

**UNILATERAL NON-COLONIAL SECESSION IN INTERNATIONAL LAW
AND DECLARATORY GENERAL ASSEMBLY RESOLUTIONS: TEXTUAL
CONTENT AND LEGAL EFFECTS**

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TABLE OF CONTENTS

I. INTRODUCTION.....	346
II. THE DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF THE UNITED NATIONS (“FRIENDLY RELATIONS DECLARATION”).....	348
<i>A. The Meaning of “Peoples”</i>	350
<i>B. A Right of Peoples to UNC Secession</i>	354
<i>C. Conclusion—The Friendly Relations Declaration</i>	368
III. THE DECLARATION ON THE OCCASION OF THE FIFTIETH ANNIVERSARY OF THE UNITED NATIONS (“FIFTIETH ANNIVERSARY DECLARATION”).....	368
<i>A. The Meaning of “Peoples”</i>	369
<i>B. A Right of Peoples to UNC Secession</i>	370
<i>C. Conclusion—The Fiftieth Anniversary Declaration</i>	371
IV. SUMMATION OF DECLARATORY GENERAL ASSEMBLY RESOLUTIONS.....	371
<i>A. Legal Effect of Declaratory General Assembly Resolutions</i>	372
1. Declaratory General Assembly Resolutions as Authentic Interpretations of the U.N. Charter: Article 38(1)(a) of the Statute of the ICJ.....	373
2. Declaratory General Assembly Resolutions as Customary Law: Article 38(1)(b) of the Statute of the ICJ.....	379
i. Are Statements Included Under Article 38(1)(b) of the Statute of the ICJ.....	379
ii. Various Forms of State Practice and Relative Weight Thereof.....	383
iii. The Impact of Repetition.....	383
iv. <i>Opinio Juris</i>	384
3. Declaratory General Assembly Resolutions as General Principles of International Law: Article 38(1)(c) of the Statute of the ICJ.....	388
4. Declaratory General Assembly Resolutions as “Consensus”: Beyond Article 38(1) of the Statute of the ICJ.....	391
<i>B. Distillation</i>	394
V. CONCLUSION.....	394

I. INTRODUCTION

Since the conclusion of World War II several new states have been created as a result of unilateral non-colonial ("UNC") secession.¹ These include Bangladesh (Pakistan), Eritrea (Ethiopia), Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Slovenia, Serbia, Kosovo (Yugoslavia), and South Sudan (Sudan).² Some well-known examples of attempted UNC secession include Serbian Krajina (Croatia), Chechnya (Russian Federation), Gagauzia (Moldova), Transnistria (Moldova), Abkhazia (Georgia),³ and South Ossetia (Georgia).⁴ These

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1. Secession can be unilateral or consensual. In the case of the former, secession occurs without the existing state's consent. By contrast, consensual secession receives the existing state's imprimatur. Consensual secession can be conceptually subdivided into constitutional and politically negotiated secession. Secession may occur in a colonial or a non-colonial context, as any new assertion of sovereignty over a colonial territory or part of an existing state involves a modification to the sovereignty of the metropolitan power or existing state respectively. For scholars who propound that secession may occur in a colonial or a non-colonial context, see HANNA BOKOR-SZEGŐ, *THE ROLE OF THE UNITED NATIONS IN INTERNATIONAL LEGISLATION* 53 (1978); JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 330, 370 (2d ed. 2007); INGRID DETTER DELUPIS, *INTERNATIONAL LAW AND THE INDEPENDENT STATE* 14-16 (1st ed. 1974); THOMAS D. MUSGRAVE, *SELF-DETERMINATION AND NATIONAL MINORITIES* 180-81 (1997); FATSAH OUGUERGOUZ, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: A COMPREHENSIVE AGENDA FOR HUMAN DIGNITY AND SUSTAINABLE DEMOCRACY IN AFRICA* 235-36 (2003); PETER RADAN, *THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW* 18 (2002); Christine Haverland, *Secession*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 384, 384-87 (10th ed. 1987); Patrick Thornberry, *Self-Determination and Indigenous Peoples: Objections and Responses*, in *OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION* 39, 52-54 (Pekka Aikio & Martin Scheinin eds., 2000); Frank Przetacznik, *The Basic Collective Human Right to Self-Determination of Peoples and Nations as a Prerequisite for Peace*, 8 N.Y.L. SCH. J. HUM. RTS. 49, 103 (1990-91).

2. South Sudan might alternatively be considered a consensual secession, given that it was ultimately achieved by way of a referendum. See Anthony J. Christopher, *Secession and South Sudan: an African Precedent for the Future*, 93 S. AFR. GEOGRAPHICAL J. 125, 125-132 (2011) (explaining that an agreement regarding a constitutional means of attaining secession was effective); Peter Radan, *Secessionist Referenda in International and Domestic Law*, 18 NATIONALISM & ETHNIC POLS. 8, 8-21 (2012). It should be noted, however, that this vote was the ultimate culmination of "the longest civil conflict on the continent [of Africa]." Khalid Medani, *Strife and Secession in Sudan*, 22 J. DEMOCRACY 135, 135 (2011). The secession of South Sudan might therefore be classified as unilateral in substance.

3. Abkhazia may eventually become a successful UNC secession, given that the Russian Federation, Nicaragua, Venezuela, Nauru, Vanuatu, and Tuvalu extended recognition on 26 August 2008, 5 September 2008, 10 September 2009, 15 December 2009, 23 May 2011, and 18 September 2011 respectively. *But see* Jelena Radoman, *Future Kosovo Status – Precedent or Universal Solution*, 3 W. BALKANS SECURITY OBSERVER 14, 17 (2006). For discussion of the Abkhazia conflict in general, see Antje Herrberg, *Conflict Resolution in Georgia: A Synthesis Analysis with a Legal Perspective*, CRISIS MGMT. INITIATIVE (CMI) (2006), http://humansecuritygateway.com/documents/CMI_Georgia_conflictresolutionsynthesisanalysis.pdf.

4. South Ossetia may eventually become a successful UNC secession, given that the Russian Federation, Nicaragua, Venezuela, Nauru, and Tuvalu have extended recognition on Aug 26, 2008,

examples—along with many others—demonstrate that UNC secession is an important method of state creation.

The present article examines whether a right to UNC secession is contained in United Nations (“U.N.”) declaratory General Assembly resolutions, and if so, what might be the legal effect of such a right. Examination of declaratory General Assembly resolutions is critical to establishing a right to UNC secession in international law.⁵ This is because scant—if any—support for such a right can be found in treaty law.⁶ Yet UNC secession is a well-recognized method of state creation,⁷ which by its very nature leads to a sovereignty conflict between the existing state and the (putative) secessionist state. The primary rules invoked for the resolution of this conflict are those relating to the international law of self-determination. It is this body of law, as developed and applied primarily by the U.N., which provides justification for the creation of a new state by way of UNC secession.

Two declaratory General Assembly resolutions arguably provide a qualified⁸ right to UNC secession for peoples: The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations⁹ (“Friendly Relations Declaration”) and the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations¹⁰ (“Fiftieth Anniversary Declaration”). The article’s first half examines the textual content of these instruments asking two interrelated questions: first, “what does the term ‘peoples’ mean?”; and second, “does the law of self-determination provide peoples—however defined—with a right to UNC secession?”¹¹ Both questions are controversial, with various scholars arguing

Sept. 5, 2008, Sept. 10, 2009, Dec. 15, 2009, and Sept. 19, 2011 respectively. For discussion of the South Ossetia Conflict in general, see Radoman, *supra* note 3; Herrberg, *supra* note 3; Gerard Toal, *Russia’s Kosovo: A Critical Geopolitics of the August 2008 War over South Ossetia*, 49 EURASIAN GEOGRAPHY & ECON. 670, 670 (2008), available at http://www.colorado.edu/geography/class_homepages/geog_4712_f08/ToalSouthOssetia.pdf.

5. On the ability of declaratory General Assembly resolutions to influence legal norms generally, see *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 70 (July 8); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 193 (June 27).

6. Such a right can arguably be construed from the African Charter on Human and Peoples’ Rights, particularly Articles 20(2) and 20(3). African Charter on Human and Peoples’ Rights (Banjul Charter), art. 20, June 27, 1981, 21 I.L.M. 58. In any event, this instrument only has narrow application being solely binding upon African Union states. The African Charter does not establish a general international legal right to UNC secession.

7. See, e.g., CRAWFORD, *supra* note 1, at 375.

8. The right is qualified in the sense that it is not open ended; it is only available to peoples who have been subject to sustained and systematic discrimination “of any kind” by their existing state. See G.A. Res. 50/6, U.N. Doc. A/RES/50/6 (Oct. 24, 1995) [hereinafter G.A. Res. 50/6]. The right contained in these declaratory instruments therefore has a relatively high threshold to meet.

9. G.A. Res. 2625 (XXV), U.N. Doc. A/8082 (Oct. 24, 1970).

10. G.A. Res. 50/6, *supra* note 8.

11. When examining the precise parameters of self-determination in the instruments that follow, orthodox canons of interpretation will be employed. Whenever possible, key words and phrases will be

for¹² and against¹³ the extension of “peoples” to the non-colonial context and a right of peoples to UNC secession respectively.

The article's second half investigates the legal effect of declaratory General Assembly resolutions from a variety of perspectives, including whether they (1) constitute authentic interpretations of the U.N. Charter, (2) create binding customary law, (3) serve to create general principles of international law, and (4) can create new law by way of consensus. This investigation is vital to precisely understanding the legal effects of textually articulated rights in declaratory General Assembly resolutions. This is especially the case given the implications of UNC secession: can declaratory General Assembly resolutions create a right that even partly undermines the well-established principles of state sovereignty and territorial integrity?

The article concludes that the Friendly Relations Declaration and Fiftieth Anniversary Declaration articulate a qualified right to UNC secession, but that this right will only gain legal effect by way of customary law. Furthermore, it is determined that a customary law right to UNC secession will only be legally perfected by state practice in terms of physical acts and omissions. In other words state practice in relation to UNC secessionist disputes, particularly grants of recognition to UNC secessionist groups, must be concomitant with the qualified right to UNC secession articulated in declaratory General Assembly resolutions.

II. THE DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF THE UNITED NATIONS (“FRIENDLY RELATIONS DECLARATION”)

The Friendly Relations Declaration¹⁴ was adopted by the U.N. General Assembly in October 1970, and as the name suggests, enumerates principles of international law concerning friendly relations and cooperation among states.¹⁵

construed according to their plain and ordinary meaning, with regard for the particular instrument's “object and purpose,” as laid down by Article 31(1) of the 1969 Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331. When, however, key words and phrases remain “ambiguous or obscure,” resort will also be made to the *travaux préparatoires* (preparatory work, normally of a documentary nature) and *procès verbaux* (preparatory work, documenting oral debate), as enumerated by the Vienna Convention in Article 32(a). *Id.* art. 32(a).

12. See ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 119-20 (1999); RADAN, *supra* note 1, at 52.

13. See Guyora Binder, *The Case for Self-Determination*, 29 STAN. J. INT'L L. 223, 238 (1993); Donald L. Horowitz, *A Right to Secede?*, in SECESSION AND SELF-DETERMINATION 50, 64 (Stephen Macedo & Allen Buchanan eds., 2003).

14. G.A. Res. 2625, *supra* note 9.

15. These principles include (1) the prohibition on the threat or use of force, (2) the peaceful settlement of disputes, (3) non-intervention, (4) the duty to cooperate, (5) equal rights and self-determination, (6) the sovereign equality of states, and (7) good faith and the fulfilment of obligations. *Id.* at pmb1., ¶¶ (a)-(g); Robert Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT'L L. 713, 713 (1971). See generally V.S.

Principle 5 deals with the “equal rights and self-determination of peoples” and given its centrality to the present article is reproduced *in extenso* below:

[1] By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the rights freely to determine, without external interference, their political status and to pursue their economic social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

[2] Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

(a) to promote friendly relations and co-operation among States;
and

(b) to bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

[3] Every State has a duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

[4] The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by the people.

[5] Every State has a duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the principle of their right to self-determination and freedom and independence. In actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter.

[6] The territory of a colony or other non-self-governing territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or non-self-governing

territory have exercised their right to self-determination in accordance with the Charter, and particularly its purposes and principles.

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

[8] Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.¹⁶

A. *The Meaning of "Peoples"*

Although the word "peoples" is mentioned in the Declaration's preamble,¹⁷ Principle 1,¹⁸ and Principle 3,¹⁹ the first significant application of the term occurs in Principle 5, paragraph 1:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.²⁰

Paragraph 1 thus mentions "State[s]" and "peoples" as two separate concepts. It also creates a nexus between "peoples" and "cultural development," the latter of which resembles some aspects of the definition of a nation.²¹ Additionally,

16. G.A. Res. 2625, *supra* note 9, at 123-124.

17. *Id.* at pmb.

18. *Id.* at 122 ("The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.").

19. *Id.* at 123 ("The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter The use of force to deprive people of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention.").

20. *Id.* at 123 (Principle 5 is "[t]he principle of equal rights and self-determination of peoples.").

21. "Culture," consisting of language and customs, has long been associated with national identity. For a similar argument regarding the nexus between "peoples" and "cultural development" in the context of the U.N. Charter and Article 73(a), see RADAN, *supra* note 1, at 31. The link between "culture" and "peoples" also finds support at page 123 of the Friendly Relations Declaration: "[t]he use of force to deprive peoples of their *national identity* constitutes a violation of their inalienable rights and of the principle of non-intervention." G.A. Res. 2625, *supra* note 9, at 123 (emphasis added).

paragraph 1 declares that “*all* peoples”²² enjoy the right to self-determination, which *prima facie* indicates that “peoples” is an expression of broad and general applicability extending to the colonial and non-colonial context.²³

A similar conclusion is reached by examination of Principle 5, paragraph 2, which once again mentions “State[s]” and “peoples” as two distinct concepts.²⁴ Furthermore, sub-paragraph 2(b) indicates that peoples may exist in a colonial context, and then supplements this with the addendum that “subjection of peoples to alien subjugation, domination and exploitation” is contrary to the U.N. Charter.²⁵ Unless the latter phrase is pleonastic, it would seem to indicate that peoples can also exist in a non-colonial context, as situations of “alien subjugation, domination and exploitation” are not unique to colonisation.

Principle 5, paragraph 4 reiterates, the content of Principle VI of Resolution 1541²⁶ regarding the methods by which a people may exercise their right to external self-determination.²⁷ However, unlike Principle VI, the paragraph does not explicitly seek to limit the application of its content to colonial peoples. This difference is crucial, as it arguably opens the possibility for paragraph 4 to apply to non-colonial peoples. Paragraph 4 would thus seem to comport with the meaning of “peoples” as deduced from paragraphs 1 and 2.

Principle 5, paragraph 5 deals with the duty of “states” to refrain from action that would deprive “peoples” of their right to self-determination. The paragraph’s phraseology therefore implicitly reaffirms that states and peoples are two distinct concepts. Furthermore, if it is accepted that paragraphs 1, 2, and 4 imply that peoples may exist in a colonial and non-colonial context, it follows that the directive contained in paragraph 5 must also apply to peoples in a colonial and non-colonial context.

Principle 5, paragraph 6 deals exclusively with peoples in a colonial context, as indicated by the opening phrase, “[t]he territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the

22. G.A. Res. 2625, *supra* note 9, at 123 (emphasis added).

23. See Šuković, who when contemplating the meaning of “peoples” within the Friendly Relations Declaration notes that “[i]n the end the opinion prevailed that the right of peoples to self-determination had a universal character and that this right belonged to *all peoples* regardless of whether they had gained independence or not.” Olga Šuković, *Principle of Equal Rights and Self-Determination of Peoples*, in *PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND COOPERATION* 323, 346 (Milan Šahović ed., 1972) (emphasis in original).

24. G.A. Res. 2625, *supra* note 9, at 123-124.

25. *Id.* at 124.

26. Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for under Article 73e of the Charter, G.A. Res. 1541 (XV), Principle VI, U.N. Doc. A/RES/1541 (XV) (Dec. 15, 1960). This resolution served as the interpretative counterpart to the 1960 Declaration on the granting of independence to colonial countries and peoples. G.A. Res. 1514 (XV), U.N. Doc. A/RES/1514 (XV) (Dec. 14, 1960).

27. Principle VI of Resolution 1541 states, “A Non-Self-Governing Territory can be said to have reached a full measure of self-government by: (a) Emergence as a sovereign independent State; (b) Free association with an independent State; or (c) Integration with an independent State.” G.A. Res. 1541, *supra* note 26, at 29.

territory of the State administering it.”²⁸ The fact that paragraph 6 explicitly confines its purpose to colonial peoples is significant for the fact that the other paragraphs preceding it do *not* explicitly confine their purpose to colonial peoples. This is further inferential evidence that the preceding paragraphs—1, 2, 4, and 5—refer to peoples *beyond* the colonial context.

Paragraph 6 continues by noting “such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination”²⁹ Crucially, paragraph 6 would seem to indicate that only one people can exist within a non-self-governing territory, as the plural “peoples” is not employed.³⁰ This drafting is inconsistent with Articles 73, 73(b), and 76(b) of the U.N. Charter, all of which indicate that more than one people may inhabit a non-self-governing territory.³¹ It is also inconsistent with Principles 2, 7(a), 8, and 9 of Resolution 1541, all of which suggest that more than one people can inhabit a non-self-governing territory.³² On balance, therefore, the failure of paragraph 6 to use the plural term “peoples” probably constitutes a drafting error.

Principle 5, paragraph 7 of Resolution 2625 arguably moves beyond the colonial context when employing the term “peoples”:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.³³

Paragraph 7 hence links its content to “sovereign and independent States,” which would, on balance, seem to refer to “States”—not non-self-governing territories. Although it may be argued that metropolitan powers³⁴ are “States” responsible for non-self-governing territories, this does not seem to be the primary objective of paragraph 7. This reasoning is not negated by the subsequent phrase: “States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above,” which necessarily requires that all

28. G.A. Res. 2625, *supra* note 9, at 124.

29. *Id.*

30. *Id.*

31. Paragraph 6 is consistent only with Principle VII(b) of Resolution 1541, which states, “The associated territory should have the right to determine its internal constitution without outside interference, in accordance with due constitutional processes and the freely expressed wishes of the people. This does not preclude consultations as appropriate or necessary under the terms of the free association agreed upon.” G.A. Res. 1541, *supra* note 26, at 29-30.

32. *Id.* at 29-30.

33. G.A. Res. 2625, *supra* note 9, at 124.

34. A “metropolitan” power is a state which has responsibility for a non-self-governing territory as enumerated in Principles V and VI of Resolution 1541. G.A. Res. 1541, *supra* note 26, at 29.

other paragraphs before paragraph 7 must be considered—as paragraphs 1, 2, 4, and 5 indicate—that peoples may exist in a colonial and non-colonial context. Only paragraph 6 restricts its discussion of peoples to the non-self-governing or colonial context. It would thus seem highly probable that paragraph 7 is addressing its comments to sovereign states, which by implication confirms the applicability of the term “peoples” to the non-colonial context.

Paragraph 7 does, however, contain some drafting problems. This is because although it applies the term “peoples” to the non-colonial context, taken literally, it suggests that only one people may constitute a sovereign state. This is revealed by the phrase “thus possessed of a government representing the whole *people* belonging to the territory”³⁵ If it is accepted that “peoples” may refer to national groups within non-self-governing territories and states, as indicated by Articles 73, 73(b), and 76(b) of the U.N. Charter and Principles 2, 7(a), 8, and 9 of Resolution 1541, it would seem that the drafting of paragraph 7 is incorrect. This is because the phrase “whole people belonging to the territory” suggests that there may only be one people within a state. Moreover the phrase “without distinction as to race, creed or colour,” which proceeds the phrase “whole people belonging to the territory,” suggests that states are not monolithic units and comprise sub-state groups.³⁶ Paragraph 7 should perhaps have used the phrase “thus possessed of a government representing *all peoples* belonging to the territory without distinction as to race, creed or colour.” This use of the plural “peoples” would bring paragraph 7 unambiguously into line with other prior U.N. instruments, including the U.N. Charter, which the Friendly Relations Declaration was drafted to be in accordance with, as indicated by the latter’s extended title—Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States *in Accordance With the Charter of the United Nations*.

35. G.A. Res. 2625, *supra* note 9, at 124 (emphasis added). Pentassuglia states that “[a] narrow reading of the clause [at page 124] is suggested by the ‘whole people’ formula: it is precisely the whole people, not individual groups comprising it, to be entitled to react to oppressive regimes.” Gaetano Pentassuglia, *State Sovereignty, Minorities and Self-Determination: A Comprehensive Legal View*, 9 INT’L J. MINORITY & GRP. RTS. 303, 311 (2002); Iorns argues that “even though the whole people may have a right of self-determination under the Declaration, a part of that whole may not have any separate right.” Catherine J. Iorns, *Indigenous Peoples and Self-Determination: Challenging State Sovereignty*, 24 CASE W. RES. J. INT’L L. 199, 260 (1992). Thornberry has argued that “the point is that ‘whole’ territories or peoples are the focus of rights, rather than ethnic groups” Patrick Thornberry, *Self-Determination, Minorities, Human Rights: A Review of International Instruments*, 38 INT’L & COMP. L.Q. 867, 877 (1989).

36. Radan, for example, has noted that “[t]his ‘without distinction’ provision implies the existence of different groups as parts of a state’s entire population. If there was no recognition that such groups could exist within a state, the ‘without distinction’ provision would be superfluous.” RADAN, *supra* note 1, at 60. Duursma has similarly noted “[t]he whole people’ of paragraph 7 of the Declaration means either that one State can have but one people, or that within a State more than one people can coexist. The latter meaning seems correct if we read it in combination with the prohibition of discrimination on grounds of race, creed or colour.” JORRI DUURSMA, *FRAGMENTATION AND THE INTERNATIONAL RELATIONS OF MICRO-STATES* 25 (James Crawford et al. eds., 1996).

B. A Right of Peoples to UNC Secession?

Principle 5, paragraph 1 specifies “[b]y virtue of the principle of equal rights and self-determination of peoples . . . all peoples have the right freely to determine . . . their political status and to pursue their economic, social and cultural development . . .” Paragraph 1 thus makes clear that self-determination applies to “all peoples,” which has been determined in the previous section to include colonial and non-colonial peoples.³⁷ Paragraph 1 also reveals that self-determination is a right, declaring, “every State has the duty to respect this right.”³⁸ The use of the words “duty” and “right” strongly suggests that there are remedies for the breach of such a right.³⁹ However, examined in isolation, paragraph 1 provides little insight as to whether potential remedies might include UNC secession.

Principle 5, paragraph 2 affirms the applicability of the right of peoples to self-determination in cases of colonialism and situations of “alien subjugation, domination and exploitation.”⁴⁰ Although the phrase “alien subjugation, domination and exploitation” includes colonial situations, it also captures non-colonial situations. Beyond this finding, however, paragraph 2 fails to yield further information.

Principle 5, paragraph 4 enumerates the ways in which a people might pursue their external self-determination, namely, the establishment of “a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people.”⁴¹ As observed in the previous section, paragraph 4, although based upon the text of Resolution 1541, does not restrict its application specifically to non-self-governing peoples. In other words, paragraph 4 is deliberately unspecific as to which types of peoples its content applies. This generates the conclusion that one of the modes of external self-determination—the establishment of “a sovereign and independent State”—may apply to colonial and non-colonial peoples, with the latter by necessity opening the possibility of UNC secession.

Principle 5, paragraph 5 deals with the duty of states “to refrain from any forcible action which deprives peoples . . . of their right to self-determination and freedom and independence.”⁴² Paragraph 5—like paragraph 4—is deliberately unspecific as to the types of peoples its content is applicable to, with the logical corollary that it likely applies to colonial and non-colonial peoples. It follows that where a breach of internal self-determination has occurred, the afflicted people

37. G.A. Res. 2625, *supra* note 9, at 123.

38. *Id.*

39. Here the Latin maxim *ubi jus ibi remedium* (there cannot be a right without a remedy) is relevant. See generally Olga Šuković, *Principle of Equal Rights and Self-Determination of Peoples*, in *PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND COOPERATION* 323, 331-332 (Milan Šahović ed., 1972).

40. G.A. Res. 2625, *supra* note 9, at 124.

41. *Id.*

42. *Id.*

should not be forcibly deprived of their right to remedy this situation by the pursuit of external self-determination, as indicated by the words “freedom and independence.” By implication, therefore, paragraph 5 would seem to endorse unilateral colonial (“UC”) and UNC secession.⁴³

Principle 5, paragraph 7 provides the clearest grounds for UNC secession, with an *a contrario* reading indicating that only those “States conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . . and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour”⁴⁴ will be guaranteed their “territorial integrity or political unity.”⁴⁵ Paragraph 7 thus stipulates that if a state does not represent the whole population, or discriminates on the grounds of “race, creed or colour,”⁴⁶ it is in violation of the right to self-determination and therefore illegitimate.⁴⁷ In order to rectify this situation, secessionist activities that would “dismember or impair, totally or in part the territorial integrity or political unity of sovereign and independent States” appear to be implicitly endorsed.⁴⁸ *A priori*, paragraph 7 contains a right to UNC secession.

This right is a *qualified* one, however, with paragraph 7 stipulating that non-colonial peoples may only “dismember or impair, totally or in part the territorial integrity and political unity of sovereign States” when they are subjected to discrimination on the grounds of “race, creed or colour.”⁴⁹ This prompts the question: what exactly do the latter three terms mean? As the Declaration’s *travaux préparatoires* and *procès verbaux* provide little or no guidance, it has been left to eminent scholars to formulate their own definitions.

Cassese has provided one of the best known analyses. He argues that the terms “race” and “colour” express an identical concept—race—and represent a

43. The implications of this paragraph for unilateral non-colonial secession are, with perhaps the exception of Castellino’s circumspect comments, universally unacknowledged by scholars who instead prefer to focus on the more textually obvious paragraph 7 of principle 5. See JOSHUA CASTELLINO, *INTERNATIONAL LAW AND SELF-DETERMINATION: THE INTERPLAY OF THE POLITICS OF TERRITORIAL POSSESSION WITH FORMULATIONS OF POST-COLONIAL ‘NATIONAL’ IDENTITY* 39-40 (2000).

44. G.A. Res. 2625, *supra* note 9, at 124.

45. *Id.*

46. *Id.* Such behaviour would likely offend Articles 2, 14, 17, 18, 24, 25, 26, and 27 of the International Covenant on Civil and Political Rights, and Articles 2, 7(a)(i), possibly 13(1) and 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights. International Covenant on Civil and Political Rights arts. 2, 14, 17-18, 24-27, Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights arts. 2, 7(a)(i), 13(1), 15(1)(a), Dec. 16, 1966, 993 U.N.T.S. 3.

47. G.A. Res. 2625, *supra* note 9, at 124.

48. W. Otuatye-Kodjoe, *Self-Determination*, in UNITED NATIONS LEGAL ORDER 349, 362-63 (Oscar Schachter & Christopher C. Joyner eds., 1995); RADAN, *supra* note 1, at 52-53; LEE C. BUCHHEIT, *SECESSION: THE LEGITIMACY OF SELF-DETERMINATION* 92-93 (1978); Rosenstock, *supra* note 15, at 732; M. Rafiqul Islam, *Secession Crisis in Papua New Guinea: The Proclaimed Republic of Bougainville in International Law*, 13 U. HAW. L. REV. 453, 456-61 (1991); Jordan J. Paust, *Self-Determination: A Definitional Focus*, in SELF-DETERMINATION: NATIONAL, REGIONAL, AND GLOBAL DIMENSIONS 3, 7 (Yonah Alexander & Robert A. Friedlander eds., 1980).

49. G.A. Res. 2625, *supra* note 9, at 124.

pleonasm originating from Article 2 of the 1948 Universal Declaration on Human Rights.⁵⁰ Cassese strictly construes “race” as only connoting physical somatic differences, explicitly rejecting any definition that encompasses factors such as language or culture.⁵¹ He further postulates that the meaning of “creed” is restricted to “religious beliefs”⁵² rather than the broader definition provided by the *Oxford English Dictionary*: “a set of opinions on any subject.”⁵³ Cassese arrives at this conclusion by arguing that if “creed” encompassed the broader Oxford definition, “a set of opinions on any subject,” a government not representing the opinions of a people, even if democratically elected, could be interpreted as violating that people’s right to self-determination.⁵⁴ He therefore concludes that the right to UNC secession contained in paragraph 7 is activated *only* on the grounds of racial or religious discrimination against a people.⁵⁵

Cassese’s first point—that the terms “race” and “colour” represent a pleonasm—is convincing for the following reason: it is difficult, if not impossible, to imagine a situation where two or more peoples may be of a different colour, whilst at the same time not also constituting a different race.

Less convincing, however, is Cassese’s narrow definition of “race,” which is confined to physical somatic differences. As Radan points out, prior to the adoption of the Friendly Relations Declaration in 1970, the words “race” and “nation”—the latter of which incorporates sociological elements, such as language and culture—were often used interchangeably.⁵⁶ To illustrate this point, Radan quotes Hobsbawm:

[W]hat brought ‘race’ and ‘nation’ even closer was the practice of using both as virtual synonyms, generalizing equally widely about ‘racial’/‘national’ character, as was then the fashion. Thus before the Anglo-French Entente Cordiale of 1904, a French writer observed, agreement between the two countries had been dismissed as impossible because of the ‘hereditary enmity’ between the two races.⁵⁷

50. Article 2 of the Universal Declaration of Human rights provides that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.” Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 2, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). See CASSESE, *supra* note 12, at 112.

51. CASSESE, *supra* note 12, at 112.

52. *Id.*

53. OXFORD ENGLISH DICTIONARY 1157 (2d ed. 1933).

54. CASSESE, *supra* note 12, at 112-13.

55. Cassese does not use the word “people” in his analysis of the terms “race, creed or colour.” Although, as Radan asserts, “it is hard to see how [Cassese] could deny [that a group is a people], given that only peoples have the right to self-determination.” RADAN, *supra* note 1, at 56 n.132.

56. *Id.* at 58.

57. *Id.* (quoting ERIC J. HOBBSBAWM, NATIONS AND NATIONALISM SINCE 1780: PROGRAMME, MYTH, REALITY 108-09 (1990)). Brownlie also agrees with this interpretation, asserting “[t]he concept

This same tendency is also prevalent in the U.N. Charter's *travaux préparatoires*, which demonstrate that on numerous occasions the word "race" was used interchangeably with "peoples."⁵⁸ In the Summary Report of the Sixth Meeting of Committee II/4 of 17 May 1945, for example, a sentence appeared stating:

[n]othing in the Charter should contravene the principle of the equality of all races; and their right to self-determination, whether it resulted in independence or not, should be recognized.⁵⁹

The synonymy between "races" and "peoples" evident above is important, as the Charter's *travaux* also reveals that the word "peoples" captures the concept of "nations."⁶⁰ Adding further weight to the argument for an expansive interpretation of the word "race" is the definition provided by the *Oxford English Dictionary*: "a tribe, *nation* or people, regarded as of common stock."⁶¹

Further evidence of the synonymy between "races" and "nations" is provided by the 1966 International Convention on the Elimination of All Forms of Racial Discrimination, Article 1 of which contains the most widely accepted definition of "racial discrimination" stating:

[i]n this convention, the term 'racial discrimination' shall mean any distinction, exclusion or restriction or preference based on race, colour, descent, or national or ethnic origin.⁶²

It follows that the notion of racial discrimination encompasses distinction or exclusion based upon and related to "national or ethnic origin." It may be reasonably inferred then that the term "race" not only connotes physical somatic differences, but also other factors associated with nationality and ethnicity, such as language, culture and customs. Although proponents of a restrictive interpretation of "race" may argue that the International Convention on the Elimination of All Forms of Racial Discrimination does not constitute text of the Friendly Relations Declaration, it could hardly be suggested that the most important international

of [a people's] distinct character depends on a number of criteria which may appear in combination. Race (or nationality) is one of the more important of the relevant criteria, but the concept of race can only be expressed scientifically in terms of more specific features, in which matters of culture, language, religion and group psychology predominate." Ian Brownlie, *The Rights of Peoples in Modern International Law*, 9 BULL. AUSTRAL. SOC'Y LEGAL PHIL. 104, 108 (1985).

58. RADAN, *supra* note 1, at 58. See also, e.g., United Nations Conference on International Organization, S.F., Cali., Apr. 25-June 26, 1945, *Belgian Delegation Amendment to Paragraph 2 of Chapter I*, ¶ 1, U.N. Doc. A/CONF.374/17 (Vol. 6) (May 17, 1945); United Nations Conference on International Organization, S.F., Cali., Apr. 25-June 26, 1945, *New Uruguayan Proposals on Dumbarton Oaks Proposals*, U.N. Doc. A/CONF.2 (Vol. 3) (May 5, 1945).

59. United Nations Conference on International Organization, 1945, *Summary Report of the Sixth Meeting of Committee II/4*, ¶ 3, U.N. Doc. A/CONF.404/17 (Vol. 10) (May 17, 1945).

60. RADAN, *supra* note 1, at 58-59.

61. OXFORD ENGLISH DICTIONARY 87 (8th ed. 1933).

62. International Convention on the Elimination of All Forms of Racial Discrimination art. 1, ¶ 1, Dec. 21, 1965, 660 U.N.T.S. 195, available at <http://www.unhcr.org/refworld/docid/3ae6b3940.html>.

document expounding on matters of racial discrimination should be ignored, or even worse, contradicted, when construing paragraph 7.⁶³

Thus, to confine the meaning of “race” purely to physical somatic differences, as Cassese advocates, is unjustified. The term “race” should also be read as connoting other factors associated with nations, such as language, culture, and customs. It is entirely conceivable therefore, that linguistic, cultural, and customary discrimination could be covered by paragraph 7.⁶⁴ *A priori*, peoples subjected to linguistic, cultural, or customary discrimination within sovereign states could be entitled to UNC secession.

Cassese’s interpretation of “creed”—confined only to religious groups—is more convincing. As noted above, if the broad definition of creed were to be accepted—“a set of opinions on any subject”—a government not specifically representing the opinions of a people, even if democratically elected, could be interpreted as violating that people’s right to self-determination. This in turn would open the possibility for unlimited UNC secession, having chaotic and destabilizing implications for international politics—hardly the intention of drafters. “Creed” should thus be understood as *only* endorsing UNC secession where a people experience religious discrimination.⁶⁵

To recapitulate, paragraph 7 only guarantees the sovereignty and territorial integrity of states conducting themselves “in compliance with the principle of equal rights and self-determination of peoples . . . and thus possessed of a government representing the whole population belonging to the territory without distinction as to race, creed or colour.”⁶⁶ The words “race,” “creed,” and “colour” clearly encompass racial, linguistic, cultural, customary, and religious discrimination. *A priori*, a *prima facie* right to UNC secession exists in cases of racial, linguistic, cultural, customary, and religious discrimination. Paragraph 7 therefore has a wide operational ambit and is not confined merely to racially discriminatory regimes.⁶⁷

63. This fact is further reinforced by the case of *Iran v. United States*, where the Iran-U.S. Claims Tribunal indicated that Article 31(3)(c) of the Vienna Convention on the Law of Treaties (“VCLT”) allows analysis of other legal documents in the relevant subject area when construing an instrument’s parameters. *Iran v. United States*, 5 Iran-U.S. Cl. Trib. Rep. 251 (1984). Article 31(3)(c) of the VCLT provides that when construing the meaning of an instrument, “any relevant rules of international law applicable in the relations between the parties” may be utilized. *Id.*; see also MALCOLM N. SHAW, *INTERNATIONAL LAW* 935 (6th ed. 2008).

64. This is a finding explicitly ruled out by Cassese, who argues “the right of internal self-determination embodied in the 1970 declaration is a right conferred only on *racial* or *religious* groups living in a sovereign State which are denied access to the political decision making process; *linguistic* or *national* groups *do not* have a concomitant right.” CASSESE, *supra* note 12, at 114 (emphasis in original).

65. This is supported by a holistic examination of “creed” within the *Oxford English Dictionary*, which suggests that the primary meaning of the term is confined to religious belief. See OXFORD ENGLISH DICTIONARY, *supra* note 53, at 1157. Paragraph 7 ought to have, therefore, used the word “religion” rather than “creed” to avoid confusion and ambiguity.

66. G.A. Res. 2625, *supra* note 9, at 124.

67. The primary example of such a regime would be apartheid South Africa.

It should be noted, however, that although paragraph 7 explicitly qualifies the right to UNC secession to discrimination based on “race, creed or colour,” four further *implicit* qualifying conditions are also likely attached. First, as Cassese has correctly observed, the right will only be exercisable where the discrimination is of a deliberate, sustained, and systematic nature, with “the exclusion of any likelihood for a possible peaceful solution within the existing state structure.”⁶⁸ Thus, isolated instances of discrimination, or unwitting application of discriminatory principles by a government against a people, will not automatically invoke a right to UNC secession. An additional level of *dolus*, or intentional malice, such as flagrant disregard for fundamental human rights, is necessary. These requirements operate as a general “threshold test” for the operation of paragraph 7 rights, ensuring that UNC secession is only permitted under especially egregious conditions.

A second and related qualifying condition arguably implicit in paragraph 7—although almost universally unacknowledged by scholars—is that the deliberate, sustained, and systematic discrimination must possess sufficient contemporaneousness. In other words, there must be a sufficient temporal nexus between the alleged discrimination and the resultant claim for UNC secession. Without this requirement, UNC secession would be permitted based on human rights abuses that might have occurred hundreds of years earlier.⁶⁹ The precise time necessary for the expiration of a right to UNC secession is obviously debatable, although it is submitted here that a minimum time of ten to fifteen years from the cessation of abuses would be required. Certainly, a short time period, such as five years, should not jeopardize a valid claim.⁷⁰

A third qualifying condition arguably implicit in paragraph 7 is that any state established by UNC secession must ensure that the human rights of minorities—especially those minority groups that were previously part of the oppressive majority—are protected, preferably by way of constitutional structures. This condition, which might for convenience be termed the “internal consistency

68. CASSESE, *supra* note 12, at 120. For similar comments, see Dietrich Murswiek, *The Issue of a Right to Secession – Reconsidered*, in MODERN LAW OF SELF-DETERMINATION 21, 26 (Christian Tomuschat ed., 1993); Katherine Doehring, *Self-Determination*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 56, 66 (Bruno Simma ed., 1994); Erica-Irene A. Daes, *The Spirit and Letter of the Right to Self-Determination of Indigenous Peoples: Reflections on the Making of the United Nations Draft Declaration*, in OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION 67, 76 (Pekka Aikio & Martin Scheinin eds., 2000).

69. Goodwin has remarked, “[t]he integration of Mercia into the emerging English nation at the point of the sword of the King of Wessex was probably no laughing matter, even by 10th century standards; could it be used as a basis for a claim to secede from its southern neighbours?” Morag Goodwin, *From Province to Protectorate to State? Speculation on the Impact of Kosovo’s Genesis upon the Doctrines of International Law*, 8 GERMAN L. J. 1, 6 (2007), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=786>. See also G.A. Res. 2625, *supra* note 9, at 124.

70. Goodwin, although pondering the length of time necessary for the expiration of a qualified right to unilateral non-colonial secession, does not suggest an answer. Goodwin, *supra* note 69, at 6-7.

principle,” would ensure that the law of self-determination cannot, under any circumstances, be utilized to foster or perpetuate human rights violations.⁷¹

Finally, any UNC secession pursuant to paragraph 7 would be required to comply with the criteria for statehood based on effectiveness, namely, a permanent population, a defined territorial claim, a government, capacity to enter relations with other states and independence.⁷² It would also have to fulfil the criteria for statehood based on compliance with peremptory norms, in particular, the prohibition of the illegal use of force.⁷³ Failure to satisfy one or more of these conditions, with the possible exception of effective government,⁷⁴ would obviously be fatal to any UNC secession attempt, preventing the attainment of statehood and precluding existing states from granting critically important recognition.⁷⁵

71. The internal consistency principle is arguably implicit in General Assembly Resolution 54/183, which prohibits “ethnically based division” and “cantonization” in Kosovo, and hence discrimination by the majority ethnic group (ethnic Albanians) against other minorities. G.A. Res. 54/183, ¶ 7, U.N. Doc. A/RES/54/183 (Feb. 29, 2000). The principle may also be considered as informing the European Community’s Guidelines on the Recognition of New States, promulgated in late 1991 in response to political events in Europe. The Guidelines enumerate that European Community member states will “adopt a common position on the process of recognition of . . . new States, which requires,” *inter alia*, “guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE.” Danilo Turk, *Recognition of States: A Comment*, 4 EUR. J. INT’L L. 6, 72 (1993). In a purely philosophical context, an alternative approach to the protection of newly created minorities has been mooted by Hannum, namely, that they should “enjoy the same right of secession or self-determination that was asserted by the seceding population.” Although philosophically appealing, it is submitted here that it is *probably* going too far to read such a condition into paragraph 7 of the Friendly Relations Declaration. Hurst Hannum, *A Principled Response to Ethnic Self-Determination Claims*, in JUSTICE PENDING: INDIGENOUS PEOPLES AND OTHER GOOD CAUSES: ESSAYS IN HONOUR OF ERICA-IRENE A. DAES 263, 271 (Gudmundur Alfredsson and Maria Stavropoulou eds., 2002). *See also* Hurst Hannum, *The Specter of Secession: Responding to Claims for Ethnic Self-Determination*, FOREIGN AFF., Mar.-Apr. 1998, at 17, available at <http://www.foreignaffairs.com/articles/53801/hurst-hannum/the-specter-of-secession-responding-to-claims-for-ethnic-self-de>.

72. RADAN, *supra* note 1, at 21, 245; Garth Nettheim, *‘Peoples’ and ‘Populations’ – Indigenous Peoples and the Rights of Peoples*, in THE RIGHTS OF PEOPLES 105, 120 (James Crawford ed., 1988). On the criteria for statehood based on effectiveness generally, see, for example, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 70-72 (7th ed. 2008); CRAWFORD, *supra* note 1, at 45-46; JOHN DUGARD, RECOGNITION AND THE UNITED NATIONS 7 (1987); Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 COLUM. J. TRANSNAT’L L. 403, 413-14 (1999).

73. On the criteria for statehood based on compliance with peremptory norms generally, see, for example, Crawford, *supra* note 72, at 107; DUURSMA, *supra* note 36, at 127-28; DAVID RAIČ, STATEHOOD AND THE LAW OF SELF-DETERMINATION 156, 167 (2002).

74. Regarding the “compensatory force principle,” see RAIČ, *supra* note 73, at 104, 364.

75. *See* RADAN, *supra* note 1, at 245; Lawrence M. Frankel, *International Law of Secession: New Rules for a New Era*, 14 Hous. J. INT’L L. 521, 550 (1992); Holly A. Osterland, *National Self-Determination and Secession: The Slovak Model*, 25 CASE W. RES. J. INT’L L. 655, 676-78 (1993); Ved P. Nanda, *The New Dynamics of Self-Determination: Revisiting Self-Determination as an International Law Concept: A Major Challenge in the Post-Cold War Era*, 3 ILSA J. INT’L & COMP. L. 443, 446 (1997). Lloyd argues the criteria for statehood based on effectiveness played an important role in the recognition of the former Soviet and Yugoslav republics. David O. Lloyd, *Succession, Secession and State Membership in the United Nations*, 26 N.Y.U. J. INT’L L. & POL. 761, 792-94 (1994).

The view that UNC secession may be permitted in the event of deliberate, sustained and systematic discrimination, although clearly antithetical to a state-centric international legal order, is not entirely without precedent. Paragraph 7 does, for example, draw a modicum of support from comments made by the Commission of Jurists and the Commission of Rapporteurs in the 1920 Aaland Islands dispute between Finland and Sweden. The dispute arose with the collapse of the Russian provisional government in October 1917, when Finland—that included the Aaland Islands—asserted its independence and the islands' Swedish inhabitants simultaneously sought reunification with Sweden, appealing to the right of peoples to self-determination.⁷⁶ The Commission of Jurists observed, “Positive international law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognises the right of other States to claim such separation.”⁷⁷

Significantly, this finding was followed by a statement that the Commission:

does not give an opinion concerning the question as to whether a manifest and continued abuse of sovereign power, to the detriment of a section of the population of a State, would, if such circumstances arose, give to an international dispute, arising therefrom, such an international character that its object should be considered as one which is *not confined to the domestic jurisdiction of the State concerned*.⁷⁸

The above quotation clearly indicates that domestic disputes between segments of a state's population may assume an international character in the event of “manifest and continued abuse of sovereign power.”⁷⁹ It follows that if a segment of a state's population were subjected to deliberate, sustained and systematic discrimination, with no prospect for domestic resolution, a right to UNC secession might arise.

The Commission of Rapporteurs also denied the existence of an unqualified right to UNC secession, stating:

[i]s it possible to admit as an absolute rule that a minority of the population of a State, which is definitely constituted and perfectly capable of fulfilling its duties as such, has the right of separating itself

76. See JAMES BARROS, *THE AALAND ISLANDS QUESTION: ITS SETTLEMENT BY THE LEAGUE OF NATIONS* 60-65 (1968); MUSGRAVE, *supra* note 1, at 33; Philip Marshall Brown, *The Aaland Islands Question*, 15 AM. J. INT'L L. 268, 268-69 (1921); Charles Noble Gregory, *The Neutralization of the Aaland Islands*, 17 AM. J. INT'L L. 63, 64 (1923); Tore Modeen, *Völkerrechtliche Probleme der Åland-Inseln*, 37 HEIDELBERG J. INT'L L. 604, 604 (1977), available at http://www.zaoerv.de/37_1977/37_1977_3_4_a_604_619.pdf; Tore Modeen, *Aaland Islands*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 1, 1-3 (12th ed. 1992); Norman J. Padelford and K. Gosta A. Andersson, *The Aaland Islands Question*, 33 AM. J. INT'L L. 465, 469 (1939).

77. *Report of the Int'l Comm. 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 Doc. C.20/4/238 1920 VII (1920).

78. *Id.* (emphasis added).

79. *Id.*

from her in order to be incorporated in another State or to declare its independence? The answer can only be in the negative. To concede to minorities, either of language or religion or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity.⁸⁰

However, like the Commission of Jurists, the Rapporteurs did not completely rule out UNC secession:

The separation of a minority from the State of which it forms part and its incorporation in another State can only be considered as an exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees [of linguistic, religious and social freedom].⁸¹

UNC secession therefore appears to be implicitly endorsed when a “State lacks either the will or power to enact and apply just and effective guarantees” of linguistic, religious, and social freedom for a segment of its population.⁸² In this sense, both Commissions’ comments resemble—albeit circumspectly—the content of paragraph 7, namely, that state sovereignty and territorial integrity is only guaranteed in the absence of deliberate, sustained, and systematic discrimination, and that should such abuses occur, UNC secession constitutes a legitimate *ultimum remedium*.⁸³

It might also be argued that the law of decolonization provides further implicit support for a qualified right to UNC secession. It is undeniable, for example, that post-1945, the colonization of peoples by imperial powers was regarded as undesirable. Preambular paragraph 1 of the 1960 declaration on the Granting of Independence to Colonial Countries and Peoples⁸⁴ (“Colonial Declaration”) describes colonialism as an impediment to “social progress and better standards of life in larger freedom.”⁸⁵ Preambular paragraph 7 similarly asserts that colonialism “prevents the development of international economic co-operation, [and] impedes the social, cultural and economic development of dependent peoples.”⁸⁶ Finally, preambular paragraph 9 portrays colonialism as tantamount to institutionalized

80. *Report Presented to the Council of the League by the Comm. of Rapporteurs*, at 28, League of Nations Council Document B7.21/68/106 (1921).

81. *Id.*

82. *Id.*

83. Many commentators overlook or obscure these aspects of the Aaland Islands reports. *See, e.g.*, HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 29 n.86 (1990); Lawrence S. Eastwood Jr., *Secession: State Practice and International Law After the Dissolution of the Soviet Union and Yugoslavia*, 3 *DUKE J. COMP. & INT'L L.* 299, 302 (1993).

84. G.A. Res. 1514, *supra* note 26, ¶ 1.

85. *Id.*

86. *Id.*

segregation and discrimination.⁸⁷ The foregoing collectively imply that colonialism is inherently *unjust*, whether examined from an economic, social, or cultural perspective. In order to remedy this injustice, instruments such as the Colonial Declaration, Resolution 1541, and the Friendly Relations Declaration declare that *prima facie*, complete independence should be granted to the peoples so affected.⁸⁸ The law of decolonization therefore functions in a *remedial* manner, attempting to eliminate situations of economic, social, and cultural oppression. In this sense then, the import of Principle 5, paragraph 7 of the Friendly Relations Declaration operates as a logical extension of the decolonization doctrine. Accordingly, the notion that territorial integrity and state sovereignty might be violable under certain strict conditions does not appear entirely anomalous.⁸⁹

Finally, Principle 5, paragraph 8 declares “[e]very State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.”⁹⁰ The opening words of the paragraph—“[e]very State”—suggest that the content of the paragraph applies only to *states*—not peoples. This is hardly surprising, given that the entire Declaration is directed at friendly relations and cooperation *among states*.⁹¹ Thus, paragraph 8 does not in any way prejudice the qualified right to UNC secession contained in paragraph 7, which is exercisable by peoples.⁹²

The Friendly Relations Declaration therefore allows self-determination to predominate over state sovereignty and territorial integrity in the event of deliberate, sustained, and systematic discrimination against peoples. By doing so, the Declaration draws a link between internal self-determination and external self-determination: the neglect of the former provides justification for the invoking of the latter, which may be exercised by UNC secession.⁹³ This is a seminal development, challenging—albeit modestly—the incontrovertibility of state sovereignty and territorial integrity.

87. *Id.*

88. The other options posited by such instruments include free association with an independent state and integration with an existing state. *See, e.g.*, G.A. Res. 2625, *supra* note 9, at 124.

89. Indeed some scholars, such as Franck and Crawford, have propounded the doctrine of “internal colonization,” which potentially allows peoples within states to unilaterally secede. *See* Tom Franck, *Postmodern Tribalism and the Right to Secession*, in *THEMES AND THEORIES: SELECTED ESSAYS, SPEECHES, AND WRITINGS IN INTERNATIONAL LAW* 828, 830 (Roselyn Higgins ed., 2009); James Crawford, *Outside the Colonial Context*, in *SELF-DETERMINATION IN THE COMMONWEALTH* 1, 13-14 (W.J. MacArtney ed., 1988).

90. G.A. Res. 2625, *supra* note 9, at 124.

91. The Declaration’s preamble also makes this point: “[r]eaffirming, in accordance with the Charter, the basic importance of sovereign equality and stressing that the purposes of the United Nations can be implemented only if *states* enjoy sovereign equality and comply fully with the requirements of this principle in their international relations.” *Id.* pmb. (emphasis added).

92. *See* RADAN, *supra* note 1, at 56; MUSGRAVE, *supra* note 1, at 76; Robin C.A. White, *Self-Determination: Time for a Reassessment?*, 28 NETH. INT’L L. REV. 147, 159 (1981).

93. *See* CASSESE, *supra* note 12, at 120; Frederic L. Kirgis, Jr., *The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT’L L. 304, 305-06 (1994).

In addition to Cassese⁹⁴ and Radan,⁹⁵ numerous other scholars have broadly concurred with the foregoing analysis.⁹⁶ The significance of paragraph 7 was also noted by the International Commission of Jurists in its 1972 study, *The Events in East Pakistan 1971*.⁹⁷ After stating that paragraph 7 gave primacy to the principle of territorial integrity, the Commission further remarked:

[i]t is submitted, however, that this principle is subject to the requirement that the government does comply with the principle of equal rights and does represent the whole people without distinction. If one of the constituent peoples of a state is denied equal rights and is discriminated against, it is submitted that their full right to self-determination will revive.⁹⁸

94. CASSESE, *supra* note 12, at 119-20 (“Although secession is implicitly authorized by the Declaration, it must however be strictly construed, as with all exceptions. It can therefore be suggested that the following conditions might warrant secession: when the central authorities of a sovereign State persistently refuse to grant participatory rights to a religious or racial group, grossly and systematically trample upon their fundamental rights, and deny the possibility of reaching a peaceful settlement within the framework of the State structure. Thus a denial of the basic right of representation does not give rise *per se* to the right of secession. In addition, there must be gross breaches of fundamental human rights, and, what is more, the exclusion of any likelihood for a peaceful resolution within the existing State structure.”).

95. RADAN, *supra* note 1, at 52 (“The very essence of paragraph 7 is that a state’s territorial integrity is assured only under certain conditions. These conditions require a state to conduct itself in such a way that certain groups within the state are not subjected to particular discrimination. If groups are subjected to discrimination they are entitled to secede.”).

96. See BUCHHEIT, *supra* note 48, at 92; CASSESE, *supra* note 12, at 118-20; CRAWFORD, *supra* note 1, at 119; C. Lloyd Brown-John, *Self-Determination, Autonomy and State Secession in Federal Constitutional and International Law*, 40 S. TEX. L. REV. 567, 588 (1999). See also James Crawford, *Right of Self-Determination in International Law*, in PEOPLES’ RIGHTS 57 (Philip Alston ed., 2001); HÉCTOR GROS ESPIELL, THE RIGHT TO SELF-DETERMINATION: IMPLEMENTATION OF UNITED NATIONS RESOLUTIONS 10 (1980); Neil Finkelstein, George Vegh & Camille Joy, *Does Quebec have a Right to Secede at International Law?*, 74 CAN. B. REV. 225, 260 (1995); Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT’L L. 257, 269-70 (1981); Paust, *supra* note 48, at 7; M. K. Nawaz, *Bangladesh and International Law*, 11 INDIAN J. INT’L L. 251, 256 (1971); Islam, *supra* note 48, at 458; Don Johnson, *Toward Self-determination—A Reappraisal as Reflected in the Declaration on Friendly Relations*, 3 GA. J. INT’L & COMP. L. 145, 153 (1973); Otto Kimmich, *A ‘Federal’ Right of Self-Determination?*, in MODERN LAW OF SELF-DETERMINATION 91 (Christian Tomuschat ed., 1993); Kirgis, *supra* note 93, at 308; P. H. Kooijmans, *Tolerance, Sovereignty and Self-Determination*, 42 NETHERLANDS INT’L L. R. 211, 216 (1996); Roman Kryszewski, *The Right of Peoples to Self-Determination*, 63 REVUE DE DROIT INTERNATIONAL DE SCIENCES ET POLITIQUES 289, 297 (1985); Héctor Gros Espiell, *The Right to Self-Determination: Implementation of United Nations Resolutions*, at 10, U.N. Doc. A/E/CN.4/Sub.2/405 (June 20, 1980); Jiménez de Aréchaga, *International Law in the Past Third of a Century*, in RECUEIL DES COURS 110 (1978); Robert McCorquodale, *Self-Determination Beyond the Colonial Context*, 4 AFR. J. INT’L & COMP. L. 598, 603-604 (1992); Murswiek, *supra* note 68, at 27; MUSGRAVE, *supra* note 1, at 76; Raič, *supra* note 73, at 323; M. G. Kaladharan Nayar, *Self-Determination Beyond the Colonial Context: Biafra in Retrospect*, 10 TEX. INT’L L. J. 321, 337 (1975).

97. The Secretariat of the International Commission of Jurists, *The Events in East Pakistan, 1971: A Legal Study* (1972), available at <http://nsm1.nsm.iup.edu/sanwar/Bangladesh%20Genocide.htm>.

98. *Id.* See also RADAN, *supra* note 1, at 61.

It follows that UNC secession is permitted in circumstances where peoples are subject to discrimination.

Commensurate comments regarding paragraph 7 were rendered by Judge Yusuf in his Separate Opinion in the *Kosovo Advisory Opinion*.⁹⁹

This provision [Principle 5, paragraph 7 of the Friendly Relations Declaration] makes it clear that so long as a sovereign and independent State complies with the principle of equal rights and self-determination of peoples, its territorial integrity and national unity should neither be impaired nor infringed upon. It therefore primarily protects, and gives priority to, the territorial preservation of States and seeks to avoid their fragmentation or disintegration due to separatist forces. However the saving clause in its latter part implies that if a State fails to comport itself in accordance with the principle of equal rights and self-determination of peoples, an exceptional situation may arise whereby the ethnically or racially distinct group denied internal self-determination may claim a right of external self-determination or separation from the State which could effectively put into question the State's territorial unity and sovereignty.¹⁰⁰

Judge Yusuf thus interpreted paragraph 7 as making a linkage between the denial of internal self-determination and the right of peoples to exercise external self-determination by way of UNC secession. His comments thus represent a qualification upon the traditional principles of state sovereignty and territorial integrity.

There are some scholars, however, who deny that paragraph 7 endorses UNC secession. Binder, for example, after reviewing paragraphs 1 and 7, has asserted, "the Declaration recognized a right of secession not for *peoples* at all, but for those territories that happened to be recognized by the United Nations as colonies."¹⁰¹ He later concludes "[b]eyond the decolonization context . . . the Declaration *completely* absorbed the nationalist component of self-determination into the sovereignty of existing states."¹⁰²

These observations are manifestly incorrect. Paragraphs 1 and 7 do not restrict the meaning of the word "peoples" only to colonial situations. On the contrary, as pointed out above, paragraph 1 explicitly states that "all peoples" have the right to

99. Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶ 12 (July 22) (separate opinion of Judge Yusuf).

100. *Id.* See also *id.* ¶¶ 182-84 (separate opinion of Judge Cançado Trindade). *But see id.* ¶¶ 21-25. See generally Helen Quane, *Self-Determination and Minority Protection After Kosovo*, in *KOSOVO: A PRECEDENT?: THE DECLARATION OF INDEPENDENCE, THE ADVISORY OPINION AND IMPLICATIONS FOR STATEHOOD, SELF-DETERMINATION AND MINORITY RIGHTS* 181, 205-06 (James Summers ed., 2011); John R. Alban, *Signal and Affirm: How the United Nations Should Articulate the Right to Remedial Secession*, 45 VAND. J. TRANSNAT'L L. 211, 218-221 (2012); Evan G. Brewer, *To Break Free from Tyranny and Oppression: Proposing a Model for a Remedial Right to Secession in the Wake of the Kosovo Advisory Opinion*, 45 VAND. J. TRANSNAT'L L. 245, 245 (2012).

101. Binder, *supra* note 13 (emphasis in original).

102. *Id.* at 239 (emphasis added).

self-determination, a point previously affirmed by Article 2 of the Colonial Declaration and common Article 1(1) of the International Covenants on Human Rights. Furthermore, when Principle 5 does focus exclusively on colonial peoples, as in paragraphs 2(b) and 6, this fact is explicitly made clear. It is also difficult to understand how Binder could overlook the basic meaning of paragraph 7, namely, that only those “*States* conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . . and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour”¹⁰³ are entitled to their “territorial integrity or political unity.”¹⁰⁴ As indicated by italics, paragraph 7 refers to “*States*,” not non-self-governing territories. Clearly then a literal interpretation of the Declaration’s text cannot sustain Binder’s “anti-secession” arguments.

Shaw has proffered a similar argument claiming:

[i]f the principle [of self-determination] exists as a legal one, and it is believed that such is the case, the question arises then of its scope and application. As noted above, U.N. formulations of the principle from the 1960 Colonial Declaration to the 1970 Declaration on Principles of International Law and the 1966 International Covenants on Human Rights stress that it is the right of “all peoples.” If this is so, then all peoples would become thereby to some extent subjects of international law as the direct repositories of international rights, and if the definition of “peoples” used was the normal political-sociological one, a major re-arrangement of international law principles would have been created. In fact, that has not occurred and an international law concept of what constitutes a people for these purposes has evolved, so that the “self” in question must be determined within the accepted colonial territorial framework. Attempts to broaden this have not been successful and the U.N. has always strenuously opposed any attempt at the partial or total disruption of the national unity and territorial integrity of a country.¹⁰⁵

As the above quotation reveals, Shaw is subtly misrepresenting the claim made by proponents of a qualified right to UNC secession, by omitting mention that such a right is in fact *qualified*. By doing so, Shaw implicitly suggests that to allow such a right would be tantamount to anarchy. This is an overstatement. Furthermore, as with Binder, his claim that the meaning of “peoples” is confined to the colonial context cannot be supported by a literal interpretation of the Friendly Relations Declaration, especially paragraphs 1 and 7.

103. G.A. Res. 2625, *supra* note 9, at 124 (emphasis added).

104. *Id.*

105. SHAW, *supra* note 63, at 256. See also Malcolm N. Shaw, *Peoples, Territorialism and Boundaries*, 8 EURO. J. INT'L L. 478, 483 (1997); Malcolm N. Shaw, *Self-Determination and the Use of Force*, in MINORITIES, PEOPLES AND SELF-DETERMINATION: ESSAYS IN HONOUR OF PATRICK THORNBERRY 35, 40 (Nazila Ghanea & Alexandra Xanthaki eds., 2005).

Nonetheless, the conclusions drawn by Shaw, Binder, and others¹⁰⁶ prompt the questions: why did paragraph 7 fail to endorse *explicitly* a qualified right of UNC secession? Why must the legitimacy of UNC secession be extracted by an *a contrario* reading?¹⁰⁷ The answer lies in the drafting of the Declaration itself, which as the *travaux préparatoires* reveals, was dominated by two diametrically opposed positions: those states, which favoured the inclusion of a right to unilateral secession, and those states that did not. The communist bloc, for instance, argued that the right to self-determination included an inherent and unqualified right to UNC secession.¹⁰⁸ Many western and African states, however, felt that self-determination did *not* include such a right, qualified or otherwise. With the opposing viewpoints unable to agree, the representative for the Netherlands suggested a compromise:

The real problem [is] whether the firm determination to safeguard the concept of the territorial integrity of sovereign States should go so far as to exclude under all circumstances the possibility of the existence or emergence of the right to self-determination [that is the right of secession] on the part of a given people within a given State. So long as adequate provision was made against abuse, the Committee would not serve the cause of justice by excluding the possibility that a people within an existing or future State would possess sufficient individual identity to exercise the right to self-determination. If, for example—in the opinion of the world community—basic human rights and fundamental freedoms which imposed obligations on all States,

106. CASTELLINO, *supra* note 43, at 40; Gregory H. Fox, *Self-Determination in the Post-Cold War World: A New Internal Focus?*, 16 MICH. J. INT'L L. 733, 740 (1995); Horowitz, *supra* note 13, at 63-67; Iorns, *supra* note 33, at 261; Patrick Thornberry, *The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism*, in MODERN LAW OF SELF-DETERMINATION 101, 118 (Christian Tomuschat ed., 1993); Johan D. van der Vyver, *The Right to Self-Determination and its Enforcement*, 10 ISLA J. INT'L & COMP. L. 421, 427 (2004). Other scholars also seem to deny the secessionist implications of paragraph 7, but are less explicit in their reasoning. Hannum, for instance, seems to believe that paragraph 7 does not provide a qualified right to secession. Interestingly though, he argues (without mentioning the Friendly Relations Declaration), that international law *should* permit secession in situations analogous to that enumerated by paragraph 7. See Hurst Hannum, *The Right of Self-Determination in the Twenty-First Century*, 55 WASH. & LEE L. REV. 773, 776-77 (1998). Higgins, after mentioning paragraph 7, concludes that state sovereignty and territorial integrity prevails over a right to secession. See ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT! 121 (1994). Myall also seems to deny the significance of paragraph 7, stating “the principle of national self-determination . . . cannot be invoked—at least not with any hope of securing widespread support—by dissatisfied minorities within existing states.” James Myall, *Non-Intervention, Self-Determination and the New World Order*, 67 INT'L AFF. 421, 424 (1991).

107. Rosenstock has correctly observed that Principle 5 of the Friendly Relations Declaration “contains some tortured phraseology.” Rosenstock, *supra* note 15, at 733.

108. Unqualified in the sense that a people need only decide to secede by referendum. No additional criteria, such as egregious human rights violations, or discrimination on the basis of “race creed or colour,” was stipulated. A joint draft of paragraph 1 by the Soviet Union, Romania, Poland, and Czechoslovakia demonstrates this position: “[e]ach people has the right to determine freely their political status, including the right to establish an independent national state.” See BUCHHEIT, *supra* note 48, at 91.

irrespective of their sovereign will, were not being respected by a certain State, vis-à-vis one of the people living within its territory, would one in such an instance—whatever the human implications—wish to prevent the people that was fundamentally discriminated against from invoking its right to self-determination [and hence, that people's right to secede?]¹⁰⁹

A qualified right to UNC secession—enlivened by the denial of “basic human rights and fundamental freedoms”—thus became the solution to break the deadlock between either extreme. In order to satisfy those states opposed to a right of UNC secession, paragraph 7 was carefully worded to omit any explicit mention of such a right, even though an *a contrario* reading reveals it was implicitly endorsed under certain circumstances. The arguments proffered by scholars such as Eastwood that “[t]here are no United Nations documents that *expressly* recognize a general right of [UNC] secession stemming from the concept of self-determination” therefore constitute a gross over-simplification.¹¹⁰ As Rosenstock has correctly observed, the fact that paragraph 7 requires an *a contrario* reading to reveal the legitimacy of UNC secession “should not be misunderstood to limit the sweep and liberality of the paragraph.”¹¹¹

C. Conclusion—The Friendly Relations Declaration

Examination of the Friendly Relations Declaration reveals that the term “peoples” is not necessarily synonymous with the entire population of a non-self-governing territory or state and may include national groups within non-self-governing territories and states. Principle 5, paragraph 7 provides a qualified right to UNC secession in the event that a people experience deliberate, sustained and systematic discrimination on the basis of “race, creed or colour” which includes racial, linguistic, cultural, customary, and religious discrimination.

III. THE DECLARATION ON THE OCCASION OF THE FIFTIETH ANNIVERSARY OF THE UNITED NATIONS (“FIFTIETH ANNIVERSARY DECLARATION”)

In October 1995, the General Assembly adopted the Fiftieth Anniversary Declaration,¹¹² which repeated, *mutatis mutandis*, the text of Article 2 of the Vienna Declaration and Programme of Action.¹¹³

109. RAIČ, *supra* note 73, at 320.

110. Eastwood, *supra* note 83, at 303.

111. Rosenstock, *supra* note 15, at 732.

112. G.A. Res. 50/6, *supra* note 8.

113. The Vienna Declaration and Programme of Action—a non-General Assembly instrument—was adopted unanimously by the U.N. World Conference on Human Rights in June 1993. The Vienna Declaration and Programme of Action, however, was subsequently endorsed by the General Assembly in Resolution 48/121. G.A. Res. 48/121, at 2, U.N. Doc. A/RES/48/121 (Dec. 20, 1993).

A. *The Meaning of “Peoples”*

Although “peoples” is mentioned in the Fiftieth Anniversary Declaration’s preamble,¹¹⁴ the first significant application of the term occurs in Article 1, which provides that the U.N. will, *inter alia*,

[c]ontinue to reaffirm the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right to 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 peoples and thus possessed of a government representing the whole people belonging to the territory without distinction of any kind.¹¹⁵

Article 1 contains two sentences. The first sentence provides that “all peoples” have the right to self-determination, which *prima facie*, indicates that “peoples” is a term of broad and general applicability. This interpretation is confirmed by the remainder of the first sentence, which recognizes the “*particular* situation of peoples under colonial or other forms of alien domination or foreign occupation.”¹¹⁶ The phrase “colonial . . . domination” is clearly referring to colonial situations of the type targeted and defined in the Colonial Declaration and accompanying Resolution 1541. The phrase “alien domination,” although including colonial situations, is necessarily broader, extending to the non-colonial context where peoples are subjected to alien or foreign rule. The phrase “foreign domination” most likely refers to situations of foreign occupation and exploitation, and therefore also captures peoples in a colonial and non-colonial context. The first sentence of Article 1 thus indicates that peoples may exist in a colonial and non-colonial context. It fails, however, to indicate whether peoples are necessarily synonymous with the entire population of a state or non-self-governing territory, or may also include national groups within non-self-governing territories and states. No explicit reference is made, for example, to the articulation of the “self-determination of peoples” in any earlier U.N. instruments, such as the Friendly Relations Declaration.

The second sentence of Article 1 reiterates, *mutatis mutandis*, Principle 5, paragraph 7 of the Friendly Relations Declaration, with an *a contrario* reading revealing that only those “sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the

114. *Id.*

115. *Id.*

116. *Id.* (emphasis added).

territory without distinction of any kind” will be guaranteed their “territorial integrity or political unity.”¹¹⁷ The second sentence of Article 1 thus links its content to “sovereign and independent States”—not non-self-governing territories. Although it might be argued that metropolitan powers are “states” responsible for non-self-governing territories, this does not seem to be the overall objective of the second sentence of Article 1.

As with Principle 5, paragraph 7 of the Friendly Relations Declaration, however, the second sentence of Article 1 of the Fiftieth Anniversary Declaration does contain some drafting irregularities. This is because if taken literally, it indicates that only one people may constitute a sovereign state. This is revealed by the phrase, “thus possessed of a government representing the whole *people* belonging to the territory.”¹¹⁸ The use of the singular “people” as opposed to the plural “peoples” can most likely be attributed to the fact that the second sentence of Article 1 was based on Principle 5, paragraph 7 of the Friendly Relations Declaration. If, however, it is accepted that “peoples” may refer to national groups within non-self-governing territories and states, as indicated by instruments antedating the Friendly Relations Declaration, such as the U.N. Charter (Articles 73, 73(b), and 76(b)) and Resolution 1541 (Principles 2, 7(a), 8, and 9), it would seem that the drafting of Article 1 is incorrect, as the phrase “whole people” suggests there may only be one people within a state. Moreover, the phrase “without distinction of any kind,” which proceeds the phrase “whole people belonging to the territory,” suggests that states are not monolithic and comprise sub-state groups.¹¹⁹ On balance, therefore, the phrase “whole people” most likely represents a drafting oversight.

B. A Right of Peoples to UNC Secession?

The first sentence of Article 1 provides that the U.N. will, *inter alia*, “continue to reaffirm the right of self-determination of all peoples.”¹²⁰ Immediately, therefore, it is clear that Article 1 casts self-determination as a “right,” thereby strongly implying that there must be remedies for a breach of this right.¹²¹ It is uncertain from examination of the first sentence, however, whether potential remedies include a right to UNC secession.

The second sentence of Article 1, however, does contain a right to UNC secession, with an *a contrario* reading providing that only those “sovereign and independent States conducting themselves in compliance with the equal rights and self-determination of peoples and thus possessed of a government representing the

117. *Id.*

118. *Id.* (emphasis added).

119. See DUURSMA, *supra* note 36, at 25; RADAN, *supra* note 1, at 60.

120. G.A. Res. 50/6, *supra* note 8, art. 1.

121. Here the Latin Maxim, *ubi jus ibi remedium* (there cannot be a right without a remedy), is applicable.

whole people belonging to the territory without distinction of any kind” are guaranteed their “territorial integrity or political unity.”¹²²

It will be recalled that this text is substantially identical to Principle 5, paragraph 7 of the Friendly Relations Declaration. There is one important difference though: the phrase “without distinction as to race, creed or colour” has been replaced by the broader expression “without distinction of any kind.” Article 1 thus removes the ambiguity and interpretative tedium associated with the words “race, creed or colour” confirming that any form of discrimination against a people is unacceptable. Thus, although the right to UNC secession contained within Article 1 is qualified, it is perhaps slightly *less* qualified than the comparable right contained in Principle 5, paragraph 7 of the Friendly Relations Declaration. In any event, Article 1 would seem to capture racial, linguistic, cultural, customary, religious, or other forms of discrimination along ethnic or national lines. This would of course capture a broad spectrum of human rights abuses, whether *in moderato* (political, cultural and racial discrimination) or *in extremis* (ethnic cleansing, mass killings and genocide).

As with the Friendly Relations Declaration, however, Article 1 arguably contains four *implicit* qualifying conditions. First, the right to UNC secession will only be exercisable where the discrimination is of a deliberate, sustained, and systematic nature with “the exclusion of any likelihood for a possible peaceful solution within the existing state structure.”¹²³ Thus, isolated instances of discrimination or unwitting application of discriminatory principles by a government against a sub-state group will not automatically invoke a right to UNC secession by the group affected. Second, the discrimination in question would have to possess sufficient contemporaneousness. Third, the internal consistency principle would mandate constitutional protections for newly created minorities. Finally, the UNC secession effectuated would have to comply with the criteria for statehood based on effectiveness and compliance with peremptory norms.

C. Conclusion—The Fiftieth Anniversary Declaration

Examination of the Fiftieth Anniversary Declaration reveals that the term “peoples” is not necessarily synonymous with the entire population of a non-self-governing territory or state and may include national groups within non-self-governing territories and states. Furthermore, the Declaration provides a qualified right to UNC secession for sub-state national groups subject to deliberate, sustained and systematic discrimination “of any kind.”

IV. SUMMATION OF DECLARATORY GENERAL ASSEMBLY RESOLUTIONS

The instruments examined above indicate, on balance, that the term “peoples” is not necessarily synonymous with the entire population of non-self-governing

122. G.A. Res. 50/6, *supra* note 8, art. 1.

123. CASSESE, *supra* note 12, at 120. *See also* Doehring, *supra* note 68, at 66; Murswiek, *supra* note 68, at 26.

territory or state and may include national groups within non-self-governing territories and states. Principle 5, paragraph 7 of the Friendly Relations Declaration and Article 1 of the Fiftieth Anniversary Declaration provide a right to UNC secession. This right is a qualified one and will only be enlivened where non-colonial peoples are subject to deliberate, sustained, and systematic discrimination “of any kind.”¹²⁴ This formulation captures a broad spectrum of human rights abuses, whether *in moderato* (political, cultural and racial discrimination) or *in extremis* (ethnic cleansing, mass killings and genocide).

A. *Legal Effect of Declaratory General Assembly Resolutions*

An investigation of the legal effects of declaratory General Assembly resolutions facilitates an understanding of the precise impact of the qualified right to UNC secession contained in Principle 5, paragraph 7 of the Friendly Relations Declaration and Article 1 of the Fiftieth Anniversary Declaration.¹²⁵ The legal potency of declaratory General Assembly resolutions has been the subject of considerable scholarly debate. One school of thought, sometimes referred to as the “traditional” school, denies that declaratory General Assembly resolutions have legal effect.¹²⁶ The other school, sometimes referred to as the “progressive” school, argues that such resolutions do have legal significance.¹²⁷ Although the General Assembly is *not* a legislature, it is nonetheless submitted here that there are four possible ways declaratory resolutions influence the law-making process: as authentic interpretations of the U.N. Charter, as evidence of state practice (customary law formation), as general principles of international law, and by indicating international consensus.¹²⁸ With the exception of consensus, these

124. Although the Friendly Relations Declaration used the phrase “race, creed or colour” this has arguably been replaced by the broader expression “discrimination of any kind” and is therefore used here for summative purposes. *See* G.A. Res. 50/6, *supra* note 8, art. 1.

125. Surprisingly almost every scholarly analysis of a right to UNC secession in declaratory General Assembly resolutions fails to examine this issue. *See, e.g.,* Ved P. Nanda, *Self-Determination and Secession Under International Law*, 29 DENV. J. INT'L L. & POL'Y 305, 309-11, 314-15 (2001).

126. *See, e.g.,* LEO GROSS, *ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION* 214-20 (1984); G.W. Haight, *The New International Economic Order and the Charter of Economic Rights and Duties of States*, 9 INT'L LAW. 591, 597 (1975).

127. *See, e.g.,* OBED Y. ASAMOAH, *THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS* 2 (1966); BLAINE SLOAN, *UNITED NATIONS GENERAL ASSEMBLY RESOLUTIONS IN OUR CHANGING WORLD* 53-76 (1991). As Saffo has suggested “[i]t is axiomatic that the General Assembly possesses no formal competence to attribute binding legal force to externally directed resolutions. At the same time, however, it is equally true that such recommendations often have undeniable legal or political effects quite out of proportion to their formal recommendatory status.” Paul Laurence Saffo, *The Common Heritage of Mankind: Has the General Assembly Created a Law to Govern Seabed Mining?*, 53 TUL. L. REV. 492, 508 (1979).

128. As Sloan has suggested, “every resolution . . . is part of the raw material from which custom is made and therefore a material source of international law.” SLOAN, *supra* note 127, at 41. Similarly, Lukashuk of the Institute of State and Law, USSR Academy of Sciences, has remarked that if General Assembly Resolutions lacked any binding force, they would be rendered “senseless, and the United Nations would have lost an important instrument for influencing international relations . . .” I.I. Lukashuk, *Recommendations of International Organisations in the International Normative System*, in

methods are included in Article 38(1)(a)-(c) of the Statute of the International Court of Justice (“ICJ”), which is generally regarded as the most authoritative statement on sources of international law.¹²⁹

1. Declaratory General Assembly Resolutions as Authentic Interpretations of the U.N. Charter: Article 38(1)(a) of the Statute of the ICJ

It is possible that declaratory General Assembly resolutions may gain legal effect if they constitute authentic interpretations of the U.N. Charter, which itself is a treaty and valid source of international law under Article 38(1)(a) of the Statute of the ICJ.¹³⁰ The putative basis for such interpretations is found in Articles 10, 11(1), and 13(1)(a) of the Charter.¹³¹ The former states:

[t]he General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.¹³²

Article 11(1) provides:

[t]he General Assembly may consider the general principles of co-operation in the maintenance of international peace and security,

INTERNATIONAL LAW AND THE INTERNATIONAL SYSTEM 35 (W.E. Butler ed., 1987). *See also* HANNA BOKOR-SZEGÖ, *THE ROLE OF THE UNITED NATIONS IN INTERNATIONAL LEGISLATION* 71-74 (1978); INGRID DELUPIS, *INTERNATIONAL LAW AND THE INDEPENDENT STATE* 13-14 (1st ed. 1974); J.G. STARKE, *INTRODUCTION TO INTERNATIONAL LAW* 51-53 (9th ed. 1984); Gregory Marchildon & Edward Maxwell, *Quebec’s Right of Secession Under Canadian and International Law*, 32 VA. J. INT’L L. 583, 604 (1992).

129. Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055, 33 U.N.T.S. 993 (“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”).

130. The term “authentic” is used here, as opposed to “authoritative” as on balance, the former seems to be the most correct. *See* INGRID DETTER, *THE INTERNATIONAL LEGAL ORDER* 227-29 (1994); Oscar Schachter, *Interpretation of the Charter in the Political Organs of the United Nations*, in *LAW, STATE, AND THE INTERNATIONAL LEGAL ORDER: ESSAYS IN HONOUR OF HANS KELSEN* 271 (Salo Engel & Rudolf A. Metall eds., 1964); Kay Hailbronner & Eckart Klein, *Functions and Powers: Article 10*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 237 (Bruno Simma ed., 1994); Jean-François Gareau, *Shouting at the Wall: Self-Determination and the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 18 LEIDEN J. INT’L L. 489, 500 (2005).

131. Binder, for example, explicitly characterizes the Friendly Relations Declaration as an authoritative interpretation of the U.N. Charter: “[t]he Declaration on Friendly Relations, defining the right of self-determination, is generally viewed as an authoritative interpretation of the U.N. Charter.” Binder, *supra* note 13, at 236 n.52. *See also* G.A. Res. 2625, *supra* note 9, at 124.

132. U.N. Charter art. 10.

including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both.¹³³

Article 13(1)(a) provides:

[t]he General Assembly shall initiate studies and make recommendations for the purpose of:

- a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification.¹³⁴

The central question, therefore, is whether a qualified right to UNC secession might gain legal effect by expression in a declaratory resolution purporting to interpret the U.N. Charter through Articles 10, 11(1), or 13(1)(a). The most likely declaration to fulfil this requirement is the Friendly Relations Declaration, which declares principles of international law, friendly relations, and cooperation among states in *accordance with the U.N. Charter*.¹³⁵ Examination of the Declaration's draft history strongly suggests that it was intended to operate pursuant to Article 13(1)(a) of the U.N. Charter. Paragraph 2 of Resolution 1815,¹³⁶ for instance, enunciated that the General Assembly "[r]esolves to undertake, pursuant to Article 13 of the Charter a study of the principles of international law concerning friendly relations and cooperation among States in accordance with the Charter with a view to their progressive development and codification, so as to secure their more effective application."¹³⁷ A later instrument relevant to the drafting of the Friendly Relations Declaration—Resolution 1966¹³⁸—also implicitly alluded to Article 13(1)(a) in its preambular paragraph:

[r]ecalling its resolutions 1505 (XV) of 12 December 1960, 1686 (XVI) of 18 December 1961 and 1815 (XVII) of 18 December 1962, which affirm the importance of encouraging the progressive development of international law and its codification and making it a more effective means of furthering the purposes and principles set forth in Articles 1 and 2 of the U.N. Charter.¹³⁹

Finally, if any doubt need be eradicated, the sixteenth preambular paragraph of the Friendly Relations Declaration explicitly describes the seven principles contained therein as the "progressive development and codification" of international law.¹⁴⁰ Thus, it is clear that the principles contained in the Declaration are designed to operate pursuant to Article 13(1)(a) of the U.N. Charter.

133. *Id.* art. 11, para. 1.

134. *Id.* art. 13, para. 1.

135. The long title of the Declaration reflects such a linkage. *See* G.A. Res. 2625, *supra* note 9.

136. G.A. Res. 1815 (XVII), art. 2, U.N. Doc. A/RES/17/1815 (Dec. 18, 1962).

137. *Id.* (emphasis omitted).

138. G.A. Res. 1966 (XVIII), pmbl., U.N. Doc. A/RES/18/1966 (Dec. 16, 1963).

139. *Id.*

140. G.A. Res. 2625, *supra* note 9, pmbl.

At this point it is apposite to note that the Friendly Relations Declaration has been invoked and endorsed by subsequent declaratory General Assembly resolutions, such as the Definition of Aggression,¹⁴¹ the Declaration on the Admissibility of Intervention in the Internal Affairs of States,¹⁴² the Manila Declaration on the Peaceful Settlement of Disputes,¹⁴³ the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations,¹⁴⁴ the Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field,¹⁴⁵ and the Fiftieth Anniversary Declaration. Accordingly, it can be argued that these instruments also purport to operate vicariously pursuant to Article 13(1)(a).

The next question, therefore, concerns the actual scope and intent of Article 13(1)(a). Does it allow for authentic interpretations of the U.N. Charter by the General Assembly (“GA”)? Scholars, such as Hailbronner and Klein, are of the clear opinion that it does not:

Of course, the resolutions of the GA could have a binding effect if the GA were entitled to make authentic and binding interpretations of the Charter. Such a power was, however, expressly denied the GA at the founding conference in San Francisco. The Belgian proposal already made at the Dumbarton Oaks conference, namely to incorporate a provision to that effect into the Charter, was unsuccessful. Judgments of the ICJ thus far have not contradicted this point. In the advisory opinion of July 20, 1962 . . . (*Expenses* case), the ICJ acknowledged that every organ itself must in the first instance interpret the specifications of its competence as laid down in the Charter; there is, however, no mention of a binding effect on the member states. It follows that the GA does not enjoy a privilege of interpretation; this would require an alteration to the Charter under Arts. 108 and 109.¹⁴⁶

When trying to assess the scope of Article 13(1)(a), it is worth recalling that Article 13(1) provides that the General Assembly “shall initiate studies and make recommendations.”¹⁴⁷ Article 13(1) does not, therefore, mandate that the General Assembly may make legally binding determinations. On the contrary, it merely suggests the Assembly may adopt a recommendatory role.¹⁴⁸ This more limited

141. G.A. Res. 3314 (XXIX), pmb., U.N. Doc. A/RES/3314 (Dec. 14, 1974).

142. G.A. Res. 36/103, pmb., U.N. Doc. A/RES/36/103 (Dec. 9, 1981).

143. G.A. Res. 37/10, Annex, U.N. Doc. A/RES/37/10 (Nov. 15, 1982).

144. G.A. Res. 42/22, Annex, U.N. Doc. A/RES/42/22 (Nov. 18, 1987).

145. G.A. Res. 43/51, Annex, U.N. Doc. A/RES/43/51 (Dec. 5, 1988).

146. Hailbronner & Klein, *supra* note 130, at 237-38 (citations omitted). *See also* Villiger who notes, in perhaps less equivocal terms, that “[r]esolutions can, of course, have certain effect. They may amount to an authoritative—though not necessarily authentic—interpretation of the Charter.” MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES 125 (2d ed. 1997).

147. U.N. Charter art. 13, para. 1 (emphasis added).

148. VILLAGER, *supra* note 146, at 124.

scope is supported by the wording of Article 13(1)(a), which provides that such recommendations are designed to “encourag[e] the progressive development of international law and its codification.”¹⁴⁹ The use of the words “encourage” and the phrase “progressive development” both suggest that Article 13(1)(a) is predominantly concerned with the development of international law *de lege ferenda*. Article 13(1)(a) does, however, also include the word “codification,” which may arguably denote a more positivist *de lege lata* function. When trying to determine the difference between the terms “progressive development” and “codification” it is useful to consider the maiden report of the Committee on the Progressive Development of International Law and its Codification¹⁵⁰ (the Committee of Seventeen):

The Committee recognized that the tasks entrusted by the General Assembly to the Commission might vary in their nature. Some of the tasks might involve the drafting of a convention on a subject which has not yet been regulated by international law or in regard to which the law has not been highly developed or formulated in the practice of States. Other tasks might, on the other hand, involve the more precise formulation and systemization of law in areas where there has been extensive State practice precedent and doctrine. For convenience of reference, the Committee has referred to the first type of task as ‘progressive development’ and to the second type of task as ‘codification.’ The Committee recognizes that the terms employed are not mutually exclusive, as, for example, in cases where the formulation and systemization of the existing law may lead to the conclusion that some new rule should be suggested for adoption by States For the codification on international law, the Committee recognized that no clear-cut distinction between the formulation of the law as it is [*lex lata*] and the law as it ought to be [*lex ferenda*] could be rigidly maintained in practice. It was pointed out that in any work of codification, the codifier inevitably has to fill the gaps and amend the law in light of new developments.¹⁵¹

The foregoing would therefore seem to indicate that instruments adopted by the General Assembly under Article 13(1)(a) may contain elements of both *lex lata* and *lex ferenda*.

149. U.N. Charter art. 13, para. 1(a).

150. The Committee was established by General Assembly Resolution 94 (I). G.A. Res. 94 (I), ¶ 3, U.N. Doc. A/RES/94 (I) (Dec. 11, 1946). Based on the maiden report of the Committee, the General Assembly at its second session established the International Law Commission and approved its statute via General Assembly Resolution 174 (II). G.A. Res. 174 (II), ¶ 4, U.N. Doc. A/RES/174(II) (Nov. 21, 1947). See Carl-August Fleischhauer, *Article 13*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 265, 268 (Bruno Simma ed., 1994).

151. *Report of the Committee on the Progressive Development of International Law and its Codification on the Methods for Encouraging the Progressive Development of International Law and its Eventual Codification*, 41 AM. J. INT'L L. 18, 20, 22 (1947). See also Fleischhauer, *supra* note 147.

This conclusion is supported by examination of Article 15 of the Statute of the International Law Commission,¹⁵² which defines “progressive development” as “the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which law has not yet been sufficiently developed in the practice of States.”¹⁵³ *A priori* “progressive development” may involve legal innovation beyond *lex lata* and thus constitute *lex ferenda*. The same Article defines “codification” as “the more precise formulation and systemization of rules of international law in fields where there has already been extensive state practice, precedent and doctrine.”¹⁵⁴ *A priori*, “codification” signifies the transfer of *lex lata* from *jus non-scriptum* to *jus scriptum*.¹⁵⁵

Bearing in mind the foregoing observations, it is submitted here that the view of scholars such as Arangio-Ruiz and Witten regarding the legal status of the Friendly Relations Declaration is to be preferred. The former, for example, has observed:

[t]he impact of the declaration on existing international law—and in particular on the law of the United Nations (and mainly on the Charter)—can thus be described in the sense that the declaration could be considered *per se* neither as a part of customary or general international law, nor as an authentic determination or interpretation of custom or treaty. The declaration places itself *below* general—written or unwritten—international law, *below* existing treaties, and, in particular, *below* the Charter of the United Nations.

That does not exclude, of course, that the declaration could have *an impact* on the formulation, development and application of rules of international law, whether customary or conventional.¹⁵⁶

Witten has similarly concluded:

[t]he Declaration is tentative and ambiguous as to its very status. It declares that, ‘the principles of the Charter which are embodied in this Declaration constitute basic principles of international law,’ but does not grant the actual Principles of the Declaration the same status The Declaration, therefore, perceives itself as aspirational rather than programmatic, as a guide rather than a mandate.¹⁵⁷

This position is informed by analysis of Article 2 of the Friendly Relations Declaration, which provides:

152. G.A. Res. 174, *supra* note 150, art. 15.

153. *Id.*

154. *Id.* See also *Review of the Multilateral Treaty Making Process (Paragraph 2 of General Assembly Resolution 32/48)*, [1979] 2 Y.B. INT’L L. COMM’N 183, 187, U.N. Doc. A/CN.4/325.

155. VILLIGER, *supra* note 146, at 102.

156. GAETANO ARANGIO-RUIZ, *THE UNITED NATIONS DECLARATION ON FRIENDLY RELATIONS AND THE SYSTEM OF THE SOURCES OF INTERNATIONAL LAW* 96 (1979).

157. Roger M. Witten, *The Declaration on Friendly Relations*, 12 HARV. INT’L L.J. 509, 517 (1971).

[n]othing in this declaration shall be construed as prejudicing in any manner the provisions of the Charter or the rights of peoples under the Charter taking into account the elaboration of these rights in this declaration.¹⁵⁸

Hence, Article 2 specifies that the Declaration does *not* enjoy a status equal to the U.N. Charter, and furthermore, when construing the Charter's provisions, the Declaration is clearly disqualified as an interpretative source. As Arangio-Ruiz has poignantly noted, "the Charter is not *tampered with* by the declaration except by way of *exhortation*."¹⁵⁹ *A priori*, the Declaration is not an extension of the Charter.

Article 3 further holds that "[t]he principles of the Charter which are embodied in this declaration constitute basic principles of international law."¹⁶⁰ When read in conjunction with Article 2, which stipulates that the Declaration is of no prejudice to the Charter's provisions, it is clear that *only* the content of the Charter itself is regarded as international law pursuant to Article 38(1)(a) of the Statute of the ICJ.¹⁶¹

This interpretation of the Friendly Relations Declaration would seem to be implicitly supported by the ICJ's reasoning in *Nicaragua v. the United States of America*.¹⁶² Here—in the context of customary law—it was held that the assent by states to the Friendly Relations Declaration afforded a *prima facie* indication as to their *opinio juris* relating to matters contained therein.¹⁶³ However, the ICJ ruled that this presumption could be overcome in the event of conflicting state practice in terms of physical acts and omissions.¹⁶⁴ As such, the ICJ effectively ruled that the Friendly Relations Declaration is not to be viewed in terms analogous to the Charter itself.

This then leads to the consideration of whether the qualified right to UNC secession contained in Principle 5, paragraph 7 of the Friendly Relations Declaration could be validly incorporated into international law under the combined operation of Article 13(1)(a) of the U.N. Charter and Article 38(1)(a) of the Statute of the ICJ. Obviously, if the foregoing analysis is to be adopted, then

158. G.A. Res. 2625, *supra* note 9, at 124.

159. ARANGIO-RUIZ, *supra* note 156, at 96.

160. *Id.*

161. *But see* Oscar Schachter, *The Relation of Law, Politics and Action in the United Nations*, 109 RECUEIL DES COURS 169, 186 (1963) ("[t]he question of primary interest to the international lawyer has generally been the extent to which the interpretations reached by, or within, the political organs are to be regarded as legally authoritative when the organ has not been accorded the competence to make binding decisions. In considering this, one might start with the principle that an 'authentic' interpretation of a treaty by the parties is legally binding on them to the same degree as the treaty itself. I believe it is generally accepted that this conclusion would hold for an interpretation of the Charter adopted by all the Members (or even 'by the overwhelming majority' except for some abstentions) in the General Assembly; the interpretation would be characterized by international lawyers as having the same legal force as the Charter itself.").

162. *See generally* Military and Paramilitary Activities in and Against Nicaragua, *supra* note 5.

163. *Id.*

164. *Id.* at 107-08.

only those matters contained within both the U.N. Charter and the Friendly Relations Declaration can be considered *lex lata*. Matters beyond the scope of the U.N. Charter cannot simply become *lex lata* by textual elaboration in the Friendly Relations Declaration. It can be noted at this point that the U.N. Charter in Article 1(2) enshrines the “principle of equal rights and self-determination of peoples” but that the drafting committee explicitly ruled out any grounds for unilateral secession of any type through this provision: “the principle conformed to the purposes of the Charter only in so far as it implied to the right of self-government of peoples, and *not the right of secession*.”¹⁶⁵ Other aspects of the U.N. Charter, such as Chapters XI and XII, implicitly suggest that self-determination equates with self-government, which effectively means that metropolitan powers *should* consensually grant self-government or independence to non-self-governing peoples. Hence, it can be concluded that a right to UNC secession cannot be incorporated into international law under the combined operation of Article 13(1)(a) of the U.N. Charter and Article 38(1)(a) of the Statute of the ICJ.

2. Declaratory General Assembly Resolutions as Customary Law: Article 38(1)(b) of the Statute of the ICJ

The following section discusses the legal status of declaratory General Assembly resolutions *vis-à-vis* customary law. Specifically, it examines four questions: first, whether statements, such as those contained in declaratory General Assembly resolutions, constitute customary law; second, whether various types of state practice are accorded different weight; third, whether textual repetition of a doctrine is necessary for solidification of a customary rule; and fourth, how the requirement of *opinio juris* impacts upon customary law formation.

i. Are Statements Included Under Article 38(1)(b) of the Statute of the ICJ?

Article 38(1)(b) of the Statute of the ICJ lists “international custom, as evidence of a general practice” as one source of international law.¹⁶⁶ The debate over the precise definition of “general practice” has been extensive and controversial. D’Amato, for example, has adopted a restrictive interpretation of general practice whereby only physical acts qualify: “a claim is not an act Claims . . . although they may articulate a legal norm *cannot* constitute the material component of custom.”¹⁶⁷ This restrictive view, which would seem to deny the salience of declaratory General Assembly resolutions as evidence of state practice,

165. United Nations Conference on International Organization, S.F., Cali., Apr. 25-June 26, 1945, *Summary Report of Sixth Meeting of Committee I/1*, ¶ 1(A), U.N. Doc. A/CONF.343 1/1/16 (Vol. VI) (May 16, 1945) (emphasis added). See BUCHHEIT, *supra* note 48, at 73-74; W. Ofuatey-Kodjoe, *supra* note 48, at 353.

166. See BROWNIE, *supra* note 72, at 4; SLOAN, *supra* note 127, at 53.

167. ANTHONY D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 88 (1971) (emphasis added).

has been supported by Judge Read's Dissenting Opinion in the *Fisheries Case (U.K. v. Norway)*:¹⁶⁸

Customary international law . . . cannot be established by citing cases where coastal States have made extensive claims, but have not maintained their claims by the actual assertion of sovereignty over foreign ships [physical acts] The only convincing evidence of State practice is to be found in seizures, where the coastal State asserts its sovereignty over trespassing foreign ships.¹⁶⁹

Still, this relatively narrow view has been ignored by subsequent ICJ cases, such as the *Asylum Case*,¹⁷⁰ *North Sea Continental Shelf Cases*,¹⁷¹ *Fisheries Jurisdiction Case (U.K. v. Iceland)*,¹⁷² *Rights of United States Nationals in Morocco Case (United States v. France)*,¹⁷³ *Nicaragua v. the United States of America*,¹⁷⁴ and the *Nuclear Weapons Advisory Opinion*,¹⁷⁵ all of which viewed claims—and not just physical acts and omissions—as relevant to the field of state practice.

A slightly different interpretation of Article 38(1)(b) has been proffered by Thirlway, who argues that state practice *can* include claims and other diplomatic/political statements, but only if they relate to concrete situations and are not merely *in abstracto*.¹⁷⁶ Accordingly, general statements of principle such as that espoused in declaratory General Assembly resolutions are not included under this definition:

[T]he occasion of an act of State practice contributing to the formation of custom must always be some specific dispute or potential dispute.

The mere assertion *in abstracto* of the existence of a legal right or legal rule is not an act of State practice; but it may be adduced as evidence of the acceptance by the State against which it is sought to set up the claim, of the customary rule which is alleged

168. *Fisheries (U.K. v. Nor.)*, 1951 I.C.J. 116, 191 (Dec. 18) (dissenting opinion of Judge Read).

169. *Id.* at 191.

170. *Asylum (Colum. v. Peru)*, 1950 I.C.J. 266, 277 (Nov. 20) (indicating the ICJ regarded the actual exercise of diplomatic asylum and official views expressed in relation to diplomatic asylum as both constituting valid examples of state practice).

171. *North Sea Continental Shelf (Ger. v. Den./Ger. v. Neth.)*, 1969 I.C.J. 3, 32-33, 47, 53 (Feb. 20).

172. *Fisheries Jurisdiction (U.K. v. Ice.)* 1974 I.C.J. 3, 47, 56-58, 81-88, 119-120, 135, 161 (July 25). In this case textual arguments between states in diplomatic correspondence or conferences on the law of the sea were held to constitute state practice.

173. *Rights of Nationals of The United States of America in Morocco (Fr. v. U.S.)*, 1952 I.C.J. 176, 200, 209 (Aug. 27). Here the ICJ looked for evidence of custom in diplomatic correspondence and conference records.

174. *Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 5, ¶¶ 188-89, 191, 202, 205.

175. *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 5, ¶¶ 68-73.

176. H. W. A. THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION: AN EXAMINATION OF THE CONTINUING ROLE OF CUSTOM IN THE PRESENT PERIOD OF CODIFICATION OF INTERNATIONAL LAW* 57 (1972).

to exist, assuming that State asserts that it is not bound by the alleged rule. More important, such assertions can be relied on as *supplementary* evidence both of state practice and of the existence of the *opinio juris*; but only as supplementary evidence.

Practice or usage consists of an accumulation of acts which are material or concrete in the sense that they are intended to have an immediate effect on the legal relationships concerned.¹⁷⁷

Thirlway's argument does, however, suffer from a number of deficiencies. It would seem obvious, for instance, that when a state makes a statement *in abstracto*, it may actually be intending the remark to apply to a *specific* situation. For reasons of diplomacy though, the state making the statement may feel it is simply more expedient to refrain from specific mention of the particular target dispute or issue. On the other hand, a state's stance on a particular issue may be shaped not by the specific issue at hand, but instead the desire to solidify a general principle. Hence, a reaction to a concrete and specific situation may be shaped by principles *in abstracto*. When viewed this way, Thirlway's arguments, although interesting, appear unjustifiably narrow.¹⁷⁸

Not surprisingly perhaps, Thirlway's views have not been reflected in judicial reasoning. In the *North Sea Continental Shelf Cases*,¹⁷⁹ for example, the ICJ indicated that statements *in abstracto* could lead to the formation of a customary rule of international law, provided such statements were framed *de lege lata* and not *de lege ferenda*.¹⁸⁰ Similar reasoning was employed in the *Fisheries Jurisdiction Case (U.K. v. Iceland)*,¹⁸¹ where the ICJ cited a resolution passed by the 1958 United Nations Law of the Sea Conference and an amendment tabled at the 1960 Conference as state practice that had contributed to the creation of a customary rule of international law.¹⁸² In the *Barcelona Traction Case*,¹⁸³ Judge Ammoun, in his Separate Opinion, stated:

[t]he positions taken up by the delegates of States in international organizations and conferences, and in particular in the United Nations, naturally form part of State practice . . . [and] amount to precedents contributing to the formation of custom.¹⁸⁴

177. *Id.* at 58.

178. See Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 4 (1976).

179. *North Sea Continental Shelf*, *supra* note 171.

180. *Id.* at 38.

181. *Fisheries Jurisdiction*, *supra* note 172, at 26.

182. *Id.*

183. *Barcelona Traction, Light and Power Company (Belg. v. Spain)*, 1970 I.C.J. 4 (Feb. 5).

184. *Id.* at 302-03.

Similar views have been expressed in the *South West Africa Cases*,¹⁸⁵ *Nicaragua v. the United States of America*,¹⁸⁶ and the *Nuclear Weapons Advisory Opinion*.¹⁸⁷

The more appropriate view, therefore, is that statements, whether in relation to concrete situations or *in abstracto*, provided they are framed *de lege lata*, are capable of contributing to customary rules of international law. This broader view has attracted support from numerous scholars. Akehurst, for example, has defined state practice as “any act or statement . . . from which views [about customary law] can be inferred”, which includes physical acts, claims, declarations *in abstracto* (such as General Assembly resolutions), national laws, national judgments and omissions. Customary law can also be created by the practice of international organizations.”¹⁸⁸ Bailey has similarly maintained that “customary law consists of the rules established by the general practice of states, which certainly includes their diplomatic acts and public pronouncements.”¹⁸⁹ Dixon has adopted an analogous definition: “state practice includes, but is not limited to, actual activity (acts and omissions), statements made in respect of concrete situations or disputes, statements of legal principle made in the abstract, such as those preceding the adoption of a resolution of the General Assembly, national legislation and the practice of international organizations.”¹⁹⁰ Other scholars adopting similarly broad definitions include Villiger,¹⁹¹ Brownlie,¹⁹² Shaw,¹⁹³ Higgins,¹⁹⁴ Asamoah,¹⁹⁵ Castaneda,¹⁹⁶ and Arangio-Ruiz.¹⁹⁷

185. *South West Africa* (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6, 291-92 (dissenting opinion of Judge Tanaka).

186. *Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 5, ¶¶ 188-89, 191, 202, 205.

187. *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 5, ¶¶ 68-73.

188. Akehurst, *supra* note 178, at 10. *See also* GILLIAN D. TRIGGS, *INTERNATIONAL LAW: CONTEMPORARY PRINCIPLES AND PRACTICES* 68 (2006).

189. Sir Kenneth Bailey, *Making International Law in the United Nations*, 61 *AM. SOC'Y INT'L L. PROC.* 233, 235 (1967). Dixon shares a similar view. *See* MARTIN DIXON, *TEXTBOOK ON INTERNATIONAL LAW* 30-31 (6th ed. 2007). Sloan further suggests that as international organizations are subjects of international law, organizational practice also bears upon the creation of custom. *See* SLOAN, *supra* note 127, at 72.

190. DIXON, *supra* note 189, at 31.

191. Villiger elaborates that, “State practice includes any act, articulation or other behaviour of a state, as long as the behaviour in question discloses the State’s conscious attitude with respect to its recognition of a customary rule.” VILLIGER, *supra* note 146, at 16.

192. BROWNLIE, *supra* note 72, at 6.

193. SHAW, *supra* note 63, at 82.

194. ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 4-7 (1963).

195. OBED Y. ASAMOAH, *THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS* 52-57 (1966).

196. JORGE CASTAÑEDA, *LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS* 168-69 (Leland M. Goodrich & William T.R. Fox eds., 1969).

197. ARANGIO-RUIZ, *supra* note 156, at 40.

ii. Various Forms of State Practice and the Relative Weight Thereof

Having determined that statements such as those contained in declaratory General Assembly resolutions *do* constitute a valid source of customary law under Article 38(1)(b) of the Statute of the ICJ, a further point of discussion is the relative weight that might be afforded to different types of practice. In other words, should the physical acts and omissions of states be accorded a higher priority than statements, be the latter *in abstracto* or otherwise? If such a hierarchy exists, it may be that the content of the declaratory General Assembly resolutions such as the Friendly Relations Declaration, which contains a qualified right to UNC secession, might be wholly negated or at least nullified by contrary physical acts and omissions.

Very few scholars have examined this question in any detail. Akehurst, however, has suggested that “[t]here is no compelling reason for attaching greater importance to one kind of practice than to another.”¹⁹⁸ Similar remarks have been made by Arangio-Ruiz, who has noted:

United Nations practice as a whole, inclusive of Assembly recommendations, is an integral part of the practice of States. It is only for reasons of practical convenience or scientific analysis that one distinguishes between the practice of States in the United Nations and States’ *practice at large*; and it is only for such reasons that one may want to isolate either United Nations practice as a whole or United Nations resolutions from States’ practice at large. In so far as United Nations practice, and notably United Nations declarations are concerned, the ascertained inexistence of any contractual or customary rule qualifying Assembly declaratory resolutions as binding legal instruments and the obvious inexistence of any rule qualifying United Nations practice in a wide sense as of special legal value, exclude the existence of any legal distinction either of United Nations practice as a whole or of Assembly recommendations from States’ practice at large.¹⁹⁹

Hence, it seems that any attempt to discredit the relative value of declaratory General Assembly resolutions *vis-à-vis* state practice at large is misguided. It must be noted though that where a conflict exists between different types of state practice, this will almost certainly prevent the formation of a customary rule.

iii. The Impact of Repetition

A further question requiring examination is to what extent the *repetition* of a certain practice—such as the drafting of multiple declaratory General Assembly resolutions supporting a qualified right to UNC secession—contributes to the crystallization of a customary rule of international law. Intuitively it would seem that repetition of a practice—be it statements or physical acts and omissions—

198. Akehurst, *supra* note 178, at 21.

199. ARANGIO-RUIZ, *supra* note 156, at 44.

should be a precondition for the solidification of a customary rule. Surprisingly though, analysis of case law suggests that repetition is not always a *conditio sine qua non*. In the *North Sea Continental Shelf Case*,²⁰⁰ for example, the ICJ indicated that limited practice may bring about the establishment of a new customary rule of international law, particularly when the new rule is relatively uncontroversial or established *in vacuo*.²⁰¹ When a new rule is more controversial, however, such as a qualified right to UNC secession, more extensive practice seems necessary. In this regard it should be noted that a qualified right to UNC secession has been articulated by the Friendly Relations Declaration and Fiftieth Anniversary Declaration. This repetition certainly bolsters claims that a customary rule of international law has been *prima facie* created.²⁰² Once again, though, it must be considered whether other forms of state practice, such as physical acts and omissions, conflict with the aforementioned instruments. If a conflict does exist, then this will thwart the creation of a customary rule.

iv. *Opinio Juris*

One final element of customary law requiring analysis is *opinio juris*.²⁰³ Article 38(1)(b) of the Statute of the ICJ refers to “a general practice *accepted as law*.”²⁰⁴ The phrase “accepted as law” seems to imply that a practice will only become customary law when accompanied with the requisite psychological belief that such a practice is rendered obligatory.²⁰⁵ In many ways then, the requirement of *opinio juris* is tautologous, requiring that states consider a given practice or omission law before it is recognized as such.²⁰⁶ Regardless of these theoretical and conceptual difficulties, the requirement of psychological belief *is* a necessary ingredient for the formation of customary law. How this requisite psychological component is identified depends on the nature of the dispute under consideration. When dealing with relatively uncontroversial subject matter, the ICJ has, as

200. *North Sea Continental Shelf*, *supra* note 171, at 45.

201. *Id.* An example of a new rule established *in vacuo* might be the creation of space law. See Akehurst, *supra* note 178, at 13. *But see* Peter Malanczuk, *Space Law as a Branch of International Law*, 25 NETH. Y.B. INT'L L. 143, 160-61 (1994).

202. *South West Africa*, *supra* note 185, at 291-93 (dissenting opinion of Judge Tanaka) (concluding that an accumulation of resolutions could precipitate the formation of a customary rule of international law).

203. The Latin phrase “*opinio juris*” also referred to as “*opinio juris sive necessitatis*” was first coined by the French scholar François Gény to differentiate legal custom from mere social usage. On the subject of *opinio juris*, see SHAW, *supra* note 63, at 84-89; Oscar Schachter, *New Custom: Power, Opinio Juris and Contrary Practice*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY* 531, 531-32 (Jerzy Makarczyk ed., 1996).

204. Statute of the International Court of Justice, *supra* note 129, art. 38(1)(b) (emphasis added).

205. BROWNIE, *supra* note 72, at 8; DIXON, *supra* note 189, at 34.

206. DIXON, *supra* note 189, at 35. D'Amato remarks “[h]ow can custom create law if its psychological component requires action in conscious accordance with law pre-existing the action?” D'AMATO, *supra* note 167, at 66. Triggs has noted “the test of *opinio juris* is circular.” TRIGGS, *supra* note 188, at 49.

evidenced by the *Gulf of Maine Case*,²⁰⁷ been willing simply to equate *opinio juris* with general practice.²⁰⁸ When the subject matter is controversial, however, the ICJ has imposed a more exacting test to determine the requisite psychological belief. It is submitted that the latter approach is the most relevant to the present study, which is concerned with the controversial subject of UNC secession. Regarding this second approach to *opinio juris*, three cases are particularly instructive, the first of which is the *Lotus Case*.²⁰⁹ Here the Permanent Court of International Justice (“PCIJ”) stated:

[e]ven if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstances alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; *for only if such abstention were based on their being a conscious duty to abstain would it be possible to speak of an international custom.* The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand . . . there are other circumstances calculated to show the contrary is true.²¹⁰

As Brownlie has suggested, the above reasoning applies with equal relevance to proactive state conduct.²¹¹

A very similar approach was taken in the *North Sea Continental Shelf Case*,²¹² where the ICJ stated that in order for a customary rule of international law to be created,

[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to evidence a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.²¹³

207. Delimitation of Maritime Boundary in Gulf of Maine Area (Can./U.S.), 1984 I.C.J. 246, 293-94 (Oct. 12).

208. BROWNIE, *supra* note 72, at 8.

209. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 at 18 (Sept. 7).

210. *Id.* at 28; *see also* BROWNIE, *supra* note 72, at 9.

211. BROWNIE, *supra* note 72, at 9.

212. North Sea Continental Shelf, *supra* note 171, at 44.

213. *Id.* *See* BROWNIE, *supra* note 72, at 9; VILLIGER, *supra* note 146, at 47; Akehurst, *supra* note 178, at 31-32.

Hence, it follows that a particular (ongoing) practice will become customary law provided it is accompanied by the requisite psychological belief.

In the later case of *Nicaragua v. the United States of America*,²¹⁴ the ICJ reiterated this traditional formulation when it stated:

[I]n considering the instances of the conduct above described, the Court has to emphasize that, as was observed in the *North Sea Continental Shelf* cases, for a new rule of customary law to be formed, not only must the acts concerned 'amount to a settled practice,' but they must be accompanied by the *opinio juris sive necessitatis*. Either the State taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such as belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates*.'²¹⁵

However, *Nicaragua* also developed a new variant of *opinio juris* relating specifically to declaratory General Assembly resolutions. This new variant contained a two-stage test: first, that *opinio juris* could be *prima facie* deduced from widespread state acceptance of declaratory General Assembly resolutions, such as the Friendly Relations Declaration, and second, that such *opinio juris* would be legally perfected by concomitant state physical acts and omissions. The first stage of the test was enunciated by the ICJ as follows:

[O]*pinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625(XXV) entitled 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.' The effect of consent to the text of such resolutions cannot be understood as merely that of a 'reiteration or elucidation' of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.²¹⁶

The Court continued:

As already observed, the adoption by States of this text [the Friendly Relations Declaration] affords an indication of their *opinio juris* as to customary international law on the question.²¹⁷

214. Military and Paramilitary Activities in and Against Nicaragua, *supra* note 5.

215. *Id.* ¶ 207.

216. *Id.* ¶ 188.

217. *Id.* ¶ 191. Franck has opined that "[t]he effect of this enlarged concept of the lawmaking force of . . . General Assembly resolutions" is that it "may well . . . caution states to vote against 'aspirational' instruments' if they do not intend to embrace them totally and at once, regardless of circumstance." Thomas M. Franck, *Some Observations on the ICJ's Procedural and Substantive Innovations*, 81 AM. J. INT'L L. 116, 119 (1987). Whilst Franck's observation is valid, as Judge Schwebel pointed out in a 1972 Hague lecture, the Friendly Relations Declaration was "adopted by

The second stage of the test was enunciated by the Court when determining the binding nature of the principle of non-intervention:

Notwithstanding the multiplicity of declarations by States accepting the principle of non-intervention, there remain two questions: first, what is the exact content of the principle so accepted, and secondly, is the practice sufficiently in conformity with it for this to be a rule of customary international law?²¹⁸

This new variant of *opinio juris*—fashioned with direct reference to declaratory General Assembly Resolutions—would seem to contradict the more traditional formulation, as expressed in the *Lotus Case* and *North Sea Continental Shelf Case*, which provided that *opinio juris* could only be ascertained after a succession of consistent state acts or omissions accompanied by the requisite psychological belief that such acts or omissions were rendered legally obligatory. As commentators such as Schachter have observed, this new variant of *opinio juris*

was seen by some critics as standing custom[ary law] on its head. In place of a practice that began with the gradual accretion of acts and subsequently received the imprimatur of *opinio juris*, the Court reversed the process: an *opinio juris* expressed first as a declaration would become law if confirmed by general practice.²¹⁹

Accordingly, without a synchronicity between declaratory General Assembly resolutions and state practice in terms of physical acts and omissions, a binding rule of customary law cannot be created.

It is clear that Article 38(1)(b) of the Statute of the ICJ includes statements such as those contained in declaratory General Assembly resolutions. It is clear also that textual statements are not *per se* subordinated to other forms of state practice, such as physical acts and omissions. All forms of state practice are relevant to the formation of a customary rule and must be considered concurrently. Repetition of a certain practice strengthens the claim that a customary rule of international law has been created, although this repetition must be accompanied by the requisite *opinio juris*. As indicated by *Nicaragua v. the United States of*

acclamation and accepted by the General Assembly as declaratory of international law.” Schwebel holds the same opinion regarding the Definition of Aggression. S.M. Schwebel, *Aggression, Intervention and Self-Defence*, 136 RECUEIL DES COURS 411, 452 n.11 (1972). Supporting this view, Schachter remarks that “[m]ost states, including the United States, refer frequently to this resolution [the Friendly Relations Declaration] as an authoritative expression of the law of the Charter and related customary law.” Oscar Schachter, *Just War and Human Rights*, 1 PACE Y.B. INT’L L. 1, 8 (1989).

218. Military and Paramilitary Activities in and Against Nicaragua, *supra* note 5, ¶ 205. Earlier, the Court noted that “[t]he existence in the *opinio juris* of States of the principle of non-intervention is backed by established and substantial practice.” *Id.* at 106, ¶ 202.

219. Schachter, *supra* note 203, at 531-32. Rijpkema has similarly noted in the context of *Nicaragua* that “[t]his term [*opinio juris*] which refers to the legal convention of States, is apparently given a broader meaning than usual in the *Nicaragua* case. It transpires that manifestations of States’ legal conventions do not necessarily need to relate to acts of States which constitute a settled practice in order to be identified as statement of *opinio juris*.” P. P. Rijpkema, *Customary Law in the Nicaragua Case*, 20 NETH. Y.B. INT’L L. 91, 92-93 (1989).

America,²²⁰ where a conflict exists between various forms of state practice, *opinio juris* cannot be decisively determined from textual elaboration alone: an enquiry of state practice in terms of physical acts and omissions is also necessary.²²¹ If, therefore, state physical acts and omissions are concomitant with the qualified right to UNC secession contained in instruments such as, *inter alia*, the Friendly Relations Declaration and Fiftieth Anniversary Declaration, a *de lege lata* legal right would be established under Article 38(1)(b) of the Statute of the ICJ.

3. Declaratory General Assembly Resolutions as General Principles of International Law: Article 38(1)(c) of the Statute of the ICJ

Article 38(1)(c) of the Statute of the ICJ lists “general principles of law recognized by civilized nations” as a source of international law.²²² As with Article 38(1)(b), the precise scope and meaning of this provision is controversial.²²³ The orthodox view, favoured by scholars such as Brownlie,²²⁴ Dixon,²²⁵ Shaw,²²⁶ Glahn,²²⁷ Guggenheim,²²⁸ Mann,²²⁹ de Lupis,²³⁰ and Virally,²³¹ maintains that the section merely alludes to rules and principles common to all developed legal systems. Such rules and principles include the notions that persons are entitled to go before an impartial court to settle disputes and have the right to be heard before judgment is pronounced. It was also suggested by Judge McNair in the *International Status of South West Africa Case*²³² that certain substantive domestic law concepts might be incorporated into international law under Article 38(1)(c).²³³ Thus, legal concepts such as trusts (*International Status of South West Africa Case*),²³⁴ subrogation (*Mavrommatis Palestine Concessions*

220. Military and Paramilitary Activities in and Against Nicaragua, *supra* note 5.

221. *Id.* ¶¶ 188, 189, 191, 202, 205.

222. Statute of the International Court of Justice, *supra* note 129, art. 38(1)(c).

223. SLOAN, *supra* note 129, at 77; G.J.H VAN HOOF, RETHINKING THE SOURCES OF INTERNATIONAL LAW 131-51 (1983); Hermann Mosler, *General Principles of Law*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 89, 90-92 (7th ed. 1984).

224. BROWNLIE, *supra* note 72, at 18.

225. DIXON, *supra* note 189, at 39.

226. SHAW, *supra* note 63, at 99.

227. GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 22-24 (5th ed. 1986).

228. Paul Guggenheim, *Contribution à l'histoire des sources du droit des gens*, 94 *RECUEIL DES COURS* 1, 79 (1958).

229. F.A. Mann, *Reflections on a Commercial Law of Nations*, 33 *BRIT. Y.B. INT'L L.* 20, 20-51 (1957).

230. DETTER, *supra* note 130, at 200-03.

231. Michel Virally, *The Sources of International Law*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 116, 143-48 (Max Sørensen ed., 1968).

232. *International Status of South-West Africa*, Advisory Opinion, 1950 *I.C.J.* 128 (July 11).

233. *Id.* at 148; DIXON, *supra* note 189, at 39. *See also* Lord McNair, *The General Principles of Law Recognized by Civilized Nations*, 33 *BRIT. Y.B. INT'L L.* 1, 1-19 (1957).

234. *International Status of South-West Africa*, Advisory Opinion, 1950 *I.C.J.* 128, 148 (July 11) (separate opinion of Sir Arnold McNair).

Case),²³⁵ and limited liability (*Barcelona Traction Case*)²³⁶ might be incorporated under this section. Further, general notions of equity have been incorporated in cases such as the *Diversion of Water from the Meuse Case (Netherlands v. Belgium)*,²³⁷ *North Sea Continental Shelf Cases*,²³⁸ *Frontier Dispute Case (Burkina Faso v. Mali)*,²³⁹ and *Fisheries Jurisdiction Case (U.K. v. Iceland)*.²⁴⁰

In addition to these overarching rules and principles derived from domestic legal systems, it has been suggested that Article 38(1)(c) enlivens general principles peculiar to the international system.²⁴¹ This would include notions such as the sovereign equality of states and the right of any state to exclusive control over its sovereign jurisdiction.²⁴² Article 38(1)(c) may also allow the incorporation of more progressive general principles, such as the notion that states are prohibited from inflicting environmental pollution upon the territory of other states.²⁴³ In the *Nuclear Test Case (New Zealand v. France)*²⁴⁴ for example, Judge Weeramantry suggested that there is “a fundamental principle of environmental law which must be noted. It is well entrenched in international law . . . that no nation is entitled by its own activities to cause damage to the environment of any other nation.”²⁴⁵ Clearly, Judge Weeramantry was appealing to the operation of Article 38(1)(c) to support his position. If, therefore, it is acceptable to appeal to Article 38(1)(c) in the environmental realm, the question arises whether the provision can also be enlivened to incorporate a qualified right to UNC secession *vis-à-vis* declaratory General Assembly resolutions.

With the growth of human rights law since the U.N.’s inception, it may be arguable that certain general principles of international law have developed enshrining the right of individuals and peoples to freedom from persecution and systematic unremitting discrimination. Indeed the U.N. instruments hitherto examined provide tangible evidence that human rights law is an immutable (and ever growing) force within contemporary international law. From this premise,

235. *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. (ser. B) No. 3, at 17-18 (Aug. 30); *see also* BROWNLIE, *supra* note 72, at 472.

236. *Barcelona Traction, Light and Power Company*, *supra* note 183, at 154-55 (separate opinion of Judge Tanaka); *see also* BROWNLIE, *supra* note 72, at 18; SHAW, *supra* note 63, at 105.

237. *Diversion of Water from Meuse (Neth v. Belg.)*, 1937 P.C.I.J. (ser. A/B) No. 70 at 73, 77 (June 28) (individual opinion by Judge Hudson). *See* SHAW, *supra* note 63 at 106; BROWNLIE, *supra* note 72, at 25-26; TRIGGS, *supra* note 188, at 89.

238. *North Sea Continental Shelf*, *supra* note 171, at 53-54.

239. *Frontier Dispute (Burk. Faso/Mali)*, 1986 I.C.J. 554, 631-63 (equity in territorial delimitation). *See* DIXON, *supra* note 189, at 40; SHAW, *supra* note 63, at 108-109.

240. Here the ICJ sought “an equitable solution derived from the applicable law.” *Fisheries Jurisdiction*, *supra* note 172, at 33. *See* DIXON, *supra* note 189, at 40; SHAW, *supra* note 63, at 107 n.159.

241. DIXON, *supra* note 189, at 41.

242. *Id.* at 40-41.

243. *Id.*

244. Request for Examination of Situation in Accordance with Paragraph 63 of Court’s Judgment of 20 December 1974 in *Nuclear Tests (N.Z. v. Fr.)*, 1995 I.C.J. 288, 346 (Sept. 22) (dissenting opinion of Judge Weeramantry).

245. *Id.* at 346-47; DIXON, *supra* note 189, at 43.

therefore, can it be extrapolated that a qualified right to UNC secession exists pursuant to Article 38(1)(c)?

To propound such a view would certainly be contrary to orthodoxy. Some scholars though, such as Fitzmaurice, maintain that section 38(1)(c) is designed to incorporate natural law doctrines which have supervening legal validity, such as the protection of human rights and the prohibition of genocide.²⁴⁶ According to this view, it is perhaps feasible to include a qualified right to UNC secession as a general principle.

The view that a combination of natural law doctrines and declaratory General Assembly resolutions might provide grounds for a qualified right to UNC secession is, however, highly controversial. As scholars such as Dixon have argued, although principles such as respect for human rights and the prohibition of genocide are universal, their legal authority is, in the main, derived from treaty and customary law—Articles 38(1)(a) and (b) respectively.²⁴⁷ Questions such as “how should natural law be determined?” and “to what extent can states rely upon their individual subjective natural law interpretations?” pose significant conceptual problems. In short, it is very difficult to argue persuasively that a combination of natural law doctrines and declaratory General Assembly resolutions might create a general principle of international law that would be binding upon the international community.

An alternative strategy for incorporating a right to UNC secession under Article 38(1)(c) is the notion that declaratory General Assembly resolutions, by virtue of propounding certain overarching legal principles, *ipso facto*, constitute a valid source of international law. Schermers, for example, has suggested:

[t]o a large extent, all law making resolutions of the universal organizations adopted by a vast majority of States represent general principles of law recognized by civilized nations, the adoption in itself constituting recognition.²⁴⁸

Mendelson suggests a slightly more cautious interpretation:

[I]n certain very limited circumstances a General Assembly Resolution may constitute, or bring about the birth of, a principle of international law [pursuant to Article 38(1)(c)].²⁴⁹

However, like the natural law arguments explored above, this approach is beset with difficulties. To equate principles espoused in declaratory General

246. Sir Gerald Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, in *SYMBOLAE VERZIJL* 174 (F. M. van Asbeck, et al. eds., 1958).

247. DIXON, *supra* note 189, at 40. For a brief critique of natural law, see Youri Rechetov, *International Responsibility for Violations of Human Rights*, in *U.N. LAW/FUNDAMENTAL RIGHTS: TWO TOPICS IN INTERNATIONAL LAW* 237, 237-38 (Antonio Cassese ed., 1979).

248. HENRY G. SCHERMERS, *INTERNATIONAL INSTITUTIONAL LAW: FUNCTIONING AND LEGAL ORDER* 613 (1972).

249. Maurice Mendelson, *The Legal Character of General Assembly Resolutions: Some Considerations of Principle*, in *LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER* 95, 102-03 (Kamal Hossain ed., 1980).

Assembly resolutions with general principles of international law overlooks the inherently political nature of the General Assembly and incorrectly assigns it a primarily legislative role. The dangers of taking such an approach are manifold: states will be less inclined to accept progressive declaratory General Assembly resolutions, and this in turn will stymie the evolution of international law pursuant to section 38(1)(b). Furthermore, the view of Schermers and Mendelson also seems to impute a similar function to Articles 38(1)(b) and 38(1)(c), thereby rendering the latter somewhat pleonastic. Not only that, but it also dispenses with many of the legal criteria traditionally associated with section 38(1)(b) such as *opinio juris* and the need for synchronicity between declaratory General Assembly resolutions and state practice in terms of physical acts and omissions, as outlined by the ICJ in *Nicaragua v. the United States of America*.²⁵⁰ Thus, to assert that a qualified right to UNC secession can be elevated to a general principle of international law pursuant to Article 38(1)(c) is conceptually problematic.

In light of the difficulties associated with natural law and quasi-legislative interpretations, the view of scholars such as Arangio-Ruiz, Hailbronner, and Klein regarding Article 38(1)(c) is to be preferred. The former, for example, has asserted:

[i]n conformity with the finding that Assembly resolutions are not binding legal instruments, declarations are not *per se* sufficient to create principles of international law. This follows from the fact that principles become part of the body of international law only in so far as they enter therein through the law-making processes of international society: mainly. . . through custom or agreement.²⁵¹

Hailbronner and Klein have similarly suggested that “it is not possible to classify the content of the resolutions of the GA under Art. 38(1)(c) of the ICJ Statute.”²⁵² Hence, it is most probable that Article 38(1)(c) refers to rules and principles common to developed domestic legal systems. Accordingly, the qualified right to UNC secession contained in declaratory General Assembly resolutions would be more appropriately incorporated into international law under Article 38(1)(b).

4. Declaratory General Assembly Resolutions as “Consensus”: Beyond Article 38(1) of the Statute of the ICJ

Moving beyond the traditional sources of international law contained in Article 38(1) of the Statute of the ICJ, it is arguable that declaratory General Assembly resolutions also constitute sources of international law purely on the basis of consensus. Falk, for instance, has postulated that consensus is replacing consent as the basis of international legal obligations.²⁵³ Other scholars, such as

250. Military and Paramilitary Activities in and Against Nicaragua, *supra* note 5, ¶¶ 188-89, 191, 202, 205.

251. ARANGIO-RUIZ, *supra* note 156, at 70. See also DIXON, *supra* note 189, at 40-41.

252. Hailbronner & Klein, *supra* note 130, at 239.

253. Falk has written that “there is discernible a trend from consent to consensus as the basis of international legal obligations.” Richard A. Falk, *On the Quasi-Legislative Competence of the General*

D'Amato, appear somewhat sympathetic to this position, suggesting that consensus *is* international law.²⁵⁴

This prompts the question: what exactly does “consensus” mean? Sloan has suggested that “consensus is a method for reaching a decision without voting in the absence of formal objection.”²⁵⁵ Suy has similarly suggested that consensus connotes a positive attitude to the substance of a text and that “fundamental reservations would be contrary to the very idea of the non-objection procedure.”²⁵⁶ D'Amato has defined consensus as “complete unanimity” or “near unanimity with a few abstentions.”²⁵⁷ Importantly, “consensus” was defined in Article 161(8)(e) of the 1982 United Nations Convention on the Law of the Sea as “the absence of any formal objection.”²⁵⁸ This definition has been adopted *mutatis mutandis* by Article 2(4), Note 1 of Annex 2 of the 1994 World Trade Organization's Understanding on Rules and Procedures Governing the Settlement of Disputes.²⁵⁹ It would thus seem that the widespread acceptance of declaratory General Assembly resolutions with “the absence of any formal objection” would perhaps satisfy the criteria of consensus as a non-orthodox mode of law creation. According to this view instruments such as the Friendly Relations Declaration—which were adopted without formal objection—may impose binding obligations upon the world community. Hence, the qualified right to UNC secession espoused in Principle 5, paragraph 7 of the Friendly Relations Declaration may impose a binding legal obligation upon states.

Whether consensus *is* a viable mode of international law creation is a moot point. For such a proposition to be *prima facie* accepted, the content of the declaration must propound the law *de lege lata*, not *de lege ferenda*. Furthermore, state practice in terms of physical acts and omissions must be concomitant with the rule of law propounded, except in the rare situation where no previous example of

Assembly, 60 AM. J. INT'L L. 782, 785 (1966). See also Christoph Schreuer, *Recommendations and the Traditional Sources of International Law*, 20 GER. Y.B. INT'L L. 116, 116 (1977). But see Heinz Guradze, *Are Human Rights Resolutions of the United Nations General Assembly Law Making?*, 4 HUM. RTS. J. 453, 457 (1971); N.G. Onuf, *Professor Falk on the Quasi-Legislative Competence of the General Assembly*, 64 AM. J. INT'L L. 349, 351-52 (1970).

254. Anthony D'Amato, *On Consensus*, 8 CAN. Y.B. INT'L L. 106, 121 (1970). See also Samuel A. Bleicher, *The Legal Significance of Re-Citation of General Assembly Resolutions*, 63 AM. J. INT'L L. 444, 447 (1969). But see N.G. Onuf, *Further Thoughts on a New Source of International Law: Professor D'Amato's 'Manifest Intent'*, 65 AM. J. INT'L L. 774, 774-82 (1971).

255. SLOAN, *supra* note 127, at 87.

256. Eric Suy, *Consensus*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 49, 51 (Rudolf Bernhardt ed., 1981).

257. See D'Amato, *supra* note 254, at 106. It should be noted, though, that this definition is inferred from a reading of his article as a whole.

258. United Nations Convention on the Law of the Sea art. 161(8)(e), Dec. 10, 1982, available at http://www.un.org/depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm.

259. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 2(4), note 1, 1994, 1869 U.N.T.S. 401 (“The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision.”).

state practice exists, as with space law.²⁶⁰ Hence, where state practice in terms of physical acts and omissions is clearly and overwhelmingly contrary to the textual content of such an instrument, it is unlikely that a binding rule of law could be said to have solidified by way of consensus.²⁶¹ For this reason, it is submitted that the consensus approval of declaratory General Assembly resolutions containing a qualified right to UNC secession probably does *not* impose concrete legal obligations. Even if one were to discount the role of state physical acts and omissions, there is still the lingering conceptual problem of assigning the General Assembly a quasi-legislative function, which member states do not have any reason to accept in positive legal terms. Indeed most state action *vis-à-vis* support for various resolutions—declaratory and non-declaratory—is granted under the *proviso* that the General Assembly is primarily a forum for political expression—not a legislative chamber.²⁶²

260. See generally BIN CHENG, *STUDIES IN INTERNATIONAL SPACE LAW* 136-46 (1997).

261. Sloan seems to implicitly acknowledge this constraint. See SLOAN, *supra* note 127, at 88.

262. Nowhere in the text of the U.N. Charter, for instance, is the General Assembly attributed a legislative function. Indeed, a proposal that the General Assembly should be endowed with a legislative function at the 1945 San Francisco conference was resoundingly rejected. The Philippines delegation proposed that “[t]he General Assembly should be vested with the legislative authority to enact rules of international law which should become effective and binding upon members of the Organization after such rules have been approved by the majority vote of the Security Council. Should the Security Council fail to act on any of such rules within a period of thirty days after submission thereof to the Security Council, the same should become effective and binding as if approved by the Security Council.” See United Nations Conference on International Organization, S.F., Cali., Apr. 25-June 26, 1945, *Proposed Amendments to the Dumbarton Oaks Proposals Submitted by the Philippine Delegation*, U.N. Doc. A/CONF.2/G14(k) (Vol. 3), art. VIII, ¶ 9 (May 5, 1945); United Nations Conference on International Organization, S.F., Cali., Apr. 25-June 26, 1945, *Agenda for Tenth Meeting of Committee II/2*, U.N. Doc. A/CONF.455II/220 (Vol. 9) (May 20, 1945). This proposal was defeated by a vote of 26-1. Falk, *supra* note 253, at 783; Hailbronner & Klein, *supra* note 130, at 237. The ICJ has explicitly and implicitly affirmed this position. In the *South West Africa Cases*, the Court noted that “[r]esolutions of the United Nations General Assembly . . . are not binding, but only recommendatory in character.” *South West Africa*, *supra* note 185, at 229-30 (dissenting opinion by Judge Wellington Koo). Similar remarks were made by the Court in its *Namibia Advisory Opinion*. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, 1971 I.C.J. 6, 280-81 (Jan. 26) (dissenting opinion by Judge Fitzmaurice). The Court implicitly affirmed such an interpretation in *Nicaragua v. the United States of America*. *Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 5, ¶¶ 99-101, 106-08. For the articulation of the argument that the General Assembly is not a legislative forum, see the comments of Robert Rosenstock, acting as the U.S. Representative to the Sixth (Legal) Committee of the U.N. General Assembly, namely, “[m]y government finds this statement startling because it is open to the interpretation that this General Assembly, by its adoption of controverted resolutions, ‘develops’ principles which arguably are of a legal character. This is an interpretation of the powers and practice of this Assembly which is not accepted by my government, and which does not conform to the United Nations Charter or to international law. This Assembly is not a lawmaking body.” John A. Boyd, *Contemporary Practice of the United States*, 72 AM. J. INT’L L. 375, 377 (1978) (quoting Press Release, U.S./U.N., U.N. Press Release 112(77) (Nov. 11, 1977)).

B. Distillation

The legal effect of declaratory General Assembly resolutions has been examined from four perspectives: treaty law (Article 38(1)(a) of the Statute of the ICJ and Article 13(1)(a) of the U.N. Charter), customary law (Article 38(1)(b) of the Statute of the ICJ), general principles (Article 38(1)(c) of the Statute of the ICJ), and consensus. Of the four approaches, customary law appears, on balance, to be the most appropriate and orthodox avenue for declaratory General Assembly resolutions containing a qualified right to UNC secession to gain concrete legal effect. Suggestions, for example, that the Friendly Relations Declaration might constitute an authentic interpretation of the U.N. Charter are not supported by close analysis of the latter's Article 13(1)(a). Similarly, arguments pertaining to the incorporation of a qualified right to UNC secession *via* general principles, although interesting, do not withstand conceptual scrutiny and are clearly discordant with the preponderance of conventional legal opinion. Likewise, the unorthodox appeal to consensus, made by scholars such as Falk and D'Amato, also seems unsatisfactory. This is not to assert that the latter three methods are entirely devoid of all merit for incorporating a qualified right to UNC secession in international law; rather, that they are less likely to command widespread support and respect from legal scholars and states alike.

V. CONCLUSION

A qualified right to UNC secession is contained in Principle 5, paragraph 7 of the Friendly Relations Declaration and Article 1 of the Fiftieth Anniversary Declaration. It has been demonstrated that this right is most appropriately given legal effect under Article 38(1)(b) of the Statute of the ICJ. It remains, therefore, to investigate whether such a customary law right would be legally perfected by concomitant state practice in terms of physical acts and omissions, as indicated by the ICJ in *Nicaragua v. the United States of America*.²⁶³ Such an investigation would include, but not be limited to, acts of recognition in relation to UNC secessionist disputes. Furthermore, it remains to be determined whether a general customary law right to UNC secession would be enlivened by oppression against peoples both *in moderato* (political, cultural, and racial discrimination) and *in extremis* (ethnic cleansing, mass killings, and genocide). It will be recalled that the textual articulation of the qualified right to UNC secession would appear to capture both classes of oppression.

Although it is not the present article's purpose to venture an extended opinion as to state practice in terms of physical acts and omissions, the following tentative observations might nonetheless be made. It would seem that collectively UNC secessionist case studies such as Bangladesh, the Turkish Republic of Northern Cyprus ("TRNC"), Abkhazia, South Ossetia, Kosovo, and South Sudan indicate that only when human rights violations by the existing state are particularly

263. Military and Paramilitary Activities in and Against Nicaragua, *supra* note 5, ¶¶ 188-89, 191, 202, 205.

extreme will a right to secession be perfected in international customary law. If correct, this means that state practice in terms of recognition only supports UNC secession when the people within the seceding entity have been subject to oppression *in extremis*. This is perhaps explicable by the reluctance of states to endorse freely a method of state creation that might undermine the well-entrenched principles of state sovereignty and territorial integrity.

Although at present positive international law may only recognise a right to UNC secession in response to the most egregious human rights violations, at a normative level, this position must surely be open to question. In a fundamental sense, states exist for the benefit of human beings, rather than *vice versa*. Should a state cease to bestow the proper degree of human dignity upon its citizens, then it is submitted that the principles of state sovereignty and territorial integrity must yield to the right of peoples to self-determination. Put more overtly, in a normative sense, there are strong reasons to argue that a right to UNC secession should be available not just in response to human rights abuses *in extremis*, but also *in moderato*. This position would seem to be reflected in the textual formulations of the Friendly Relations Declaration and Fiftieth Anniversary Declaration. It would also seem commensurate with the increasing emphasis being placed upon human dignity and human rights throughout the international legal order.