external self-determination is in question, it goes entirely against the UN Resolution 1514, where any attempts to disrupt

nations integrity is incompatible with the Charter of the United Nations. A perfect example is Kosovo, where the doubts about the Declaration of Independence's legality when questioned by the Serbian authority were completely rejected by the International Court of Justice, considering the right to self-determination in international law. When enquiries regarding the statehood were raised, the ICJ refused to provide any justification on them as they were outside the scope of the question put forward by the Serbian Authorities. As discussed above, recognition simply affects the relations between states and is not a pre-condition for statehood. That is why Kosovo, even though lacking recognition from UN and some member states, it still an independent state. Coming to the case of Western Sahara, even though the territory has been unjustly annexed into Morocco, the demands for self-determination are supported by the United Nations Security Council, European Union and African Union, yet the conflict remains unresolved. It raises serious doubts over the competencies and capabilities of the international legal framework.

To sum up, the international law recognizes the right to self-determination but when this right is exercised in a way that leads to secession, international law follows mostly facts. Furthermore, it seems that recognition from other sovereign states is an important factor to construct relations post secession, but its impact directly or indirectly over statehood remains negligible. Even if the international community supports the cause of demand for self-determination, why is the case of Western Sahara remains unresolved is a question that has no answer?

Coming to the Kashmir conflict, the remedial rights theory cannot be fully implemented on this case as the demands for secession are raised by one group i.e. Kashmiri Muslims. Since the theory's main principle is to respect the rights of the minorities, supporting the secessionist claims of the Kashmiri Muslims will be against the demands of more integration into the Indian Union by the minority groups like Hindu Pandits, Gujjar and Buddhist in the state. Furthermore, the unjust annexation claim is questionable as the historical facts about it remain unclear. Lastly the violation of Human Rights are inflicted by all the parties involved in the conflict, which makes it unfair to just blame the Indian military considering the fact that its withdrawal from the region would be even worse keeping in mind the minorities living in the region and the presence of foreign parties waiting to capitalize on the opportunity to divert the struggle for their own benefit. Comparing the Kosovo and Kashmir conflict, both the states suffered human rights violation, they possess a distinct identity but

the major difference between both the cases is that Kashmir's past (annexation) evidence is blurred and conflictual. Also, the Kosovo Albanians raised a united voice towards demands for independence, but the Kashmiri Muslims remain divided on secessionist claims by the region. Furthermore, the United Nations Security Council and the TROIKA gave up on the negotiations between the Kosovo Albanian and Serbian authorities, so secession was the last resort, but the Kashmir issue is still ongoing with the United Nations along with the Indian government trying to find a suitable solution. Therefore, to say that people in Kashmir have a right to self-determination is correct. The effective right to external self-determination depends upon the discrimination and human rights abuse of the people by the state as a pre-condition. Since Kashmir already fulfills this pre-condition, it qualifies for external self-determination and if this right is exercised in the region, the demands and rights of the minorities must be respected. But considering the current situation with ongoing negotiations, to say self-determination in the form of secession as the best option would be incorrect. The UN recognizes the right to external self-determination only in the colonial context, denial of which is regarded as human rights violation. But certain cases provide proof of acceptance of unilateral secession outside colonial context as a result of exercise of the right to self-determination. For example East Pakistan's (now Bangladesh) independence as a last resort to put a stop to atrocities committed by Pakistani government over Bengalis. Furthermore, many independent countries accepted Kosovo's secession by referring to the conflict between the Serbian government and Albanian population. The UN's support for external self-determination outside colonial context has never been public, at least till the secession was completed. Bangladesh can again act as a perfect example, which received recognition from the UN after successful unilateral secession from Pakistan. There exist no legally binding guidelines for exercising such a right; therefore the possibility of successful secession as a result of fortunate time and opportunity cannot be eliminated. Additionally, its success also depends upon the time and opportunity of when the right is exercised. For example, Kosovar secession's came after the all negotiations attempts were exhausted, whereas Kashmir issue is still ongoing with possibility of a settlement.

As for Catalonia, the National self-determination theory focuses on the cultural identity of a group to lay the foundation of the claims of secession, but in this case, ever since the incorporation of Catalonia in Spain, their language has been protected and used in the education and political sectors. Furthermore, the issues shifted from the demand of more autonomy to secession mainly because of political and financial reasons during the 2000s.

Considering the right to decide, international law deems it perfectly legal but what about secession? Secessionist attempts based solely on cultural identity cannot be deemed unjustified just because Catalonia experienced no human rights violation or atrocities against their culture by the Spanish government. The identity of a sub-group/community within a state should always be respected. The National self-determination theory grants the people the right to decide their own political future. Therefore, this theory doesn't define or limit the effects of its applicability; it simply provides the right to decide to the people, which can either be in the form of external or internal self-determination. If a group exercises its right to self-determination to express the desires of a sovereign state through this theory, it has the right to do so; human rights violation or not. This is because it simply reflects the will of the people in a democratic world. However, the acceptance of either internal or external self-determination through this right would also depend upon the parent state. However, secessionist demands solely on distinct identity can lead to a "secession for all" environment especially for countries with different religious, ethnic, cultural groups comprising of its population (The Basque country in Spain or state of India). Comparing the Western Sahara case to Catalonia, both the territories possess a distinct culture, identity & past and the referendums conducted in both the regions were considered illegal by the government in power but the demands for secession were raised on completely different grounds. Western Sahara's claim was based on unjust annexation whereas the Catalonian claims are based on more autonomy, which after denial from the government turned into secessionist demand. Furthermore, the United Nations Security Council, European Union and the African Union found the claims by Western Sahara to be valid, but this is still left to say for Catalonia. Secession is always the last option but for Catalonia there is still hope. Even though the Catalonian conflict does seem complicated, the social and monetary costs for secession are too high for both nations and most probably a negotiable solution will be reached instead of independence.

To sum up the arguments raised in this thesis, International law treats Kashmir and Catalonia very differently because of their distinct basis for secessionist demands emerging from their different political and social history. Considering the Jammu and Kashmir conflict, the possible solution is to reorganize a plebiscite that couldn't be fulfilled before, under the United Nations Security Council Resolution 47 in all its principles. Not only will it give the people of the territory a chance to self-determine their own future but will also provide a non-violent solution to the issue. Whereas for Catalonia, since the demands for secession

originated after the denial of autonomy, the Spanish government should consider the cultural, economic and political repercussions of the issue over its territory and therefore agree to find a negotiable solution apart from independence such as granting Catalonia the autonomous status like the Basque Country or Navarre.

Since the international law does not contain any clause or article or provision for secession in its international legal framework, the cases in the contemporary world become very complicated to solve. To make such unique cases easier for the international community to resolve, the international law should define “secession” thoroughly and form a framework that acts as a basis to tackle secessionist claims. In secession, no two cases are similar therefore the international law will require constant reform to ameliorate its framework that can be applied to the contemporary cases of secession. Not only will this require a significant reform in the legal framework but also demand increased competencies of the international community in disentangling the prevailing or possible succeeding cases of secession. Does the increasing number of cases for unilateral secession represent a possible threat to the integrity of the nation state?

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