

# REVISITING THE CHALLENGING LANDSCAPE OF SELF-DETERMINATION WITHIN THE CONTEXT OF NATION'S RIGHT TO SOVEREIGNTY

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## I. INTRODUCTION

Academic perspectives on the issue of Self-Determination are in abundance as the International Standards with respect to the *Rights of People* and their *Rights to Self-Determination* have taken huge steps in the last two decades. This has resulted in a large number of a secessionist movements, claiming various forms of Self-Determination, in today's geo-political landscape. Furthermore, when these movements of Self-Determination embrace terrorism as their only act of expression, we find ourselves immersed in a quagmire hitherto seen in the World stage. Against this challenging backdrop, we will

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revisit the issue of Self-Determination within the evolving framework of International Law, where the Right of sovereign Nations must be taken into account while conferring legitimacy to a People's movement. This issue of sovereignty of a Nation is critical in our study to develop the proper context in which a legitimate People's Right to Self-Determination can be distinguished from the multitude of illegitimate ones mushrooming every nook and corner of the globe. In this context, we must identify the relevant actors, the minorities asserting their Rights to Self-Determination and the Nation State being accused of illegally depriving those very Rights. This is because, more often than not, international politics and the alignment of Nations either over dramatize or trivialize the legitimacy of claims for Self-Determination. This is done by casting blinders on the real issue or lumping the various forms of pseudo or illegitimate Self-Determination under one thread. Therefore, our objective in this monograph is to clarify some of these misconceptions that accompany legitimate Rights of Self-Determination.

The controversy surrounding the legitimate Rights of People for sovereignty gets murkier in the quagmire of international politics as the Rights of a minority within a Nation State gets misconstrued as the Rights of a People. Often times a Nation State is accused of demeaning and degrading the status of People to that of a minority by use of State power and thereby hindering their legitimate Right of sovereignty. On the other side of the coin, rogue States, or terrorist outfits utilize the misguided concept of Self-Determination for the fulfillment of their nefarious intentions. How is this possible? Particularly, when and if in fact, the status of People is clearly defined in International Law. We will examine this apparent quandary.

The issue before us is to determine as to what extent a government may redefine fundamental Rights of minorities with respect to the demands for the Right to Self-Determination by the use of referenda and legislation. This is because, the idea of a Nation State changing the constitutional ground rules affecting citizens without their consent has cropped up in recent years in cases dealing with People's Right to Self-Determination. However, the legitimacy of such rights can be best understood within the broader context of a Nation's sovereignty. This will eventually address the issue of legitimacy for various secessionist movements by either recognizing them as a violation of People's fundamental Rights by the Nation State or treason threatening the sovereignty of a Nation.

International covenants, working groups, and legal writings in this regard have been very successful in developing context and scope regarding Self-Determination. Moreover, International Law has gone through a tremendous metamorphosis during the last decade. But many questions still remain. Our objective in this study is to establish the premise that, Self-Determination must be addressed in the context of *original secession* of the relevant Nation State

during de-colonization. This will help us identify legitimate movements for the Right to Self-Determination from the scores of secessionist movements all over the World. One such case we present here is that of Kashmir, where the evolving legal framework on the very concept of Self-Determination is being pitted against the historical context of the region.

We begin our analysis by revisiting the history of Self-Determination in Section II, which is followed by a discussion on the evolving norms of Self-Determination in Section III. We present our case study on Kashmir in Section IV, which is followed by our discussion in Section V.

## II. HISTORY OF SELF-DETERMINATION

To trace the evolution of Self-Determination through historical documents and political actions, we must first clarify our understanding of People's Right as it has emerged over the years. This contextual necessity has historical significance, as Self-Determination cannot exist without it being the Right for the People.

### A. *Self-Determination As a Right For the People*

Both the Right to Self-Determination of People and the Right to sovereignty of Nations regardless of its size has been recognized as a basic norm of International Law<sup>1</sup>. In this context, International Covenant on Civil and Political Rights develops the framework of early versions of Self-determination.<sup>2</sup> The documents entail the following principle:

In those States where ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.<sup>3</sup>

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1. U.N. CHARTER art. 1, para. 2.

2. International Covenant on Civil and Political Rights, Dec. 16, 1966, 99 U.N.T.S 171 [hereinafter ICCPR]. The International Covenant on Civil and Political Rights was to take effect ten years later in all nations that had become state parties. *Id.* at 394. A sufficient number of states had become parties so the ICCPR took effect as planned in 1976. *Id.* The United States Senate ratified the ICCPR in June 1992. *Id.* The ratification was with declarations and understandings. *Id.* at 394-95.

3. *The Organization and Functioning of Democracy and the Expression of Ethnic Diversity as a Means of Ensuring the Stability of All States, Economic Development and Better Use of the Peace Dividend for the Benefit of the Third World*, INTER-PARLIMENTARY UNION (Apr. 11, 1992) <http://www.ipu.org/conf-e/87-2.htm>. The resolution was adopted without a vote by the 87th Inter-Parliamentary Conference on April 11, 1992, where Article 27 of the International Covenant on Civil and Political Rights was recalled. *Id.* An additional reference can be obtained from the Assembly debate on October 1, 1990 (14th Sitting). *See* Doc. 6294, Report of the Committee on Legal Affairs and Human Rights, Rapporteur: Mr Brincat; Doc. 6302,

Thus, religious, ethnic and cultural minorities have come to be recognized in International Law as *People* that have a Right to Self-Determination. Although States remain the main subjects of International Law, social institutions other than the State have long been recognized as entities with standing in International Relations.<sup>4</sup> People have thus come to be repositories in International Law for the Right to Self-Determination.

### *B. Self-Determination Through Historical Documents and Records*

Before we begin to apply the concept of Self-Determination in specific situations, let us analyze the evolution of the theory of Self-Determination. In this context, our thought process is influenced by three main caveats. First, the concept of Self-Determination has evolved over the years. As a result, we must clearly distinguish among the different shades of meaning the concept has attained. The second issue comes from the meaning attributed to Self-Determination in particular instances. That means, in order to legitimize the claim for the Right to Self-Determination, we must determine the identity of the People who have a claim to that Right. Lastly, the concept of secession should not be considered as a necessary condition for the Right to Self-Determination. Because, Right to Self-Determination is not the only vehicle through which secession is achieved. Current State practices have shown that the Right of secession has its own merit and can stand on its own feet. However, we will show in the discussion that follows that, secession is not even considered in cases involving movements where Self-Determination has already been addressed once before.

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Opinion of the Political Affairs Committee, Rapporteur: Mr Baumel.

4. Over the years the definition of People has taken different shades and evolved. The United Nations has recognized the following six categories in which the right to Self-Determination would apply to People:

1. People that constitute independent and sovereign States.
2. People of States which had lost their independence and sovereignty and wish to regain it.
3. People which although constituted in independent sovereign States are prevented by their own dictatorial governments from exercising their right to Self-Determination.
4. People who form part of an independent and sovereign State, but consider themselves absolutely different from the other elements in the country and wish to set up a separate State.
5. People constituting States that were formerly or nominally independent and sovereign but whose independence was forcibly controlled by another State.
6. Non self-governing people whose territories were administered by the so-called colonial powers.

By delving into the archives of recorded history, we find the Right to Self-Determination<sup>5</sup> dates back to World War I, when it was introduced as a norm of International Relations.<sup>6</sup> Since then the concept has evolved in meaning, and has gone through the maturation process via distinct stages. While trying to develop a legal framework for the secession of People from the old empires, the process of legitimizing the Right to Self-Determination witnessed the first phase of its development. It was made clear during the negotiations that ensued, that the Right of disposing of national territory *is not* in conflict with the Right of sovereignty. In this context, we must be cognizant of the fact that the positive International Law does not legitimize the Rights of national groups to secede any more than the States to dispose of their national territory. Therefore, the Right to Self-Determination cannot be invoked by a simple expression of interest, nor could certain disenfranchised communities within a State use it as

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5. Please note the concept of Self-Determination has been in the process of development and modification in international jurisprudence. Two salient points relating to the concept are observed by Professor Garth Netheim of University of Sydney, as follows:

The United Nations practice has been virtually to confine the right to Self-determination to People in the classic colonial context of governance from a distant European power. For such People, Self-Determination came to be regarded as virtually synonymous with independence. Partly for this reason, national governments appear reluctant to extend the right of Self-Determination to other People, including indigenous People within independent states; for fear that acknowledgment of a right to Self-Determination would threaten the territorial integrity of established states.

Also note that the concept of Self-Determination is beginning to impinge on emerging international instruments relating to indigenous People. In 1989 the International Labor Organization completed revision of its earlier 1957 Convention No. 107. The Convention Concerning Indigenous and Tribal People in Independent Countries, June 27, 1989, 28 I.L.M. 1382. It treated the question of Self-Determination with great caution and even qualified the titular reference to People by article 1(3) by stating, "The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law." *Id.* at 1385.

6. The *Declaration on Principles of International Law, Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations* emphasizes the paramount importance of the Charter of the United Nations for the maintenance of international peace and security and for the development of friendly relations and co-operation among States in this declaration. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 18, at 121, U.N. Doc. A/8082 (1970) [hereinafter *Declaration on Principles*].

Recalling its resolutions 1815 (XVII) of 18 December 1962, 1966 (XVIII) of 16 December 1963, 2103 (XX) of 20 December 1965, 2181 (XXI) of 12 December 1966, 2327 (XXII) of 18 December 1967, 2463 (XXIII) of 20 December 1968 and 2533 (XXIV) of 8 December 1969, in which it affirmed the importance of the progressive development and codification of the principles of international law concerning friendly relations and co-operation among States, having considered the report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, which met in Geneva from 31 March to 1 May 1970.

a political tool. When then, can the Right of Self-Determination be exercised? According to Nathaniel Berman,

The formation, transformation and dismemberment of States as a result of revolutions and wars create situations of fact which, to a large extent, cannot be met by applying the normal rules of positive law that 'People' may either decide to form an independent state or choose between two existing ones.<sup>7</sup> In circumstances where sovereignty has been disrupted, the principle of Self-Determination of People may be called into play.<sup>8</sup>

Thus, the legal framework for the concept of Self-Determination originated from the end of colonial rules, and was incorporated as a vehicle to provide Rights to the People dominated by the colonial powers. However, as the colonial powers started crumbling, the Right to Self-Determination started assuming different hues. The Right to Self-Determination was extended to People subjugated by racism<sup>9</sup> by expanding the concept of People from the populations in colonial rule to a larger community under foreign occupation or racist regime. This began the process of an evolving legal framework where the concept of Self-Determination encapsulates a larger section of People.

The scope of the Right to Self-Determination has further broadened by the United Nations General Assembly's Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty of 1965,<sup>10</sup> in which the United Nations called on

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7. See *Autonomy, Sovereignty and Self-Determination*, 85 AM. J. INT'L L. 730 (1991) (reviewing HURST HANNUM, *AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* (1990)).

8. *Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question*, LEAGUE OF NATIONS O.J. Spec. Supp. 3, at 6 (1920). See generally Nathaniel Berman, *Sovereignty in Abyeance: Self-Determination and International Law*, 7 WIS. INT'L L.J. 51 (1988), reprinted in *INTERNATIONAL LAW* (Martti Koskeniemi ed. 1992), and in *SELF-DETERMINATION IN INTERNATIONAL LAW* (Robert McCorquodale ed. 2000).

9. See Advisory Opinion No. 53, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, 31 (June 21).

10. *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty of 1965* [hereinafter *Declaration on the Inadmissibility of Intervention*] G.A. Res. 2131XX, U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (1965).

Recognizing that, in fulfillment of the principle of self-determination, the General Assembly, in the Declaration on the Granting of Independence to Colonial Countries and People contained in resolution 1514 (XV) of 14 December 1960, stated its conviction that all Peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory, and that, by virtue of

all States to, "respect the right of self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect to human rights and fundamental freedoms" and to this end proclaimed that, "all States shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations."<sup>11</sup>

Self-Determination has further been given legal grounds within Article 1 of the *International Covenant on Civil and Political Rights* of 1966.<sup>12</sup> This constituted a newer development in the Rights of Self-Determination that evolved after the colonization phase passed. Additionally, this entitlement signified the entitlement of a broader spectrum of People, coming from independent, non-racist States. The *International Covenant on Economic, Social and Cultural Rights* of 1966 was not restricted to only People subjugated under foreign powers, but also to People belonging to national or ethnic groups. Several important references can be made in this context. The United Nations Declaration on *Principles of International Law Concerning Friendly Relations and Co-Operation* among States in accordance with the Charter of the United Nations of 1970 guaranteed the Right to Self-Determination applicable to "all States."<sup>13</sup> Similarly, the *Helsinki Final Act* of 1975 defines the principle of Equal Rights and Self-Determination of People as entitlement that belongs to "all People always ... in full freedom, to determine ... without external interference, and to pursue as they wish their political, economic, social, and cultural development."<sup>14</sup> This certainly seems to include the People of

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that right, they freely determine their political status and freely pursue their economic, social and cultural development, Recalling that in the Universal Declaration of Human Rights the General Assembly proclaimed that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, without distinction of any kind.

*Id.*

11. Declaration on the Inadmissibility of Intervention, *supra* note 10 at para. 6.
12. See *supra* text accompanying note 2.
13. *Declaration on Principles, supra* note 6, at 124. This was adopted by consensus on October 24, 1970. *Id.* at 121. An assertion in that declaration is worth repeating. It says, "[t]he principles of the Charter which are embodied in this Declaration constitute basic principles of International Law, and consequently appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles." *Id.* at 124.
14. The Conference on Security and Co-operation in Europe, which opened at Helsinki on 3 July 1973 and continued at Geneva from 18 September 1973 to 21 July 1975, was concluded at Helsinki on 1 August 1975 by the High Representatives of Austria, Belgium, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the Union of Soviet Socialist Republics, the United Kingdom, the United States of America and Yugoslavia.

independent States.<sup>15</sup> Again in this context, we are reminded of the definition of Self-Determination as the Right of People to “freely determine their political status and freely pursue their economic, social and cultural development”, and do not in itself exclude ethnic sections within a political community. More recently, the People within an independent and sovereign State with a claim to Self-Determination have been more clearly identified as national or ethnic, religious and linguistic minorities.<sup>16</sup>

### III. CHANGING NORMS OF SELF-DETERMINATION

The above historical excursion has shown that the Right to Self-Determination developed over time and that its substantive meaning has changed over the years. Most of the current threats to international peace and security emanates from the struggles of groups of People claiming or trying to assert their Rights to Self-Determination. Whether legitimate or not, these claims are creating tensions among States, casting doubts in the nature of democracies, to say the least. Thus, the concept of democracy and Self-Determination is interconnected and we must take a closer look at this concept. One of the controversies surrounding the concept of Self-Determination is that it immediately conjures up the notion of territorial secession. However, Self-Determination should not be misconstrued to mean secession at all times; rather it should lend legitimacy to retention of territorial integrity.

We begin by identifying a path of evolution for Self-Determination in International Law. Self-Determination has originated as enforceable Right to freedom from colonial rule. The United Nation has recognized three types of situations where the Right of Self-Determination is deemed inalienable and enforceable. First and foremost, when the People’s Right of Self-Determination emanates from the colonial rule, Self-Determination must be enforced, if no

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Conference on Security and Cooperation in Europe: Final Act, Sept. 1, 1975, vol. 73 DEP’T ST. BULL., Dec. 29, 1975, at 323.

Section 1(a) Declaration on Principles Guiding Relations between Participating States states the following interesting finding:

VII. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief. This finding outlines as follows:

The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion. Within this framework, the participating States will recognize and respect the freedom of the individual to profess and practice, alone or in community with others, religion or belief acting in accordance with the dictates of his own conscience.

*Id.* at 325.

15. *Id.*

16. *Id.*



other condition makes it unable to enforce. The second situation arises when People claim Self-Determination as a result of having been under the occupation of foreign power. Thirdly, the United Nation has given legitimacy to the situation when racist domination enables the emergence of People's Right of Self-Determination.

Let us examine the concept of Self-Determination in the context of decolonization a bit further. Impregnated in the concern for People under colonial rule was the realization that conflict and chaos as a means to break the shackles of the colonial power could also easily escalate into total chaos and destruction of balance of power in the globe. Therefore, it was asserted in the *Declaration on Granting Independence to Colonial Countries and People* at the United Nations General Assembly on December 14, 1960, "The subjection of People to alien subjugation, domination and exploitation (i.e., the denial of Self-Determination) constitutes a denial of fundamental human rights."<sup>17</sup>

Not only does this interrelate with the concept of Self-Determination and the Human Rights movement but also enshrines Self-Determination under solid legal principles. However, this provides legal binding to the idea of People's Right to Self-Determination only when it relates to People Rights under colonial rule. Subsequently the word *Self-Determination* finds its way as an emancipated principle in the United Nation charter as linked to the notion that "People have equal rights."<sup>18</sup> This has alone been incorporated into the preamble to the *International Covenant on Economy, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*.

Stepping back to our discussion to identify the roots of Self-Determination in International Law, we highlighted three main themes, and questioned whether the United Nation has legitimized the People's Right of Self-Determination. There are several means through which People can exercise the rights to Self-Determination. One of which is the *Declaration of Principles of International Law* concerning friendly relations and cooperation among States which notes, "that the creation of a sovereign and independent state, the free association or integration with an independent state or the acquisition of any other friendly decided political states."

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17. This refers to the United Nations *Declaration on the Granting of Independence to Colonial Countries and People*, adopted by the United Nations General Assembly on December 14, 1960. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 2, at 66, U.N. Doc. A/4494 (1960).

18. On December 10, 1948 the General Assembly of the United Nations adopted and proclaimed the *Universal Declaration of Human Rights*. G.A. Res. 217 A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948). Following this historic act the Assembly called upon all Member countries to publicize the text of the Declaration and "to cause it to be disseminated, displayed, read and expounded principally in schools and other educational institutions, without distinction based on the political status of countries or territories." *Id.* at 78.

In spite of the above, the International instruments do not provide a succinct definition for the Rights to Self-Determination of People; and there does not exist a perfect definition of Self-Determination. This has, therefore, created more shades of gray in today's global arena when we are confronted with trying to determine whether a certain People claim for the Right to Self-Determination is truly legitimate or not. This leads us to examine two distinct frameworks within the broader concept of Self-Determination. The first is concerned with the Right to External Self-Determination, i.e., the Right of People to undertake external roles, such as foreign policy and defense; issues reserved for sovereign States to deal with. The second is the Internal Self-Determination, i.e., the concept of Self-Determination that asserts the Right of People or minorities in a variety of jurisdictions over affairs internal to State, and could range from enhanced participation in governance to autonomy under a sovereign States control.<sup>19</sup> We submit that, the Right of Internal Self-

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19. International Law, the Right to secede is only one of the options and even that option cannot be exercised unilaterally. Reference re Secession of Quebec, [1998] 2 S.C.R. 217. In fact this question was posed by the Governor in Council of Canada to the Supreme Court (1998) as follows: "[I]s there a right to Self-Determination under International Law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?" *Id.* at 218. In response, the Supreme Court of Canada (1998) set out its opinion very clearly:

The recognized sources of International Law established that the right to Self-Determination of a people is normally fulfilled through internal Self-Determination, a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to external Self-Determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances. The International Law principle of Self-Determination has evolved within a framework of respect for the territorial integrity of existing states. There is no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right of a 'people' to achieve a full measure of Self-Determination. A state whose government represents the whole of the people or People resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to the protection under International Law of its territorial integrity.

*Id.* at 282-84.

A number of commentators have further asserted that the Right of Self-Determination may ground a right to unilateral secession, when a people is blocked from the meaningful exercise of its Right to Self-Determination internally. *Id.* The Vienna Declaration adds credence to the assertion that such a complete blockage may potentially give rise to a right of secession. *Id.* We note that the Canadian Supreme Court and much of the literature on the subject (e.g., Steiner and Alston, 2000) draw a clear distinction between Internal and External Self-Determination. "Effective provision for internal Self-Determination (e.g., federalism combined with non-discrimination), far from paving the way for unilateral secession, de-legitimizes any recourse to it. On the other hand, the denial of due internal Self-Determination could legitimize a right of secession. Is there a widely recognized understanding of the term internal Self-Determination?" In this context, the broad definition offered in the above quoted judgments of the Canadian Supreme Court, viz. "a people's pursuit of its political, economic, social and cultural development within the frame work of an existing state."

Determination emanates from cases where it has been determined that the legitimacy of External Self-Determination does not exist. There are several instances where relevant People or territory of a State cannot claim the Right to External Self-Determination. For example, when the issue of Self-Determination has already been determined once during the course of evolution of the relevant People, there should be no claims for External Self-Determination. Similarly, when the relevant minority People forms part of a sovereign Nation and are in no way subjected to a systemic oppression due to their minority status, there cannot be a legitimate cause to entertain Self-Determination. By the same argument, claims for the External Right to Self-Determination cannot be legitimized for part of a Nation State when such State originally emerged as a result of the de-colonization process, unless evidence of systemic oppression can be proven against such State. In the next Section, we present our analysis of the Right to Self-Determination related to Kashmir.

#### IV. ANALYZING THE LEGITIMACY OF SELF-DETERMINATION OF KASHMIR

Kashmir presents a test to our premise that, a claim for Self-Determination must be dealt with within the dual context of the sovereignty of a Nation and the original secession of the State. As will be clear from our discussion below that, giving legitimacy to any claim for Self-Determination of Kashmir will argue for a case of a faulty de-colonization process that led to the independence of both India and Pakistan. In some parlance, Kashmir is viewed as a disputed territory, whereas in some quarters, there is no question about the legality of Kashmir as an integral part of India. The issue before us is then to analyze this situation with respect to the existing concepts of Self-Determination. Before getting into the legitimacy of the claim for Self-Determination, let us take a look at the historical context through which Kashmir was annexed as part of India.

##### *A. History and Legitimacy of Annexation*

The State of Jammu and Kashmir (J&K) acceded to the dominion of India on the 26th October 1947, as one of the remaining acts of de-colonization of British territory. In order to understand the Kashmiri's Right to Self-Determination, the legality of this accession of Kashmir has to be analyzed. The accession took place under the provisions of the Constitution of India as in force on 15th August, 1947,<sup>20</sup> as well as the *Government of India Act 1935* as adopted under

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20. Embassy of India, *Jammu & Kashmir*, at <http://www.indianembassy.org/policy/Kashmir/kashmiraccession.htm> (last visited Feb. 22, 2005).

Now, therefore, I Shriman Inder Mahander Rajrajeshwar Maharajadhiraj Shri Hari Singhji Jammu and Kashmir Naresh Tatha Tibbet adi Deshadhipathi, Ruler of Jammu and Kashmir State, in the exercise of my Sovereignty in and over my said State do hereby execute this my Instrument of Accession; and I hereby declare that I accede to

provisions of the *Indian Independence Act* 1947. The provision states, “An Indian State shall be deemed to have acceded to the dominion, if the Governor General had signified his acceptance of an instrument of accession executed by the ruler thereof.”<sup>21</sup>

Consequently, when the ruler of Kashmir executed the *Instrument of Accession*<sup>22</sup> (26 October, 1947) and Lord Mountbatten<sup>23</sup>, then Governor General, accepted the Instrument (27 October 1947), the whole of Kashmir became an integral part of India. This accession was provided within the stipulations granted by the British Government for the Independence of the India. Under this plan, the Muslim majority area in British India would constitute the Dominion of Pakistan and the Hindu majority would constitute the Dominion of India. Additionally, it also was made clear that the decision about Partition related only to British India and the Rulers of the Princely States would be restored their earlier Paramount power. In other words, the Princely States<sup>24</sup> were to become ‘independent’ and the communal basis of the division of India would not affect those States at all. Therefore, the Rulers of the Princely States were free to choose, for example, if they would join India or Pakistan, as long as the accession is agreed upon by the powers granting them that.

Since the Act was enacted by the British Parliament to create the Dominions of India and Pakistan, it cannot be questioned either by India, Pakistan or the United Kingdom, all parties to the agreement. One of the players sponsoring the current air of illegitimacy of Kashmir as an integral part of India is the neighboring country of Pakistan. However, historical events point out that the Government of the Maharaja of Kashmir was recognized by Pakistan. It

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the Dominion of India with the intent that the Governor-General of India, the Dominion Legislature, the Federal Court and any other Dominion authority established for the purposes of the Dominion shall, by virtue of this my Instrument of Accession but subject always to the terms thereof, and for the purposes only of the Dominion, exercise in relation to the State of Jammu and Kashmir (hereinafter referred to as “this State”) such functions as may be vested in them by or under the Government of India Act, 1935, as in force in the Dominion of India, on the 15th Day of August 1947, (which Act as so in force is hereafter referred to as “the Act”).

*Id.*

21. *Id.*

22. *Id.* To view the actual letter that Maharaja Hari Singh wrote requesting accession into India and also requesting for the Government of India to help protect the people from the invading Pakistan soldiers that were infiltrating Kashmir and causing great instability, [http://www.kashmi-information.com/LegalDocs/Maharaja\\_letter.html](http://www.kashmi-information.com/LegalDocs/Maharaja_letter.html).

23. See Alan Campbell-Johnson, *Mountbatten and the Transfer of Power*, HISTORY TODAY, Sept. 1997, at 34.

24. With the exit of the British and the independence of India in 1947 there were 562 Princely States. Aharon Daniel, *India History: Princely States and Provinces*, at <http://adaniel.tripod.com/princely.htm>. These Princely States were actually ruled by Kings, and some of them, such as Kashmir, and Hyderabad were as large as England. *Id.*

was with this Government that Pakistan signed a *Standstill Agreement* by the exchange of telegrams on August 12 and 16, 1947.<sup>25</sup> At that time the Pakistan Government did not question the validity of the Agreement with the Government of Maharaja of Kashmir. India's Right, as well as its duties with regard to Jammu and Kashmir flowed from the fact that accession was recognized and viewed as legitimate since the birth of the two nations. Mr. Warren Austin, the representative of the United States in his speech on February 4th 1948, during the 240th meeting of the Security Council, where he asserted the following, which further corroborated, "The external sovereignty of Jammu and Kashmir is no longer under the Maharaja. With the accession of Jammu and Kashmir with India, this sovereignty went over to India and is exercised by India."

It is significant that the legality of the accession has never been questioned either by the Security Council or by the United Nations Commissions for India and Pakistan (UNCIP). On the contrary, with regard to the question of accession, the UNCIP legal advisor examined this issue and found that it was legal and authentic and could not be questioned. This fact clearly influenced the proposals made by the UNCIP. The most significant recognition of India's legal status in Kashmir was contained in the Commission's reply to protests from the Pakistan Government against the decision of the Indian Constituent Assembly to reserve four seats for the representatives of Jammu and Kashmir. The Commission declined to take up this matter and observed, "In the Commission's view, it is difficult to oppose this measure of the Indian Government on purely legal grounds."<sup>26</sup>

The issue of armed conflict with Indian Military forces has been raised in several quarters in trying to establish legitimacy of the Self-Determination of

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25. Three days before the transfer of power, the Maharaja of Kashmir sent telegrams bearing identical dates, asking for Standstill Agreement on 12 August 1947 to both the Dominions India and Pakistan to maintain the normal amenities of life such as post office, communications and so on. The agreement, as provided in the Indian Independence Act 1947, would guarantee that till new agreements were made all existing agreements and administrative arrangements would continue. Any dispute in regard to this would be settled by arbitration and "nothing in this agreement includes the exercise of any paramount functions" Pakistan immediately accepted the agreement on 15 August through a telegraphic communication. But the Government of India asked the Prime Minister of Kashmir to fly to Delhi to negotiate the Agreement, or to send any other authorized Minister for the purpose. The non-acceptance of the Standstill Agreement by India immediately aroused suspicion in the minds of Pakistan and it complained that India's failure to conclude the agreement was indicative of some plan to effect the accession immediately. Before any Minister could reach Delhi, the Pakistan sponsored tribal invasion had altered the situation altogether.

RAM KRISHEN K. BHATT, *KASHMIR AND PARTITION OF INDIA (PART II)* (2001), <http://www.kashmir-information.com/Miscellaneous/Bhatt2.html>.

26. *KASHMIR PAPERS: REPORTS OF THE UNITED NATIONS COMMISSION FOR INDIA AND PAKISTAN (JUNE 1948 TO DECEMBER 1949)* 194.

some Kashmiri People. However, based on the legality of accession of Kashmir to India, there should be no confusion to the use of force for the law and order situation in Kashmir. Because, an essential attribute of sovereignty is the Right to maintain an army for national security. Based on the UNCIP resolutions of August 13th 1948 and January 5th, 1949, there has always been recognition of the Rights and obligations of the Government of India to maintain a sufficient force “for the support of the civil power in the maintenance of law and order.” In this way, the UNCIP, and authorized World body, not only recognized the Right of India to retain her troops in Jammu and Kashmir in sufficient numbers consistent with the security of the State, but also recognized the responsibility of India for the maintenance of law and order throughout the State.

### *B. Granularization of Self-Determination or Faulty De-colonization?*

It is imperative that the Right of Self-Determination in Kashmir is analyzed within the context of the Instrument of Accession discussed above. We have shown that, the instrument of accession was a legitimate process born out of de-colonization. The independence of India and Pakistan came about as a result of this de-colonization, which in essence was driven by a broader concept of Self-Determination. Thus, granting the territory of Kashmir to an independent India via the process of *Instrument of Accession* was an act precipitated by invoking the concept of Self-Determination. Therefore, any further granularization of this Self-Determination by responding to an illegitimate demand for Self-Determination of any territory within a sovereign State would question the legitimacy of the de-colonization process that in the first place started this chain of events. It is therefore of utmost importance to take out the blinders of political rhetoric and try to understand the legitimacy of the accession via historical truth.

The Instrument of Accession executed by the Kashmir Maharaja was in no way different from that executed by some 500 other Princely States. It was unconditional, voluntary and absolute. It was not subject to any exceptions. And as Alan Campbell-Johnson wrote in 1951,<sup>27</sup> “The legality of the accession is beyond doubt.” The legitimacy of Kashmir’s accession to India has further been corroborated as recent as February 11, 1975 Sheikh Abdullah, the Lion Leader of Kashmir, wrote a letter to India’s Prime Minister saying, “The accession of the state of J&K is not a matter in issue. It has been my firm belief that the future of J&K lies with India because of the common ideal that we share.” More than twenty years thereafter, the same sentiments are being reiterated by the present Chief Minister of Kashmir, Mufti Md. Sayed, and it is worth noting, the people democratically elected him.

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27. ALAN CAMPBELL-JOHNSON, *MISSION WITH MOUNTBATTEN* 225 (Macmillan Publishing Co. 2001).

## V. DISCUSSION

Taking a peek at history of the United States of America, we can compare the accession of Jammu and Kashmir (Kashmir) to India with the annexation of Texas by the USA in 1845. Threatened by the menace of predatory incursions from Mexico, independent Texas requested the US government to annex it. The US Congress sanctioned the proposal. When Mexico protested, the US government did not consider its action of annexation as a violation of any of the rights of Mexico. However, when Texas opted out of the Union in February 1861, so as to be unhindered in preserving and propagating slavery, Lincoln battled against the secession, committed as he was to freedom and democracy. If, therefore, minorities of Kashmiri people instigated and nurtured by Pakistan are alienated against India, should not India act like Lincoln?

Even as arguments on the Kashmir issue lingered in the United Nations Security Council for years, two important events of historical significance have further ratified the issue of accession. Firstly, in June 1949 the Prince of Kashmir,<sup>28</sup> on the advice of his council of ministers, nominated four representatives to the Indian Constituent Assembly which was then framing a Constitution for free India. At that time, it was made clear by the Kashmir government, "the accession of the J&K State with India was complete in fact and in law", the State would be governed by its own Constitution as permitted by the Instrument of Accession. Secondly, the Constituent Assembly comprising representatives duly elected in August 1951 on the basis of universal adult suffrage started deliberations, which ratified the accession on February 15, 1954. This ratification irrevocably incorporated the State of Kashmir as an integral part of the Union of India in the non-amendable Section 3 of its Constitution that came into effect from January 26, 1957.

The above series of acts by the State of Kashmir in no way violated its legal status vis-à-vis India or the United Nations Security Council. Moreover, at no time did any one doubt the representative nature of Kashmir's Constituent Assembly. Once the People of Kashmir had taken a final decision regarding their future status, the question of any further Self-Determination or plebiscite does not arise either legally or morally. Entertaining the demands of Self-Determination will only undermine the earlier Self-Determination, which in turn will create the illusion of a faulty de-colonization process. This is because, Self-Determination is a one-time process, and any movement to further granularize this would imply reopening the issue of the accession of Kashmir. This would mean going 57 years back in time and examining the legitimacy of the Independence of India and Pakistan. This lies in the simple fact, that the document that called for the accession of the Princely States including Kashmir

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28. More information can be found at <http://www.kashmir-information.com/>.

also legitimized the Independence of both India and Pakistan. We must understand, that reopening and dividing Kashmir on the basis of religious compulsion will surely lead to a replay of the communal Indian and Pakistan Holocaust of 1947.<sup>29</sup> Therefore, it is high time we engage ourselves in a bit of historical revisionism and duly recognize that the Security Council was exceeding its reach by presenting a plebiscite proposal with respect to Kashmir.

We are reminded by a more recent reaffirmation by the United Nations General Assembly where the conflict between the People Right to Self-Determination and the sovereignty of a Nation has been addressed. The declaration says,

The right of Self-Determination of all People, taking into account the particular situation of People under colonial or other forms of alien domination or foreign occupation, recognized the right of People to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of Self-Determination. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and Self-Determination of People and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.<sup>30</sup>

## VI. CONCLUSION

The concept of Self-Determination has broadened since the formative days of the post World War I. Along the way, various International bodies, Human Rights groups and the comity of Nations worked hand-in-hand to ensure freedom for all groups. The issue of Kashmir however opened up a whole set of new questions. Firstly, can the Right to Self-Determination be conferred upon a community or a group of People more than once? This situation is somewhat akin to attaching double jeopardy in common Law criminal jurisprudence,

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29. The famous Mohandas Gandhi was known for his help in gaining India's independence from the British. Generally it is accepted that Gandhi led the largely Hindu movement, and Mohammed Ali Jinnah led the Muslim majority in Pakistan. While Gandhi promoted inclusion and wanted Hindu and Muslim represented together, Jinnah advocated the division of India into two separate states, Muslim and Hindu. This division came at a painful cost. When the land was divided, violence erupted when Muslim and Hindu minorities were stranded in various areas, and raced to join their new lands. Within a few weeks half a million people had died, and resulted in nothing shy of a Holocaust.

30. *The Declaration of the Movement of Non-Aligned Countries, issued on 24 September 1996 on the occasion of the celebration of the thirty-fifth anniversary of the founding of the Movement*, U.N. GAOR, 51st Sess., Annex, U.N. Doc. A/51/462 (1996).



when a defendant cannot be tried twice. If the Right to Self-Determination is enshrined in the framework of International Law, can People's Right of Self-Determination be judged more than once? We argue, that unless evidence is presented in which a minority group is systematically subjected to State-sponsored oppression, demand for Self-Determination in any form should never be entertained.

This brings us to the legitimate issue of considering whether the current modalities of determining the Right of Self-Determination can actually work in the future. We submit, when the claim of Self-Determination is mixed with terrorism, as has been in the case of Kashmir, a sovereign State cannot ignore the threat to fragment its territorial and political unity. Especially, in the present case, if we consider that the legitimacy of the Instrument of Accession fulfilled the Kashmiri's Right to Self-Determination. Re-opening the issue of Kashmir's Self-Determination vis-à-vis the sovereignty of India would mean nullifying the Instrument of Accession, which in turn would nullify the independent status of both India and Pakistan. Can the World body afford to open that Pandora's box?

Finally, the Right to Self-Determination should always be analyzed in the context of the relevant group's original secession from the Colonial rule, if such event existed. As the rise of religious fundamentalism continue to influence political agendas all over the World, we will see an escalation of illegitimate demands for the Right to Self-Determination. The issue of Kashmir, and so many other territories in the world should be viewed with the same yardstick and be dealt with according to the sovereign decisions of the relevant Nation State. Otherwise, the whole issue of Self-Determination, in the words of Robert Lansing, (President Woodrow Wilson's Secretary of State), "would likely breed discontent, disorder and rebellion", and the world would indeed be a less safe place.