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MOCK ORAL ARGUMENT: THE CASE FOR SELF-DETERMINATION IN THE 21ST CENTURY

This panel was convened at 11:30 a.m., Thursday, June 25, 2020, by its moderator James Kateka of the International Tribunal for the Law of the Sea, who introduced the panelists: Mamadou Hébié of the International Court of Justice; Marc Weller of the University of Cambridge Faculty of Law; Milena Sterio of Cleveland-Marshall College of Law; and Nawi Ukabiala of Debevoise & Plimpton LLP.

Participants in this mock oral argument explored the law of self-determination in the twenty-first century in cases of unfinished decolonization and independent statehood movements. The views expressed by the participants were solely for the purposes of the mock debate and do not reflect their own personal views or those held by their employers.

Judge James Kateka of the fictitious International Court of Self-Determination presided.[1]

Case Concerning the Maintenance of Spanish Sovereignty Over Ceuta & Melilla in 1956 (Morocco v. Spain):

- Counsel for Morocco: Professor Mamadou Hébié.[2]
- Counsel for Spain: Professor Marc Weller.[3]

Case Concerning Catalonian Secession (Catalonia v. Spain):

- Counsel for Catalonia: Professor Milena Sterio.[4]
- Counsel for Spain: Nawi Ukabiala.[5]

I. Procedural Background

A. Morocco v. Spain

On June 1, 2019, Morocco filed an application instituting proceedings against Spain before the fictitious International Court of Self-Determination. On July 30, 2019, Spain filed preliminary objections to the jurisdiction and admissibility of the application. On December 2, 2019, the Court held a hearing on preliminary objections in which it dismissed all of Spain's objections to jurisdiction and admissibility with prejudice.

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[4] The Charles R. Emrick Jr. – Calfee Halter & Griswold Professor of Law, Cleveland-Marshall College of Law.

[5] Associate at Debevoise & Plimpton LLP in New York.

In its application and written briefs, Morocco alleges that by unlawfully maintaining sovereignty over Ceuta and Melilla at the time Spanish Morocco gained independence in 1956, Spain violated the right of the Moroccan people to self-determination by failing to respect the territorial integrity of the former colony as a whole. Morocco contends that, having regard to international law, including the United Nations Charter,[6] the International Covenant on Civil and Political Rights,[7] the International Covenant on Economic, Social and Cultural Rights,[8] and obligations reflected in relevant General Assembly resolutions,[9] the process of decolonization of Spanish Morocco was not completed when Spanish Morocco gained independence in 1956 and remains incomplete to this day.

Morocco seeks an order requiring Spain to allow the inhabitants of Ceuta and Melilla to participate in a referendum in which Moroccan citizens will vote on whether Ceuta and Melilla should become part of Moroccan territory. Morocco further seeks an order requiring Spain to transfer sovereignty over Ceuta and Melilla to Morocco if the referendum passes.

Spain contends that Ceuta and Melilla are naturally, historically, and ethnically part of the Spanish state. They contend that Ceuta and Melilla have been part of Spain since before Morocco was a political entity and that Morocco has no precolonial ties to Ceuta and Melilla. Spain further contends that the peoples of Ceuta and Melilla exercise their right to self-determination internally because they enjoy equal constitutional and administrative status to the inhabitants of mainland Spain. Alternatively, Spain argues that even if the process of decolonization was not completed in 1956, the appropriate remedy is for the peoples of Ceuta and Melilla, respectively, to participate in referendums to choose independence or association with Spain or Morocco, respectively.

B. Catalonia v. Spain

On June 15, 2019, Catalonia filed an application instituting proceedings against Spain before the Court. On July 15, 2019, Spain filed preliminary objections to the jurisdiction and admissibility of the application. On December 16, 2019, the Court held a hearing on preliminary objections in which it dismissed all of Spain's objections to jurisdiction and admissibility with prejudice.

In its application and written briefs, Catalonia contends that by nullifying the Law on the Referendum on Self-Determination of Catalonia and refusing to recognize the results of the 2017 Catalonian referendum, Spain has violated the right of the Catalonian people to self-determination guaranteed by international law including in the United Nations Charter,[10] the International Covenant on Civil and Political Rights,[11] and the International Covenant on Economic, Social and Cultural Rights.[12] Catalonia seeks an order requiring Spain to grant Catalonia independence.

In its written briefs, Spain contends that the right to self-determination does not entail a right to secession. Spain recognizes the right of the Catalonian people to self-determination and argues that

[6] UN Charter, Oct. 24, 1945, 1 UNTS XVI, *available at* https://treaties.un.org/doc/publication/ctc/uncharter.pdf.

[7] International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, 999 UNTS 171, *available at* https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf.

[8] International Covenant on Economic, Social and Cultural Rights (ICESCR), Dec. 16, 1966, 993 UNTS 3, *available at* https://treaties.un.org/doc/Treaties/1976/01/19760103%2009-57%20PM/Ch_IV_03.pdf.

[9] GA Res. 1514 (XV) (Dec. 14, 1960); GA Res. 2066 (XX) (Dec. 16, 1965); GA Res. 2232 (XXI) (Dec. 20, 1966); GA Res. 2357 (XXII) (Dec. 19, 1967).

[10] UN Charter, *supra* note 6.

[11] ICCPR, *supra* note 7.

[12] ICESCR, *supra* note 8.

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the Catalonian people enjoy the right to exercise self-determination through internal means. In the alternative, Spain argues that the right to self-determination can only be pursued through secession in extreme cases of oppression and persecution, neither of which are present here.

At the conclusion of the written proceedings, the Court granted Spain's motion to join the case to the *Morocco v. Spain* case for the oral proceedings. Accordingly, the Court scheduled the hearing on the merits in both cases for June 25, 2020.

II. Oral Proceedings

A. Judge Kateka

The International Court of Self-Determination meets today to hear the oral argument in the *Case Concerning the Maintenance of Spanish Sovereignty over Ceuta and Melilla in 1956 (Morocco v. Spain)* and the *Case Concerning Catalonia Secession (Catalonia v. Spain)*. The two cases have been joined pursuant to the Court's fictional rules of procedure.

I shall now put some questions from the Bench that will be considered by the counsel of each party in their oral arguments.

Question 1: Having regard to international law, was the decolonization process of Morocco lawfully completed when it gained its independence from Spain in 1956?

Question 2: Does international law give the "legitimate" representatives of Catalonia the right to effect secession of Catalonia from Spain unilaterally as they did through the Declaration of Independence of October 10, 2017?

Question 3: It has been contended that international law does not prohibit the secession of a territory from a sovereign state. Could the parties in the present proceedings address the Court on the rules of international law, if any, which, outside the colonial context, permit the secession of a territory from a sovereign state without the latter's consent?

Question 4: Has the right of self-determination acquired the status of a peremptory norm of general international law (*jus cogens*)?

B. Morocco v. Spain

1. Professor Mamadou Hébié for Morocco

Professor Hébié argued that by unlawfully maintaining sovereignty over Ceuta and Melilla at the time Spanish Morocco gained independence in 1956, Spain violated the right of the Moroccan people to self-determination by failing to respect the territorial integrity of the former colony as a whole.

2. Professor Marc Weller for Spain

We live in difficult times. And in difficult times, we tend to reflect and focus on what is essential for us. For us as international lawyers, these are the essential principles of the international system that preserve and protect us, our lives in peace and dignity. The most essential international rule seeking to achieve that aim is the rule of territorial integrity and the prohibition of the use of force.

Morocco is challenging this elementary sense of peace and security that has required many centuries to be built up and validated. For, it demands territory from Spain, simply because it is there, and because Morocco wants it. There is no claim to this territory of any kind—no legal claim that is. This goes directly against the well-established doctrine of the stability and finality of borders, which guarantees peace and security for us all.

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Morocco used force in 1957, when its army invaded Ifni and occupied it. Morocco used force in 1975 when it marched into the Western Sahara, subjugating the very population that was just emerging from a consensus-based process of decolonization arranged by Spain—and this occupation happened against the express ruling of the very sister court to this august body, the International Court of Justice (ICJ). In 2002, Morocco occupied the Spanish Parsley islands through military force, only to be rebuffed by the organized international community. Now, Morocco is demanding the surrender of further Spanish territory, without any legal justification whatever.

For, what possible basis can there be for a claim on a territory:

(1) That became part of Spain long before the modern era to which decolonization applies;
(2) Where there were no links of fealty or effective control between the territories of Ceuta and Melilla and their populations with what later became the Sultanate of Morocco. Indeed, the Sultanate concluded numerous treaties confirming that Ceuta and Melilla are Spanish and will be so in perpetuity;
(3) Where the territory was never part of the *uti possidetis* boundaries of the entity that became Morocco;
(4) And finally, there can be no claim where the territory has had its own population that has, over six hundred years, developed its distinct ethnic identity and strong attachment to Spain, and that has been treated by Madrid as a fully constitutionally sanctified part of Spain which is fully representing the territory, and in whose institutions the territory is fully—and may I say—genuine democratically—represented.

We will urge this High Court to disown this attempt to bully a sovereign state into surrendering its territory, and an unwilling population, to another state, merely because that territory lies geographically close to the bully, and merely because that state demands the territory without any legal justification. As we will hear from learned counsel opposite, the cloak for this unjustifiable demand is the argument of having to overcome colonialism. It is a populist claim, and one that would ordinarily attract support. Spain, after all, has attempted to offer a model of responsible decolonization as soon as the unfortunate period of dictatorship imposed upon her people was finally overcome. In contrast, it is ironic in the extreme that Morocco is pleading decolonization, while continuing to obstruct the path to freedom of so many on its southern border toward the act of self-determination. But, of course, Ceuta and Melilla were never ever a colony to which the doctrine of decolonization might be applies.

President, you have posed a number of questions to us. Let me address the points that arise in relation to Ceuta and Melilla in turn:

(1) Were Ceuta and Melilla ever part of Morocco, either before or during its colonial past?
(2) Can Morocco make a claim of incomplete decolonization?
(3) If the right to self-determination applies, who would hold it?

At the outset, let me state one undisputable truth: Ceuta and Melilla were never ever part of Morocco, either before or during the period of colonialism. Hence, there cannot be a claim to completion of the territorial identity of Morocco as a former colonial entity within the colonial, *uti possidetis* boundaries.

The two areas were acquired by Portugal and Spain from 1415 onward. No, we do not claim that they were *terra nullius*, as learned counsel opposite suggests somewhat disingenuously. They were previously held by Rome, the Byzantine Empire, and the Visigoths—not by any entity of which

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Morocco could conceivably claim to be the successor and whose precolonial integrity has been disrupted by colonialism.

The definition of colonialism does not reach back into the pre-modern era. At the time, the Muslim entities that had spread from North Africa were still holding significant parts of Spain, the *Reconquista* not having been completed. Territory was acquired according to the rules of the time.

The doctrine of decolonization, it is true, is retrospective, seeking to overcome the injustices of the imperialist past. But the doctrine does not touch upon the status of territories that had consolidated before the age of imperialism. If it did, literally no territorial boundary would be safe from irredentist challenge, from renewed aggression and war, as territory changed hands through cession, dynastic succession, and occupation throughout the pre-modern world. Should the Franks now claim Jerusalem, because they may claim a relationship to the former king and Kingdom of Jerusalem during the late Middle Ages?

In short, decolonization is rightly a powerful doctrine, but it is a doctrine whose application has a beginning and an end. The beginning lies at the point of colonial, imperialist expansion of the states of Western Europe, and later of a few others.

This has been widely accepted, including by the authorities in Morocco. From the seventeenth century onward, with the establishment of the Sultanate of Morocco, the Sultanate has consistently confirmed the appurtenance of the territories to Spain in its treaties with Spain: 1767, Sultan Mohamed bin Abdullah, 1799 Sultan Moulay Slimane, 1845, 1860, 1862, 1911, etc. Morocco takes pride in the history and effectiveness of the Sultanate at the time, and it is not possible to claim conveniently that the Sultanate was after all somehow lacking the attributes required for concluding these agreements validly.

The decolonization of Morocco was indeed completed in 1956—mainly through decolonization from France, it should be noted. With respect to the Northern Protectorate held by Spain, it was agreed that independence would take place with due respect to the territorial integrity of Morocco.

The reference to the territorial integrity of Morocco can only be understood in relation to the *uti possidetis* boundaries of the protectorate, which did absolutely, positively not include Ceuta and Melilla. Territorial integrity cannot be a reference to any additional territories an aggressive Moroccan state might like to possess. Ceuta and Melilla have always been administered separately, as part of Spain, and were not part of the protectorate or the territory that gained independence as Morocco within its *uti possidetis* boundaries.

We should note the emotional case made by Morocco to the United Nations Decolonization Committee in 1960, claiming the territories for some diffuse reasons and invoking the emotive concept of completing Morocco's decolonization.

Well, this plea was refused by the Committee, the internationally authorized body to determine authoritatively which territories are colonies and which are not. The territories were specifically and deliberately, despite Morocco's pleading, not inscribed on the list of non-self- governing territories still requiring decolonization. President, it is official: this is not a case of uncompleted decolonization

And this refusal was well reasoned. In contrast to the *Chagos Islands* case, this is not a case of the excision of a part of a *uti possidetis* territory by a colonial power just before decolonization. The territories in question had been part of Spain proper, and were not one of its colonial dependencies, for over half a millennium. Morocco's decolonization was fully completed within Morocco's *uti possidetis* boundary in 1956.

We should note that Gibraltar is entirely different because the territory at issue was evidently part of Spain, a state in existence at the time of the act colonial alienation. That is not the case here. The territories were not part of Morocco and taken from it during the colonial era. Moreover, Gibraltar

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was considered up to 2006 as a type of colonial appendage of the UK, and since then as an overseas territory. For Spain, Ceuta and Melilla are not colonial or overseas territories. They are inherently Spanish territories within the Spanish constitution and have been so since the late Middle Ages. After what the late Tom Franck called "the stealing of the Western Sahara" by Morocco, there will not be a stealing of yet further territory and additional trauma inflicted on a population that has no wish to change allegiance at the point of the gun.

President, decolonization is a doctrine at the service of a disenfranchised people, it is a people's right. But this is a territorial dispute, except it is one where Morocco has no actual legal claim of any kind, other than the desire of the child to grab whatever lies next to it, within its grasp.

Spain gave in to the forcible land grab by Morocco in Ifni, bowing to armed occupation, and also because the local population was mainly of Arab origin and favored integration.

The world has resisted the theory of so-called completion of decolonization through what is in essence the conquest of neighboring territories. Consider the case of Eastern Timor, where the organized international community resisted the forcible incorporation of that territory into Indonesia in violation of the rights and voices of its people. To this day, the organized international community remains strongly opposed to the further land grab in the Western Sahara, insisting that the Saharawi people must be allowed to exercise their right to self-determination. This is despite the fact that, in that case, the ICJ found that there did exist some preexisting historical ties between the Western Sahara and the Sultan of Morocco, which is not the case here.

For decades, Morocco has vigorously opposed the articulation of the will of the people of the Western Sahara, frustrating again and again the UN demand for a free and fair referendum of the people of that territory on their future status.

While denying a referendum to the people of the Western Sahara, in this instance, Morocco seems to favor an act of the will of the people after all. Except it is not the people concerned—they wish to stay with Spain. Morocco wants to hold a referendum of all the people of Morocco on whether Ceuta and Melilla should be part of Morocco. Well, why not hold a referendum of the people of Morocco on whether Kansas should be part of Morocco?

Obviously, as universal practice confirms without exception, it is the colonial entity entitled to self-determination that would need to articulate its wishes, not a large, external entity that would wish to impose its dominance on the self-determination entity.

Even if, for the sake of argument, Morocco as a whole would be an entity entitled to "further" decolonization and vote for the absorption of both territories, such a change in status cannot be effected unless endorsed by plebiscite by the affected local population. As an example, note the Good Friday Agreement on Northern Ireland, where the island of Ireland is identified as the self-determination unit, but no change can occur absent the consent of the people of Northern Ireland.

But this is not about the people. In 2002, Spain was compelled to resist the further Moroccan aggression against Parsley Island, where there is no population to speak of. The simple aim of Morocco to add more and more territory, just because it is there, was revealed in its stark nakedness. What is next? The Canary Islands, Sicily perhaps, or the Moon?

How can it be a self-determination dispute, when the people at issue are Spanish, are fully part of the Spanish constitutional system, and have a strong wish for this state of affairs to remain? They do not wish to have their fate determined by outsiders without regard to their will and wishes, for the mere purposes of territorial aggrandizement and outside of the law—the law we are all here, together, to defend.

Morocco has no legal claim to Ceuta and Melilla of any kind. Both are part and parcel of the territorial integrity of Spain. We cannot arbitrarily disrupt that integrity, and do it against the wishes of the people, without destroying at the same time the essential foundations of international law.

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C. Catalonia v. Spain

1. Professor Milena Sterio for Catalonia

a. Introduction: Catalonia and Its Quest for Independence

Catalonia is a region located in northeastern Spain, with a land area of 32,000 square kilometers and population of 7.5 million. Although Catalonia has been part of Spain for centuries, it has a distinct history dating back almost one thousand years, including its own language and distinctive traditions.[13]

Since the War of Spanish Secession (1701–1714), Catalonian independence and recognition of Catalan culture has been a major political issue that has sometimes led to violent conflict. Pro-independence activity in Catalonia declined after Spain passed the Statute of Autonomy of Catalonia in 1979.[14] In 2006, Spain adopted a second Statute of Autonomy of Catalonia, granting Catalonia even greater autonomy and describing it as a nation.[15] However, the Spanish Constitutional Court ruled that significant portions of the law were unconstitutional in 2010 and modified its text,[16] leading to massive protests in Barcelona.

In 2014, Catalonia passed a symbolic self-determination referendum, even though the vote had been declared illegal by the Spanish Constitutional Court. On September 6, 2017, the Parliament of Catalonia passed the Law on the Referendum on Self-Determination of Catalonia providing for an official referendum which was held on October 1, 2017. The Spanish Constitutional Court suspended the Law on the Referendum on September 7, 2017. The referendum was held on October 1, 2017 and passed with over 90 percent of Catalonians voting for independence. The Spanish Constitutional Court declared the Law on the Referendum unconstitutional on October 17, 2017.[17] The separatist majority in the Catalan parliament declared independence on October 27, 2017.[18] These events led Spain to dissolve the Catalonian government and impose direct rule on Catalonia pending elections on December 21, 2017. In those elections, pro-independence parties again won a majority. Since then Spain has convicted and sentenced various Catalonian separatist leaders for treason and sedition.[19]

The right to self-determination is a peremptory norm of international law (II). It is clear under international law that the people of Catalonia possess the right to self-determination, which they are allowed to exercise through secession (III). Moreover, no particular rules of international law prohibit this type of peaceful secession (IV). In sum, the attempted secession from Spain by the people of Catalonia is not prohibited by international law.

[13] *See Catalonia*, BRITANNICA, *at* https://www.britannica.com/place/Catalonia.

[14] Statute of Autonomy of Catalonia of 1979, *at* https://web.gencat.cat/en/generalitat/estatut/estatut1979.

[15] Statute of Autonomy of Catalonia of 2006, *at* https://web.gencat.cat/en/generalitat/estatut/estatut2006.

[16] Constitutional Court Ruling 31/2010 (June 28, 2010) (Spain), *at* https://boe.es/diario_boe/txt.php?id=BOE-A-2010-11409.

[17] Constitutional Court Ruling, 114/2017 (Oct. 17, 2017) (Spain), *available at* https://www.tribunalconstitucional.es/ResolucionesTraducidas/Ley%20referendum%20ENGLISH.pdf.

[18] Catalan Declaration of Independence, Oct. 27, 2017, *available at* http://www.cataloniavotes.eu/wp-content/uploads/2017/10/27-Declaration-of-Independence.pdf.

[19] *Catalonia*, *supra* note 15; *see also* Erin Blakemore, *Why Spain's Wealthiest Region Wants Independence*, NAT'L GEOGRAPHIC (Nov. 1, 2019), *at* https://www.nationalgeographic.com/history/reference/people/why-catalonia-spain-wealthiest-region-independence/#close.

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b. The Right to Self-Determination: A Peremptory Norm of International Law

The right of self-determination has acquired the status of a peremptory norm of general international law (*jus cogens*). According to the International Law Commission (ILC), a peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[20] Moreover, the ILC has explained how peremptory norms are identified. To identify a peremptory norm of general international law (*jus cogens*), it is necessary to establish that the norm in question meets the following criteria: (1) it is a norm of general international law; and (2) it is accepted and recognized by the by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[21] According to the ILC, customary international law is the most common basis for peremptory norms of general international law (*jus cogens*), and treaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*).[22]

The right to self-determination is a norm of general international law accepted and recognized by the international community of states; the right to self-determination is firmly embedded in the UN Charter, in treaty law, customary law, and in the case law of the ICJ.[23] In the *Portugal v. Australia (East Timor)* case, the ICJ held that self-determination was one of the "essential principles" of contemporary international law.[24] In the *Wall* case, the ICJ confirmed the *erga omnes* status of the principle of self-determination.[25] And most recently, Judge Robinson in his separate opinion in the *Chagos Islands* case clearly established that the right to self-determination was a peremptory norm of international law.[26] Thus, the right to self-determination is such a peremptory norm. No states may claim the right to deny peoples living inside their borders of the right to self-determination.

c. The People of Catalonia Possess the Right to Self-Determination

It is clear under international law that the people of Catalonia possess the right to self-determination. The Catalan constitute a people: they speak a different language, have a distinct ethnicity from the Spaniards, possess a common sense of identity, and have for years laid a well-defined territorial claim to Catalonia. All peoples possess the right to self-determination under international law. International law sources which confirm the existence of the right to self-determination include the United Nations Charter, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Social Cultural and Economic Rights (ICESCR), as well as soft law instruments such as the Friendly Relations Declaration. The right to self-determination has been confirmed in several rulings by the ICJ, including the *Wall* case and the *Kosovo* case, and, most recently, the *Chagos Archipelago* case.

[20] International Law Commission, Peremptory Norms of International Law (*Jus Cogens*), *available at* https://legal.un.org/ilc/reports/2019/english/chp5.pdf.

[21] *Id.*

[22] *Id.*

[23] UN Charter, *supra* note 6, Art. 1; ICCPR, *supra* note 7; ICESCR, *supra* note 8, Art. 1; *see* nn. 24–26 *infra*.

[24] Case Concerning East Timor (Port. v. Austl.), Judgment, 1995 ICJ Rep. 90, para. 29 (June 30).

[25] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Rep. 136, paras. 88, 156 (July 9).

[26] Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 ICJ Rep. 95, paras. 48–82 (Feb. 25) (sep. op., Robinson, J.).

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Moreover, international law grants the "legitimate" representatives of Catalonia the right to effect secession of Catalonia from Spain unilaterally, as they did through the Declaration of Independence of October 10, 2017. As indicated above, international law contains the right to self-determination for all peoples. The right to self-determination exists in two forms: internal and external. It is well established in international law that all peoples have the right to internal self-determination, which is normally exercised through autonomy within a larger mother state. If the mother state violates the people's right to internal self-determination, then in extreme circumstances, the people may exercise its right to external self-determination. As the Canadian Supreme Court has indicated in the Quebec secession case, noncolonial oppressed peoples may be entitled to exercise their right to external self-determination if their mother state does not respect their right to internal self-determination.[27] The ICJ has silently affirmed that this is correct—the world court confirmed in the *Wall* case and in the *Chagos Archipelago* case that peoples have a right to self-determination, and in the *Kosovo* case, the world court did not hold that peoples were not allowed to exercise external self-determination.[28] In the case of Catalonia, Spanish authorities have disallowed the people of Catalonia to exercise their external self-determination—in 2017, Spain revoked Catalonia's autonomy, and over the past few years, several Catalan leaders have been arrested. The exercise of external self-determination can be accomplished unilaterally, through remedial secession, without the consent of the mother state, in extreme instances of oppression. In the *Kosovo* case, the world court held that the Kosovar unilateral declaration of independence was not illegal in international law. At best, international law prohibits secessions accomplished through the use of force, as was the case of the attempted secession of Northern Cyprus. Here, the people of Catalonia have held a peaceful referendum and have not used force in their attempt to exercise external self-determination through remedial secession. Because Spain has oppressed the people of Catalonia and has not allowed them to exercise their right to internal self-determination, the people of Catalonia are entitled to exercise the right to external self-determination through remedial secession. Nothing in international law prohibits this type of a peaceful secession by an oppressed people. Thus, under the famous *Lotus* proposition, the exercise of external self-determination is allowed and legal under international law in extreme circumstances of oppression. The people of Catalonia, because they have been oppressed by Spain, are entitled to exercise external self-determination through remedial secession.

d. Relevant International Law Rules on Secession

Relevant rules of international law permit the secession of a territory from a sovereign state without the latter's consent, even outside the colonial context. Let me begin my emphasizing the importance of the famous *Lotus* proposition—that what is not prohibited by international law is actually allowed in international law. No rule of international law prohibits a peaceful secession. International law is silent on secessions and treats successful and peaceful secessions as a fait accompli. The ICJ in the *Kosovo* case confirmed this approach, by refusing to declare that the Kosovar secession from Serbia was illegal. As mentioned above, international law contains a prohibition on the use of force in Article 2(4) of the UN Charter, as well as in customary law. It follows that secessions accomplished through an illegal use of force may be illegal. But secessions accomplished through peaceful means, such as a popular referendum, are not disallowed by international law. International law also contains a norm protecting the territorial integrity of existing states. That norm, however, applies to states themselves, whereas secessionist movements are not state actors

[27] Reference re Secession of Quebec, [1998] 2 SCR 217 (Can.).

[28] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 ICJ Rep. 403, paras. 82–83 (July 22).

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and not bound by the same territorial integrity norm. The ICJ confirmed this approach as well in the *Kosovo* case, by focusing on the identity of the authors of the Kosovar Declaration of Independence, a non-state actor not bound by the same rules as states themselves. International law does contain the general right to self-determination: in the UN Charter, the two covenants (ICCPR and ICESCR), UN General Assembly resolutions, and ICJ decisions. Although the process of secession is distinct from the right to self-determination, at least one variant of self-determination, the external one, is exercised through secession. Thus, international law implicitly condones secession. Finally, evolving customary rules of international law embrace secession. Customary law forms over long periods of time through consistent state practice and *opinio juris*. States have, over the past several decades, accepted secession—this is evident from the *Kosovo* case (over half of the world's states have recognized Kosovo as an independent state), as well as from other cases such as the Bangladesh secession from India, the East Timor secession from Indonesia, and the South Sudan secession from Sudan. *Opinio juris* on secession has also formed—as mentioned above, the Permanent Court of International Justice first recognized the right to external self-determination through secession for oppressed peoples in the *Aaland Islands* case; this was further confirmed by the Canadian Supreme Court in the *Quebec* case, and was upheld by the ICJ in the *Kosovo* case. Moreover, states' acceptance of secession as a legal principle is evidenced from various states' submissions to the ICJ in the *Kosovo* case. Albania, Denmark, Estonia, Finland, Germany, Ireland, Latvia, the Netherlands, Poland, Slovenia, and Switzerland had all argued to the ICJ that the right to remedial secession was legal under international law.[29] Thus, there is an emerging customary norm recognizing secession.

e. Conclusion

In conclusion, the representatives of Catalonia have the right to effect remedial secession, because the people of Catalonia have the right to self-determination that they can exercise externally, through remedial secession, because of the Spanish denial of the Catalan exercise of internal self-determination. No rules of international law prohibit this type of secession. Moreover, the right to self-determination is a peremptory norm of international law from which no derogations are permitted. In light of the above, the appropriate remedy for the people of Catalonia is the exercise of their right to external self-determination through secession from Spain.

2. Nawi Ukabiala for Spain

It is an honor to appear here today before this pretend court, the esteem of which cannot be diminished by its fictional character. I convey my most genuine courtesies to opposing counsel. And on behalf of the Kingdom, the warmest affection and goodwill to all of the people of Catalonia.

The Kingdom regrets deeply that the Catalonians have pursued this course, that threatens its bond of fraternity with the Spanish people and the political and territorial unity of the Kingdom. The history and destiny of the Kingdom is bound up inextricably with Catalonia's. Going back for centuries, all Spanish people, including Catalonians, have been united in solidarity, through war and peace, adversity and prosperity, rallying together under a common flag. While there have been moments in history, in which the Kingdom has regrettably suppressed the justifiable desires of the Catalonians, the Kingdom is proud of its history of addressing their grievances through good faith consultation. The Kingdom remains always prepared to resolve any grievances held by Catalonians by these means.

[29] Matthew Saul, *The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?*, 11 HUM. RTS. L. REV. 609, 616 (2011).

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But today, Catalonia makes submissions that cannot be pleaded justly. This purported entitlement to a unilateral declaration of independence is based on populist impulses and imagined slights. But more pertinently, and as I will show, its claims before this court are not based on any rules of international law.

First, I will show that outside the context of decolonization, the right to self-determination does not entail a right to secession. Second, and in the alternative, I will show that even if international law recognizes the doctrine of so-called "remedial secession," it only applies in extreme cases of oppression or persecution, neither of which are present here.

a. There Is No Right to Unilateral Secession in International Law

Catalonia argues that international law sanctions its 2017 Declaration of Independence. However, the provisions of the UN Charter and the two human rights covenants on which Catalonia relies say nothing of a right to unilateral secession; they guarantee the right to self-determination. It is undeniable that all peoples enjoy the right to self-determination. However, the principle of self-determination is one of the broadest expressions in the lexicon of international relations. In international law, it is a foundational principle that manifest itself in various ways.

As the current president of the ICJ, Judge Yusuf, explained in his separate opinion in the *Kosovo* case, "the right to self-determination chiefly operates inside the boundaries of existing States." This conception, commonly referred to as "internal self-determination" applies to the entire population of a state, including distinct ethnic groups. However, Catalonia can point to no source of international law that indicates a general right to "external self-determination," that is the right to exercise self-determination by separating from a state. It is certainly not found anywhere in state practice. Rather, state practice is consistent with the General Assembly's 1970 Friendly Relations Declaration, which the ICJ held to reflect customary international law in *Nicaragua v. US.* That Declaration says that the right of self-determination "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." The absence of any consistent state practice supporting unilateral declarations of independence is consistent with that rule.

There is a good reason that international law does not embrace a general right to secession. It would be antithetical to the principles of political and territorial unity which underpin the international legal order and are reflected in the principles of territorial integrity and *uti possidetis*. It would introduce perpetual fragmentation and irredentism into the international legal order which would inevitably pose a grave threat to human security.

International law only authorizes external self-determination in the context of decolonization. The era of decolonization in the mid-twentieth century, by which so many new states were formed, provides the only reliable source of state practice concerning external self-determination. As the ICJ stated in the *Chagos* advisory opinion, UN General Assembly Resolution 1514 of 1960 represented a "defining moment in the consolidation of State practice on decolonization." By its terms, it is limited to situations of alien subjugation. It declares the right of colonized peoples to exercise their right to self-determination to obtain independence. General Assembly Resolution 1541 is also widely held to reflect custom. It too, by its terms, is limited to the context of decolonization and sets forth the ways in which colonized people may exercise their right to self-determination, which include by secession to form a new state. Throughout the process of decolonization, the dictates of these two resolutions were followed with near uniformity. They were endorsed by state practice, including within the United Nations framework. As Judge Sebutinde explained in her separate opinion in the *Chagos* case, the right to the territorial integrity of a self-determination unit achieved *jus cogens* character, but only in the context of decolonization.

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The fact that Catalonia is not a colonized territory is so manifest that it requires no explication. And outside of the context of decolonization, international law has nothing to say about secession. It neither bestows on peoples any such right, nor prohibits them from seeking independence. Thus, Catalonia's 2017 Declaration of Independence is an internal domestic affair governed solely by Spanish law. And like the laws of most countries, Spanish law treats secession attempts as treasonous.

There may be a few instances, in which states have displayed a tolerance of so called "remedial secession," that is the exercise of external self-determination to remedy grave human rights violations, but these instances are too varied and infrequent to demonstrate any consistent state practice, much less *opinio juris*. And, in any case, as I will now explain, even if a right to remedial secession does exist, the circumstances that could justify it are simply non-existent in the Catalonian case.

b. The Doctrine of Remedial Secession Does Not Apply Here.

The theory of remedial secession is fiercely contested in international law. As the Canadian Supreme Court stated in the Quebec secession case, the right to remedial secession is not clearly established in international law. However, accepting it *arguendo*, it is, by its own terms, inapplicable to the Catalonian situation. It applies only in cases where a people suffer such extreme oppression or persecution, that they are deprived of the right to internal self-determination. Moreover, it only applies in cases where there is no alternative remedy available. Neither of these conditions are met here.

c. There Is no Evidence of Oppression

First, I will show that remedial secession requires evidence of severe oppression which is not present here.

The theory of "remedial secession" is often traced back to the 1921 decision of a League of Nations Commission in the *Aaland Islands* case. In that case, the Swedish-speaking minority that inhabit Finland's Aaland Island archipelago sought to exercise external self-determination by uniting with Sweden. The commission held that the Aaland Islanders were not a people for purposes of self-determination. In a discussion that was perhaps a bit gratuitous, it also stated that a resort to external self-determination was not justified because the Aaland Islanders had "neither been persecuted nor oppressed by Finland." As the commission explained, "[t]he separation of a minority from the State of which it forms a part . . . can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees."

In 1992, in the *Katanga* case, the African Commission similarly held that the Katangese people had only the right to internal self-determination because they could not demonstrate that Zaire had egregiously violated their human rights. Similarly, in 1998, the Canadian Supreme Court held that even if remedial secession is a rule of international law, it did not apply to Quebec because its people had not been "denied meaningful access to government to pursue their political, economic, cultural and social development." Citing those cases in his separate opinion in the *Kosovo* case, Judge Yusuf, explained that a claim to external self-determination is only legitimate in cases of racial or ethnic discrimination or the denial of autonomous political structures and access to government.

These decisions demonstrate that, even if remedial secession is a rule of international law, it only applies when a state subjects a people to such extreme oppression or persecution, that they are unable to realize the right to self-determination within its constitutional framework. But the Catalonian people enjoy the most liberal exercise of the right to self-determination within the

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Spanish constitutional framework. They enjoy even greater autonomy than the League of Nations commission suggested that the Aaland Islanders were due.

Since the Statute of Autonomy of 1979, Catalonia has constantly enjoyed an autonomy regime by which it has an exceptional range of powers. Catalonia has autonomy with respect to virtually all regional matters including economics, housing, energy, environment, art, architecture, media, and so on. It also has substantial judicial and fiscal autonomy. Under this autonomy regime, Catalonia has flourished and is one of the richest regions in Spain. The Catalonian people enjoy all of the rights due to all people by virtue of their humanity. There is no evidence before this Court of any human rights violations that the Kingdom has committed against the Catalonians. There is no evidence that the Kingdom has deprived Catalonians of economic or physical security, of the right to work or social security, or healthcare. There is no evidence of high employment rates or low education rates in Catalonia.

Despite Supreme Court rulings and strong official warnings, the Catalonians pursued their separatist agenda in 2017 leaving the Kingdom no choice but to employ the limited use of force to secure respect for the rule of law. But that use of force was not only circumscribed to what was strictly necessary to maintain the political unity of the Kingdom, it was also short-lived. Therefore, it was consistent with human rights law. So, the Catalonian claim devolves into the proposition that the Kingdom's refusal to assent to its demands of Spanish disunity is oppressive. But that argument is not only circular, it finds no support in international law.

d. Alternative Remedies are Available

Finally, as reflected in all the authorities I have just discussed remedial secession is an "exceptional solution" of "last resort." It is not accessible, where there are other remedies available to be pursued. The Catalonians have ample opportunity to negotiate with the Kingdom, in good faith, to resolve any grievances.

e. Conclusion

As the United Nations stated in its 1992 Agenda for Peace, "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 achieve." The court should reject Catalonia's unfounded attempt to introduce such instability into the international legal order.

The Kingdom submits that the Court should dismiss the Catalonian claim in its entirety. Thank you.

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